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Attention: Alix Gallo

11 December 2009

Dear Ms Gallo

Re: Draft Regulations - National Consumer Credit Protection Package

I refer to our recent communications regarding the National Consumer Credit Package and the release of the Draft Regulations on 20 November 2009. Having regard to our earlier submissions and the very short timeline for making comment on the Draft Regulations, we will focus our further attached observations as follows:

a) Drawing attention to matters we raised in response to the earlier Exposure Draft Regulations, that have not been addressed in the Draft Regulations and that we believe should be accorded priority;
b) Changes or additions from the Exposure Draft Regulations that we believe will create significant problems for consumers or consumer legal advisors; and
c) Issues that we believe should be taken forward to the Stage 2 considerations.

Please feel free to contact me if you require any clarification of the issues raised.

Yours sincerely,

N. S. Reaburn
Chairperson
National Legal Aid

a) Priority issues not addressed in the Draft Regulations:

NLA provided a written submission in response to the Exposure Draft Regulations, dated 25 September 2009. We provided a number of recommendations for change and note our appreciation that several important concerns have been addressed in the Draft Regulations.

Of the recommendations that were not adopted, we consider the following to be priority issues:

- **Exemption from licensing for trustees, receivers and administrators:**

  Sub-regulations 20(3)(a)&(b) confirm that trustees, receivers and administrators of licensed entities are exempt from requirements to be licensed. Our submission on the Exposure Draft recommended that the equivalent previous provisions would benefit from clarifying the requirement for people or entities acting in these roles to meet the licensees' obligations to consumers. No clarification has been provided, we assume because the obligations are implied in any event.

  Our experience of dealing with receivers etc, in other contexts, is that they are poorly equipped to communicate fairly or appropriately with consumers. In particular, our impression is that individuals or groups acting in these roles consider their primary responsibilities lay in producing returns to creditors. As a result they are not interested in consumer rights, or in winning or retaining customers.

  The transfer of credit regulation will produce significant changes in some credit sectors. Combined with changing economic conditions it is likely that some credit providers will be unable to, or will chose not to remain in the business of providing credit. That raises real potential that trustees, receivers and administrators will be acting to wind up credit businesses and absent the requirement for direct licensing, we believe some clarity about the obligations consumers are owed under the legislation will be vital. We urge Treasury to reconsider inserting clarification of this type in the regulations, or consulting with ASIC in relation to providing regulatory guidance on this specific point. We should make clear that we believe regulatory guidance is a second-best option.

- **Clarification of when an infringement notice will *not* be appropriate:**

  We note the insertion of new Regulation 38, providing further clarification as to when ASIC can issue an infringement notice. Whilst the insertion is useful it does not cover our recommendation that there be some clarity provided about when it will *not* be appropriate to issue an infringement notice. Arguably this is the sort of concern that might

be tackled in regulatory guidance. As we have noted before however, regulatory guidance is less clear and reliable than making the point in the regulations.

The regulations would be greatly enhanced by providing non-exhaustive examples of circumstances in which it would be inappropriate to proceed by way of an infringement notice. Those circumstances might include:

- The seriousness of the failure to comply;
- The number of consumers impacted;
- Whether the licensee was aware of the problem and voluntarily reported the breach; and
- Previous compliance history.

- **Inappropriate mixing of marketing material with electronic contracts:**

  Draft Regulation 108 (2) remains as presented in the Exposure Draft, allowing marketing and other material to be presented with electronic contracts, subject to various conditions. We reiterate our strong objection to the provision in its current form.

  Electronic contracting is inherently more dangerous for consumers than signing hard copy documents. Allowing material that is not part of the contract, potentially marketing for the credit provider, to be included with the electronic contract only increases that inherent danger. As noted in NLA's Exposure Draft submission, our experience is that fringe providers and pay-day lenders are amongst the most frequent users of electronic contracting, exposing the most vulnerable of credit consumers to the heightened risk.

  There would be no diminution in the marketing opportunities available to credit providers if Draft Regulation 108 made clear that electronic contracts were limited to contractual material alone. In fact allowing the converse to be the case reduces competitive neutrality for providers that chose not to contract electronically.

- **Limitations on credit providers' rights to take or sell mortgaged property:**

  Our suggestion for amendment to paragraph 19 of Form 5 has not been adopted. To be more specific, we recommend that the single sentence in paragraph 19 be amended by adding the following words:

  '...*and the credit provider has met its notice obligations to you.*'

- **Pre-enforcement action notice to guarantors:**

  Our suggestion for amendment to paragraph 19 of Form 9 has not been adopted. To be more specific, we recommend that the wording of paragraph 19 be amended to the following:

  '*You should receive notice. The circumstances in which you may not are raised in the answer to question 17.*'

- **Cancellation of direct debits:**

  We suggested changes to the references on cancellation of direct debits in Form 11. Whilst minor amendment has been made, we do not believe it addresses the issue sufficiently. To be more specific, in the paragraph headed '*Cancelling your direct debit*' we recommend removing the final two sentences and replacing them with the following:

  '*In most situations your account provider must follow your request to cancel a direct debit. There may be rules to follow, like confirming your request in writing. You should check the process with your account provider and ask them to confirm when they have acted on your request.*'

b) New material in the Draft Regulations that raises consumer concerns:

- **Regulation 21 – exemption of debt collectors from licensing:**

  The insertion of Regulation 21 provides debt collectors acting as agents for credit providers and registered or licensed under a variety of pieces of legislation current in all jurisdictions in Australia, except the ACT, with exemption from licensing requirements for a period of two years from commencement. Whilst the concept of exemption for this type of activity is not new, linking it to <u>all</u> current legislation is. There is wide quality disparity amongst the existing regulatory processes.

  In our submission on the Exposure Draft we noted the lack of regulation on conduct expected of debt collectors. That absence remains and the only change in the Draft Regulations is the material relating to exemption.

- **Regulation 24 – exemption of securitisation entities from licensing:**

  We note the insertion of Regulation 24 and understand the reasons for it. It is important however to remember that the conduct of the securitisation industry was a significant catalyst for the Global Financial Crisis. There might be better ways to tackle the conduct of securitisation entities than in the regulations that deal with the inter-relationships between consumer borrowers and credit providers.

Notwithstanding we recommend the insertion of a clear statement to the effect that the availability and exercise of consumer rights under the consumer credit package must not be frustrated by the involvement of securitisation entities and regardless of their exemption from licensing requirements.

- **Sub-regulation 110 (3) – transitional arrangements for forms:**

  This new sub-regulation and the one that follows, allows the use of dual notification processes throughout a transitional period of two years. There is an inevitable risk that consumers will be confused by the use of dual forms and notices, particularly in relation to critical events such as enforcement. Given the delays in commencement of the package we object to the opportunity to utilise dual documentary processes at all but in any event believe that a two year transitional period is too long.

- **National Consumer Credit Protection (Transitional and Consequential Provisions) Amendment Regulations 2010:**

  There are a number of additions to the (Transitional and Consequential Provisions) Amendment Regulations. On review of these regulations, it appears that providers operating prior to transfer will benefit from both:

  - An effectively 'automatic' registration process; and
  - A regulatory gap post-transfer for pre-transfer contracts and conduct.

  In relation to the second of the points above, we also think it is likely that some providers, particularly at the fringes of the credit market, will seek to exploit the regulatory confusion through 'phoenix' closures. Continuity of effective regulatory oversight for pre-transfer contracts and conduct is an issue that should have been accorded some priority after the COAG agreement on transfer. It appears that ASIC will have no effective powers in relation to pre-transfer issues, save for matters already on foot at the time of transfer. It is therefore quite likely that some consumers will be worse off after transfer.

c) Issues to be taken forward to Stage 2:

The following items are non-exhaustive and relate specifically to issues we have already raised in relation to the regulations. Other issues identified by Government, or in submissions we have made in respect of other steps in the credit reform process are additional.

- **Point of sale:**

  The recommendations NLA made in relation to the exemption for point of sale retailers were not adopted. We look forward to the issue being tackled as a priority item in the stage 2 discussions.

- **Debt collectors:**

  As noted previously, appropriate conduct standards for debt collectors have not been dealt with the Credit reform package to date. We believe this is an issue that should attract attention in stage 2. This will be particularly important in ensuring reliable consumer access to hardship processes and/or in responding to allegations of unfair lending.

- **Consumer leases:**

  NLA's submission on the Exposure Draft raised the lack of attention to problems with consumer leases. We remain concerned that this is an area of likely abuse post-transfer and look forward to more effective regulation of leases being taken up in stage 2.

- **Regulatory powers in relation to consumer redress:**

  One of the positive changes between the Exposure Draft and the Draft Regulations was the insertion of Regulation 44(4)(b). Consumers will now be able to seek redress after a civil penalty provision has been resolved to the satisfaction of the regulator ASIC.

  This solution is a reminder however of the broader limitation that remains for ASIC in providing effective redress for consumers who suffer loss or damage. The Consumer Credit Bill, sections 273 and 275, limits ASIC's standing in seeking redress for consumers. ASIC has no standing with respect to remedies otherwise available to the consumer under part 7 of the Code. That position at odds with the sentiment outlined in recommendation 9.5 of the Productivity Commission's Review of Australia's Consumer Policy Framework:

  > *Australian Governments should ensure a provision is incorporated in the new generic consumer law that allows consumer regulators to take representative actions on behalf of consumers, whether or not they are parties to the proceedings.*

  We would welcome discussion of this concern as part of the stage 2 process.