The Senate

Economics Legislation Committee

National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020 [Provisions]

ISBN 978-1-76093-195-7 (Printed Version)

ISBN 978-1-76093-195-7 (HTML Version)

Printed by the Senate Printing Unit, Parliament House, Canberra

Members

Chair

Senator Slade Brockman	LP, WA

Deputy Chair

Senator Alex Gallacher	ALP, SA

Members

Senator Andrew Bragg	LP, NSW
Senator Jenny McAllister	ALP, NSW
Senator Susan McDonald	NATS, QLD
Senator Rex Patrick	IND, SA

Participating Members

Senator Ben Small	LP, WA

Secretariat

Mark Fitt, Committee Secretary
James Strickland, Principal Research Officer
Taryn Morton, Administrative Officer

PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3540
Fax: 02 6277 5719
Email: economics.sen@aph.gov.au

Contents

Chapter 1
Introduction

Referral of the inquiry

1.1 On 10 December 2020, the Senate referred the provisions of the National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020 (the bill) to the Economics Legislation Committee (the committee) for inquiry and report by 12 March 2021.[1]

Purpose of the bill

1.2 The Assistant Treasurer and Minister for Housing, the Honourable Michael Sukkar MP, in his second reading speech stated that, while the primary purpose to amending the *National Consumer Credit Protection Act 2009* (the Credit Act) is to provide timely flow of credit to the Australian economy, the bill will also:

> …replace the prescriptive one-size-fits-all approach that has evolved in relation to the interpretation of responsible lending and provide flexibility for lenders to assess each applicant for credit on a case-by-case basis. However, this flexibility will not diminish the consumer protections in place and, for some products, enhances these protections.[2]

1.3 The minister explained that to improve the flow of credit, particularly as the economy recovers from the COVID-19 crisis, the existing responsible lending obligations will apply only to small amount credit contracts (SACCs) and consumer leases.[3]

1.4 These amendments will enable new lending standards to be determined by the legislative instrument that will align with existing prudential standards—APS 220. The Australian Prudential Regulation Authority (APRA) will continue to regulate banks (Australian Deposit-taking Institutions (ADIs)), whereas the new standards will apply to non-bank lenders (non-ADIs). The minister stated that lenders that fail to comply with the credit assessment processes will have breached their standards, giving borrowers access to the

---

1 *Journals of the Senate*, No. 81, 10 December 2020, pp. 2870–2872.

2 The Hon. Michael Sukkar MP, Assistant Treasurer, *House of Representatives Hansard*, 9 December 2020, p. 11 029.

3 The Hon. Michael Sukkar MP, Assistant Treasurer, *House of Representatives Hansard*, 9 December 2020, p. 11 029.

Australian Financial Complaints Authority (AFCA) for free dispute resolution and restitution within AFCA's updated monetary limits.[4]

1.5 The bill will also provide a number of other amendments designed to improve and protect customers specifically in relation to SACCs and consumer lease products.

Responsible lending obligations

1.6 Schedule 1 of the bill amends the Credit Act to:

- make the responsible lending obligations apply only to small amount credit contracts (SACCs), small amount credit contract-equivalent loans by ADIs, and consumer leases;
- provide the minister with the power to determine standards, by legislative instrument, for credit licensees' systems, policies, and processes in relation to certain non-ADI credit conduct; and
- extend the best interests obligations that currently apply to mortgage brokers to other credit assistance providers.[5]

1.7 These reforms form part of the Australian government's economic recovery plan in response to the COVID-19 pandemic.[6]

Small amount credit contracts and consumer leases

1.8 Schedules 2 to 6 of the bill amend the Credit Act to reform the consumer protection framework for consumers of SACCs and consumer leases. Per the EM, these reforms aim to enhance protections while also allowing these products to continue to fulfil an important role within the economy.[7]

1.9 The Explanatory Memorandum (EM) states these reforms implement the government's response, as announced on 28 November 2016, to the recommendations made by the review panel in its final report following its review of the small amount credit contract laws (the SACC Review).[8]

Date of effect

1.10 For schedule 1, the date of effect for the amendments is generally the later of 1 March 2021 and the day after Royal Assent; however, the amendments

---

4 AFCA complaint monetary limits updated, https://www.afca.org.au/news/latest-news/afca-complaint-monetary-limits-updated (accessed 2 March 2021).

5 *Explanatory Memorandum*, p. 9.

6 *Explanatory Memorandum*, p. 3.

7 *Explanatory Memorandum*, p. 4.

8 *Explanatory Memorandum*, p. 4.

related to the best interests obligations (schedule 1, Part 3) commence 6 months after that day.[9]

1.11 For schedules 2, 3, 5, and 6, the date of effect for the amendments is generally the day after the end of the period of six months beginning on the day the bill receives Royal Assent. The anti-avoidance measures in schedule 4, and the application provisions in schedule 7, however, commence on the day after the bill receives Royal Assent.[10]

1.12 Schedule 7 implements application provisions setting out situations or timeframes in which the amendments apply or do not apply.

Background and consultation

Overview

1.13 On 25 September 2020, the Treasurer, the Honourable Josh Frydenberg MP, announced that the Australian government would undertake consumer credit reform. He said:

> As part of the Morrison Government's economic recovery plan, we are reducing the cost and time it takes consumers and businesses to access credit ... Now more than ever, it is critical that unnecessary barriers to accessing credit are removed so that consumers can continue to spend and businesses can invest and create jobs.
>
> What started a decade ago as a principles based framework to regulate the provision of consumer credit has now evolved into a regime that is overly prescriptive, complex and unnecessarily onerous on consumers. The Government will simplify the system by moving away from a "one-size-fits-all" approach while at the same time strengthening consumer protections for those that need it.[11]

1.14 Key elements of the reforms announced by the Treasurer included:

- removing responsible lending obligations from the Credit Act, with the exception of SACCs and consumer leases, where heightened obligations will be introduced;
- ensuring that ADIs will continue to comply with APRA's lending standards requiring sound credit assessment and approval criteria;
- adopting key elements of APRA's ADI lending standards and applying them to non-ADIs;

---

9 *Explanatory Memorandum*, p. 3.

10 *Explanatory Memorandum*, p. 4.

11 The Hon. Josh Frydenberg MP, Treasurer, 'Simplifying access to credit for consumers and small business', *Media release*, 25 September 2020, https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/simplifying-access-credit-consumers-and-small (accessed 21 December 2020).

- protecting consumers from the predatory practices of debt management firms by requiring them to hold an Australian credit licence when they are paid to represent consumers in disputes with financial institutions;
- allowing lenders to rely on the information provided by borrowers, replacing the current practice of 'lender beware' with a 'borrower responsibility' principle; and
- removing the ambiguity regarding the application of consumer lending laws to small business lending.[12]

1.15 The Department of the Treasury (the Treasury) sought feedback from stakeholders on the proposed reforms through a public consultation process on the associated exposure draft legislation and explanatory material. This consultation process lasted from 4 November 2020 to 20 November 2020—no submissions have been published by the Treasury.[13] Notwithstanding this, the EM notes that 58 formal submissions were received during this consultation period.[14]

1.16 The following two sections split the key high-level reforms contained within the bill and discusses each separately. The first section covers the removal of responsible lending obligations for licensees, except for SACCs and consumer leases; and the second discusses the reforming of consumer protection laws for SACCs and consumer leases.

Responsible lending obligations

Overview

1.17 Following the global financial crisis of 2007-08, in June 2009, the then Rudd Labor government introduced the National Consumer Credit Protection Bill 2009 into the House of Representatives. Following its passage through both houses, and subsequent Royal Assent on 15 December 2009, the Credit Act came into force.

1.18 The Credit Act established a licensing regime for persons engaging in credit activities and, in accordance with chapter 3, imposed responsible lending obligations on all holders of Australian credit licenses (licensees) in relation to their dealings with consumers.[15]

1.19 These obligations supplemented the general conduct obligations for licensees to operate efficiently, fairly, and honestly, and required those licensees who

---

[12] The Hon. Josh Frydenberg MP, Treasurer, 'Simplifying access to credit for consumers and small business', *Media release,* 25 September 2020.

[13] Department of the Treasury, *Consumer Credit Reforms*, https://treasury.gov.au/consultation/c2020-124502, (accessed 21 December 2020).

[14] *Explanatory Memorandum,* p. 61.

[15] *National Consumer Credit Protection Act 2009,* Chapter 3—Responsible lending conduct.

provide credit, or credit assistance, to meet additional requirements in relation to their lending and leasing conduct.[16] The Treasury estimates that, currently, $34 billion in new consumer credit issued each month is subject to these responsible lending obligations under the Credit Act.[17]

1.20 The responsible lending obligations require licensees to assess that a credit contract, or lease, is not unsuitable for the consumer's requirements and objectives, and that the consumer has the capacity to meet the financial obligations under the credit contract or lease. In doing so, reasonable inquiries must be made about the consumer's requirements, objectives, and financial situation, and reasonable steps taken to verify the consumer's financial situation.[18] This approach aims to ensure that licensees do not provide, suggest, or assist with credit contracts or leases that are unsuitable for the consumer.[19]

1.21 These obligations are currently set at the level of an individual loan decision, and, as argued by the bill's EM, impose a regulatory burden on both lender and borrower when an individual consumer applies for credit. The EM notes that subsequent guidance provided on how to interpret the law requires lenders to make 'detailed inquiries' and to 'extensively verify' the information provided, and that this influences how long it takes, and how much it costs for credit assessments to be completed.[20]

1.22 Furthermore, the EM states that the responsible lending obligations under the Credit Act broadly duplicate prudential lending obligations imposed by APRA through its prudential standards. Hence, it states that ADIs are currently required to conform to two regulatory regimes, both with broadly similar aims, resulting in duplication and an unnecessary regulatory burden without any substantial benefit to consumer protections.[21]

1.23 The EM also highlights that, although the responsible lending obligations were originally intended to provide a risk-based principles framework, over time the principles have been further defined through increased guidance from regulators which has led to a 'one-size-fits-all' approach to individual credit assessments, regardless of the specific circumstances of the individual or the nature of the credit product.[22] Given this, the EM concludes that:

---

16 National Consumer Credit Protection Bill 2009, *Explanatory Memorandum,* p. 81.

17 *Explanatory Memorandum,* p. 28.

18 *Explanatory Memorandum,* p. 8.

19 *Explanatory Memorandum,* p. 8.

20 *Explanatory Memorandum,* p. 28.

21 *Explanatory Memorandum,* pp. 36–37.

22 *Explanatory Memorandum,* pp. 28–29.

> …the current regulatory settings impose a greater regulatory burden on lenders and borrowers than was originally envisaged, over and above what may customers would seem to require, impacting both the timely access to, and the cost of, available credit, without substantial evidence that the increased cost of the regulatory burden is offset by a commensurate reduction in consumer harms.[23]

1.24 In evidence to the House of Representatives' Standing Committee on Economics, in August 2020, the Governor of the Reserve Bank of Australia, Mr Philip Lowe, also specifically spoke about this issue:

> I think the principles in the legislation are sound, but I think the way we've translated those principles into reality needs looking at again. If we can't do that properly, maybe we need to look at the legislation. We can't have a world in which, if a borrower can't repay the loan, it's always the bank's fault. On a portfolio basis, we want banks to make some loans that actually go bad, because if a bank never makes a loan that goes bad it means it's not extending enough credit. The pendulum has probably swung a bit too far to blaming the bank if a loan goes bad…[24]

1.25 In determining the Australian government's policy approach to resolve this identified problem, the Treasury undertook a cost-benefit analysis of three options: maintain the status quo; implement a new credit framework and a risk-based approach to lending responsibly; and implement a bespoke credit framework that prescribes a tiered lending approach to borrowers of varying creditworthiness.[25] Following their analysis, the Treasury decided its preferred approach was to implement a new credit framework and risk-based approach to lending responsibly; i.e. option 2.[26]

1.26 Under this preferred approach, the responsible lending obligations would be removed, except for SACCs and consumer leases. ADIs would remain subject to prudential standards set and enforced by APRA, and non-ADIs would be subject to a replacement system-based regime for responsible lending. Further, the best interests obligations, which currently apply only to mortgage brokers, would be extended to additional credit assistance providers.[27]

1.27 The Treasury notes that the new requirements on non-ADIs will incorporate the relevant provisions from prudential standard APS 220 Credit Risk Management, and that it will work closely with APRA to ensure that future changes to any of the relevant provisions in APS 220 will be reflected in the

---

[23] *Explanatory Memorandum,* p. 29.

[24] Mr Philip Lowe, Governor, Reserve Bank of Australia, House of Representatives Standing Committee on Economics, *Official Committee Hansard*, 14 August 2020, p. 20.

[25] For detailed information on each option and its associated advantages and disadvantages, see pages 48 to 60 of the EM.

[26] *Explanatory Memorandum,* p. 66.

[27] *Explanatory Memorandum,* p. 43.

non ADI framework to 'ensure a level playing field across the industry going forward'.[28]

1.28 The Treasury notes that the new regulatory approach will allow consumers to continue to access AFCA in relation to their loan, and that AFCA can award damages for 'direct financial loss' (within AFCA's monetary limits) which the consumer suffers as a result of lender conduct. It submits that this would 'ensure that any consumer harm which is caused by lenders continues to have a remedy'.[29]

1.29 Further, the new obligations will not apply to lending which is, in part, for a small business purpose. This has the effect of making permanent the temporary measure which was introduced at the start of the COVID-19 pandemic in 2020.[30]

1.30 Table 1 of the EM lists the costs and benefits identified by the Treasury for each option.[31]

Treasury's consultation

1.31 The EM submits that feedback to the Treasury from industry stakeholders regarding the responsible lending obligations has consistently indicated that they are 'imposing a level of regulatory burden not commensurate with the policy outcomes'.[32]

1.32 The EM provides a lengthy discussion on the feedback the Treasury received, separated into key stakeholder categories, on Australia's responsible lending laws during targeted consultation processes.

Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

1.33 On 14 December 2017, the then Governor-General of the Commonwealth of Australia, His Excellency General the Honourable Sir Peter Cosgrove AK MC (Retd), appointed former High Court Judge, the Honourable Kenneth Madison Hayne AC QC (the Commissioner), to inquire into and report on misconduct in the banking, superannuation and financial services industry (the Banking Royal Commission).

1.34 The Commissioner submitted his final report to the then Governor-General on 1 February 2019, and it was tabled in parliament on 4 February 2019. Amongst

---

[28] *Explanatory Memorandum,* pp. 43 and 45.

[29] *Explanatory Memorandum,* p. 45.

[30] *Explanatory Memorandum,* p. 44.

[31] See pages 67 to 68 of the EM for further information.

[32] *Explanatory Memorandum,* p. 60.

other matters, the Commissioner commented on, and made a recommendation regarding, the responsible lending obligations within the Credit Act.

Inquiries and verification

1.35 In the final report, the Commissioner highlighted that the Credit Act obliges licensees to: make reasonable inquiries about a consumer's objectives and requirements; make reasonable inquiries about a consumer's financial situation; and take reasonable steps to verify a consumer's financial situation. He stated that both income and expenditure must be considered, and reiterated what he said in his interim report that 'verification means doing more than taking the customer at his or her word'.[33]

1.36 Although noting that reviews undertaken by APRA during 2016 and 2017 had identified deficiencies in the processes used to verify borrowers' expenses, such as relying on the Household Expenditure Measure (HEM), the Commissioner stated that a number of banks had subsequently strengthened their lending processes and procedures with the aim of improving their compliance with the responsible lending obligations under the Credit Act.[34]

1.37 To the extent that these processes and procedures resulted in a tightening of credit, the Commissioner concluded that 'it [would be] a consequence of complying with the law as it has stood since the [Credit Act] came into operation'.[35] On this point, however, the Commissioner highlighted that the Treasury previously stated that '[t]here is little evidence to suggest that the recent tightening in credit standards, including through APRA's prudential measures or the actions taken by ASIC in respect of [responsible lending obligations], has materially affected the overall availability of credit'.[36]

Not unsuitable

1.38 The Commissioner noted that consumer advocacy groups urged him to recommend an amendment which would require lenders to determine whether a loan contract, or limit increase, was 'suitable' for the consumer; i.e. as opposed to the existing requirement to assess that a contract is 'not unsuitable'.[37]

---

[33] Commonwealth of Australia, *Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry–Final Report–Volume 1*, pp. 54–55.

[34] Commonwealth of Australia, *Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry–Final Report–Volume 1*, p. 55.

[35] Commonwealth of Australia, *Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry–Final Report–Volume 1*, p. 55.

[36] Commonwealth of Australia, *Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry–Final Report–Volume 1*, p. 58.

[37] Commonwealth of Australia, *Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry–Final Report–Volume 1*, p. 59.

1.39 Although noting that the double negative 'not unsuitable' appears to be clumsy and that a cursory look may not reveal any substantial difference between the two approaches, the Commissioner highlighted that the 'not unsuitable' test is aimed at avoiding harm; whereas an assessment of suitability focuses on whether entering a contract would be beneficial to the borrower.[38]

1.40 Given the above, in conclusion the Commissioner was not persuaded that the test should be changed and recommended that the Credit Act not be amended to alter the obligation to assess unsuitability.[39]

Small amount credit contracts and consumer leases

1.41 SACCs are for loans up to $2 000, where the terms of the contract is between 16 days and 12 months. These contracts are commonly used by consumers with lower incomes, or those unable to access mainstream sources of credit. Given this vulnerable demographic, there are a number of additional consumer protections that apply.[40]

Independent review of the Small Amount Credit Contract Laws

1.42 On 7 August 2015, the then Abbott Coalition government announced a review of SACC laws contained in the Credit Act and regulated consumer leases (the SACC Review). The then government asked the review panel to examine, and report on, the effectiveness of the law relating to SACCs, and to make recommendations on whether any of the provisions which apply to SACCs should be extended to regulated consumer leases.[41]

1.43 The review panel concluded that the existing laws applying to SACCs needed refinement and, in its final report, made 24 recommendations to enhance the regulatory regime with the aim of promoting financial inclusion and making the laws fit-for-purpose going forward.[42]

1.44 On 28 November 2016, the then Turnbull Coalition government released its response to the final report of the SACC Review. Of the 24 recommendations, the then government accepted 14 in full; partially accepted three; accepted

---

[38] Commonwealth of Australia, *Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry–Final Report–Volume 1*, p. 59.

[39] Commonwealth of Australia, *Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry–Final Report–Volume 1*, p. 60.

[40] For further information on these additional protections, please see page 72 of the EM.

[41] Department of the Treasury, *Review of the Small Amount Credit Contract Laws: Final Report*, March 2016, p. 1.

[42] For further information on the recommendations made by the review panel, please see pages vii to xi of the *Review of the Small Amount Credit Contract Laws: Final Report*.

three with amendments; supported one in-principle; noted one; and did not accept two.[43]

1.45 In particular, the then government supported:

- retaining the existing price caps on SACCs;
- extending the SACC protected earnings amount requirement to all consumers and lowering it to 10 per cent of the consumer's net income (currently, for those consumers who receive 50 per cent or more income through payments from Centrelink, total SACC repayments are capped at 20 per cent of a consumer's gross income);
- introducing a cap on total payments on a consumer lease equal to the base price of the good plus 4 per cent of that price per month; and
- introducing a protected earnings amount requirement for consumer lease providers of 10 per cent of net income for all consumers, equivalent but separate to the requirement for SACCs.[44] [45]

Senate Economics Legislation Committee's inquiry into the National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 (No. 2)

1.46 On 5 December 2019, the Senate referred the National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 (No. 2) (the SACC bill) to the Senate Economics Legislation Committee for inquiry and report. The SACC bill was a private members' bill co-sponsored by Senators Jenny McAllister and Stirling Griff.

1.47 The SACC bill proposed a number of amendments to the Credit Act to adjust consumer protections relating to SACCs and consumer leases, and replicated the government's exposure draft legislation that was previously released for consultation in October 2017. The purpose of that exposure draft legislation was to implement the government's response to the SACC Review, as discussed in the preceding section.

1.48 Introduction of the SACC bill into the Senate followed four bills having previously been introduced into the House of Representatives by

---

[43] Senate Economics Legislation Committee, *National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 (No. 2)*, September 2020, p. 7.

[44] Department of the Treasury, *Government response to the final report of the review of the small amount credit contract laws*, 28 November 2016, https://ministers.treasury.gov.au/ministers/kelly-odwyer-2016/media-releases/government-response-final-report-review-small-amount, (accessed 15 January 2021).

[45] For a full listing of recommendations, and the associated government response and commentary, please visit: https://ministers.treasury.gov.au/ministers/kelly-odwyer-2016/media-releases/government-response-final-report-review-small-amount (accessed 15 January 2021).

non-government members, each of which also replicated the provisions of the exposure draft legislation.[46]

1.49 The committee recommended that the Senate not pass the SACC bill and that the government, firstly, table its response to the recommendations made by the Senate Economics References Committee's (reference committee) inquiry into credit and financial services targeted at Australians at risk of financial hardship; and, secondly, reports and builds upon outcomes derived from the consultation period of the exposure draft and continues to diligently progress sensible reform and strengthen regulation in the area of SACCs and consumer leases.[47]

1.50 Labor committee members and Senator Sterling Griff delivered a dissenting report which, although also recommending that the government respond to the reference committee's prior inquiry's recommendations, recommended that the Senate pass the SACC bill.[48]

Provisions of the bill

Schedule 1—Changes to the responsible lending obligations

1.51 Schedule 1 of the bill amends chapter 3 of the Credit Act so that responsible lending obligations apply only to SACCs and consumer leases (and small amount credit contract-equivalent loans provided by ADIs).[49]

1.52 ADIs entering other types of credit contracts will still be subject to the prudential regulatory framework under the *Banking Act 1959*, including prudential standards enforced by APRA; and lending standards will be imposed on non-ADIs as part of a risk-based regulatory framework based on similar obligations to those imposed on ADIs.[50]

1.53 The bill provides for the minister to make these non-ADI lending standards by way of legislative instrument. These requirements will be system-level obligations rather than focusing on individual loans, and will specify

---

[46] Senate Economics Legislation Committee, *National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 (No. 2)*, September 2020, p. 2.

[47] Senate Economics Legislation Committee, *National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 (No. 2)*, September 2020, pp. 58 and 59.

[48] Senate Economics Legislation Committee, *National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 (No. 2)*, September 2020, pp. 63 and 65.

[49] *Explanatory Memorandum*, p. 9.

[50] *Explanatory Memorandum*, p. 9.

requirements for credit licensees' systems, policies, and processes relating to non-ADI credit conduct.[51]

1.54 Per the EM, these requirements reflect the Australian government's decision to move away from a prescriptive framework for lenders and borrowers, and aims to support risk-based lending 'attuned to the needs and circumstances of the borrower and credit product'.[52]

1.55 The bill also extends the best interests obligations, which are already legislated for mortgage brokers, to certain other credit assistance providers. The EM explains that this is to 'ensure appropriate consumer protections remain in place'.[53]

1.56 This extension will require licensees[54] and their credit representatives to act in the best interest of consumers when providing credit assistance in relation to credit contracts and consumer leases; and, where there is a conflict of interest, give priority to consumers in providing credit assistance in relation to credit contracts and consumer leases.[55]

Comparison of key features of new law and existing law

1.57 Table 1.1, below, highlights the key differences between the existing law and the proposed new law.

Table 1.1 Comparison of current law and new law

New law	Current law
Responsible lending obligations	
Chapter 3 responsible lending obligations only apply to small amount credit contracts and consumer leases (and small amount credit contract equivalent loans provided by ADIs) beginning on 1 March 2021 (or the day after Royal Assent, if it occurs later). This is the case for both credit providers and credit assistance providers.	Chapter 3 responsible lending obligations apply to all consumer credit contracts (including small amount credit contracts) and consumer leases. This is the case for both credit providers and credit assistance providers.
ADIs are not subject to Chapter 3 responsible lending obligations (other than	ADIs are subject to Chapter 3 responsible lending obligations and a

51 *Explanatory Memorandum,* p. 9.

52 *Explanatory Memorandum,* pp. 9–10.

53 *Explanatory Memorandum,* p. 9.

54 A licensee is a person who holds an Australian credit license granted by ASIC under the Credit Act.

55 *Explanatory Memorandum,* p. 12.

for small amount credit contract equivalent loans) beginning on 1 March 2021 (or the day after Royal Assent, if it occurs later). Existing prudential standards continue to apply.	prudential standards regime set and enforced by APRA under the *Banking Act 1959*.
Non-ADI credit conduct is not subject to Chapter 3 responsible lending obligations from 1 March 2021 (or the day after Royal Assent, if it occurs later). This conduct does not include small amount credit contracts and consumer leases. Non-ADI credit conduct is subject to non-ADI credit standards made by legislative instrument. These will be similar to standards imposed on ADIs.	Non-ADIs are subject to Chapter 3 responsible lending obligations.
Best interests obligations	
A best interests duty and obligation to resolve conflicts of interest in the consumer's favour apply to certain other credit assistance providers.	A best interests duty and obligation to resolve conflicts of interest in the consumer's favour are legislated to apply to mortgage brokers only.
New non-ADI credit standard	
The minister is able to make non-ADI credit standards, by way of legislative instrument, specifying requirements for a credit licensee's systems, policies and processes relating to certain non-ADI credit conduct.	No equivalent.

Source: Explanatory Memorandum, pp. 10–11.

Detailed explanation of reforms

Licensees that provide credit assistance in relation to credit contracts

1.58 Upon commencement, a number of existing obligations in Part 3–1 of the Credit Act will only apply to licensees providing credit assistance in relation to SACCS and small amount credit-equivalent loans provided by ADIs. These relate to:

- obligations of credit assistance providers before providing credit assistance for credit contracts (section 115);
- preliminary assessments of unsuitability of credit contracts (section 116);
- reasonable inquiries about the consumer (section 117);
- when a credit contract must be assessed as unsuitable (sections 118 and 119);

- providing consumers with preliminary assessments (section 120); and
- prohibitions on suggesting or assisting consumers to enter, remain, or increase credit limits under unsuitable credit contracts (sections 123 and 124).[56]

1.59 The bill extends the best interests obligations that apply to mortgage brokers to certain other credit assistance providers. This does not alter the existing arrangements already in place for mortgage brokers, and is intended to improve consumer outcomes by requiring a broader cross-section of credit assistance providers to act in the consumer's best interest.[57]

1.60 The extension requires certain other licensees and their credit representatives to act in the best interests of consumers when providing credit assistance in relation to credit contracts and consumers leases; and, where there is a conflict of interest, give priority to consumers' interests.[58] Importantly, licensees that authorise credit representatives must also take reasonable steps to ensure that those persons comply with the new obligations.[59]

1.61 These obligations do not apply to credit assistance provided in relation to credit for predominantly business purposes; nor do they generally apply to licensees that provide credit assistance where they are also the credit provider.[60]

Licensees that are credit providers under credit contracts

1.62 Upon commencement, a number of existing obligations in Part 3–1 of the Credit Act apply only to licensees that are credit providers under SACCs and small amount credit contract-equivalent loans provided by ADIs. These relate to:

- obligations to assess unsuitability (section 128);
- assessment of unsuitability of a credit contract (section 129);
- reasonable inquiries about a consumer (section 130);
- when credit contracts must be assessed as unsuitable (section 131);
- giving consumers the assessments (section 132); and
- prohibition on entering, or increasing the credit limit of, unsuitable credit contracts (section 133).[61]

1.63 Item 1 of schedule 1 of the bill introduces the term 'low limit credit contract' into the Credit Act to encompass SACCs and SACC-equivalent loans by ADIs.

---

56 *Explanatory Memorandum,* p. 11.

57 *Explanatory Memorandum,* p. 13.

58 *Explanatory Memorandum,* p. 12.

59 *Explanatory Memorandum,* p. 13.

60 *Explanatory Memorandum,* p. 13.

61 *Explanatory Memorandum,* p. 15.

This has the effect of retaining the responsible lending obligations for each credit contract provided by an ADI which would be a SACC if it were not provided by an ADI.[62] [63]

Non-ADI credit standards

1.64 Upon commencement, the minister will be able to make credit standards, via legislative instrument, for non-ADIs. These standards will specify requirements for credit licensees' systems, policies, and processes which relate to certain credit conduct by these entities.[64]

1.65 Non-ADI credit conduct relates to credit contracts where the contract is not a SACC and the credit provider is not an ADI. Per the EM, these standards are adopted from the APRA standards with the goal of maximising the alignment between ADI and non-ADI regimes.[65] Further, the EM argues that by having these credit standards determined by legislative instrument, the law can adapt over time and consistency can be maintained on an ongoing basis across ADIs and non-ADIs.[66]

1.66 The EM states that these standards will enable credit assessments to move away from a prescriptive framework and support risk-based lending that is 'attuned to the needs and circumstances of the borrower and credit product'.[67]

1.67 The non-ADI credit standards may apply generally or in a limited manner, and may make different provisions in relation to different situations, activities or classes of licensees and credit providers.[68]

1.68 The EM notes that, where a licensee fails on a repeated basis to comply with the requirements of the systems, policies and processes it has established, the licensee will contravene a civil penalty provision with a maximum penalty of at least 5 000 penalty units.[69] The EM clarifies that a single failure will not contravene the civil penalty provision, and will not enable ASIC's licensing enforcement powers; however, it states that the contravention of the Credit Act

---

62 *Explanatory Memorandum,* p. 16.

63 This is necessary as the definition of a SACC in the Credit Act excludes credit contracts provided by ADIs, even if such a contract meets the other criteria of the definition. See Division 2—The Dictionary of the Credit Act.

64 *Explanatory Memorandum,* p. 19.

65 *Explanatory Memorandum,* p. 19.

66 *Explanatory Memorandum,* p. 20.

67 *Explanatory Memorandum,* p. 19.

68 *Explanatory Memorandum,* p. 20.

69 *Explanatory Memorandum,* p. 21.

means consumers retain access to redress through other mechanisms, such as AFCA.[70]

Licensees and reverse mortgages—projection and prohibition

1.69 The bill retains the requirement for licensees to provide equity projections; however, upon commencement the obligation must be met before a licensee provides credit assistance; enters a reverse mortgage; increases the credit limit of a reverse mortgage; or makes an unconditional representation about a consumer's eligibility.[71]

1.70 Further, a licensee must show the consumer a comparison of his or her stated expected aged care costs with the equity projection. Importantly, the licensee is only required to ask the consumer for an estimate of these future costs, and is not required to form its own view. The licensee must also show the consumer the comparison in person and provide a printed copy.[72]

1.71 The bill also introduces a new prohibition on licensees from entering into reverse mortgages where the loan to value ratio would exceed a certain amount, based on the borrower's age. Specifically, a licensee must not enter into a reverse mortgage with a borrower who:

- is under 56 years of age, where the loan to value ratio of the mortgage exceeds 15 per cent; or
- is at least 56 years of age, where the loan to value ratio of the mortgage exceeds the sum of 16 per cent and 1 per cent for each year the borrower is more than 56 years of age.[73]

1.72 Notwithstanding this prohibition, the bill provides an exception where a licensee reasonably believes that a reverse mortgage, or an increase in the credit limit of a reverse mortgage, is appropriate because of an applicant's special circumstances.[74]

Schedules 2 and 6—Small amount credit contract reforms

1.73 Schedules 2 and 6 of the bill implement the Australian government's response to the recommendations made in the SACC Review. Per the EM, these reforms aim to:

> …enhance the consumer protection framework for consumers of small amount credit contracts. In particular, the amendments reduce the risk that consumers of these credit contracts—many of whom are financially

[70] *Explanatory Memorandum,* p. 22.

[71] *Explanatory Memorandum,* p. 16.

[72] *Explanatory Memorandum,* p. 17.

[73] *Explanatory Memorandum,* pp. 17–18.

[74] *Explanatory Memorandum,* p. 18.

vulnerable—are unable to meet their basic needs or default on other necessary commitments as a result of entering into the contract.[75]

1.74 Key amendments in schedules 2 and 6 of the bill include:

- updating the mechanism for restricting the repayments that are allowed under a SACC (also known as the protected earnings amount);
- repealing the rebuttable presumption that a SACC is unsuitable if the consumer has entered into two or more SACCs in the past 90 days, or the consumer is in default under a SACC;
- requiring SACCs to have equal repayments and equal repayment intervals over the life of the loan;
- expressly prohibiting licensees from charging monthly fees in respect of the residual term of a loan where a consumer fully repays the loan early;
- prohibiting licensees from making unsolicited communications to consumer to apply for, or enter into, a SACC in certain circumstances;
- requiring licensees to document, in writing, their assessment, or preliminary assessment, that a SACC is not unsuitable for a consumer; and
- requiring licensees to display and give information to consumers about SACCs in accordance with the requirements determined by ASIC in a legislative instrument.[76]

1.75 Table 1.2, below, highlights the key differences between the existing law and the proposed new law.

Table 1.2 Comparison of current and new law

New law	Current law
Licensees must not enter into a small amount credit contract with a consumer if the repayments under the contract would not meet the requirements prescribed in the regulations.	Licensees must not enter into a small amount credit contract with a consumer if: • the consumer is included in a class of consumers prescribed by the regulations; and • the repayments do not meet the requirements prescribed by the regulations.
The rebuttable presumption is repealed	A small amount credit contract is presumed to be unsuitable for a consumer if: • the consumer has had two

[75] *Explanatory Memorandum,* p. 71.

[76] *Explanatory Memorandum,* pp. 72–73.

	or more other small amount credit contracts in the past 90 days; or • is in default under another small amount credit contract.
Small amount credit contracts must have equal repayments and equal repayment intervals over the life of the loan, subject to certain limited exceptions.	No equivalent.
Licensees cannot charge a consumer monthly fees in respect of the residual term of the small amount credit contract where the consumer fully repays the loan early.	No equivalent.
Licensees are prohibited from making unsolicited communications to a consumer that contain an offer or invitation to enter into or apply for a small amount credit contract in certain circumstances.	No equivalent.
Licensees must document in writing their assessment that a small amount credit contract is not unsuitable for a consumer.	No equivalent.
Licensees must display information and give information to consumers about small amount credit contracts in accordance with requirements determined by the Australian Securities and Investments Commission (ASIC) in a legislative instrument.	Licensees must display information about SACCs in accordance with the requirements prescribed by the regulations.

Source: Explanatory Memorandum, pp. 73-74.

Detailed explanation

The protected earnings amount

1.76 The existing section 133C of the Credit Act allows regulations to be made which prescribe requirements for SACCs made to certain classes of consumers. Regulations made under this section aim to ensure that where a consumer receives at least 50 per cent of their gross income from social security payments, 80 per cent of the consumer's gross income is protected and cannot

be used to repay SACCs. This protected proportion is referred to as the 'protected earnings amount'.[77]

1.77 Item 10 of schedule 2 of the bill repeals subsection 133CC(1) of the Credit Act and replaces it with a general provision that prohibits licensees from entering into SACCs if the repayments would not meet the requirements prescribed by regulations.[78] This change gives effect to the Australian government's response to recommendation 1 of the SACC Review.[79]

1.78 The key aspect of this reform is that regulations made for the purposes of the new subsection 133CC(1) do not require a prescribed earnings amount in respect of a prescribed class of consumers. Instead, the new regulations can apply more broadly to ensure that all consumers are covered by a protected earnings amount.[80]

1.79 Per the EM, it is expected that the regulations will provide separate protected earnings amounts for consumers who receive 50 per cent, or more, of their net income from social security payments and those who do not.[81]

1.80 For consumers who receive 50 per cent or more of their net income from social security payments, a licensee must not enter into a SACC or consumer lease with the consumer if the total repayments under the SACC or consumer lease would exceed 20 per cent of their net income; and within that 20 per cent, the total repayment under the SACC would exceed 10 per cent of their net income.[82] For all other consumers, a licensee must not enter into a SACC with the consumer if the total repayments under the SACCS would exceed 20 per cent of their net income.[83]

1.81 To deter contraventions of these requirements, failure to comply attracts a civil penalty of up to 5 000 penalty units and constitutes the commission of an offence with a financial penalty of up to 50 penalty units.[84]

1.82 To create a financial incentive for licensees to comply with the repayment requirements, item 11 of schedule 2 of the bill introduces a loss of charges mechanism for licensees who enter into SACCs in contravention of these

---

77 *Explanatory Memorandum,* p. 74.

78 *Explanatory Memorandum,* p. 74.

79 *Explanatory Memorandum,* p. 77.

80 *Explanatory Memorandum,* p. 75.

81 *Explanatory Memorandum,* p. 75.

82 *Explanatory Memorandum,* p. 75.

83 *Explanatory Memorandum,* p. 75.

84 *Explanatory Memorandum,* p. 75.

requirements. This change gives effect to the government's response to recommendation 23 of the SACC Review.[85]

1.83 Under this mechanism, a licensee who enters into such a SACC loses their entitlement to any permitted establishment and monthly fees that would otherwise be payable under the contract if the court had made a declaration that the licensee has contravened the civil penalty provision in subsection 133CC(1) in relation to the contract; or the licensee is found guilty of an offence under subsection 133CC(2) in relation to that contract.[86]

Removing the unsuitability presumption

1.84 Under the Credit Act, there is currently a rebuttable presumption that a SACC is unsuitable for a consumer if the consumer is in default under another SACC; or the consumer has had two or more other SACCs in the previous 90-day period.[87]

1.85 The SACC Review determined that this presumption is ineffective in addressing the harm caused by repeat borrowings and debt spiral and, hence, should be replaced with an amended protected earnings requirement.[88]

1.86 Items 3, 4, 6 and 7 of schedule 2 of the bill repeal the provisions in the Credit Act that create the rebuttable presumption, and give effect to the government's response to recommendation 2 of the SACC Review.[89]

Requirement for equal repayments and intervals

1.87 Item 12 of schedule 2 of the bill adds section 133CD to the Credit Act which requires that a licensee must not enter into, or offer to enter into, a SACC with a consumer unless:

- the contract provides for equal repayments;
- the due dates for each repayment are set at equal intervals over the life of the loan; and
- the interval between the date on which the credit would first be provided and the due date of the first repayment is no more than twice the length of the interval between each repayment.[90]

---

85 *Explanatory Memorandum,* p. 77.

86 *Explanatory Memorandum,* p. 77.

87 See subsections 118(3A), 123(3A), 131(3A) and 133(3A) of the Credit Act.

88 See the panel's discussion on page 22 of the SACC Review's final report for further information on the rationale for its recommendation to remove the rebuttable presumption (i.e. recommendation 2).

89 *Explanatory Memorandum,* p. 78.

90 *Explanatory Memorandum,* p. 78.

1.88 The purpose of new section 133CD is to address the existing practice of front-loading repayments whereby licensees maximise revenue by front-loading repayments and extending the overall term of the contract with lower repayments in the later stages. The EM notes that, by artificially extending the term of the SACC in this way, the provider increases costs to the consumer by gaining additional revenue when the risk of default is lower.[91]

1.89 Failure to comply with the new requirements attracts a civil penalty of up to 5 000 penalty units, and the commission of an offence and a strict liability offence.[92]

1.90 This reform gives effect to the government's response to recommendation 5 of the SACC Review.

Prohibition on charging monthly fees after early repayment

1.91 Item 13 of schedule 2 of the bill inserts section 31C into the National Credit Code (Schedule 1 of the Credit Act) (the Credit Code) and prohibits providers of SACCS from requiring or accepting payment of an unexpired monthly fee by a consumer, where the consumer fully repays the balance of a SACC before the end of the original term of the loan.[93]

1.92 This reform is aimed at addressing concerns regarding how credit providers structure payments of permitted monthly fees, such as requiring all permitted monthly fees to be paid up-front or required permitted monthly fees to be paid in advance of the month in respect of which the fee applies. Further, this change also aligns protections for SACCs with those of other credit contracts.[94]

1.93 Failure to comply with the new requirement constitutes the commission of an offence and a strict liability offence, and a contravention of a key requirement for which a penalty may be imposed by a court under part 6 of the Credit Code. The EM notes that this provides an additional avenue for consumers to seek redress.[95]

1.94 This change brings the protections for SACCs into line with those that apply for other credit contracts, and implements the government's response to recommendation 7 of the SACC Review.[96]

---

91 *Explanatory Memorandum,* p. 79.

92 *Explanatory Memorandum,* p. 80.

93 *Explanatory Memorandum,* pp. 80–81.

94 *Explanatory Memorandum,* p. 81.

95 *Explanatory Memorandum,* p. 82.

96 *Explanatory Memorandum,* pp. 81 and 83.

Prohibiting unsolicited communications

1.95 Under item 12 of schedule 2 of the bill, a licensee must not make, or arrange for the making of, an unsolicited communication to a consumer that contains an offer to the consumer to enter into a SACC; or an invitation to the consumer to apply for a SACC, where the consumer is, or was, a debtor under a SACC.[97]

1.96 Per the EM, this prohibition is not intended to capture communications that are directed to consumers at large. Instead, its purpose is to ensure that licensees cannot make unsolicited communications to vulnerable consumers; and applications for SACCs are made actively and not in response to being prompted.[98]

1.97 To promote compliance with the new prohibition, item 12 of schedule 2 of the bill introduces a loss of charges mechanism for licensees who enter into SACCs in contravention of the new prohibition. Further, a civil penalty of up to 5 000 penalty units applies, and contravention constitutes a commission of an offence, with a financial penalty of up to 100 penalty units.[99]

1.98 The prohibition on unsolicited communications and the introduction of a loss of charges mechanism give effect to the government's response to recommendations 8 and 23 of the SACC Review.[100]

Documenting assessments that a contract is not unsuitable

1.99 Item 12 of schedule 2 of the bill introduces a new requirement for licensees to document, in writing and in accordance with any requirements determined by ASIC in a legislative instrument, any assessment that a SACC is not unsuitable for a consumer, and the inquiries and verifications made in relation to such an assessment. This new requirement does not impose any record-keeping requirements where a SACC is assessed as unsuitable for a consumer.[101]

1.100 The object of this reform is to improve the transparency and accountability of decisions made by licensees, and supplements the existing responsible lending obligations under the Credit Act. Failure to comply with the new requirements attracts a civil penalty of up to 5 000 penalty units.[102]

1.101 This reform implements the government's response to recommendation 20 of the SACC Review.[103]

---

97 *Explanatory Memorandum,* p. 83.

98 *Explanatory Memorandum,* p. 83.

99 See pages 84 and 85 of the EM for further information.

100 *Explanatory Memorandum,* p. 85.

101 *Explanatory Memorandum,* p. 86.

102 *Explanatory Memorandum,* pp. 85–86.

103 *Explanatory Memorandum,* p. 87.

Protection of account statements

1.102 Item 3 of schedule 6 of the bill introduces a restriction on the use and disclosure of 'constrained documents', which includes account statements obtained by licensees in connection with a SACC or proposed SACC. Such statements are currently required to be obtained by providers of SACCs and licensees who provide credit assistance in relation to SACCs, and forms part of the licensee's obligation to verify a consumer's financial situation.[104]

1.103 Under the new restriction, a person must not use or disclose an account statement, or information contained in an account statement, unless the use or disclosure is:

- necessary for the person to comply with the person's obligations under the Credit Act;
- required or authorised by, or under, a law of the Commonwealth, or of a state or territory, or a court or tribunal order;
- for the purposes of considering a hardship notice;
- for the purposes of assisting ASIC to perform its functions or exercise its powers; or
- for the purposes of allowing the AFCA to perform its functions or exercise its powers.[105]

1.104 The reform gives effect to the government's response to recommendation 19 of the SACC Review, and has the object of ensuring that consumers' personal information is not misused by a licensee or its representative.[106] Failure to comply with the new restrictions attracts a civil penalty of up to 5 000 penalty units, and constitutes the commission of an offence and a strict liability offence.[107]

Enhancing warning statements

1.105 Item 9 of schedule 2 of the bill replaces the existing requirement for licensees to display information, known as warning statements, as required by the regulations with a new requirement to display information, and give information to consumers, in accordance with any requirements determined by ASIC in a legislative instrument.[108]

1.106 Specifically, ASIC may determine the information that a licensee must display and give to consumers; and how, when, and in what form a licensee must display and give information to consumers. The EM states that the power for

---

[104] *Explanatory Memorandum,* p. 87.

[105] *Explanatory Memorandum,* p. 87.

[106] *Explanatory Memorandum,* p. 89.

[107] *Explanatory Memorandum,* p. 88.

[108] *Explanatory Memorandum,* p. 89.

ASIC to determine these requirements is necessary to 'ensure the information provided is effective in highlighting risks with these contracts and assisting customers to make better use of alternative where available'.[109]

1.107 By providing relevant information about the financial implications of entering into a SACC, this reform aims to assist consumers make informed decisions and provide a better understanding of the alternatives that may be available.[110]

1.108 The existing civil and criminal penalties continue to apply to the new requirement and, hence, contraventions attract a civil penalty of up to 5 000 penalty units, and also constitute the commission of an offence with a financial penalty of up to 50 penalty units.[111]

1.109 This change implements the government's response to recommendation 21 of the SACC Review.[112]

Schedules 3 and 6—Consumer lease reforms

1.110 Schedules 3 and 6 of the bill introduce:

- a cap on the amount a lessor can charge in connection with a consumer lease;
- the concept of 'consumer leases for household goods' in the Credit Act, and the following obligations in respect of those leases:
- the requirement for lessors to collect and consider consumers' account statements for the 90 days prior to entering into a consumer lease for household goods with the consumer;
- the requirement for lessors to disclose to lessees the base price of goods hired under the lease and the difference between the total amount payable by the lessee in connection with the lease and the base price;
- the prohibition of lessors from undertaking door-to-door selling of consumer leases for household goods;
- the requirement for licensees to document, in writing, their assessment or preliminary assessment that a consumer lease for household goods is not unsuitable for a consumer; and
- the requirement for licensees to display and give information to consumers in accordance with the requirements determined by ASIC in a legislative instrument; and
- a new regulation-making power to set a protected earnings amount for consumer leases for household goods.[113]

---

109 *Explanatory Memorandum,* p. 89.

110 *Explanatory Memorandum,* p. 90.

111 *Explanatory Memorandum,* p. 90.

112 *Explanatory Memorandum,* p. 90.

113 *Explanatory Memorandum,* p. 96.

1.111 Table 1.3, below, highlights the key differences between the existing law and the proposed new law.

Table 1.3 Comparison of current law and new law

New law	Current law
There is a cap on the total amount that would be payable by the lessee in connection with the consumer lease.	No equivalent.
Lessors of household goods must obtain and consider a consumer's account statements for the preceding 90 days in the course of verifying the consumer's financial situation.	There is a general obligation on lessors to take reasonable steps to verify a consumer's financial situation, which in many cases would already involve obtaining and considering a consumer's account statements.
There is a regulation-making power to prescribe protected earnings amount for consumer leases for household goods.	No equivalent.
Lessors of household goods are prohibited from visiting a place of residence for the purpose of inducing a person who resides there to apply for or obtain a lease, except by prior arrangement.	No equivalent.
Lessors of household goods are required to disclose the base price of the goods being leased and the difference between the base price and the total amount payable by the lessee in connection with the lease.	Lessors are required to disclose, among other matters, the total amount of rental payments under the lease.

Source: Explanatory Memorandum, p. 97.

Detailed explanation

Introducing a cap on costs

1.112 Item 31 of schedule 3 of the bill introduces a cap on costs for all consumer leases regulated under the Credit Act. Specifically, it requires that a lessor must not enter into, or vary, a consumer lease so that the total amount that would be payable by the lessee in connection with the lease is more than the permitted cap for the lease.[114]

1.113 The permitted cap for a consumer lease is the sum of:

[114] *Explanatory Memorandum*, p. 97.

- the base price of the goods hired under the lease;
- the permitted delivery fee (if any) for the consumer lease;
- the permitted installation fees (if any) for the consumer lease; and
- the sum of the above amounts, multiplied by:
  - in the case of a consumer lease for a fixed term–0.04 for each whole month of the consumer lease to a maximum of 48 months; or
  - in the case of a consumer lease for an indefinite period–1.92.[115]

1.114 This reform further aligns the consumer protections for consumer leases with those for SACCs, and aims to prevent lessors, and other parties, from charging lessees excessive fees and charges.[116]

1.115 Failure to comply with the permitted cap, or the permitted monthly cap, constitutes the commission of an offence, with a financial penalty of up to 100 penalty units. Further, a contravention also constitutes a contravention of a key requirement for which a penalty may be imposed by a court under part 6 of the Credit Code.[117]

1.116 This reform gives effect to the government's response to recommendations 11, 12, 13, and 14 of the SACC Review.[118]

Consumer leases for household goods

1.117 Item 35 of schedule 3 of the bill introduces into the Credit Code the concept of a 'consumer lease for household goods'. Such a lease is a regulated consumer lease where any of the goods hired under the lease are household goods; however, this does not include a consumer lease where any of the goods hired under the lease include:

- a motor vehicle;
- a vehicle that is not for use on a road and is of a kind intended primarily for use by persons with restricted mobility; or
- goods that are ordinarily used for accommodation.[119]

1.118 The object of this definition is to ensure that lessors cannot avoid the new obligations relating to consumer leases for household goods by including non-household goods in the same lease contract as a household good.[120]

---

115 *Explanatory Memorandum,* p. 98.

116 *Explanatory Memorandum,* pp. 97–98.

117 *Explanatory Memorandum,* pp. 103–104.

118 *Explanatory Memorandum,* p. 104.

119 *Explanatory Memorandum,* pp. 104–105.

120 *Explanatory Memorandum,* p. 105.

Introducing a protected earnings amount

1.119 Item 7 of schedule 3 of the bill prohibits lessors from entering into, or offering to enter into, a consumer lease for household goods if the amount required to be paid under the lease would not meet the requirements, such as the protected earnings amount, prescribed by the regulations.[121]

1.120 Per the EM, it is expected that the regulations will provide separate protected earnings amounts for consumers who receive 50 per cent or more of their income from social security payments and those who do not.[122]

1.121 For consumers who receive 50 per cent or more of their net income from social security payments, a licensee must not enter into a SACC or consumer lease with the consumer if the total repayments under the consumer's SACCs and the total payments under the consumer's proposed consumer lease and any existing consumer leases would exceed 20 per cent of the consumer's net income; and within that 20 per cent, the total repayments under the SACCs would exceed 10 per cent of the consumer's net income.[123]

1.122 For all other consumers, a licensee must not enter into a consumer lease with the consumer if the total payments would need to be paid under the consumer's leases would exceed 20 per cent of the consumer's net income.[124]

1.123 Failure to comply with the new requirements attracts a civil penalty of up to 5 000 penalty units; and also constitutes the commission of an offence, with a financial penalty of up to 50 penalty units.[125]

1.124 Similar to the approach used to promote regulatory compliance with SACCs, the bill introduces a loss of charges mechanism which allows consumers to recover all the fees and charges above the base price that would otherwise be payable under a lease, if the lessor fails to comply with the payment requirements prescribed by the regulations.[126]

1.125 These reforms implement the government's response to recommendations 15 and 23 of the SACC Review.

Obtaining and considering account statements

1.126 Item 6 of schedule 3 of the bill introduces an obligation on lessors offering consumer leases for household goods to obtain and consider a consumer's account statements that cover the immediately preceding period of 90 days.

---

121 *Explanatory Memorandum,* pp. 105–106.

122 *Explanatory Memorandum,* p. 106.

123 *Explanatory Memorandum,* p. 106.

124 *Explanatory Memorandum,* p. 106.

125 *Explanatory Memorandum,* p. 106.

126 *Explanatory Memorandum,* p. 108.

The same obligation is also introduced for licensees that provide credit assistance in relation to consumer leases.[127]

1.127 These requirements mirror existing provisions relating to SACCs, and the EM notes that they 'address concerns that lessors are not making adequate inquiries about a consumer's expenses and capacity to pay before entering into the lease with the consumer'.[128]

1.128 Schedule 6 of the bill also introduces restrictions on the use, and disclosure, of constrained documents, including account statements obtained by lessors in connection with consumer leases for household goods or proposed consumer leases for household goods.[129]

1.129 The object of these restrictions is to ensure that personal information is not misused by a lessor or its representatives. Under the restrictions, a person must not use, or disclose, an account statement, or information contained in an account statement, unless the use or disclosure is:

- necessary for the person to comply with the person's obligations under the Credit Act;
- required or authorised by, or under, a law of the Commonwealth, or of a state or territory, or a court or tribunal order;
- for the purposes of considering a hardship notice;
- for the purposes of assisting ASIC to perform its functions or exercise its powers; or
- for the purposes of allowing the AFCA to perform its functions or exercise its powers.[130]

1.130 Failure to comply with these new restrictions on using or disclosing constrained documents attracts a civil penalty of up to 5 000 penalty units, and also constitutes the commission of an offence and a strict liability offence.[131]

1.131 These changes implement the government's response to recommendation 19 of the SACC Review.[132]

Documenting assessments that a contract is not unsuitable

1.132 Item 7 of schedule 3 of the bill introduces a requirement for lessors of consumer leases for household goods to document, in writing, and in accordance with any requirements determined by ASIC any assessment that a

---

127 *Explanatory Memorandum,* pp. 108–109.

128 *Explanatory Memorandum,* p. 109.

129 *Explanatory Memorandum,* p. 109.

130 *Explanatory Memorandum,* p. 109.

131 *Explanatory Memorandum,* p. 110.

132 *Explanatory Memorandum,* p. 111.

consumer lease is not unsuitable for a consumer; and the inquires and verifications made in relation to that assessment.[133]

1.133 This complements the existing responsible lending obligations which require lessors to assess whether a consumer lease will be unsuitable for a consumer before entering into the consumer lease with the consumer; or making an unconditional representation to the consumer that the lessor considers that the consumer is eligible to enter into a consumer lease.[134]

1.134 The object of the change is to enhance the transparency and accountability of decisions made by lessors that a proposed contract is not unsuitable. This new requirement does not apply where a lessor assesses that a consumer lease is unsuitable.[135]

1.135 Contravention of the new requirement attracts a civil penalty of up to 5 000 penalty units, and is consistent with the existing civil penalties in the Credit Act.[136]

1.136 This reform implements the government's response to recommendation 20 of the SACC Review.[137]

Prohibition on door-to-door selling of consumer leases

1.137 Item 34 of schedule 3 of the bill prohibits lessors visiting a place of residence for the purpose of inducing a person who resides there to apply for, or obtain, a consumer lease for household goods, unless there is a prior arrangement with a person who resides at the property.[138]

1.138 The purpose of this new prohibition is to address unfair sales practices often used by lessors in the course of door-to-door selling at residential properties. The EM notes that 'in particular it recognises the potential for the sales environment to make it difficult for the consumer to refuse to enter into the lease and ask the lessor to leave'.[139]

1.139 A contravention of the new prohibition constitutes the commission of an offence and a strict liability offence, and a contravention of a key requirement for which a penalty may be imposed by a court under part 6 of the Credit Code.[140]

---

133 *Explanatory Memorandum,* p. 111.

134 *Explanatory Memorandum,* p. 111.

135 *Explanatory Memorandum,* p. 113.

136 *Explanatory Memorandum,* p. 112.

137 *Explanatory Memorandum,* p. 113.

138 *Explanatory Memorandum,* p. 112.

139 *Explanatory Memorandum,* p. 112.

140 *Explanatory Memorandum,* pp. 112–113.

1.140 This reform implements the government's response to recommendation 18 of the SACC Review.[141]

Warning statements

1.141 Item 7 of schedule 3 of the bill requires licensees who offer consumer leases for household goods to display information and give information to consumers in accordance with any requirements determined by ASIC in a legislative instrument.[142]

1.142 Such requirements may state the information that a licensee must display and give to consumers; and how and when the licensees must display and give the information to consumers.[143]

1.143 The object of these obligations is to ensure that consumers receive 'relevant and effective information about the financial implications of entering into or using a consumer lease for household goods'.[144]

1.144 Contravention of these new requirements attracts a civil penalty of up to 5 000 penalty units, and constitutes the commission of an offence with a financial penalty of up to 50 penalty units.[145]

1.145 This reform implements the government's response to recommendation 21 of the SACC Review.[146]

Base price disclosure

1.146 For consumer leases of household goods, item 30 of schedule 3 of the bill requires lessors to disclose:

- the base price of the goods hired under the lease; and
- the difference between the base price of the goods hired under the lease and the sum of:
- the total amount payable in connection with the lease, but not including an amount set out in subsection 175AA(4); and
- the establishment fee, if any, as described in paragraph 175AA(4)(a).

1.147 The object of this is to assist lessees make informed decisions about a lease by ensuring they are aware of its financial implications, and that the difference

---

141 *Explanatory Memorandum,* p. 113.

142 *Explanatory Memorandum,* p. 113.

143 *Explanatory Memorandum,* p. 113.

144 *Explanatory Memorandum,* p. 114.

145 *Explanatory Memorandum,* p. 114.

146 *Explanatory Memorandum,* p. 114.

between the cost of a good (i.e. the base price of the good) and how much the lessee is paying to lease the good is clearly shown.[147]

1.148 A contravention of section 174 of the Credit Code, including these new disclosure requirements, attracts a civil penalty of up to 5 000 penalty units, and also constitutes the commission of a strict liability offence with a financial penalty of up to 100 penalty units. Further, a contravention of the new disclosure requirements also constitutes a contravention of a key requirement for which a penalty may also be imposed by a court under part 6 of the Code.[148]

1.149 This reform gives effect to the government's response to recommendation 22 of the SACC Review.[149]

Schedules 4 and 5—Anti-avoidance measures

Prohibition of avoidance schemes

1.150 Schedules 4 and 5 of the bill introduce anti-avoidance measures to prohibit schemes that are designed to avoid the application of the Credit Act in relation to small amount credit contracts and consumer leases; and regulate consumer leases for an indefinite period under the Credit Act.[150]

1.151 These measures address the issue highlighted by the SACC Review that the introduction of conduct obligations resulted in some lenders and lessors seeking to avoid them through various practices. The measures implement the Australian government's response to recommendation 24 of the SACC Review.[151]

1.152 Table 1.4, below, highlights the key differences between the existing law and the proposed new law.

Table 1.4 Comparison of current law and new law

New Law	Current Law
A person must not enter into, begin to carry out a scheme or carry out a scheme for an avoidance purpose.	No equivalent
Consumer leases for an indefinite period are regulated under the Credit Act.	No equivalent—consumer leases for an indefinite period are excluded

147 *Explanatory Memorandum,* p. 115.

148 *Explanatory Memorandum,* p. 115.

149 *Explanatory Memorandum,* p. 115.

150 *Explanatory Memorandum*, p. 119.

151 *Explanatory Memorandum,* p. 120.

	from the regulation under the Credit Act.

Source: Explanatory Memorandum, p. 120.

Detailed explanation

Prohibition of avoidance schemes

1.153 Schedule 4 of the bill introduces new rules which prohibit schemes designed to prevent a contract from being a SACC or consumer lease. The general prohibition provides that a person must not enter into a scheme, begin to carry out a scheme, or carry out a scheme if, having regard to specified matters, it would be reasonable to conclude that the purpose, or one of the purposes of the person engaging in that conduct was an avoidance purpose.[152]

1.154 Per the EM, the following are considered avoidance purposes:

- prevent a contract from being either a SACC or a consumer lease;
- cause a contract to cease to be a SACC or a consumer lease;
- avoid the application of a provision of the Credit Act to a SACC or consumer lease; and
- avoid the application of a provision of the Credit Act to a contract that has ceased to be a SACC or consumer lease.[153]

1.155 Failure to comply with any of the new prohibitions attracts a civil penalty of up to 5 000 penalty units; and also constitutes the commission of an offence, with a financial penalty of up to 100 penalty units if fault is proven.[154]

Consumer leases entered into for an indefinite period

1.156 Currently, the Credit Code does not apply to consumer leases entered into for an indefinite period. Schedule 5 removes the provision in the Credit Code which excludes consumer leases entered into for an indefinite period from being regulated under the Credit Act.[155]

1.157 Notwithstanding the above, the Credit Code will only apply to a consumer lease entered into for an indefinite period that meets the definition of a consumer lease under section 169 of the Credit Code; is otherwise a consumer lease to which part 11 of the Credit Code applies; and is within the constitutional limitations.[156]

---

[152] *Explanatory Memorandum,* p. 121.

[153] *Explanatory Memorandum,* p. 121.

[154] *Explanatory Memorandum,* p. 124.

[155] *Explanatory Memorandum,* p. 125.

[156] *Explanatory Memorandum,* p. 126.

1.158 The government is introducing this change to reflect the risk that the introduction of the new obligations imposed by schedule 3 of the bill, such as the introduction of a cap on the total amount that can be charged in connection with a consumer lease, will incentivise lessors to offer unregulated products where there is no cap.[157]

1.159 A contravention attracts a civil penalty of up to 5 000 penalty units, and constitutes the commission of an offence with a financial penalty of up to 100 penalty units.[158]

Legislative scrutiny

1.160 In its Scrutiny Digest 2 of 2021, the Senate Standing Committee for the Scrutiny of Bills (the Scrutiny Committee) raised concerns with the bill regarding a number of significant matters which are determined by delegated legislation.

1.161 The Scrutiny Committee highlighted that legislative instruments made by the executive are not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill, and was of the view that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.[159]

1.162 Given the above, the Scrutiny Committee requested advice from the Treasurer regarding why it was considered necessary and appropriate to leave a number of significant matters to delegated legislation, and whether the bill could be amended to included high-level guidance, at a minimum, on the face of the primary legislation in relation to:

- the manner of giving a comparison of equity projections and aged care costs to a consumer;
- the content of the non-ADI credit standards;
- conditions whereby repayments under a SACC are taken as equal; and
- circumstances in which regulations may prescribe that specified kinds of communications are not unsolicited for the purpose of the prohibition proposed in section 133CF.[160]

1.163 The Scrutiny Committee noted that schedule 4 of the bill establishes a prohibition on schemes that are designed to avoid the application of the Credit Act in relation to SACCs and consumer leases, and that ASIC would be provided the power to exempt a scheme or class of schemes from all, or

---

157 *Explanatory Memorandum,* p. 126.

158 *Explanatory Memorandum,* p. 127.

159 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2021,* 3 February 2021, pp. 13-14.

160 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2021,* 3 February 2021, pp. 14–15.

specified parts, of the prohibitions. Given this the Scrutiny Committee requested detail advice as to:

- why it was considered necessary and appropriate to leave the prescription or determination of avoidance schemes and matters relevant to making a conclusion that a scheme is an avoidance scheme to delegated legislation;
- why it is proposed to confer on ASIC the broad power to exempt schemes from the operation of the prohibition of avoidance schemes in proposed section 323A;
- whether the bill can be amended to include high-level guidance, at a minimum, regarding schemes that will be presumed to be entered into for an avoidance purpose on the face of the primary legislation and the circumstances where it would be appropriate for ASIC to exempt such schemes;
- why it is proposed to place a legal burden of proof on the defendant by including presumptions in relation to these civil penalty provisions; and
- why it is not sufficient to reverse the evidential, rather than legal, burden of proof in this instance.[161]

1.164 The Scrutiny Committee also raised concerns regarding the reversal of the evidential burden of proof in proposed subsections 133DB(4A) and (4B), stating that it expects any such reversal to be justified. The Scrutiny Committee noted that this has not been addressed in the explanatory materials accompanying the bill and, hence, requested advice from the Treasurer as to why it is proposed to use offence-specific defences, which reverse the evidential burden of proof, in this instance.[162]

Regulatory and financial impact

Schedule 1—Changes to the responsible lending obligations

1.165 The EM states that schedule 1 will have a nil financial impact.[163]

1.166 The EM describes the reforms as deregulatory in nature, in that they will not impose compliance costs. Conversely, it states that the reforms will benefit lenders; borrowers; and credit assistance providers.[164]

Schedules 2 to 6—Small amount credit contract and consumer lease reforms

1.167 The EM states that schedules 2 to 6 will have a nil financial impact.[165]

---

161 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2021,* 3 February 2021, pp. 17–19.

162 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2021,* 3 February 2021, p. 20.

163 *Explanatory Memorandum,* p. 3.

164 *Explanatory Memorandum,* p. 3.

1.168 The EM submits that annual compliance costs are estimated to be $15.91 million because the reforms will require providers of SACCs and consumer leases to modify systems, processes and procedures; and undertake ongoing monitoring and maintenance to ensure compliance with the new obligations.[166]

1.169 The Regulation Impact Statement (RIS) details for schedules 2 to 6 are described as a 'Review'. Under the Australian Government Guide to Regulatory Impact Analysis on the Office of Best Practice Regulation (OBPR), it describes that in 'some special cases in the RIS process, one of which is that a RIS is not required for a regulatory proposal if an independent review, or other similar mechanism, has undertaken a process and analysis equivalent to a RIS. In such a case, the independent review can substitute for the RIS. This approach aims to remove duplication between comprehensive review processes and RISs.

1.170 The Office of Best Practice Regulation notes that in these circumstances the office does not assess the quality of the analysis in the Independent Review or RIS-like process. OBPR is, however, required to assess the Independent Review for relevance to the recommended option(s) that have been certified as being informed by a process and analysis equivalent to a Regulation Impact Statement.

Conduct of the inquiry

1.171 The committee advertised the inquiry on its website and wrote to relevant stakeholders and interested parties inviting submissions by 3 February 2021. The committee received 112 submissions, which are listed at appendix 1.

1.172 The committee held public hearings in Canberra on 19 February 2021 and 26 February 2021. The names of witnesses who appeared at these hearings are at appendix 2.

1.173 The committee thanks all individuals and organisations that contributed to the inquiry.

1.174 Hansard references throughout this document relate to proof Hansard, unless otherwise stated. Please note that page numbering may differ between proof and official Hansard.

---

165 *Explanatory Memorandum,* p. 4.

166 *Explanatory Memorandum,* pp. 4–5.

Chapter 2
Views on the bill

2.1 This chapter summarises the views held by stakeholders on the provisions of the National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020 (the bill). This chapter is intended to provide an indicative, though not exhaustive, account of the key issues raised and examined during the committee's inquiry.

2.2 Following a call for submissions, the committee received 112 submissions from interested parties.

2.3 The discussion is separated into the key high-level changes the bill makes: reforming the responsible lending obligations; extending the best interests obligations; and amending the protections for small amount credit contracts (SACCs) and consumer leases.

Responsible lending obligations

Support for the reforms

2.4 Inquiry participants representing the Australian banking industry were supportive of the government's proposed reforms to the responsible lending obligations. For example, the Australian Banking Association (ABA) stated that the reforms would retain customer protections whilst improving the customer experience through streamlined credit application and information collection processes. Further, it stated that the reforms would 'simplify and modernise the regulatory landscape'.[1]

2.5 Articulating the ABA's position, Ms Anna Bligh, the association's chief executive officer, in verbal evidence provided to the committee, stated the following:

> This reform means less time and paperwork for borrowers, not less scrutiny for lenders. It means less reliance on obscure discretionary spending during the loan assessment and more attention on the factors that count, like income expenses and debt. Banks know from decades of experience that Australians are reliable and responsible borrowers. They adjust their lifestyle to repay their loans, and when things go wrong it is rarely, if ever, due to spending habits but more to major life events that impact income, such as job loss, illness or divorce. That's why this change makes sense.[2]

---

1 Australian Banking Association, *Submission 80,* p. 1.

2 Ms Anna Bligh, Chief Executive Officer, Australian Banking Association, *Committee Hansard,* 19 February 2021, p. 1.

2.6 Aligning with the above, the industry association representing Australia's mutual banks, credit unions, and building societies, the Customer Owned Banking Association (COBA), stated that the current responsible lending obligations are not well drafted, and that they are 'elaborate and prescriptive'.[3] COBA's chief executive officer, Mr Michael Lawrence, made a number of further observations to the committee during his evidence. He submitted that:

> …the requirements are specific and detailed and contraventions are subject to very significant penalties; that the regime imposes prescriptive procedural obligations on the credit provider; that it is an elaborate statutory regime; and, finally, that identifying the proper construction of key provisions is not straightforward, and civil penalty provisions should be interpreted on the basis that it is expected that the obligation imposed would have been identified clearly and unambiguously.[4]

2.7 COBA also submitted that the reforms would remove regulatory duplication for authorised deposit-taking institutions (ADIs) and enhance competition, whilst also retaining multiple consumer protection regimes.[5]

2.8 Representatives of the property sector were also supportive of the reforms. The Property Council of Australia stated that credit approval waiting times for first home buyers has increased from several weeks to several months, and that the responsible lending obligations have resulted in many Australians missing the opportunity to obtain grants under the Australian government's HomeBuilder scheme.[6]

2.9 The Housing Industry Association (HIA) was also concerned about the ability of first home buyers to access credit. Although noting that the credit reforms implemented over the last decade have generally improved lending practices and the quality of credit, the HIA submitted that they have not come without a cost. On this point, the HIA stated that:

> [a] consequence of the reforms that improved credit quality is that there is now a greater disincentive for lenders to lend to higher risk borrowers, which includes first home buyers. Far more aspiring first home buyers are unable to access the credit they need. This is contributing to the drop in home ownership rates amongst younger age cohorts.[7]

2.10 Master Builders Australia stated that they believe the proposed amendments would deliver a 'smoother and more timely flow of credit to the housing market', whilst also retaining important safeguards to protect consumers. They

---

3 Customer Owned Banking Association, *Submission 27*, p. 1.

4 Mr Michael Lawrence, Chief Executive Officer, Customer Owned Banking Association, *Committee Hansard*, 26 February 2021, p. 8.

5 Customer Owned Banking Association, *Submission 27*, p. 1.

6 Property Council of Australia, *Submission 43*, [p. 2].

7 Housing Industry Association, *Submission 88*, p. 2.

also indicated their belief that the current laws are unbalanced and are detrimental to consumers and the broader economy.[8]

2.11 The peak national body representing Australian mortgage brokers, the Mortgage and Finance Association of Australia (MFAA), supported the reforms. In their submission to the inquiry, they stated that:

> [t]he MFAA welcomes the [bill] and considers it will ultimately lead to stronger customer outcomes, as lenders and brokers will have a clearer understanding of their individual responsibilities, including a higher legal duty for brokers. It will also enable a more efficient flow of credit, whilst maintaining customer protections.[9]

2.12 The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) was also supportive of the reforms. In its submission it highlighted that access to capital is an ongoing problem for small business and that, notwithstanding that the responsible lending obligations apply only to consumer lending, banks commonly utilise a one-size-fits-all approach, resulting in unnecessary burden on small business. In conclusion, ASBFEO stated that:

> [l]ending to small business should be clear, simple and safe. Unfortunately, this is not always the case and we hope these reforms will help address the issue.[10]

2.13 Mr Daniel Popovski, a senior adviser from the Australian Chamber of Commerce and Industry (ACCI), further articulated this issue in his evidence to the committee. Supporting the reforms, he stated the following:

> Following the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, many banks have erred on the side of caution and applied responsible lending obligations for consumers to small businesses. Banks have noted that these standards are applied because there is often a blurred line between personal and business finances for small business owners. These standards have reportedly continued to be applied by banks, despite ASIC reiterating that these obligations should not apply to lending for business purposes. What we [ACCI] find is that because of the regulatory overlap that these reforms are trying to circumvent, banks are actually becoming overly cautious and applying the laws where they are not fit for purpose. They're actually applying the laws where a business owner might have blurred lines between their personal and business spending behaviour.[11]

---

8 Master Builders Australia, *Submission 62,* [p. 1].

9 Mortgage and Finance Association of Australia, *Submission 49,* p. 1.

10 Australian Small Business and Family Enterprise Ombudsman, *Submission 35,* [p. 1].

11 Mr Daniel Popovski, Senior Advisor, Economics and Industry Policy, Australian Chamber of Commerce and Industry, *Committee Hansard,* 26 February 2021, p. 19.

Concerns with the reforms

2.14 A number of inquiry participants from a cross-section of the community raised concerns with the government's proposed reforms to the responsible lending obligations. Key issues raised by these individuals and groups are discussed below.

Reform rationale

2.15 A number of submitters questioned the government's rationale for reforming the responsible lending obligations. For example, Legal Aid Queensland (LAQ), in its submission to the inquiry, stated that there is no evidence that consumers are encountering difficulties gaining access to credit.[12]

2.16 To support their statement, LAQ referred to prior evidence provided by the Treasury to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Banking Royal Commission), and by the Australian Prudential Regulation Authority (APRA) and the Commonwealth Bank to two parliamentary committees. LAQ noted that this evidence indicated that there is an abundant supply of credit in Australia; the responsible lending obligations have not materially affected the flow of credit; and that adhering to the existing laws would likely enhance, rather than detract from, macroeconomic performance.[13]

2.17 Ms Amy Auster, a chief advisor within the Markets Group of the Treasury, accepted that credit has grown overall; however, she noted that this growth has been uneven throughout the economy, and that the proposed reforms are not necessarily about increasing the overall supply of credit, but are also aimed at reducing credit assessment timeframes. Specifically, she said the following:

> Credit to housing is growing very strongly, personal lending products are shrinking rapidly and credit to business is relatively stagnant. So, while you have credit growing overall, the distribution of that credit through the economy is pretty varied.
>
> In relation to this specific proposed change in legislation, we make the point in the regulatory impact statement that it's obviously very difficult to attribute a change in growth of overall credit to one regulatory or legal shift, but this particular proposal is about addressing the time and effort that it takes to receive approval on a credit assessment or to undertake a credit assessment and have that come to a decision. It is not necessarily about the overall supply of credit.[14]

2.18 Reflecting on the argument that responsible lending obligations are prescriptive and have resulted in a 'one-size-fits-all' approach, Mr Ben Slade,

---

12 Legal Aid Queensland, *Submission 25,* p. 6.

13 Legal Aid Queensland, *Submission 25,* pp. 6–7.

14 Ms Amy Auster, Chief Advisor, Markets Group, Department of the Treasury, *Committee Hansard,* 26 February 2021, p. 40.

the chair of the Australian Consumer Law Committee of the Law Council of Australia (LCA) said the following:

> We understand that the primary reason, the pressure, is that ADIs complained that the responsible lending obligations are prescriptive and impose burdensome and unnecessary processes—the one-size-fits-all argument. We don't understand why it has got to that in practice, unless it is that the ASIC guideline RG 209 is overly prescriptive, or at least the interpretation of RG 209 by the lending institutions has turned into something overly prescriptive, because it's not what chapter 3 of the [Credit Act] imposes. It doesn't impose a one-size-fits-all burden—in fact, on the contrary. The Full Federal Court has said that all that chapter 3 does is impose a requirement on lenders to not make unsuitable loans and to have a system in place to assess the granting of loans to ensure that the loans are 'not unsuitable'.[15]

2.19 In its submission, the LCA also highlighted that the bill makes permanent changes to Australia's consumer credit protection framework to address a temporary issue, the COVID-19 pandemic, and that it is concerned with the long-term consequences of such an approach. On this issue the LCA stated that:

> [w]hile it is appreciated that the COVID-19 pandemic has changed the economic circumstances in Australia, the Bill does not represent a temporary adjustment to exceptional conditions. Rather, it seeks to make permanent changes that will not expire when the crisis has passed. The Law Council is concerned that the reforms proposed under the Bill may impact consumers in the long term…[16]

Assessing unsuitability

2.20 A number of submitters stated that removing the responsible lending obligations was in direct opposition to the recommendation made by Commissioner Hayne, in the final report of the Banking Royal Commission, that the *National Consumer Credit Protection Act 2009* (the Credit Act) should not be amended to alter the obligation to assess unsuitability.[17]

2.21 For example, in a joint submission to the inquiry, Care and the ACT Council of Social Service claimed that the proposed amendments contradict recommendation 1.1 of the Banking Royal Commission.[18] This was also emphasised by Good Shepherd Australia New Zealand which stated that the

---

[15] Mr Ben Slade, Chair, Australian Consumer Law Committee, Law Council of Australia, *Committee Hansard,* 26 February 2021, p. 25.

[16] Law Council of Australia, *Submission 103,* p. 7.

[17] For further information on recommendation 1.1 see: Commonwealth of Australia, *Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry–Final Report–Volume 1,* pp. 59–60.

[18] Care and ACTCOSS (Joint submission), *Submission 64,* p. 3.

reforms are contrary to the commission's findings and weaken responsible lending obligations.[19]

2.22 In response to the suggestions that the proposed reforms go against recommendation 1.1 of the Banking Royal Commission, the ABA and COBA indicated that these claims misrepresent what the commissioner said. The ABA highlighted the commissioner's recommendation was made in response to a proposal by consumer advocacy groups to amend the Credit Act to require lenders to determine whether a loan contract was 'suitable', as opposed to 'unsuitable', for a consumer. On this point the ABA said:

> The Commission did not give consideration to the question of whether the regulatory landscape facilitates or hinders the efficient supply of credit. Nor did it make any recommendations to the effect that an elected government should never review or revise the regulatory landscape when economic conditions change.
>
> It is a mischaracterisation of the Commissioner's recommendation to say otherwise.[20]

2.23 Reflecting on this issue, COBA concluded that the commissioner's recommendation to not alter the obligation to assess unsuitability did not amount to an endorsement by the commissioner of the responsible lending obligations.[21]

Government consultation

2.24 Ms Amy Auster articulated to the committee the approach used by the Treasury, APRA, and the government following the announcement of the reforms. She said the following:

> Following the [government's] announcement, Treasury undertook consultation that included over 20 meetings, leading to direct contact with more than 30 stakeholders and representative groups.
>
> In November [2020], Treasury consulted on the draft legislation package, including the bill, the non-ADI standard and supporting changes. Over 50 submissions were received. Changes made to the bill prior to the introduction into parliament reflect this feedback. The government and APRA have released draft standards that will govern the regulatory practice for non-ADIs and ADIs in respect of credit assessments.[22]

2.25 Notwithstanding the above approach, the committee received evidence raising concerns regarding the level of community consultation on the proposed

---

[19] Good Shepherd Australia New Zealand, *Submission 31,* p. 5.

[20] Australian Banking Association, *Submission 80,* p. 7.

[21] Customer Owned Banking Association, *Submission 27,* p. 3.

[22] Ms Amy Auster, Chief Advisor, Markets Group, Department of the Treasury, *Committee Hansard,* 26 February 2021, p. 39.

reforms, and how the current government's approach differed markedly from that taken prior to the introduction of the responsible lending laws.

2.26 For example, Ms Karen Cox, the chief executive officer of the Financial Rights Legal Centre, stated that she first heard about the proposed changes the night before they were announced by the government. She contrasted this to her prior experience leading up to the introduction of the existing laws which involved 'extensive consultation' with all major lending industry bodies, broker industry bodies, and lenders.[23]

2.27 The financial counselling sector, in a joint submission, stated that the government is overturning these laws with 'very little thought and with very little time for stakeholders to respond'.[24] To support this claim, they noted that the proposed reforms were only publicly announced on 25 September 2020 with an original commencement date of 1 March 2021; and that the draft legislation was released for comment on 4 November 2020, with responses due by 20 November 2020.[25]

Protections for the vulnerable

2.28 Consumer groups who responded to the inquiry expressed concern that removing the responsible lending obligations could reduce protections for vulnerable community members. For example, the financial counselling sector submitted that the removal of the requirement that licensees make reasonable inquiries about a consumer's requirements and objectives could encourage over-commitment and that consumers may end up with loans they cannot afford and that do not meet their needs.[26]

2.29 Commenting on the importance of these protections, the chief executive officer of the Consumer Action Law Centre (CALC), Mr Gerard Brody, said the following to the committee:

> The existing law has, as part of the suitability assessment, two parts: the lender has to make an assessment of (1) whether repayments will cause a substantial hardship; and (2) whether the loan is in line with the borrower's requirements and objectives. That part in particular is being pulled out entirely under the government's proposal in this bill. The risk associated with that is that people will be given an inappropriate product for their circumstances.[27]

---

[23] Ms Karen Cox, Chief Executive Officer, Financial Rights Legal Centre, *Committee Hansard*, 19 February 2021, p. 28.

[24] Financial Counselling Australia and others (Joint submission), *Submission 67*, p. 5.

[25] Financial Counselling Australia and others (Joint submission), *Submission 67*, p. 5.

[26] Financial Counselling Australia and others (Joint submission), *Submission 67*, p. 10.

[27] Mr Gerard Brody, Chief Executive Officer, Consumer Action Law Centre, *Committee Hansard*, 19 February 2021, p. 19.

2.30 The Economic Abuse Reference Group highlighted the importance of responsible lending in preventing economic abuse. It stated the following in its submission to the inquiry:

> When responsible lending is done correctly it can help to prevent economic abuse because the lender will make reasonable inquiries about each applicant's financial position and assess the requirements, objectives and the financial situation of each borrower. This process is an effective mechanism to expose undue influence, imbalance of bargaining power and the underlying dynamic behind economic abuse.[28]

2.31 In her verbal evidence to the committee, Ms Laura Bianchi from the Redfern Legal Centre, a member of the Economic Abuse Reference Group, stated her concerns regarding the removal of responsible lending obligations and articulated their role in preventing abuse. She said:

> Economic abuse can take various forms, but most relevant to this bill are cases which involve a person using coercion or fraud to make their partner liable or jointly liable for a credit contract under which their partner derives no benefit. That debt trap is a common barrier to a victim-survivor remaining in or returning to a violent relationship. Retaining the current responsible lending obligations is vital to prevent debts from economic abuse originating and to provide individual remedies when lenders wilfully or inadvertently allow their credit products to be used to perpetrate economic abuse.[29]

2.32 However, Mr Michael Lawrence from the Customer Owned Banking Association clarified that this bill is not about winding back on consumer protections. Rather, it is about removal of duplications within the legislation while still affording substantial means of redress for consumers who need it:

> ….what we're talking about here in terms of the bill is the removal of duplication without the consumer losing any of their ability to have any sort of redress.[30]
>
> With this bill, under the credit act, there are still requirements to act honestly and fairly. There are requirements around unfair contracts, unconscionable conduct and misleading and deceptive conduct.[31]
>
> But could I add that it's also this cost burden, because, at the end of the day, the more that costs are layered on top of an organisation, the

---

28 Economic Abuse Reference Group, *Submission 50*, p. 2.

29 Ms Laura Bianchi, Team Leader, Redfern Legal Centre, *Committee Hansard*, 26 February 2021, p. 1.

30 Mr Michael Lawrence, Chief Executive Officer, Customer Owned Banking Association, *Committee Hansard*, 26 February 2021, p. 10.

31 Mr Michael Lawrence, Chief Executive Officer, Customer Owned Banking Association, *Committee Hansard*, 26 February 2021, p. 10.

> consumer pays for it. So anything that can remove it, whilst the consumer is still protected, has to be a positive thing for the consumer.[32]

Penalties and redress

2.33 The Law Council of Australia, a group of legal academics, and various consumer groups,[33] amongst others, voiced their concern that removing the civil and criminal penalties, and various consumer remedies, associated with the responsible lending obligations, would result in reduced incentives for lenders to comply with good lending practices.

2.34 The Indigenous Consumer Assistance Network stated their concerns succinctly as follows:

> The Bill removes civil penalties for unsuitable lending and instead provides that civil penalties be imposed where lenders have engaged in 'repeated' or systemic breaches of the standards set by the Australian Prudential Regulatory Authority (APRA) (for lending by banks) and the Ministerial Standards (for non-bank lending). The intention is clearly to remove rights regarding civil penalty provisions from the hands of individual consumers as it will be all but impossible for an individual to first, identify that the unsuitable loan that they obtained is indicative of broader systemic or repeated practices by the lender and second, prove this.[34]

2.35 The Law Council of Australia submitted that consumer remedies are an essential part of promoting compliance with legislative requirements, and raised concerns that the proposed reforms would deprive consumers of individual remedies if they are victims of unsuitable lending. Specifically, it stated the following:

> Sections 179 to 184 of the [Credit Act] empower courts to grant remedies, including injunctions and compensation orders, to prevent or compensate for loss or damage suffered, or likely to be suffered, by consumers as a consequence of conduct of licensed credit providers and credit assistance providers in breach of the [Credit Act]. Removing [the responsible lending obligations] of banks would mean that these remedial powers of the courts would no longer apply to decisions taken by banks about loan suitability.[35]

2.36 Similarly, a group of consumer law academics noted that the removal of responsible lending obligations would reduce opportunities for legal action and, hence, impact the ability to clarify the expectations of lenders under the new regulatory regime. They said:

---

[32] Mr Michael Lawrence, Chief Executive Officer, Customer Owned Banking Association, *Committee Hansard*, 26 February 2021, p. 10.

[33] See: submission 103 by the Law Council of Australia; submission 91 by various law academics; and submission 40 by the Consumer Action Law Centre and others.

[34] Indigenous Consumer Assistance Network, *Submission 69*, [p. 3].

[35] Law Council of Australia, *Submission 103*, p. 10.

> As a consequence of [the] effective removal of the [responsible lending obligations] from the [Credit Act], and lack of opportunity for legal action, there will be no opportunity to use litigation to clarify the scope of the expectations of lenders. The fact that the vast majority of disputes at [the Australian Financial Complaints Authority] are resolved by negotiation also results in a lack of transparency about the expectations of lenders, which in turn makes it difficult for consumers to know whether standards are below what is required.[36]

2.37 In its submission to the inquiry, ASIC stated that it was currently unclear what direct remedies would be available to consumers who have complaints about assessments and credit decisions made by ADIs under the new regime.

2.38 However, COBA disagreed with this perspective:

> Borrowers will continue to be protected by multiple consumer protection regimes. The reforms will not remove the ability of consumers to dispute transactions or obtain redress from their lender. Lenders will be required to undertake reasonable credit assessments using appropriate systems, policies and procedures in place to make responsible inquiries and appropriately evaluate credit applications. They will be required to assess whether the consumer will be able to comply with the financial obligations under the contract without substantial hardship. Lenders will continue to be required to maintain appropriate internal dispute resolution processes. Consumers will also continue to receive free redress from AFCA in the event that disputes cannot be resolved directly with the consumer's financial institution.[37]

2.39 Similarly, the chief executive of the ABA submitted that '[t]he government's reforms in this bill do not affect the rights of customers to bring a lending complaint to AFCA', and that the EM makes this clear.[38]

2.40 Further, Treasury clarified the role of AFCA and the process for redress for consumers who need it:

> AFCA is the financial services dispute resolution and redress authority. Consumers can go and do go to AFCA to make complaints. Those get resolved, and consumers receive redress. There is no plan to change any aspect of that under this legislation…. The average time for AFCA to close banking and finance related complaints in the last year, including RLO complaints, is about 62 days and it's free. That tells you why AFCA is so much more attractive as a proposition to consumers than, for example, going through the court…By and large, in the world of responsible lending

---

[36] Consumer law academics, *Submission 91*, p. 2.

[37] Mr Michael Lawrence, Chief Executive Officer, Customer Owned Banking Association, *Committee Hansard*, 26 February 2021, p. 8.

[38] Ms Anna Bligh, Chief Executive Officer, Australian Banking Association, *Committee Hansard*, 19 February 2021, p. 1.

> obligations, the vast, vast majority of issues end up with AFCA and not in the courts.[39]

Avoidance

2.41 A number of stakeholders raised concerns regarding the differing protections afforded to consumers who borrow up to $2 000, compared to those who borrow larger amounts. For example, Good Shepherd said this approach may create an incentive for credit providers to 'upsell' potential borrowers to a higher loan amount so that they would no longer be required to meet the responsible lending obligations.[40]

2.42 Similarly, WEstjustice were also concerned that the combination of removing the responsible lending obligations for loans over $2 000, and enhancing protections for consumers of loans up to $2 000, could inappropriately promote larger loans. It believes such an outcome would have 'perverse consequences' where customers are no longer protected by the responsible lending obligations and their associated legal remedies.[41]

2.43 Another concern of inquiry participants was the small business purpose exemption, whereby once a lender identifies that part of the credit is for a small business purpose, the obligations in the new non-ADI standard are switched off.[42] Notwithstanding the safeguard that the small business purpose must not be minor or incidental to the overall purpose of the credit, the financial counselling sector believes that this will encourage 'sham' business lending.[43]

Twin peaks framework

2.44 Australia's financial regulation is founded on the 'twin peaks' model whereby the key components of financial regulation are primarily split between ASIC and APRA. Under this model, APRA is the financial safety regulator, focusing on financial soundness and stability, and ASIC is the conduct regulator responsible for regulating companies, markets, and enforcing consumer protections.[44]

2.45 In his opening remarks to the committee, Mr Sean Hughes, a commissioner of ASIC outlined the commission's view of the future and where it will be focusing its efforts. He said the following:

---

[39] Ms Amy Auster, Chief Advisor, Markets Group, Department of the Treasury, *Committee Hansard*, 26 February 2021, pp. 43–44.

[40] Good Shepherd, *Submission 31,* p. 12.

[41] WEstjustice, *Submission 44,* [p. 5].

[42] See page 44 of the Explanatory Memorandum for further details.

[43] Financial Counselling Australia and others (Joint submission), *Submission 67,* pp. 14–15.

[44] Australian Prudential Regulation Authority, *Submission 74,* p. 2.

> In terms of the approach going forward: our position will be that we will not be responsible for administering responsible lending obligations in relation to ADI lenders, that there will be a different regime in relation to the regulation of credit by non-ADI lenders and that we will be responsible for regulating small-amount credit contracts and other low-limit loans, both by non-ADI lenders and other providers. So our role will be more focused in relation to the non-ADI and small-amount credit contract providers.[45]

2.46 In her evidence to the committee, Ms Renee Roberts, an executive director at APRA, explained the authority's role as '[ensuring] that there is confidence in the safety of individual banks and in the financial stability of the system overall'. She indicated to the committee that the authority emphasises systemic lending issues at an institutional level, rather than having a direct focus on outcomes at an individual loan or customer level, and that it is not planning any material changes to its standards and guidance on the basis of the proposed reforms.[46]

2.47 Given the changes within the bill, inquiry participants were concerned that the reforms dismantle the existing twin peaks regulatory regime. The CALC, in a joint submission with a number of other organisations, stated that the bill would confuse and undermine the existing model, as APRA would now be required to act as both a prudential regulator for all ADIs and as a conduct regulator for the lending activities of those institutions.[47]

2.48 CALC was also concerned that the new approach may result in the inconsistent application of similar laws by ASIC and APRA, as CALC believes it unlikely that both organisations would apply identical compliance and enforcement tools.[48] In conclusion, the centre stated:

> This overlap of conduct and prudential oversight will be confusing and inefficient. It will not be competitively neutral, and it will create conflicting regulatory objectives for APRA.[49]

2.49 A joint submission by the peak bodies representing the financial counselling sector raised concerns that the reforms would reduce the effectiveness of both regulators and, as a result, consumers would 'fall through the gap'.[50] The counsellors also believe that, as APRA is focused on financial system stability

---

[45] Mr Sean Hughes, Commissioner, Australian Securities and Investments Commission, *Committee Hansard,* 26 February 2021, p. 31.

[46] Ms Renee Roberts, Executive Director, Policy and Advice, Australian Prudential Standards Authority, *Committee Hansard,* 26 February 2021, p. 35.

[47] Consumer Action Law Centre and others (Joint submission), *Submission 40,* p. 25.

[48] Consumer Action Law Centre and others (Joint submission), *Submission 40,* p. 25.

[49] Consumer Action Law Centre and others (Joint submission), *Submission 40,* p. 25.

[50] Financial Counselling Australia and others (Joint submission), *Submission 67,* p. 16.

and the protection of depositors, it is unlikely to take enforcement action if consumers are harmed by lending practices.[51]

2.50 As noted by the Treasury, however, prudential regulation and conduct are not distinct, but operate along a continuum:

> …there is a continuum between what constitutes a prudent ADI and good prudential regulation and the conduct of the entity and how prudent lending and conduct intersect. Subsequently APRA, as you would have heard, now administers the BEAR regime, which is another good example of where conduct and prudential standards are, in a sense, becoming more intertwined. RLOs, which originally started as a conduct matter, essentially became more strongly reflected in APS 220, which is prudential guidance, and so ADIs now have a prudential standard and they also have a conduct standard, which by and large have the same requirements on the banks, on the ADIs, but with different language and responding to two different regulators in respect of those requirements.[52]

Best interests obligations

2.51 There was general support for the extension of the best interests obligations from mortgage brokers to other credit assistance providers. For example, CPA Australia stated that:

> [t]he extension of the best interests duty from only mortgage brokers to all credit representatives is one measure that will enhance consumer protections. The current principles-based approach will help support and positively influence the conduct of all credit representatives to ensure they prioritise the interests of their clients over those of their own, or other relevant associates.[53]

2.52 The Economic Abuse Reference Group also expressed its support for this reform, noting in their submission that they support the 'general principal and standard of behaviour' contained within these obligations. Notwithstanding this, the group also submitted to the committee that the extension of these obligations should complement, not replace, the existing responsible lending obligations, as they do not consider, or resolve conflicts between co-borrowers or guarantors.[54]

Small amount credit contracts and consumer leases

2.53 Evidence provided to the committee indicated general support for improving protections for consumers of SACCs and consumer leases; however, a

---

[51] Financial Counselling Australia and others (Joint submission), *Submission 67,* p. 16.

[52] Ms Amy Auster, Chief Advisor, Markets Group, Department of the Treasury, *Committee Hansard*, 26 February 2021, pp. 40–41.

[53] CPA Australia, *Submission 23,* [p. 1].

[54] Economic Abuse Reference Group, *Submission 50,* p. 9.

significant number of inquiry participants raised key concerns with the specific reforms being proposed by the government within the bill.

Support for the reforms

2.54 The Legal Services Commission of South Australia welcomed the proposal to enhance protections for consumers of SACCs and consumer leases. It noted that the financial harm of these products is well known and that capping payments and extending protections to all consumers would go some way in reducing this harm.[55]

2.55 The Salvation Army also endorsed a number of the reforms, such as requiring equal repayments and prohibiting certain unsolicited contact by lenders, noting that they would provide safeguards against various predatory practices.[56] [57]

2.56 The Consumer Household Equipment Rental Providers Association (CHERPA) stated that schedules 3 and 6 of the bill, which relate to consumer leases, would provide essential additional consumer protections for recipients of consumer leases.[58]

2.57 CHERPA also submitted that the government has set these additional protections at levels which would preserve the consumer lease industry's viability; prevent financial exclusion; and avoid placing excessive financial burdens on consumers.[59] Specifically reflecting on the proposed protected earnings amount within the bill, it stated the following:

> This amount matches CHERPA's broad industry experience in determining general affordability of consumer leases and is adequate in the vast majority of cases to both prevent financial exclusion in consumers needing to secure essential household items, while mitigating any excessive financial burden to those consumers.[60]

2.58 CHERPA also highlighted the importance of a nationally consistent approach to the regulation of its industry, indicating that if the Australian Government fails to act then state and territory parliaments would. CHERPA stated that this would lead to a 'patchwork of inconsistent government approaches

---

55 Legal Services Commission SA, *Submission 56*, p. 11.

56 The Salvation Army, *Submission 48*, p. 2.

57 Please note that the Salvation Army raised concerns with other reforms within the bill and, when considered as a whole, recommended the bill not be passed.

58 Consumer Household Rental Equipment Providers Association, *Submission 77*, p. 2.

59 Consumer Household Rental Equipment Providers Association, *Submission 77*, p. 2.

60 Consumer Household Rental Equipment Providers Association, *Submission 77*, p. 3.

throughout the country…to the determinant of the national economy, business, and consumer stakeholders'.[61]

2.59 Aspire 42, a business operating within the leasing industry, also indicated its support for a consistent national approach to regulation, stating in its submission that:

> …it is imperative that the national approach to [consumer leasing] in the Bill is passed as quickly as possible to ensure consistently high levels of protection for [consumer leasing] customers across the country and prevent inconsistent legislation by states and the adverse consequence of that.[62]

Concerns with the reforms

2.60 The National Credit Providers Association (NCPA) submitted that a number of the proposed reforms to the regulation of SACCs would not be in the interests of consumers, and would 'further disadvantage financially excluded Australians who are unable to access credit from a bank or who simply [choose] not to have a credit card'.[63] It submitted that the bill would either make it harder, and up to 155 per cent more expensive, for many financially excluded Australians to qualify for a SACC; or disqualify them altogether.[64]

2.61 Another concern of inquiry participants was that the enhancements to the protections for consumers of SACCs and consumer leases proposed by the bill do not reflect the recommendations made by the 2016 review of small amount credit contracts (the SACC Review). For example, WEstjustice, submitted that the proposed reforms to SACCs represent a 'missed opportunity' to make meaningful changes to protect low-income earners and that they are a 'heavily diluted' version of the recommendations made by the SACC Review.[65]

2.62 Similarly, the NILS Network of Tasmania, a community-lending service based in Tasmania, also expressed its disappointment with the provisions of the bill, stating that they have been 'weakened' and 'watered down', and will not protect consumers from predatory practices.[66]

2.63 The Indigenous Consumer Assistance Network, an organisation providing education, advocacy, and counselling services in north and far-north Queensland stated that:

---

61 Consumer Household Rental Equipment Providers Association, *Submission 77,* p. 4.

62 Aspire 42, *Submission 73,* p. 1.

63 National Credit Providers Association, *Submission 86*, p. 1.

64 National Credit Providers Association, *Submission 86*, p. 2.

65 WEstjustice, *Submission 44,* [p. 4].

66 NILS Network of Tasmania, *Submission 63,* p. 2.

> [t]he reforms proposed in the Bill fall so far short of what was recommended in the SACC Review that we are unable to support them. Far from welcoming the proposals in the Bill regarding Small Amount Credit Contracts and consumer leases, we see these as an affront to the people who most need these laws changed.[67]

2.64 A number of submissions raised specific concerns regarding the protected earnings amount; the cost cap for consumer leases; and the prohibition of door-to-door selling and unsolicited communications. These specific issues are discussed below.

Protected earnings amount

2.65 In its joint submission, the CALC submitted that the protected earnings amount reforms would not deliver on the recommendations made by the SACC Review. Specifically, it stated that the amount is double that recommended by the review and that:

> [u]nder these laws, most people could still have up to 40% of their income taken to repay payday loans and consumer leases collectively. Doubling these limits will result in payday loans and consumer leases continuing to cause low-income earners significant hardship.[68]

2.66 Legal Aid NSW welcomed the introduction of the protected earnings amount reforms; however, it believes that the 10 per cent repayment cap for people receiving 50 per cent or more of their income from Centrelink should also apply to all low income consumers, such as those currently receiving a pension from the Department of Veteran Affairs.[69]

2.67 Cash Converters submitted that the proposed reforms to the protected earnings amount would require it to decline many customers who would otherwise qualify for a SACC, and, for those who remain eligible, the cost of their loan would increase and the amount they could access would be reduced.[70] Cash Converters also provided the inquiry with the results of a survey it conducted of reportedly 12 700 of its customers, noting that 93 per cent of respondents disagreed with the proposed changes and 89 per cent believe they would significantly impact on their ability to budget.[71]

Consumer lease cost caps

2.68 In their respective submissions, Good Shepherd and the ACTU both raised concerns regarding the proposed extra charges which the bill includes in the consumer lease cost cap. They noted that the SACC Review recommended a 4

---

[67] Indigenous Consumer Assistance Network, *Submission 69,* [p. 8].

[68] Consumer Action Law Centre and others (Joint submission), *Submission 40,* pp. 28–29.

[69] Legal Aid NSW, *Submission 5,* p. 9.

[70] Cash Converters, *Submission 84,* p. 3.

[71] Cash Converters, *Submission 84,* p. 1.

per cent monthly cost cap for consumer leases, calculated on the retail price of the leased good; however, the bill permits 4 per cent monthly fees calculated on the base price plus delivery and installation fees.[72]

2.69 Both Good Shepherd and the ACTU also highlighted that the bill permits consumer lease providers to charge an extra 20 per cent establishment fee in addition to the cost cap that was recommended by the SACC Review. Good Shepherd noted that this would likely increase, rather than prevent, harm.[73]

Door-to-door selling and unsolicited communications

2.70 Although there was general support for the prohibition on unsolicited direct communications, a number of inquiry participants raised specific concerns with the efficacy of the proposed amendments. These are discussed below.

2.71 CALC was concerned that the reforms prohibiting unsolicited selling of consumer leases does not deliver on the intent of recommendation 18 of the SACC Review. Specifically, it states that due to the 'except by prior arrangement' exemption, the proposed provision is unlikely to stop door-to-door selling. It submits that this is a 'significant loophole' and will allow considerable scope for consumer lease providers to circumvent the prohibition.[74]

2.72 Legal Aid NSW supports the prohibition; however, it believes the measure is too restrictive and should not be limited to a person's place of residence. Aligning with the SACC Review, it submitted that the prohibition should include situations where canvassing is done from vehicles outside, or in proximity to, a person's residence.[75]

Committee view

Responsible lending obligations and best interests obligations

2.73 The committee notes that a well-functioning credit market is essential for economic growth generally, and for Australia's recovery from the COVID-19 pandemic specifically. The committee agrees that the current consumer credit protection framework is potentially overly prescriptive and that regulatory duplication between the responsible lending obligations, under the Credit Act, and the prudential standards issued by APRA could be an issue.

2.74 The committee is concerned by evidence that the regulatory framework has resulted in consumers being unable to access credit in a timely manner to buy their first home or to obtain a grant under the HomeBuilder scheme. The

---

[72] Good Shepherd, *Submission 31,* p. 12; Australian Council of Trade Unions, *Submission 51,* p. 4.

[73] Good Shepherd, *Submission 51,* p. 12.

[74] Consumer Action Law Centre and others (Joint submission), *Submission 40,* p. 31.

[75] Legal Aid NSW, *Submission 5,* p. 9.

committee is also concerned by the invasive and onerous nature of the inquiry and verification processes required under the existing responsible lending obligations.

2.75 The committee notes the key concerns with the proposed reforms raised by inquiry participants, both through their submissions and at the two public hearings held in Canberra. The committee is of the view that these regulatory changes will not undermine consumer protections and that the principal of 'responsible lending' is deeply embedded in Australia's broader regulatory framework, which credit providers and credit assistance providers must still operate within and comply with.

2.76 Additionally, the committee notes the vital role that AFCA plays in the efficient resolution of complaints and redress for consumers who need it. It is a free, fast and independent dispute resolution scheme, which improves the level of support and outcomes for consumers, especially those who are in substantial hardship. The committee suggests that the government continue to raise awareness of and promote the dispute resolution services available through AFCA, with an ongoing focus on continual improvements of AFCA's processes and services.

2.77 The committee welcomes the extension of the best interests obligations, which currently apply only to mortgage brokers, to other credit assistance providers, and the enhancement proposed by APRA to its credit risk management prudential standard (APS 220) requiring ADIs to assess an individual borrower's capacity to repay a loan without substantial hardship. The committee also notes similar arrangements are expected to be put in place for non-ADIs through a legislative instrument.

SACCs and consumer leases

2.78 The committee is acutely aware of the harm that unsuitable SACCs and consumer leases can cause vulnerable members of the community, and strongly supports the proposed enhancements to consumer protections for these products.

2.79 In addition to protecting vulnerable members of the community, the committee believes the reforms proposed by the government will promote financial inclusion through the introduction of a new protected earnings amount and a cap on costs for consumer lease. The committee believes these reforms will reduce the risk that consumers are unable to pay for their basic needs, or will default on their other commitments.

Recommendation 1

2.80 The committee recommends the bill be passed.

Senator Slade Brockman
Chair
Liberal Senator for Western Australia

Dissenting report from Labor Senators

Schedule 1

History of Responsible Lending Obligations (RLOs)

1.1 In 2009, the then Labor Government introduced Responsible Lending Obligations as part of Chapter 3 of the National Consumer Credit Protection Act (NCCP Act). The Labor Government was determined not to see a repeat of the type of lending misconduct that had occurred in the United States prior to the Global Financial Crisis.

1.2 Chapter 3 of the Act was established to protect the interest of consumers over the lenders by putting the following standards into law:

> Expected standards of behaviour of licensees when they enter into consumer credit contracts or leases, where they suggest a credit contract or lease to a consumer, or assist a consumer to apply for a credit contract or lease.
>
> The key obligation on licensees is to ensure they do not provide a credit contract or lease to a consumer or suggest or assist a consumer to enter into a credit contract or lease that is unsuitable for them. This obligation requires licensees to assess that the credit contract or lease is not unsuitable for the consumer's requirements and that the consumer has the capacity to meet the financial obligations under the credit contract or lease.[1]

1.3 A decade later, these standards served an important marker for the financial services industry, as the Royal Commission into misconduct in the Banking, Superannuation and Financial Services Industry unfolded, commonly known as the Banking Royal Commission.

1.4 Labor Senators want to stress a key statement made by Commissioner Kenneth Hayne in the final report:

> My conclusions about issues relating to the NCCP Act can be summed up as 'apply the law as it stands'.[2]

1.5 Commissioner Hayne also made a clear recommendation relating to the NCCP Act:

> The NCCP Act should not be amended to alter the obligation to assess unsuitability.[3]

---

1 National Consumer Credit Protection Bill 2009, *Consolidated Explanatory Memorandum*, p. 4.

2 Commonwealth of Australia, *Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry-Final Report-Volume 1*, p. 60.

3 Commonwealth of Australia, *Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry-Final Report-Volume 1*, p. 60.

1.6 It is the view of Labor Senators that the Banking Royal Commission reaffirmed the need for responsible lending obligations to be enshrined in the NCCP Act. The responsible lending obligations (RLOs) have successfully worked in Australia over the past decade and removing it through Schedule 1 of this bill from the NCCP Act puts at risk a system that has worked. This was particularly made clear by submissions and witnesses at the hearing, which can be summed up by Mr Kirkland from CHOICE who stated:

> The interim report of the royal commission presented evidence of over $350 million in compensation that had been paid or had been agreed to be paid to consumers—to around 600,000 people—from 2010 to 2018 as a result of remediation programs. This was where institutions agreed that they had breached responsible lending laws and that consumers were owed compensation. That simply won't happen if this bill goes through. There will be no hook to create remediation programs, so if institutions behave in the same way in the future then there will be no such compensation for consumers. That shows the power of these laws but also the impact of this bill for consumers.[4]

The Diminished Role of ASIC in Responsible Lending in Schedule 1

1.7 An important part of responsible lending obligations is the role ASIC plays in compliance and enforcement of ADI's. ASIC explained to the committee their current role in respect to their obligations under the NCCP Act:

> **Mr Hughes:** The role that ASIC plays at the moment in relation to the regulation of consumer credit is as set out in the credit act. Our role is to monitor the compliance by credit licensees, which includes credit assistance providers, with the obligations that are set out in the act—colloquially referred to as the responsible lending obligations—amongst other things. We also have a role in observing and approving codes of conduct, such as the Banking Code of Practice. We also have a role in relation to allowing entrants into the market, which is the licensing function, in monitoring and then enforcing the obligations under the credit act. The submission you will have seen has attached as an appendix some examples of the enforcement actions that we've taken over the years.[5]

1.8 ASIC's submission to the inquiry pulls no punches in terms of their approach to enforcing the NCCP Act:

> Through our enforcement work, we seek to deter poor behaviour and misconduct, punish wrongdoers and protect consumers. In particular, we focus on cases of high deterrence value and those involving egregious harm or misconduct. ASIC is committed to stepping in and taking strong enforcement action when we see misconduct that is likely to cause, or has caused, significant harm to consumers.[6]

---

4 Mr Alan Kirkland, Chief Executive Officer, CHOICE, *Committee Hansard*, 19 February 2021, p. 27.

5 Mr Sean Hughes, Commissioner, Australian Securities and Investments Commission, *Committee Hansard*, p. 32.

6 Australian Securities and Investments Commission, *Submission 110*, p. 8.

1.9 Schedule 1 of this bill diminishes the role of ASIC, as ASIC's own submissions points:

> If the Bill is passed, ADIs will not be subject to responsible lending obligations, other than in relation to small or low limit loans that are equivalent to a SACC. Accordingly, ASIC will no longer have a direct role in supervising decisions by ADIs to enter loans with consumers. ADIs will be subject to prudential standards that relate to credit assessment (the revised APS 220) and regulated by APRA.[7]

1.10 It had been suggested by Coalition Senators, through their line of questioning, that APRA and AFCA will have sufficient powers to uphold responsible lending obligations through the Act, Prudential Standards and Guides, even with the removal of Chapter 3 in Schedule 1 of this bill. Evidence provided to the committee did not share the same view, as APRA's role is focused on systemic risk relating to the protection of depositor's money and not the failings of ADIs towards individual consumers .The scope for AFCA to resolve disputes for individual consumers is limited between financial firms and consumers. These issues were discussed with Senator McAllister and Mr Brody from the Consumer Law Action Centre:

> **Senator McALLISTER:** At the moment ASIC regulates on behalf of consumers, APRA is responsible for financial stability and AFCA provides a remedy for individual compliance and problems. Under the new order, what under this bill is imagined that each of these institutions will contribute, and what is your assessment about their capacity to fulfil that task from a consumer perspective?
>
> **Mr Brody:** That's a really good question, because it's slightly uncertain. The regime, as I understand it under this new bill, will be that ASIC will retain some responsibility over lending for nonbanks—non-authorised deposit-taking institutions. For authorised deposit-taking institutions, including banks, credit unions and the like, APRA will be the responsible entity. That already creates a problem in terms of a competitive marketplace— different rules for different players that are competing against each other. APRA's role is, as you said, to protect systemic risk. It's role is to protect the money of depositors, really, that put their money with the bank. APRA's role is not to look at individual matters; it's at a systemic level. So giving lending regulation to APRA, I think, really confuses the regulatory architecture between APRA and ASIC. There's going to be an expectation that APRA do something now they've got this responsibility, but they don't really have the tools to do that. They don't have compliance and enforcement mechanisms in the same way that ASIC does.
>
> AFCA's role is to resolve disputes between consumers and financial firms. It is limited in the way it applies its rules. One of its rules says that it cannot consider complaints about credit risk decisions. That is actually excluded from its jurisdiction. What AFCA can consider is what is called maladministration. They can also consider responsible lending.

[7] Australian Securities and Investments Commission, *Submission 110*, p. 10.

> But, outside responsible lending—like the small business example I talked about before— they can consider maladministration. That is whether the lender had systems in place and whether they followed them. What AFCA cannot do is make any determination based on the quality of that decision, because that would be outside their jurisdiction. So, will consumers will be able to complain to AFCA, AFCA's ability to resolve disputes will be really limited because it will have to apply the law at the time. So we expect that consumers will not get a remedy through complaints to AFCA.[8]

1.11 The view that current protections will be lost was supported by Mr Kirkland of CHOICE:

> I think there's an important distinction to be made in that AFCA is not a law enforcement agency. AFCA is there to resolve relatively small disputes. It has caps on how much compensation it can order. It has rules that exclude a number of disputes based on various facts from even getting to it. That's very different to the role that's currently performed by ASIC which is there to regulate conduct in individual lending decisions. What flows from that is that ASIC can effectively get an institution to the point of setting up a large-scale remediation scheme. As we've seen, that's not something that either AFCA or APRA will be able to do under the reforms.
>
> The other thing that ASIC can do at the moment is, of course, take court action leading to quite significant fines—and that has a range of deterrent effects such as the reputational damage to institutions and financial penalties—and that will not be the case if this bill goes through. So, yes, there may well be legislative instruments bringing forward something a bit like responsible lending obligations, but the enforcement mechanisms will be significantly weaker.[9]

1.12 ASIC in their submission make this clear point:

> At this stage of the development of the new regime, it is not clear what direct remedies will be available to consumers who have complaints about assessments and credit decisions by ADIs. The explanatory memorandum to the Bill indicates the Australian Financial Complaints Authority (AFCA) will have jurisdiction to hear consumer complaints. APRA has indicated in its submission to the Committee that it has developed a relationship with AFCA and that it will refer individual complaints to AFCA.
>
> AFCA makes decisions that it considers are fair in all the circumstances, having regard to legal principles, applicable industry codes or guidance, good industry practice and previous relevant AFCA determinations. It is not clear what legal principles AFCA will be able to have regard to where the only credit assessment requirements are under prudential standards for managing credit risk (unless the individual matter indicates the ADI has not met its general obligation to act 'efficiently, honestly and fairly' or

---

[8] Mr Gerard Brody, Chief Executive Officer, Consumer Action Law Centre, *Committee Hansard*, 19 February 2021, p. 20.

[9] Mr Alan Kirkland, Chief Executive Officer, CHOICE, *Committee Hansard*, 19 February 2021, pp. 31–32.

> that the entry into the loan is an unjust transaction for the purpose of s76 of the National Credit Code).[10]

1.13 ASIC also points to a shift of responsible lending from the consumer to a portfolio basis if Schedule 1 was to pass:

> **Senator BRAGG:** People who don't want these laws to pass say that there are not going to be any responsible lending rules. Clearly there will be responsible lending obligations.
>
> **Mr Hughes:** I just want to repeat what Ms Bird said. It is subject to finalisation. But the differentiation, as we interpret it, is that the level of individual assessment on a per borrower basis will be different as opposed to the assessment on more of a systems basis—more of a portfolio basis.[11]

1.14 Evidence provided to the committee also indicated that the legislation would represent a confusing step away from the "twin peaks" model of financial regulation. Under Australia's current financial regulatory system, conduct regulation (undertaken by ASIC) is largely separated from prudential regulation (APRA). The retention of this model was explicitly recommended by the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.[12]

1.15 The Consumer Action Law Centre said in their submission:

> Confusingly, ASIC would remain the regulator for bank misconduct such as unconscionable conduct and misleading and deceptive conduct, but not lending conduct. This overlap of conduct and prudential oversight will be confusing and inefficient. It will not be competitively neutral, and it will create conflicting regulatory objectives for APRA.[13]

1.16 While the Government's stated objective is to use the bill to simplify lending regulation, evidence presented to the committee indicated that these changes—including the confused roles of APRA and ASIC, and the replacement of the RLOs with APRA prudential standards—could in fact lead to additional complexity. The Law Council of Australia noted in their submission:

> Under this regime, non-bank lending to consumers will not be judged by whether unsuitable outcomes for consumers result but rather by whether:
>
> (a) the systems and processes conform to the criteria in the regulatory declaration; and

---

10 Australian Securities and Investments Commission, *Submission 110*, p. 11.

11 Mr Sean Hughes, Commissioner, Australian Securities and Investments Commission, *Committee Hansard*, pp. 34–35.

12 Commonwealth of Australia, *Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry-Final Report-Volume 1*, p. 423.

13 Consumer Action Law Centre and others (Joint submission), *Submission 40*, p. 25.

> (b) the assessment of suitability was made in accordance with those systems and processes.
>
> Respectfully, the Law Council submits that this does not represent a simplification of RLOs, but rather makes enforcement of the standards complex and difficult. It would also make it highly difficult for a consumer to assess whether or not their own lender has breached the non-ADI standards.[14]

1.17 These concerns were not confined to legal or consumer advocacy groups. Banks also noted the potential for regulatory disjunction between the regime for ADI lenders and the regime for non-ADI lenders. In their submission, Suncorp Group Limited said:

> Suncorp believes there is a lack of regulatory alignment between ADIs and non-ADIs which compromises consumer protections by incentivising credit applicants to use non-ADI lenders who have simpler credit assessment standards and less regulatory oversight.[15]

1.18 Labor Senators agree with the evidence provided to the committee that a shift away from Chapter 3 of the NCCP Act and a reliance on APRA and AFCA to enforce standards and to regulated against conduct in individual lending decisions is significantly weakened by Schedule 1 of this bill. The view of Labor Senators is that this weakening will lead to negative impacts to the individual consumers.

1.19 Labor Senators also note that the bill stands in direct opposition to at least two recommendations of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry – Recommendation 1.1 (the retention of the responsible lending obligations) and Recommendation 6.10 (the retention of the twin peaks model for financial sector regulation). This is a concerning decision, and contributes to the Government's ongoing failure to understand and implement the findings of Commissioner Hayne.

Using responsible lending obligations to prevent financial abuse

1.20 Labor Senators note that several stakeholders raised concerns that the bill will negatively impact victim-survivors of domestic and family violence and leave them exposed to the risk of continued and increased financial abuse. This is unacceptable. As the committee heard:

> More needs to be done to protect victims-survivors of economic abuse, not less.[16]

1.21 When responsible lending obligations (RLOs) are correctly implemented, they can help to prevent economic abuse because the lender will make reasonable

---

[14] Law Council of Australia, *Submission 103*, pp. 8–9.

[15] Suncorp, *Submission 92*, p. 8.

[16] Ms Dacia Abela, Senior Lawyer, WEstJustice, *Committee Hansard*, 26 February 2021, p. 2.

enquiries about each applicant's financial situation, the accuracy of information provided and suitability of the loan. This process is an effective mechanism to expose undue influence, imbalance of bargaining power and the underlying dynamic behind economic abuse.

1.22 The removal of obligations on lenders to make enquiries, and the transfer of obligations to consumers, heightens risks that financial abuse of victims of domestic violence will be masked by abusers through the information they disclose. For example, it will be easier for perpetrators of economic abuse to manipulate information on credit applications in order to get access to funds, with victims left holding the debt. In addition, because there will be no requirement for lenders or brokers to consider a borrower's requirements and objectives, victims of domestic violence and economic abuse will lose a key protection as it will not be apparent when the borrower, or one of the borrowers, will get no benefit from the loan.

1.23 As Ms Dacia Abela, Senior Lawyer, Economic Abuse, WEstjustice (Member of the Economic Abuse Reference Group), told the committee:

> If this bill is passed, we expect an increase in the number of loans being approved in circumstances of economic abuse, and victims-survivors will have reduced options to seek an individual remedy against those lenders. Whilst lenders will still be expected to consider the affordability of a loan, the bill removes entirely the requirement for lenders to make reasonable inquiries of the borrower's requirements and objectives. This represents a missed opportunity to identify red flags of economic abuse.[17]

The proposed legislation weakens individual rights to redress

1.24 The legislation will make it much more difficult for people who have experienced economic abuse to seek redress such as compensation, debt waivers and alternative payment arrangements. Removing redress will reduce the ability of advocates like financial counsellors and community lawyers to assist survivors with debts that they accrued during abusive relationships.

1.25 The practical implications of this for victims of domestic violence can be seen from this passage of evidence:

> **Senator McALLISTER:** In your case study with Kate, you make the point that, where responsible lending obligations under the current regime were overlooked, you were able to use those obligations to argue for a full debt waiver for the loans. What does that mean, practically, for a woman who's escaping violence?
>
> **Ms Abela:** Practically speaking, what we've heard from clients is that they have better mental health, they have less stress, they feel like they can move on with their lives post family violence, once that family-violence debt is removed from their names. We often hear that family violence victims-survivors suffer the economic consequences of family violence

[17] Ms Dacia Abela, Senior Lawyer, WEstJustice, *Committee Hansard*, 26 February 2021, p. 2.

> long after they've left a violent relationship, and this is just one way in which we can relieve some of that stress. Essentially, if we don't have the ability to argue under the responsible lending obligations that debts should not been placed in their name, we might see people returning to violent relationships or people staying in violent relationships because the financial pressures might be so insurmountable that they don't want to leave that relationship for fear of homelessness and things like that.[18]

How regulatory changes will have a negative impact

1.26 Evidence presented to the committee also raised concerns about the proposed changes to regulatory arrangements, which are envisaged to have negative consequences for victims and survivors of domestic violence if responsibility for regulation moves from ASIC to APRA. As Ms Abela explained:

> Australia's financial regulatory system is currently based on this twin peaks model, which is basically the premise that prudential regulation should be separated from conduct regulation. APRA's role has always been to protect banks against systemic risk and to look after the interests of depositors. Essentially, APRA ensures that banks don't fail, and they've not had to deal with individual consumer protections before. In fact, we're concerned that this would create a conflicting regulatory objective for APRA. In contrast, ASIC regulates on behalf of consumers and it has powers to effectively monitor compliance and protect consumers, and it has enforcement powers that allow it to take lenders to court, whereas APRA don't seem to have those correlating powers and it doesn't appear that they are going to receive a corresponding expansion of those enforcement powers to enable them to protect individual consumers. So, unless the consumer could establish something like a repeated failure, which is obviously notoriously difficult to track in family violence instances, then there would basically be no action that APRA could take.
>
> Lastly, and importantly, APRA has probably not had to think much about how family violence intersects with financial services, whereas bodies such as AFCA and ASIC are developing practices and knowledge of how to deal with family violence issues. So, APRA would effectively be moving into new territory with virtually no knowledge of or set practice in the area.[19]

1.27 The Government has not presented any satisfactory evidence in favour of this move in responsibility from ASIC to APRA, and the question remains as to why it is necessary given the contrary evidence presented about the likely harm to victims and survivors of family violence.

Supply of credit

1.28 The Coalition Government, through this bill, are seeking to undo responsible lending obligations in the name of supporting economic recovery, despite the lack of any evidence of a credit supply gap at the current time.

---

[18] Ms Dacia Abela, Senior Lawyer, WEstJustice, *Committee Hansard*, 26 February 2021, pp. 4–5.

[19] Ms Dacia Abela, Senior Lawyer, WEstJustice, *Committee Hansard*, 26 February 2021, pp. 4–5.

1.29 Even the Australian Banking Association stated:

> It is not the view or the assertion of the ABA or its member banks that current provisions are choking the supply of credit……macrodata tells us that, yes, credit is getting into the economy.[20]

1.30 To support this view, Maurice Blackburn in their submission pointed out to the committee that there is not a need for this bill as it is seeking to solve an issue that does not exist.[21] To further this point Maurice Blackburn highlighted from data:

- The total value of new loan commitments for housing and the value of owner occupier home loan commitments each reached record highs in October 2020.
- The total value of new loan commitments for housing rose 0.7 per cent in October, seasonally adjusted.
- The value of new owner occupier home loan commitments rose 0.8 per cent in October 2020, more than 30 per cent higher than October 2019.
- Commitments for the construction of new dwellings rose 10.9 per cent and was the largest contributor to the rise in October's owner occupier housing loan commitments.
- In October, the number of owner occupier first home buyer loan commitments increased by 3.4 per cent to reach 13,481 (seasonally adjusted) which was more than 30 percent higher than in any pre-COVID month since 2009.
- The total value of loan commitments for investor housing was unchanged at $5.3 billion.
- The value of new loan commitments for fixed term personal finance rose 4.3 per cent in October, seasonally adjusted.

> These facts do not indicate that access to credit is an issue – in fact they show that access to credit is booming under the current settings.[22]

1.31 Labor Senators' noted there are concerns raised in the evidence over the timely access of credit. However, it is the view of Labor Senators' that this is not a compelling enough reason to repeal the responsible lending standards. The repeal of the RLOs would strip away consumer protections. If the Government's objective is to improve regulatory processes, it should consider options that do not result in real consumer harms.

Who Benefits?

1.32 It is important to note that under questioning, the Customer Owned Banking Association by Senator Bragg pointed out that there is a financial benefit to

---

[20] Ms Anna Bligh, Chief Executive Officer, Australian Banking Association, *Committee Hansard*, 19 February 2021, p. 3.

[21] Maurice Blackburn, *Submission 60*, p. 1.

[22] Maurice Blackburn, *Submission 60*, p. 2.

their members if the current regime of responsible lending obligations is removed:

> **Senator Bragg:** So there must be a cost saving for your customer owned banks if this legislation is successful?
>
> **Mr Lawrence:** Absolutely.[23]

1.33 Labor Senators are concerned that the passage of this bill will serve to transfer risk from consumers to lenders. In doing so, the Government will have provided a significant financial benefit to the banking sector.

1.34 It is clear that the changes in the bill will overwhelmingly benefit one side of the lending market: banks and lending institutions. Labor Senators' view is that legislation should be used to ensure fairness, rather than designed to benefit the major banks.

Schedule 2-6

1.35 Schedules 2-6 of the bill relate to small amount credit contract reforms, commonly referred to as SACCs.

1.36 Evidence provided to the committee describes these changes as not going far enough by not implementing the Government's response to the independent review of the small amount credit contract laws. Mr Brody from the Consumer Action Law Centre summarises:

> I want to be clear that this bill does not deliver on the federal government's own commitment to implement the reforms recommended by the 2016 small amount credit contracts review. That review made recommendations that were designed to promote financial inclusion for lower income and more vulnerable people who may be excluded from mainstream credit. The review report said that unaffordable credit arrangements do not provide for financial inclusion and that both the cost of credit and the repayments of credit need to be affordable for financial inclusion to be achieved.
>
> Unfortunately, the changes now proposed compared to amendments previously considered by the parliament fail on this objective of financial inclusion. The proposal is to double the 10 per cent protected earnings amount cap recommended for each payday loan and consumer leases for most consumers and to allow lenders an extra 20 per cent establishment fee to be charged with consumer leases on top of already generous mark-ups. This will mean that these products will continue to be unaffordable for many, making it likely that people will continue to be trapped in a cycle of high-cost credit that is difficult to escape. We implore that the committee recommend this bill not be passed.[24]

---

[23] Mr Michael Lawrence, Chief Executive Officer, Customer Owned Banking Association, *Committee Hansard*, 26 February 2021, p. 13.

[24] Mr Gerard Brody, Chief Executive Officer, Consumer Action Law Centre, *Committee Hansard*, 19 February 2021, pp. 17–18.

1.37 It is the view of Labor Senators that if the Government were serious about reform in this area, they would pass the National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 (No. 2) that is before the Senate.

1.38 This bill has already been through the Senate Economics Legislation Committee, and has the broad support of stakeholders. It would accurately implement the Government's own commitment to implement the recommendations of the 2016 review of small amount credit contracts.

Recommendations

Recommendation 1

1.39 The bill not be passed.

Recommendation 2

1.40 The Senate immediately pass the National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 (No. 2).

Senator Alex Gallacher
Deputy Chair
Labor Senator for South Australia

Senator Jenny McAllister
Member
Labor Senator for New South Wales

Dissenting report from the Australian Greens

Apply the law as it stands

1.1 The Hayne Royal Commission was a once in a century examination of the banking sector. A year-long inquiry, that received over 10 000 submissions from the public, that commissioned background papers from a raft of experts, that pulled together an army of the best legal minds in the country, that held hearings all around the country, that produced a three volume interim report running over 1 000 pages, followed up by an equally exhaustive final report, handed down barely two years ago with 72 recommendations on how to regulate banks in the public interest.

1.2 The first recommendation of the final report of the Royal Commission was that 'the NCCP Act should not be amended to alter the obligation to assess unsuitability'.[1] The government accepted this recommendation without qualification in February 2019. And yet this bill does the exact opposite of Recommendation 1.1. This bill rips up the responsible lending obligations in the NCCP Act that Commissioner Hayne said should not be amended.

1.3 There is no ambiguity about the Commissioner's intent. The government's too-smart-by-half argument—echoed by the banks—that the Commissioner's recommendation was made in the context of a proposal by consumer groups to change the test from 'not unsuitable' to 'suitable' is a ruse. Commissioner Hayne was crystal clear:

> My conclusions about issues relating to the NCCP Act can be summed up as 'apply the law as it stands'.[2]

1.4 This bill has confirmed that this government never had their heart in the Royal Commission. They resisted it for years. They established it with great reluctance and only to quell a backbench revolt. And now they have abandoned its primary recommendation, disingenuously using a pandemic-induced recession as cover for their reversion to type which is to be the parliamentary agents for the banks and their pursuit of ever bigger profits.

1.5 This bill is an insult to the Commissioner himself, through to the tens of thousands of people whose lives were destroyed by the banks' rapacious behaviour. It is also an insult to everyone who called for, supported and participated in the Royal Commission.

---

[1] Commonwealth of Australia, *Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry–Final Report–Volume 1*, p. 60.

[2] Commonwealth of Australia, *Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry–Final Report–Volume 1*, p. 60.

A solution in search of a problem

1.6 The pretext for this bill is that current responsible lending obligations place an undue burden on banks, that this is impeding the flow of credit, and that removing these barriers is important to support economic recovery in the wake of a pandemic. The trouble for the government is, the numbers tell the exact opposite story.

1.7 The most recent ABS lending data shows that growth in new loans to households for housing over the last twelve months was 44 per cent, seasonally adjusted.[3] This is the highest growth rate over any twelve month period on record. This twelve month period starts in January 2020 before the pandemic hit and covers the time in which there was a nationwide lock down. That is, despite the pandemic, banks increased lending at a faster rate than they ever have. This illustrates that, so far as the economy wide provision of consumer credit is concerned, the effect of the RBA's monetary policy and APRA's prudential regulation dwarfs that of responsible lending obligations.

1.8 If the government was serious about 'supporting economic recovery' then it would commit to a long-term program of government spending that will support aggregate demand, starting with increasing JobSeeker to a rate above the poverty level, and moving through to a program of investment that would provide high-quality, universally accessible public services, rebuild manufacturing, and transition the nation to a carbon-neutral economy.

Creating a mountain out of a molehill

1.9 In seeking to make the case for this bill, the Explanatory Memorandum includes a lot of hand-wringing about how difficult it is, apparently, for banks to get loans out the door. In particular, the supposed burden imposed by ASIC Regulatory Guide (RG) 209 *Credit licensing: Responsible lending conduct* receives a lot of attention. Most of this is pure cant that doesn't stand up to the barest of examination.

1.10 RG 209 has supposedly led to a 'one-size-fits-all' approach 'regardless of the specific financial circumstances of the individual borrower or nature of the credit product'.[4] Yet an entire section of RG 209 is dedicated to guiding banks as to what inquiries and verifications it should make to 'determine what is appropriate in individual circumstances'.[5] This includes that a lender may take into account the borrower's income, expenses, credit history, the size of the loan, and the cost of the loan, amongst other things.

---

3 Australian Bureau of Statistics, Lending indicators, January 2021.

4 *Explanatory Memorandum*, p. 29.

5 ASIC Regulatory Guide (RG) 209 Credit licensing: Responsible lending conduct, p. 8.

1.11 But then the Explanatory Memorandum, which itself runs to 143 pages, goes on to state that ASIC's RG 209 'runs to more than 90 pages'.[6] So, on the one hand the guidance is overly simplistic and 'one-size-fits-all', yet on the other hand it's too long for the banks to get their heads around.

1.12 Finally the Explanatory Memorandum states that 'over 50 per cent of the time spent on a credit application can go toward verifying information provided by borrowers'.[7] Which begs the question: isn't that exactly what a bank should be spending its time doing? The spreadsheet does all the loans calculations in the blink of an eye. In the modern age, the human task is to test the veracity of the information being provided.

The bigger the loan, the easier the money

1.13 This bill functions by removing responsible lending obligations on consumer credit, except for on small amount credit contracts (SACCs) and consumer leases. SACCs are 'loans of up to $2,000, where the term of the contract is between 16 days and 12 months'.[8] The result is that loans less than $2 000 will be subject to responsible lending obligations, whereas loans greater than $2 000 will not.

1.14 This is utterly perverse. This bill will literally make it easier for the banks to lend someone $2 000 000 than it would be to lend someone $2 000. And if a customer walks into a bank looking for a $1 900 loan, then the bank will be able to offer them a bigger loan at a lower cost because the transaction costs for the bank will be less.

A regulatory vacuum

1.15 By removing the responsible lending obligations from the vast majority of consumer loans, this bill would create a regulatory vacuum. Under the current 'twin peaks' regulatory framework, ASIC is the conduct regulator responsible for consumer protection and APRA is the prudential regulator responsible for stability of the banking system.

1.16 Here again, this bill is in contradiction with the findings of Commissioner Hayne who, while being highly critical of the performance of financial regulators, concluded:

> The twin peaks model of regulation has now operated in Australia for many years. It should be maintained and strengthened.[9]

---

6 *Explanatory Memorandum*, p. 30.

7 *Explanatory Memorandum*, p. 30.

8 *Explanatory Memorandum*, p. 71.

9 Commonwealth of Australia, *Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry–Final Report–Volume 1*, p. 480.

1.17 If responsible lending obligations are removed, then ASIC will no longer have a role in consumer lending and, instead, APRA's prudential regulation will be relied upon to protect consumers. This is a fundamental shift in the framework for regulating consumer loans and is as good there being no consumer regulation at all.

1.18 This is evident in APRA's submission to this committee inquiry, which explained:

> APRA's mandate is to protect the Australian community by establishing and enforcing prudential standards and practices designed to ensure that, under all reasonable circumstances, financial promises made by the institutions it supervises are met within a stable, efficient and competitive financial system. As the prudential regulator of ADIs, APRA seeks to assure depositors that their deposits are safe and the Australian community that the financial system is stable.[10]

1.19 No mention of individual borrowers whatsoever. Because that's not APRA's job.

Conclusion

1.20 What this bill boils down to is that people will be left to fend for themselves. As is befitting of this government's ideology, this bill will shift the burden of responsibility from the bank to the consumer. The vast majority of borrowers will not be provided with the most basic of consumer protection, which is that the product being sold to them is fit for purpose.

1.21 This gets to a fundamental question about how markets are regulated and what protections should be provided to consumers. Again, Commissioner Hayne explored this issue at length and highlighted it in the second of four key observations that he made about the misconduct that he uncovered in the Introduction to his Final Report:

> ...entities and individuals acted in the ways they did because they could. Entities set the terms on which they would deal, consumers often had little detailed knowledge or understanding of the transaction and consumers had next to no power to negotiate the terms. At most, a consumer could choose from an array of products offered by an entity, or by that entity and others, and the consumer was often not able to make a well-informed choice between them. There was a marked imbalance of power and knowledge between those providing the product or service and those acquiring it.[11]

1.22 This is why consumer regulation exists. Because the dream of the efficient-market hypothesis, where well-informed individuals act rationally, seeking out the best deal for themselves, and, in doing so,

---

[10] Australian Prudential Regulation Authority, *Submission 74*, p. 2.

[11] Commonwealth of Australia, *Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry–Final Report–Volume 1*, p. 2.

encourage competition is just that: a dream with no foundation in reality. In reality, neoliberalism is about enabling the already wealthy and powerful to accumulate yet more wealth and more power.

1.23 This bill is designed to let the banks get on with writing loans as big as they possibly can, whether it's good for people or not, so that they can pay even bigger bonuses and rack up even bigger profits. In a country that already has one of the highest levels of consumer debt per capita in the world, this bill would give the banks a license to entice people into even more debt. Rather than building productive capacity and ensuring individual security, this would further constrain household spending, further constrain innovation, and further lead Australia down the dead end path that is an economy built on ever increasing house prices at the expense of just about everything else.

Recommendation 1

1.24 That the bill be opposed.

Senator Nick McKim
Australian Greens Senator for Tasmania

Appendix 1
Submissions and additional information

1 Mr John Telford
2 Bank Reform Now
3 Mr William Ifield
4 Victims of Financial Fraud
5 Legal Aid NSW
6 Mr Geoff Marr
7 Mr Michael Sanderson
8 Mr Frank Bernabei
9 *Name Withheld*
10 Mr Ronan O'Connor
11 Mr John Kohl
12 Mr Ken Grundy
13 Ms Monica Mesch
14 Mr John Rawson OAM
15 Reverse Mortgage Finance Solutions
16 Mr Jarrad Fairlie
17 Mr Peter Holland
18 Ms Catherine Brown
19 *Name Withheld*
20 Mr Lynton Freeman
21 *Name Withheld*
22 Tom & Joy Jordan
23 CPA Australia
24 *Confidential*
25 Legal Aid Queensland
26 Digital Finance Analytics
27 Customer Owned Banking Association (COBA)
28 Ms Teresa Ferrigno
29 Mrs Janet Pukallus
30 *Confidential*
31 Good Shepherd Australia New Zealand
32 Barwon Community Legal Service
33 Mr Timothy Cragg
34 Anglicare Tasmania
35 Australian Small Business and Family Enterprise Ombudsman (ASBFEO)
36 Inspector-General of Taxation
37 *Confidential*
38 Financial Counselling Network & Partners
39 Women's Legal Service Queensland

40 Consumer Action Law Centre
41 Catholic Social Services Australia
42 Mr Ray Jans
43 Property Council of Australia
44 WEstjustice Community Legal Centre
45 *Name Withheld*
46 Mr Steven Mitchell
47 *Name Withheld*
48 The Salvation Army
49 Mortgage & Finance Association of Australia (MFAA)
50 Economic Abuse Reference Group
51 Australian Council of Trade Unions
52 Commercial & Asset Finance Brokers Association of Australia (CAFBA)
53 Mr Alan Quirk
54 The Tasmanian Council of Social Service (TasCOSS)
55 Stop the Debt Trap Alliance
56 Legal Services Commission of South Australia
57 South Australian Council of Social Service Inc
58 *Name Withheld*
59 Westpac
60 Maurice Blackburn Lawyers
61 Western Australian Council of Social Service Inc
62 Master Builders Australia
63 No Interest Loan Scheme (NILS) Network of Tasmania
64 Care Inc and ACTCOSS - Joint Submission
65 Anglicare Australia
66 Domestic Violence NSW
67 Financial Counselling Australia
68 Mrs Ann Lawler
69 Indigenous Consumer Assistance Network
70 Consumer Credit Legal Service (WA) Inc
71 CHOICE
72 UnitingCare Australia
73 Aspire 42 Financing Pty Ltd
74 Australian Prudential Regulation Authority
75 Mr David Neve
76 Uniting Communities Consumer Credit Law Centre SA
77 Consumer Household Equipment Rental Providers Association (CHERPA)
78 National Australia Bank
79 Australian Finance Group Ltd
80 Australian Banking Association
81 Redfern Legal Centre
82 Domestic Violence Victoria

83 Commonwealth Bank of Australia
84 Cash Converters
- Attachment 1

85 Australian Retail Credit Association (ARCA)
86 National Credit Providers Association (NCPA)
87 *Confidential*
88 Housing Industry Association
89 Ms Wendy Bruce
90 *Name Withheld*
91 Consumer Law Academics
92 Suncorp Group Limited
93 Consumer Policy Research Centre (CPRC)
- Attachment 1

94 Finance Brokers Association of Australia Limited (FBAA)
95 Australian Chamber of Commerce and Industry (ACCI)
96 Council of Small Business Organisations Australia (COSBOA)
97 ANZ
98 Dr Mark McGovern
99 Mr Keith Kerr
100 South Australian Government
101 Credit Reboot
102 Ms Rita Mazalevskis
103 Law Council of Australia
104 Kingsford Legal Centre
105 Mr Neil Skilbeck
106 *Name Withheld*
107 *Name Withheld*
108 Mrs Kay Christensen
109 Bendigo and Adelaide Bank
110 Australian Securities and Investment Commission (ASIC)
111 Ms Anita Shannon
112 Australian Finance Industry Association
- Attachment 1
- Attachment 2

Additional Information

1 100 Families WA: Insights into Hardship and Disadvantage in Perth, Western Australia: The 100 Families WA Baseline Report - Received as additional information from the Western Australian Council of Social Services (WACOSS)

2 100 Families WA Project August 2020: The Impact of COVID-19 on Families in Hardship in Western Australia - Received as additional information from the Western Australian Council of Social Services (WACOSS)

Answer to Question on Notice

1 Treasury Answer to a question on notice 1 (PN-IQ21-000020) from Tuesday 23 February 2021

2 Customer Owned Banking Association (COBA): Answers to questions on notice from a public hearing in Canberra on 26 February 2021

3 Economic Abuse Reference Group (EARG): Answers to questions on notice from a public hearing in Canberra on 26 February 2021

4 Australian Prudential Regulation Authority (APRA): Answer to a question on notice (01Qon) from a public hearing in Canberra on 26 February 2021

5 Australian Prudential Regulation Authority (APRA): Answer to a question on notice (01QW) from a public hearing in Canberra on 26 February 2021

6 Australian Prudential Regulation Authority (APRA): Answer to a question on notice (02QON) from a public hearing in Canberra on 26 February 2021

7 Australian Prudential Regulation Authority (APRA): Answer to a question on notice (02QW) from a public hearing in Canberra on 26 February 2021

8 Australian Prudential Regulation Authority (APRA): Answer to a question on notice (03QON) from a public hearing in Canberra on 26 February 2021

9 Australian Banking Association (ABA): Answers to Questions on Notice from Hearing in Canberra on 26 February 2021

10 Western Australian Council of Social Service (WACOSS): Answer to a question on notice from hearing in Canberra on 19 February 2021

11 CHOICE: Answer to a question on notice from a public hearing in Canberra on 19 February 2021

12 Australian Chamber of Commerce and Industry (ACCI): Answer to a question on notice from a public hearing in Canberra on Friday, 26 February 2021

Tabled Documents

1 Financial Counselling Australia: Opening Statement from the public hearing in Canberra on Friday, 19 February 2021

2 Financial Rights Legal Centre: Opening Statement from the public hearing in Canberra on Friday, 19 February 2021

3 WA Council of Social Services: Opening Statement from the public hearing in Canberra on Friday, 19 February 2021

4 Indigenous Consumer Assistance Network: Opening Statement from the public hearing in Canberra on Friday, 19 February 2021

5 Senator Andrew Bragg: 2009 Labor media release tabled in the public hearing in Canberra on Friday, 19 February 2021

6 Senator Andrew Bragg: 2020 Labor media release tabled in the public hearing in Canberra on Friday, 19 February 2021

7 Economic Abuse Reference Group: Opening Statement from the public hearing in Canberra on Friday, 26 February 2021

8 Customer Owned Banking Association (COBA): Opening Statement from the public hearing in Canberra on Friday, 26 February 2021

9 Commercial & Asset Finance Brokers Association of Australia (CAFBA): Opening Statement from the public hearing in Canberra on Friday, 26 February 2021

10 The Treasury: Opening Statement from the public hearing in Canberra on Friday, 26 February 2021

Appendix 2
Public hearings

Friday, 19 February 2021
Committee Room 2S3
Parliament House
Canberra

Australian Banking Association
- Ms Anna Bligh, Chief Executive Office

Property Council of Australia
- Mr Michael Zorbas, Group Executive Policy & Advocacy

Housing Industry Association
- Mr Geordan Murray, Executive Direction—Industry Policy
- Mr Tim Reardon, Chief Economist

Master Builders Australia
- Mr Alex Waldren, National Director—Industry Policy
- Mr Shane Garrett, Chief Economist

Consumer Action Law Centre
- Mr Gerard Brody, Chief Executive Officer

Financial Counselling Australia
- Ms Fiona Guthrie, Chief Executive Officer

CHOICE
- Mr Alan Kirkland, Chief Executive Officer
- Mr Patrick Veyret, Policy & Campaign

Financial Rights Legal Centre
- Ms Karen Cox, Chief Executive Officer
- Ms Julia Davis, Policy & Communications Officer

Western Australian Council of Social Service Inc
- Mr Chris Twomey, Research and Policy Development Leader
- Mr Graham Hansen, Senior Policy Officer
- Ms Eva Perroni, Senior Policy Officer

Consumer Household Equipment Rental Providers Association (CHERPA)
- Mr Steve King, President
- Mr Timothy McKenzie

Indigenous Consumer Assistance Network

- Ms Jillian Williams, Operations Manager
- Ms Jenny King, Financial Counsellor
- Ms Sharon Edwards, Financial Capacity Coordinator

Friday, 26 February 2021

Committee Room 2S3
Parliament House
Canberra

Economic Abuse Reference Group

- Ms Laura Bianchi, Team Leader—Redfern Legal Centre
- Ms Gayatri Nair, Policy and Capacity Building Officer—Redfern Legal Centre
- Ms Dacia Abela, Senior Lawyer Economic Abuse—WEstjustice

Customer Owned Banking Association (COBA)

- Mr Michael Lawrence, Chief Executive Officer
- Ms Sally MacKenzie, Director of Strategy and Stakeholders

Australian Council of Trade Unions

- Mr Christopher Watts, Senior Policy Advisor
- Mr Mark Pannowitz, National Industrial Officer—Finance Sector Union of Australia
- Mr Clive Pattison, National Research Officer—Finance Sector Union of Australia

Australian Chamber of Commerce and Industry (ACCI)

- Mr Daniel Popovski, Senior Advisor Economics and Industry Policy
- Dr Ross Lambie, Chief Economist

Commercial & Asset Finance Brokers Association of Australia (CAFBA)

- Mr Matthew Atkin, President
- Mr David Gandolfo, Advocacy Chair & Immediate Past President

Law Council of Australia

- Mr Ben Slade, Chair

Australian Securities and Investment Commission (ASIC)

- Mr Sean Hughes, Commissioner
- Ms Joanna Bird, Executive Director—Financial Services and Wealth
- Mr Tim Gough, Senior Executive Leader—Credit and Banking

Australian Prudential Regulation Authority

- Ms Renée Roberts, Executive Director—Policy and Advice Division
- Mr Gideon Holland, Policy

The Treasury

- Ms Claire McKay, Director
- Mr Simon Writer, First Assistant Secretary and Chief Counsel
- Ms Amy Auster, Chief Advisor—Markets Group