National Consumer Credit Protection Amendment (Home Loans and Credit Cards) Bill 2011

John Murray
Law and Bills Digest Section

Contents

Purpose .................................................................................................................................................. 3
Background ........................................................................................................................................... 4
  Basis of policy commitment ............................................................................................................. 4
  Policy position of non-government parties/independents ............................................................... 4
  Committee consideration ................................................................................................................. 5
Main issues ............................................................................................................................................ 5
  Unsolicited credit limit extensions ................................................................................................. 5
  Offences ........................................................................................................................................... 6
  Strict Liability ................................................................................................................................ 7
  Retrospective application of provisions ......................................................................................... 7
  Commencement ............................................................................................................................... 7
  The ‘buffer’ ...................................................................................................................................... 8
  Regulations ..................................................................................................................................... 9
Main provisions .................................................................................................................................. 10
  Schedule 1—Amendments ............................................................................................................... 10
    Part 1—Amendments relating to home loans .............................................................................. 10
      Division 2—Key Facts Sheets for standard home loans ......................................................... 10
    Part 2—Amendments relating to credit cards ........................................................................... 11
      Division 3—Key Facts Sheets for credit card contract ............................................................ 11
      Division 4—offers, et cetera to increase credit limit of credit card contract ......................... 11
      Division 5—Use of credit card in excess of credit limit ........................................................... 12

BILLS DIGEST NO. 140, 2010–11
22 June 2011
Division 6—Order of application of payments made under credit card contracts ..........13
Schedule 2—Application and transitional provisions ........................................................................13
Concluding comments ..................................................................................................................13
National Consumer Credit Protection Amendment (Home Loans and Credit Cards) Bill 2011

Date introduced: 24 March 2011

House: House of Representatives

Portfolio: Treasury

Commencement: The formal provisions commence on Royal Assent. Part 1 of Schedule 1 commences on 1 September 2011. Part 2 of Schedule 1 commences on 1 July 2012. Schedule 2 commences on 1 July 2012.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/bills/. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

On 14 June 2011 amendments to the Bill were tabled in the House of Representatives. The amendments replace proposed Division 5 with a substantially different version. The text of the amendments is available from the Bill’s home page (see link above). This Digest does not cover the proposed amendments.

Purpose

The Bill amends the National Consumer Credit Protection Act 2009 (the NCCP Act) in order to:

- require lenders to give prospective borrowers a fact sheet prior to entering into home loan and credit card contracts
- prohibit lenders from sending unsolicited invitations to borrowers to increase credit limits
- prohibit lenders from charging over-limit fees to customers who exceed their credit limit, and
- require lenders to allocate credit card repayments to higher-interest debts first.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Background

The Commonwealth took responsibility for regulating the credit industry from the states following a Council of Australian Governments agreement in 2008. The NCCP Act took effect on 1 July 2010. The Treasury released an exposure draft Bill on 4 March 2011, receiving twelve submissions in response. Issues raised in submissions are discussed under the 'main issues' heading below.

The main difference between the exposure draft Bill and the Bill as presented is the addition of the measure requiring lenders to apply credit card repayments to higher-interest debts first (Division 6 of proposed Part 3-2B).

Basis of policy commitment

The Gillard Government announced the measures contained in the Bill on 15 August 2010, other than the mandatory fact sheet for loans which was announced (amongst a large number of other banking-related policy proposals) on 12 December 2010.

The announcements followed a Treasury consultation on a National Credit Reform Green Paper.

Policy position of non-government parties/independents

Non-government parties and independents have not publicly expressed a position on the measures contained in the Bill.

---


Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Committee consideration

The House of Representatives Main Committee referred the Bill to the Standing Committee on Economics (the Economics Committee) on 11 May 2011 for inquiry and report.6

The Economics Committee recommended that clause 2 of the Bill be amended so that the Key Fact Sheet provisions commence on 1 January 2012, and that subject to that recommendation that the Bill be passed.7

Main issues

Submissions to Treasury on the exposure draft Bill generally claimed that elements of the Bill differed from positions agreed between Treasury and lenders prior to release of the exposure draft Bill, and also differed from election commitments. Most submissions on the exposure draft Bill made reference to the short consultation period: only two full working days were provided by Treasury for industry to comment on the exposure draft.8

The Australian Bankers’ Association in its submission to the Economics Committee also expressed concerns that less than three working days had been made available to its inquiry.9 In this regard, the Economics Committee inquiry was established on 11 May 2011 and submissions closed on 20 May 2011. Submissions to the Economics Committee largely repeated concerns raised in submissions to Treasury.

Unsolicited credit limit extensions

Several submissions to Treasury noted that the whilst the Government’s press release of 15 August 2010 announced a ban on unsolicited offers of credit limit extensions, the ban has been broadened to cover both offers of increased credit and invitations to apply for increased credit, as

---


Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
well as any communication which could encourage a customer to apply for increased credit. Visa submitted:

The Bill contains a complete prohibition of [credit limit] invitations. We note that the concept of an “invitation” appears on its face to be conceptually broader than an “offer”, the latter being the original intent, as widely understood, of the Election Policy. The “invitation” concept was also not clearly discussed to our knowledge in any of the Implementation Group meetings.

By contrast, National Legal Aid suggested that the definition of credit limit increase invitation in proposed section 133AE(5) of the exposure draft Bill (proposed section 133BE(5)) in the Bill as presented) should be broadened to cover all forms of communication, not just written communications.

The Association of Building Societies and Credit Unions argued that the prohibition would “give lenders regulatory incentives to push borrowers towards a higher initial limit than they might otherwise have offered – prompted by the recognition that ongoing direct marketing will be largely impossible.”

**Offences**

Both Westpac and Visa submitted to Treasury that the penalty provisions of the Bill appear disproportionate to the offences. The Australian Finance Conference cited a lack of evidence of market failure in opposing the offence provisions of the exposure draft Bill (which are identical to those in the Bill as presented):

Given industry remains unclear of the extent of market failure and risk of consumer harm that necessitated the regulatory reform response by the Government, it is extremely difficult for industry to understand the significant and broad extent of the parameters of risk for breach.
Without this understanding, we oppose introduction of these measures and recommend their omission from the draft bill.15

Strict Liability

Concerns as to the penalties and strict liability provisions have been expressed by the banks and the Financial Sector Union in submissions to the Economics Committee. For example, National Australia Bank states:16

Furthermore, it is not clear whether the civil, criminal and strict liability offences operate separately or cumulatively or the level at which liability operates. For example, a branch staff member could be liable for filling out a KFS form incorrectly or a Call Centre staff member could be liable for not ticking a box in a system making a record of consent to receive a Credit Limit Increase offer.

As a company we would not allow our staff to be impacted upon by a criminal penalty.

Retrospective application of provisions

The Australian Bankers’ Association in its submission to the Economics Committee has expressed concern that the provisions in relation to unsolicited credit card increase invitations (proposed Schedule 1, Part 2, Division 4) will apply to both new and existing contracts.17

National Legal Aid strongly supported the retrospective application of the provisions relating to unsolicited offers of increased credit limits.18

In relation to other measures, such as changes to overlimit fees and payment hierarchy changes, National Australia Bank expresses regret that these changes do not extend to existing customers.19

Commencement

Several submissions on the exposure draft raised concerns that the commencement date in the exposure draft Bill did not leave enough time for industry to comply with the legislation, commencement being on a day fixed by proclamation, or six months from the day of Royal Assent.20

The Bill as presented provides for the home loan provisions to commence on 1 September 2011, and the credit card provisions to commence on 1 July 2012.

17. Australian Bankers’ Association, op. cit., p. 3.
20. Visa, op. cit., p.2; Australian Finance Conference, op. cit., p. 5; Citibank, op. cit., p. 3.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
In evidence to the Economics Committee these concerns were reiterated especially in relation to the requirement to have Key Fact Sheets ready in time for this date.21

The ‘buffer’

The exposure draft Bill (and the Bill as presented) contain provision for a ‘buffer’, being an amount of credit over and above the borrower’s credit limit, for which over-limit fees cannot be charged.

Westpac’s submission stated that Treasury and industry representatives had agreed that credit providers could charge over-limit fees where a customer had agreed to an over-limit facility, and that the opt-out buffer facility provided for in the exposure draft Bill would effectively grant customers an automatic 10% increase on their credit limit whilst prohibiting credit providers from charging over-limit fees:

Instead, we now have a situation where a ‘buffer’ has been mandated in legislation, with customers being required to ‘opt out’ if they do not wish to take advantage of the buffer. The presence of the buffer in the legislation will have the effect of misleading consumers into believing that they have an additional 10 per cent of their credit limit available if they choose, which is not and was never intended to be the case.22

The Finance Union of Australia expressed similar concerns about the purpose and effect of the buffer:

We remain confused about the default buffer concept. In essence we believe that this provides a boon for industry with an extra 10% or $500, whichever is the lesser, in higher-interest bearing loans to the vast majority of the Australian populace. We would also contend that many consumers will use this extra buffer as a normal part of their credit, rather than a once-off, emergency, facility.23

The provisions relating to the ‘buffer’ in the Bill as presented differ from those in the exposure draft.

The default buffer in the exposure draft is defined as $500 or 10% of the credit limit, whereas the Bill as presented defines the buffer as 10% of the credit limit. Under the Bill, the buffer will apply unless the debtor, under the contract, elects for it not to apply and that election has not been withdrawn (proposed section 133BI). Note 2 to this provision states:

---


*Warning:* All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
The fact that the default buffer applies to a credit card contract does not of itself result in the licensee being obliged to approve any use of a credit card in excess of the credit limit for the contract.

Submissions to the Economics Committee from the banks submitted that the provision was in ‘stark contrast’ to the Government’s announcement with respect to credit limits and it has a clearly ‘unintended consequence’ that every credit card holder will receive and automatic entitlement to 10% additional credit.

In evidence to the Economics Committee, the Treasury official stated that:

I suppose it is fair to say there is a difference in legal interpretation as to whether or not the default buffer is automatic. It is a question of the interpretation of section 133(b)(i) [sic]. Our view is that that does not create an automatic default buffer and the lender still has the discretion whether or not to offer a buffer – and the explanatory memorandum reflects that intention.

Further, the Bill as presented contains provision for the regulations to specify a further supplementary buffer for which credit providers may charge fees or higher interest (see discussion of proposed sections 133BM and 133BN below).

Regulations

Citibank’s submission raised the issue of the amount of detail yet to be specified in regulations:

Our concerns in relation to commencement are compounded by the fact that much of the detail in the obligations has been deferred to regulations to be produced subsequently. Without knowing the content of these regulations it would be impossible for us to commence work to implement the reforms.

Further information on matters to be dealt with in regulations is outlined in the concluding comments.

---

27. Citibank, op. cit., p. 3.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Main provisions

Schedule 1—Amendments

Part 1—Amendments relating to home loans

Item 5 inserts proposed Part 3-2A into the NCCP Act.

Proposed Division 1 is a guide to the proposed Part.

Division 2—Key Facts Sheets for standard home loans

Proposed Division 2 imposes an obligation on licensees to provide a Key Facts Sheet (KFS) for a standard home loan. Details of precisely what the KFS must contain are to be specified in regulations (proposed section 133AB).

Under proposed section 133AA standard home loan is a standard form of credit contract where a licensee provides credit for a purchase of residential property or to refinance an existing loan. Regulations may make provisions for determining whether a credit contract is in the standard form.

Under proposed section 133AC the KFS must be capable of being generated from the licensee’s website. A breach of this requirement carries a civil penalty of 2000 penalty units ($220 000), is an offence carrying a penalty of 50 penalty units ($5500), and is a strict liability offence carrying a penalty of 10 penalty units ($1100).

Under proposed section 133AD, if a consumer requests a KFS otherwise than through a website, or in other circumstances prescribed by regulations, the licensee must provide it. A breach of this requirement carries the same civil and criminal penalties as the requirement imposed by proposed section 133AC, but is not a strict liability offence.

---

29. The Bill uses the term licensee to refer to home loan lenders and credit card providers. The NCCP Act defines a licensee as someone who holds an Australian Credit Licence. Credit licences are issued by the Australian Securities and Investments Commission.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Under **proposed section 133AE**, if a licensee cannot generate a KFS due to insufficient information from the consumer, the licensee must tell the consumer what information it needs to prepare the KFS. This requirement carries the same civil and criminal penalties as **proposed section 133AD**. Under **proposed section 133AF** defences are available if the licensee has already provided the licensee with a KFS, if the licensee reasonably believes another person has provided the licensee with the same KFS, or if the licensee reasonably believes that the consumer would not be eligible for the loan.

**Part 2—Amendments relating to credit cards**

**Item 19** inserts **proposed Part 3-2B** into the NCCR Act. The proposed Part contains six divisions.

**Proposed Division 1** is a simplified outline of the Part.

**Proposed Division 2** contains definitions of terms used in the Part.

**Division 3—Key Facts Sheets for credit card contract**

**Proposed Division 3** contains similar provisions to **proposed Division 2** of **proposed Part 3-2B**, but applying to **credit card contracts**.31

Under **proposed section 133BC** application forms for credit card contracts must contain an up-to-date KFS. A breach of the requirement carries the penalties as **proposed section 133AD** (discussed above). Pursuant to regulations, out-of-date information can be provided to a consumer provided that on applying for a credit contract the consumer is given up-to-date information (proposed **subsection 133BC(3)**). This provision is presumably designed to provide for the frequency of fluctuations in interest rates on credit card accounts.

Under **proposed section 133BD**, a licensee may not enter into a credit card contract unless the application has been made using a form which includes a KFS, or, if an out-of-date KFS has been provided with the application form, the consumer has been provided with an up-to-date KFS.

**Division 4—offers, et cetera to increase credit limit of credit card contract**

**Proposed Division 4** prohibits licensees from offering unsolicited credit limit increases.

Under **proposed section 133BE**, a licensee must not make a credit limit increase invitation. Breach of the requirement carries the same civil, criminal and strict liability penalties as **proposed section 133AC**.

---

31. Credit card contract is defined in **proposed section 133BA** as a continuing credit contract under which credit is ordinarily obtained only by the use of a credit card.

**Warning**: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Under **proposed section 133BF** credit limit increases can be offered if the licensee has obtained the consent of the consumer to whom the offer is made. The licensee must inform the consumer of certain matters, including that the consumer has discretion with regard to applying for a limit increase, and that the licensee has discretion with regard to granting a limit increase. Regulations may prescribe requirements to be complied with regard to giving or withdrawing consent.

Under **proposed section 133BG** the licensee must keep records of consents and consent withdrawals, with details of the requirements to be specified in regulations. A breach of this requirement carries the same penalties as **proposed section 133AD**.

**Division 5—Use of credit card in excess of credit limit**

**Proposed Division 5** contains rules regarding the use of *credit cards* in excess of a credit limit.

**Proposed section 133BH** forbids a licensee from approving the use of a credit card in excess of:

- the credit limit plus a *default buffer* of 10%
- the credit limit and default buffer plus a *supplementary buffer*
- the credit limit (if no buffer applies).

A breach of the requirement carries the same penalties as **proposed section 133AC**. Under **proposed section 133BK**, the licensee must keep records of elections and withdrawals of the default buffer in accordance with requirement prescribed by the regulations. A breach of this requirement carries the same penalties as **proposed section 133AD**.

Regulations may prescribe circumstances where **proposed section 133BH** does not apply (**proposed section 133BL**). Regulations may also require a licensee to notify a consumer where a credit card has been used in excess of the credit limit (**proposed section 133BM**). Where such regulations apply, non-compliance carries the same penalties as **proposed section 133AD**.

**Proposed section 133BN** prevents a licensee from imposing fees, charges or a higher rate of interest where a consumer exceeds a credit limit, unless if a supplementary buffer applies. In these cases, subsection 23(1) of the NCC applies, with the effect that a consumer can recover the amount charged for exceeding the credit limit. A contravention of subsection 23(1) carries its own penalties under the NCC.

---

32. *Credit card* is broadly defined in **proposed section 133BA** as a card of a kind commonly known as a credit card, a card issued for use in obtaining foods or services on credit, any anything else which can be used as such cards.

33. Under **proposed section 133BI** the *default buffer* is 10% of the credit card limit, and applies unless the consumer has elected that it be withdrawn.

34. Under **proposed section 133BJ** the regulations may provide for a *supplementary buffer* of a specified amount in addition to the default buffer.

*Warning:* All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Division 6—Order of application of payments made under credit card contracts

Proposed Division 6 contains rules regarding the application of payments to credit card accounts.

Under proposed section 133BQ, where different interest rates apply to different parts of a credit balance, a licensee must apply payments to the part of the balance with the highest interest rate.

Proposed section 133BO requires licensees to apply payments in accordance with the proposed Division. A breach of the requirement carries the same penalties as proposed section 133AC.

Under proposed section 133BP the licensee must apply payments against particular amounts at a customer’s request, which may be withdrawn. Regulations may prescribe requirements.

Item 22 inserts proposed clause 30B into the National Credit Code. The proposed clause provides for regulations to be made regarding application of interest rates to credit card contracts, and may provide for offences and civil penalties. The government intends that regulations will allow consumers to compare different credit products in circumstances where interest rates are comparable but where benefits such as interest-free periods result in different amounts of interest being charged. 36

Schedule 2—Application and transitional provisions


The schedule applies proposed Division 4 of the Bill (offers to increase credit limits) to credit card contracts entered into before, on or after the commencement of the Bill, and applies proposed Divisions 5 and 6 (use of credit cards in excess of limits; order of application of payments) to credit card contracts entered into after commencement.

Concluding comments

The Bill leaves a considerable amount of detail to be specified in regulations. Most significantly, the precise form and content of Key Facts Sheets is left to regulation, although the Explanatory Memorandum provides some indication of the likely content. 37 Other matters to be dealt with in regulations include:

- specifications for the standard form of credit contracts (proposed subsection 13AA(2))

36. Explanatory Memorandum, p. 27.
37. Explanatory Memorandum, pp. 11 and 17-18.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
• circumstances in which a lender must provide a KFS (other than by a borrower’s request) (proposed subparagraph 133AD(1)(a)(ii))
• specifics of the supplementary buffer (proposed section 133BJ)
• details of record-keeping requirements imposed upon lenders (proposed section 133BG and 133BK)
• defences available to credit providers who approve the use of credit cards in excess of the credit limit (proposed section 133BL), and
• notification to consumers of credit limit breaches (proposed section 133BM).