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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

Banking Amendment (Rural Finance Reform) Bill 2018

EXPLANATORY MEMORANDUM

and

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Circulated by authority of
the Member for Mayo, Ms Rebekha Sharkie MP
Banking Amendment (Rural Finance Reform) Bill 2018

OUTLINE

Small primary production businesses are predominantly family-run and operate in perfectly competitive markets which are highly responsive to market fluctuations, weather and exchange rate movements largely outside the control of the business. Small primary production businesses ordinarily expect to make profits over a multi-year cycle rather than in each and every season; their ability to pay creditors or reduce their debt level is grounded in these profit cycles.

Operating under such variable conditions places small primary production businesses at a distinct disadvantage in managing their credit arrangements with financial institutions (Authorised Deposit-taking Institutions, ‘ADIs’). Although ADIs are not responsible for the conditions facing small primary production businesses, additional protections are deemed prudent for loans to small primary production businesses. The Bill thus:

- Requires ADIs to provide a simple one-page summary (‘Key Facts Sheet’) of the clauses that may trigger a non-monetary default by the borrower
- Prohibits ADIs from being able to unilaterally perform a valuation of any security given in respect of the loan
- Prohibits ADIs from including catch-all material adverse change clauses in their loan documents, except where it relates to fraud or criminal activity
- Requires ADIs to provide a 30 business day notice period where it intends to exercise a power under a general restriction covenant, except where it relates to fraud or criminal activity
- Requires ADIs that conduct valuations of any security to a loan, to provide a copy of valuation instructions and final valuation reports to the borrower
  - ADIs must not require the borrower to meet any part of the cost the valuation
- Requires ADIs that conduct audits (i.e. investigative accounting) of the business, to provide a copy of the report to the borrower
  - ADIs must not require the borrower to meet any part of the cost the audit
- Requires ADIs to notify and request to meet with the borrower at least 6 months prior to the expiry of a term loan
- Prohibits ADIs from unilaterally varying a term or condition of the loan unless:
  - the ADI has given the borrower at least 6 months’ written notice; or
  - the borrower has failed to comply with a term or condition of the loan (and the non-compliance is not of a minor or technical nature); or
  - the change:
    - reduces the obligations of the borrower or extends time for payment; or
    - is a change in a rate payable under the loan that is determined by referring to a reference rate
- Requires ADIs to provide a minimum 90 business day notice period where a decision is made not to renew or extend the loan
- Requires ADIs to provide notice about borrower rights to external dispute resolution (EDR) when:
  - a borrower receives a default notice from the ADI; or
  - a borrower requests assistance relating to financial hardship and that request is declined; or
  - the ADI refuses to renew or extend the borrower’s loan.

Failure to adhere to these protections will result in civil penalties for the ADI.

The Bill will commence from the first 1 July after the Royal Assent.
FINANCIAL IMPACT

The bill will have no financial impact.

NOTES ON CLAUSES

Clause 1: Short Title
Clause 1 provides for the Bill, once enacted, to be cited as the Banking Amendment (Rural Finance Reform) Bill 2018.

Clause 2: Commencement
Clause 2 provides for the Bill to commence from the first 1 July after the Act receives the Royal Assent.

Clause 3: Schedules
Clause 3 provides that legislation specified in a Schedule is amended or repealed as set out in that Schedule.

Schedule 1 – Amendments

Item 1

Item 1 provides definitions or references for definitions referred to in the amendments. Most significantly:
- a primary production business has the same meaning as in the Income Tax Assessment Act 1997
- a primary production business small loan; and
- a primary production business small loan threshold.

Item 2

Item 2 inserts a new division, Division 6 – Loans to primary production businesses.

Section 37 defines a primary production business small loan as a loan by an Authorised Deposit-taking Institution (ADI) to a primary production business that does not exceed the primary production business small loan threshold.

Section 37A defines the primary production business small loan threshold at $5 million, indexed each year for Consumer Price Index (CPI), using the index number from each March Quarter to determine the indexation factor for the subsequent financial year.

Section 37B defines a Key Facts Sheet (a simple, one-page summary of information regarding a primary production business small loan) and the requirements that it must adhere to.

Section 37C creates an obligation upon an ADI to provide a Key Facts Sheet to a primary production business small loan borrower 7 days prior to the borrower entering into the loan, with a civil penalty to apply where this obligation is not met.

Section 37D prohibits ADIs from being able to include terms or conditions in a primary production business small loan which would allow the ADI to:
- unilaterally perform a valuation of any security given in respect of a primary production business small loan
- include a material adverse change clause of a broad or general nature, except where that clause relates to fraud or criminal activity by the borrower in connection with the loan

Any such terms or conditions are voidable, and civil penalties apply where these obligations are not met.

**Section 37E** prohibits an ADI from exercising a power under a general restrictive covenant of the terms and conditions of a primary production business small loan except where the ADI has provided the borrower with 30 business days' written notice of their intention to exercise the power, or where the exercise of the power relates to suspected fraud or criminal activity by the borrower in connection with the loan.

Further, the section prohibits ADIs from unilaterally varying a term or condition of the loan except where:
- the ADI has provided the borrower at least six months’ written notice of the particulars of the variation; or
- where the borrower has not complied with a term or condition of the loan and the non-compliance is not of a minor or technical nature; or
- the change is favourable to the borrower; or
- the change is a change in a rate determined by a reference rate (as notified in a newspaper circulating throughout each State and Territory).

The ADI must not require the borrower to bear any costs of a unilateral variation of term or condition to a primary production business small loan.

The ADI is required to provide an accompanying notice about the borrower’s rights to external dispute resolution (EDR) when giving notice to the borrower about a default by the borrower, a refusal by the ADI to provide assistance to the borrower regarding the borrower’s financial hardship, or a decision by the ADI to refuse to renew or extend the loan.

Civil penalties apply where obligations under section 57E are not met.

**Section 37F** creates obligations upon the ADI, at least 6 months’ before the expiry of the term of a primary production business small loan, to provide written notice of the loan’s termination date; and to request the borrower attend a meeting with the ADI for good faith discussions regarding the possible renewal or extension of the loan.

Further, an ADI must give the borrower 90 business days’ notice of any decision to refuse to renew or extend the loan, except where the borrower is in default.

Civil penalties apply where obligations under section 57F are not met.

**Section 37G** prohibits an ADI from requiring a valuation of any security given in respect of a primary production business small loan within less than seven days after the ADI has given the borrower a copy of the valuation instructions. The ADI is also required to provide a copy of the valuation report to the borrower within 7 days of receiving it.

The ADI must not require the borrower to meet any part of the valuation’s cost.

Civil penalties apply where obligations under section 57G are not met.
Section 37H relates to investigative accounting. It prohibits an ADI from appointing an auditor or accountant who provides opinions on the borrower’s business (in relation to a primary production small business loan, and in accordance with standards from the Australian Accounting Standards Board and Auditing and Assurance Standards Board) within less than seven days after the ADI has given the borrower a copy of the instructions to the auditor or accountant. The ADI is also required to provide a copy of the auditor or accountant’s report to the borrower within 7 days of receiving it.

The ADI must not require the borrower to meet any part of such an auditor or accountant’s cost.

Civil penalties apply where obligations under section 57H are not met.

Item 3

Item 3 clarifies that amendments made by Schedule 1 only apply to loans made on or after the commencement of the Schedule.
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Banking Amendment (Rural Finance Reform) Bill 2018

This bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the bill

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Operating under such variable conditions places small primary production businesses at a distinct disadvantage in managing their credit arrangements with financial institutions (Authorised Deposit-taking Institutions, ‘ADIs’). Although ADIs are not responsible for the conditions facing small primary production businesses, additional protections are deemed prudent for loans to small primary production businesses. The Bill thus:

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- Requires ADIs to provide a 30 business day notice period where it intends to exercise a power under a general restriction covenant, except where it relates to fraud or criminal activity
- Requires ADIs that conduct valuations of any security to a loan, to provide a copy of valuation instructions and final valuation reports to the borrower
  - ADIs must not require the borrower to meet any part of the cost the valuation
- Requires ADIs that conduct audits (i.e. investigative accounting) of the business, to provide a copy of the report to the borrower
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  - the borrower has failed to comply with a term or condition of the loan (and the non-compliance is not of a minor or technical nature); or
  - the change:
    - reduces the obligations of the borrower or extends time for payment; or
    - is a change in a rate payable under the loan that is determined by referring to a reference rate
- Requires ADIs to provide a minimum 90 business day notice period where a decision is made not to renew or extend the loan
• Requires ADIs to provide notice about borrower rights to external dispute resolution (EDR) when:
  o a borrower receives a default notice from the ADI; or
  o a borrower requests assistance relating to financial hardship and that request is declined; or
  o the ADI refuses to renew or extend the borrower’s loan.

Failure to adhere to these protections will result in civil penalties for the ADI.

The Bill will commence from the first 1 July after the Royal Assent.

**Human rights implications**

This bill does not engage any of the applicable rights or freedoms.

**Conclusion**

This bill is compatible with human rights as it does not raise any human rights issues.

**Ms Rebekha Sharkie MP**