

15 October 2015

Our reference
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SACC Review Secretariat
Financial System and Services Division
Markets Group
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir/Madam

Review of the small amount credit contract laws

K&L Gates welcomes the opportunity to make this submission in response to the discussion paper '*Consultation on the regulation of small amount credit contracts and comparable consumer leases*', issued by the Commonwealth Treasury in September 2015, in connection with its review of the small amount credit contract laws (the **Discussion Paper**).

By way of background, K&L Gates is an international law firm, with more than 2,000 lawyers across five continents. With more than 400 lawyers located in Asia Pacific, we are the largest integrated firm in the Asia Pacific region.

We offer clients our services in nine core practice areas including financial services. We have an ongoing interest in developments that affect the regulation of financial products and services in Australia.

One of our partners is the co-author of five editions of the '*Annotated National Credit Code*' LexisNexis, Beatty and Smith (5th edition published in 2014). We act for a number of small amount credit contract (**SACC**) and consumer lease providers.

The purpose of this submission is to make observations about aspects of the regulatory regime that applies for SACCs, which appear to be unintended consequences. We do not comment on various questions raised in the Discussion Paper as many of them relate to commercial matters which are outside our areas of expertise.

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1. Complexity of the current regulatory regime

- 1.1 Question 2 of the Discussion Paper asks whether the current regulatory regime could be simplified, while maintaining at least the same level of protection for consumers.
- 1.2 The regime established by the *National Consumer Credit Protection Act 2009 (Cth)* (**NCCP Act**) including the *National Consumer Credit Code (NCC)* is complex. For example, the regime has defined the new credit contract classes of (**SACCs**) and medium amount credit contracts (**MACCs**). In addition, the NCCP Act and NCC regime has specific regulation for reverse, mortgages, consumer leases and continuing credit contracts.
- 1.3 There is a further category of contract regulated by the NCCP Act and the NCC - namely, all remaining non-continuing credit contracts that are not SACCs, MACCs, reverse mortgages or consumer leases. The NCCP Act and NCC regime does not expressly define these contracts, as it does for the other types of contracts mentioned above.
- 1.4 Due to the definitions of those contract types - particularly the definition of a SACC¹- the NCC does not contemplate a lender who is not an authorised deposit taking institution (**ADI**) offering a standard interest rate, non-continuing credit contract for a term of 12 months or less if the loan amount is \$2,000 or less (a **standard loan**). This is the case even if the interest rate the lender were to charge did not exceed the interest rate cap of 48%, as prescribed by section 32A of the NCCP Act.
- 1.5 The NCCP Act and the NCC do not expressly prohibit non-ADI lenders offering a standard loan – however, it is arguable that the definition of SACC means a standard loan is not permitted.
- 1.6 This limitation appears to have no basis in policy (and as far as we aware, no policy basis has been identified). Where it is commercially viable for lenders to do so, the NCC should clarify that non-ADI lenders may offer a standard loan, namely, an interest-bearing loan for \$2,000 or less for a term of 12 months or less, provided the interest charged does not exceed the prescribed cap.
- 1.7 This would not decrease the protection for consumers, since the prescribed interest rate cap would apply, but would enable non-ADI lenders to offer a simpler alternative to a SACC.

Our recommendation

We recommend that the definition of "small amount credit contract" be amended to exclude a non-continuing credit contract of \$2,000 or less for a term of between 16 days and 1 year, where a traditional interest rate is charged and it does not exceed the prescribed interest rate cap.

¹ section 5(1) of the NCCP Act: non-continuing credit contract, not offered by an ADI, of \$2,000 or less for between 16 days and 1 year

2. Unintended consequence

- 2.1 There is a gap between the definitions of SACC and MACC. A SACC is \$2,000 or less for between 16 days and 1 year. A MACC is \$2,001 to \$5,000 for between 16 days and 2 years². This means that a non-continuing credit contract (offered by a non-ADI lender) for \$2,000 or less for any term longer than 1 year is not subject to the SACC or MACC regime.
- 2.2 The definition of a SACC was originally drafted to apply to loans of \$2,000 or less for between 16 days and 2 years. The gap that now exists appears to be an unintended consequence of changes made to the definition of a SACC before the *Consumer Credit Legislation Amendment (Enhancements) Act 2012* was passed by the parliament.
- 2.3 Effective and efficient regulation can only be achieved if unintended consequences are avoided. This principle of regulation is recognised in *The Australian Government Guide to Regulation 2014*³.
- 2.4 We urge the review committee to consider whether an assessment of the regulatory impact and outcomes created by the existence of the gap between SACCs and MACCs should be the subject of any recommendation the committee makes at the conclusion of its review.

We would be happy to discuss any aspect of our submission if required.

Yours faithfully

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² section 204 of the NCC: and is a non-continuing credit contract and is not offered by an ADI

³ at 40 and 41, published by the Department of Prime Minister