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Commissioner Robert Fitzgerald
Presiding Commissioner
Review of Australia's Consumer Policy Framework
Productivity Commission
PO Box 1428
CANBERRA CITY ACT 2616

Dear Presiding Commissioner,

DRAFT REPORT: CONSUMER POLICY FRAMEWORK

Westpac Banking Corporation congratulates the Productivity Commission on its Draft Report, which sets out a number of critical challenges and opportunities facing Australia's consumer protection landscape.

We appreciate the additional time provided by the Commission to make these comments, which are confined to the policy intentions, design settings and implementation issues associated with the regulatory treatment of consumer credit.

We also note Westpac is supporting the submission of the Australian Bankers' Association (ABA), which responds to each of the Draft Report Recommendations.

Regulating consumer credit

At the outset, we acknowledge that the current *Uniformity Agreement* and *Uniform Consumer Credit Code* (UCCC), which is the primary law regulating consumer credit in jurisdictions around Australia, has been a welcome step. However, new market developments and a fracturing among State and Territory jurisdictions have rendered the UCCC an inefficient form of national regulation.

National markets should strive for national regulatory solutions and, we believe, it is time for consumer credit to be regulated on a footing that reflects its cross-border nature and its significance for consumers and providers.

We offer our in-principle support for the transfer of consumer credit regulation from the States and Territories to the Commonwealth. We offer this support with the proviso that this raises numerous complex regulatory considerations that will require substantial discussion with industry stakeholders.

It would be unfortunate for consumers and credit providers if, in the process of transferring to the Commonwealth, consumer credit received blunt regulatory attention that failed to properly recognise the nature of product offerings, the diversity of consumer needs and

variations between market participants. This would in effect increase complexity and cost for the consumer.

Therefore, as a matter of good public policy, we believe an effective transfer of consumer credit regulation to the Commonwealth is as much about getting the policy intentions and design settings right as it is about sensible implementation and outcomes.

The opportunity exists now to get the reform package right and learn from recent Financial Services Reform (FSR) and existing UCCC examples. We support an approach that will deliver a simple transfer to the Commonwealth without replicating the onerous and overly prescriptive FSR experience (nor the roll-back it later required) or the complexity of the Ministerial Council for Consumer Affairs (MCCA) and UCCC Management Committee (UCCCMC) processes.

We believe this can best be achieved by:

- re-enacting the UCCC, in materially its current form, as national legislation. This offers a simpler early process, bringing a well-understood regime within the scope of the Australian Securities & Investments Commission (ASIC). This would be a minimalist approach – directed primarily at uniformity – to the “*appropriate modified*” element of Recommendation 5.2;
- empowering the ASIC as *sole* administrator and enforcer of the new national consumer credit legislation. This would recognise ASIC’s established understanding of the financial community and its existing experience as a consumer regulator with carriage for nationally operating products, providers and markets;
- ensuring any future reform of credit regulation properly accounts for existing prudential and corporations obligations. It is important that any reform recognises the Australian Prudential Regulation Authority’s (APRA) supervision of *Authorised Deposit-taking Institutions* (ADI) under the Banking Act 1959 and ASIC’s regulation of *Australian Financial Services* (AFS) licensees under the Corporations Act 2001 vis-à-vis other credit providers;
- enacting stand-alone and targeted mortgage broker regulation under ASIC supervision; and
- establishing new mechanisms for engaging consumer and industry stakeholders in robust and informed policy formulation and consultation.

We further believe the regulatory environment and the appetite among consumer and industry stakeholders is ripe for a pathway to reform to be prioritised. But it is equally important that any move to transfer consumer credit to the Commonwealth is reflected in current MCCA and individual State-based reform initiatives. This may be a role for the Council of Australian Governments (COAG).

There is little benefit to be achieved by continuing down jurisdictional silos in the face of substantial national credit reform. Accordingly, we also offer our support for the MCCA agenda to be handed over to ASIC at the time of the enactment of national credit legislation.

Current difficulties

A malfunctioning reform model has led to significant inertia in terms of consumer credit regulation. Key consequences include increasing frustration by individual States and

Territories and consumer and industry stakeholders about the pace of change and the ability for the regulatory structure to adapt to product innovation and market behaviour.

The Commission would be aware that it is MCCA's role ...to consider consumer affairs and fair trading matters of national significance and, where possible, develop a consistent approach to those issues¹. This includes dealing with matters relating to the management of the UCCC. However, the Commission would also be aware that the *Uniformity Agreement* is not absolute and individual jurisdictions have sought to move to implement their own measures in their own timeframes.

These disparate approaches often over-lap or conflict with each other or with other national reform proposals. This results in a lack of uniformity across State and Territory jurisdictions, which can lead to inconsistencies for consumers across the nation and a risk of jurisdiction shopping, poor targeting of regulation and scope creep and expensive and duplicative processes for market participants that operate across a national footprint.

These poor outcomes foster fragmented and opaque consultation processes for developing new measures or making changes to the UCCC. This makes it difficult for industry to provide timely and measured feedback, particularly in relation to possible regulatory burdens or customer impacts.

Further, the uniform model also relies on each State and Territory undertaking its own enforcement action. This means the uniform model is susceptible to local variations that risk differential consumer treatment and can add significantly to the regulatory burden.

Some selected examples follow:

- *Supervision* – credit providers can be subject to separate audits on the UCCC from different States or Territories as well as facing ASIC oversight on similar or identical matters. This duplicates time, resource, legal and other costs;
- *Mortgage Brokers* – despite general agreement among stakeholders, as well as numerous contributions to the policy process dating back to 2003, finance broking regulations took many years to produce. Yet the 2007 draft Bill contained provisions that were either not previously subject to consultation or did not explain why earlier feedback had been accepted or rejected;
- *Fringe Credit* – despite general agreement that the fringe market represents a particular subset of the credit provider segment and mainstream credit providers keenly supporting tighter regulatory controls over these providers, the August 2007 proposals sought to introduce a regime covering all credit providers that imposed a new untested and unconsulted regulatory standard;
- *Mandatory Comparison Rates* – despite mounting evidence that MCRs are ineffectual and the existence of the sunset clause, which industry reasonably expected to be activated in such circumstances, the MCR regime continues to be extended; and
- *Unfair Contract Terms* – despite a lack of empirical evidence, some jurisdictions are looking to capture consumer credit within broad unfair contract terms proposals. This distorts the picture in relation to consumer credit contracts, where the UCCC and self-regulatory measures provide a layer of protection and redress opportunities for consumers who have grounds for complaint.

¹ <http://www.consumer.gov.au/html/protection.htm>

In this climate, we offer our in-principle support for moving credit regulation to the Commonwealth for the following reasons:

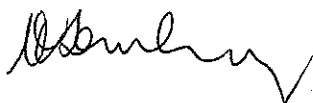
- *Uniformity* – single national regulation can deliver enhanced uniformity of policy-setting, decision-making and enforcement. This prevents forum shopping and can deliver greater consistency and certainty for consumers. National regulation can more efficiently target consumer detriment while avoiding adversely impacting highly-regulated credit providers;
- *Accountability* – placing consumer credit regulation within ASIC's bailiwick provides a more comprehensive and transparent structure that offers simplicity and consistency for the regulated community. Working through ASIC offers a credible and robust regulatory mechanism that is preferable to current arrangements that can be characterised as disparate and sporadic;
- *Efficiency and simplification* – multiple layers of regulation, each with its own enforcement regime, create inefficiencies that increase operational costs that often end up being funded by consumers. Single national regulation offers a model to reduce these costs and burdens; and
- *Neutrality* – consumers are directly disadvantaged by the lack of regulation addressing sharp practices by fringe credit providers and some intermediaries. Applying a single national regulatory model would ensure consistency of standards across the country. This is also an important competitive neutrality concern for mainstream providers that are already subject to substantial prudential and corporate regulatory oversight.

Conclusion

In our view there is now a unique opportunity to make sensible changes to the regulation of consumer credit that can materially improve the quality and consistency of protection for consumers and deliver certainty, efficiency and simplification for the market.

We look forward to contributing further to settling the design and implementation features of Australia's national consumer policy framework. If you would like to discuss any of the matters in this submission, please contact me on (02) 8253 3138 or at vsomlyay@westpac.com.au.

Yours sincerely



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