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Consultation – Mandatory Comprehensive Credit Reporting
National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018

Treasury's continued consultation with AFIA on this policy initiative and the Bill is appreciated. As you are aware, AFIA has a deep and diverse membership of financiers, offering consumer or commercial finance, or both. In particular, the Membership ranges from large to medium sized businesses, who rely on services provided by (consumer) credit reporting bodies ('CRBs'), as permitted by the Privacy Act. A number of Members hold Australian Credit Licences, where required by the National Consumer Credit Protection Act ('NCCP Act'); some Members are not required to be licensed.

It is in this context, AFIA has several key policy concerns with the Bill in that:

1. its policy objective appears to be inconsistent with the policy of open banking
2. credit reporting policy, administration and compliance would become disparate across multiple regulators and law
3. it mandates comprehensive credit reporting, potentially across the whole consumer finance sector, regardless of the size, credit decisioning policies and management and the business resource capacity of individual credit providers
4. it is unclear in the way it could deal with credit providers who are exempt from licensing because they satisfy the criteria for a 'special purpose funding entity' and provide credit through a service agreement with a business which holds a credit licence authorising it to engage in credit providing on behalf of the credit provider

1. Apparent Policy Inconsistency with Open Banking

In the credit reporting regime, consumers do not need to give their consent for information about them to be collected, used and disclosed. Consumers merely need to be informed. In other words, they have no control, other than to seek correction of credit information about them. By comparison, Open Banking with its 'Consumer Data Right' is intended to give customers rights to control and dictate how information about them can be shared, if at all. This presents an inconsistency in policy outcome. If open banking is to give customers rights to withhold data about them or otherwise control its sharing in all circumstances, then that undermines mandating comprehensive credit reporting.

AFIA Recommendation

(a) Clarify the policy interaction between mandating comprehensive credit reporting and open banking.

2. Credit Reporting Law

AFIA is concerned with the policy of dispersing credit reporting policy, law, administration and compliance across both:

- the Privacy Act, with its Credit Reporting Code, and the National Consumer Credit Protection Act ('NCCP Act') and
- the Office of the Australian Information Commissioner ('OAIC') and the Australian Securities and Investments Commission ('ASIC').

Australia's regulatory environment and compliance with it is already challenging without this further complication. The draft Bill adds another level of complexity, together with differing administrative responsibilities between OIAC and ASIC.

As an example, when mandated, the information which is required to be given to, and available through, a CRB is essentially 'credit information', as defined in s 6N of the Privacy Act. That section provides a comprehensive and exclusive list of what constitutes credit information for credit reporting purposes. That list cannot be changed by the OAIC or by regulation under the Privacy Act. However, proposed s 133CP of the Bill authorises the making of regulations to, in effect, extend that list to prescribed information about accounts or account holders, introducing a new concept for affected credit providers of 'mandatory credit information'.

The outcome is that 'credit information' will have differing meanings between the Privacy Act and the NCCP Act, according to whether a licensed credit provider is mandated to provide credit information. In practice, if a licensed credit provider is mandated to provide credit information, the extent of credit information will differ to that which a licensed credit provider would provide if it voluntarily engaged in comprehensive credit reporting.

AFIA Recommendation

(b) Effect any legislative measure to mandate comprehensive credit reporting through the Privacy Act, not the NCCP Act as is the proposed approach with the Bill.

(c) Remove from the Bill the ability to extend by regulation the concept of 'credit information', so that concept remains consistent for all credit providers and CRBs with the Privacy Act.

3. Mandating Comprehensive Credit Reporting

It is AFIA's preferred policy for comprehensive credit reporting not to be mandated by law but instead allow credit providing businesses to engage in it when they are ready to and there is a business case to do so.

Until only 4 years ago, comprehensive credit reporting had been expressly prohibited since 1992 under the Privacy Act. During the prohibition, credit providers managed credit and pricing risks through then available information, investing in their businesses knowing the law prohibited anything more. Many credit providers do not have internal resources readily available to engage in comprehensive credit reporting, needing a significant lead time to make the necessary capital expenditure in IT, credit criteria redevelopment and retraining. Many of these would not have deep IT resources readily available and would rely on third party systems providers to develop and supply the relevant systems support.

If the Bill is to proceed, it should explicitly appreciate that not all credit providing businesses are the same, and nor would contributing their comprehensive credit reporting data or using it deliver any significant benefit to the pool of credit information accessed through CRBs or to those businesses' credit decisions or product pricing.

As observed earlier, the AFIA Membership comprises large to medium sized businesses, with significantly differing levels of available resources and expertise. Mandating involvement has significant financial and

commercial implications for those less well resourced, particularly when three (3) credit reporting bodies are involved. Smaller credit providers would only contribute a relatively limited number of accounts that would not affect the overall integrity, or add to the value of, the CCR regime. Therefore, to meet the Government's objectives, mandating involvement can be retained for the large businesses, with a voluntary opt in ability for smaller ones.

The Bill allows for regulations to be made requiring additional credit providers to be mandated to provide mandated credit information, beyond the initial large credit providers with assets exceeding $100B. AFIA has strong reservations about that regulation-making power being available without limitation or criteria. Unless sufficient lead time were allowed in prescribing other credit providers, we are confident many would simply be unable to comply with providing mandatory credit information, leading to them exiting the credit reporting regime altogether, until or if they are in a position to comply. Such an outcome would undermine business viability. It would also reduce competition in the consumer credit market – an outcome contrary to the Government's policy objectives.

AFIA Recommendation

(d) *The authorisation in the Bill to be able prescribe a licensee as an 'eligible licensee' under the proposed s 133CN(1)(a) of the Bill should exclude small to medium sized businesses.*

(e) The Bill specifically provide for small to medium sized businesses to be given the ability to voluntarily opt in to comprehensive credit reporting, should they wish, without the regulatory structure and burden the Bill creates when mandating involvement.

However, should it be necessary in the future to extend the scope of mandatory comprehensive credit reporting, it is expected the availability in the market of resources at the same time to credit providers would be limited and stretched. Also, acquiring capital to make the necessary changes would take time. It is for that reason, AFIA considers a reasonable implementation time of at least 3 years.

AFIA Recommendation

(f) The authorisation in the Bill to be able prescribe a licensee as an 'eligible licensee' under the proposed s 133CN(1)(a) of the Bill should be constrained to apply a minimum implementation time of 3 years.

4. Unlicensed Credit Providers

If the Bill is to proceed, the combined concepts of 'credit provider' and 'eligible licensee', respectively in cl 2 of Sch 1 of the Bill and proposed s 133CN(1), are directed to a credit providing business holding an Australian Credit Licence. However, some credit providers are exempt from licensing because they satisfy the criteria for a 'special purpose funding entity' under the NCCP Regulations and provide credit through a service agreement with a business which holds a credit licence authorising it to engage in credit providing on behalf of the credit provider. While this does not affect the initial scope of the Bill, it may have implications should a future Government prescribe additional businesses to be eligible licensees.

AFIA Recommendation

(g) Review the Bill to ensure it also addresses circumstances where credit providers are exempt from holding an Australian Credit Licence.

Other points to consider

We have undertaken considerable dialogue with our members on this topic. Given the diversity of views, the following additional points have emerged that Treasury may like to consider:

- Providing access to consumer credit information to organisations who lend to micro / small business only (at present this is not possible under reciprocity agreements) as this would be consistent with other markets, including the US, and is an important aspect to fostering competition and supporting access to capital.
- Asking the Australian Information Commissioner to urgently provide clarity on how hardship accounts will be reported under CCR and that such advice covers:
    - What is a payment arrangement (where the customer is not requesting a hardship variation but would simply like to catch up on their repayments and not have any further collections / repossession activity undertaken) as opposed to what is hardship (where there is a contract variation and, according to an Ombudsmen, RHI should be reported as up-to-date).
    - Hardship flags - the timeframes that a hardship flag should stay on a CCR record as well as the comment that without a hardship flag, the value of RHI data could be lost when a contract is varied due to hardship.
- Disclosing the timeframe when alignment will occur between the Privacy Act and the Credit Act such that it will allow non-regulated products to be captured under CCR.
- The following exemptions from mandatory credit reporting. Accounts that:
    - Are in dispute – Disputed accounts increase the potential that any credit reporting may subsequently prove to be in error. Credit providers spend large amounts dealing with contested credit listings (through both internal dispute resolution and through ombudsman schemes) and mandatory reporting should not exacerbate this.
    - Are in hardship or subject to repayment forbearance – From a practical perspective, creditors will regularly exercise forbearance where they consider it fair and reasonable and after considering the customer's situation. In such circumstances, the credit provider may also consider that reporting such forbearance may unfairly affect the consumer so allowing credit providers discretion to exclude such accounts from reporting should be considered.
    - Have been accelerated (subject to a section 88 notice) and / or subject to an unpaid default listing – In these circumstances, there is no longer any periodic repayment from which to determine arrears status and the entire balance is immediately due and payable. While there may be some repayments from time to time, it would be burdensome and inefficient to provide updates on the large number of historic accounts in this situation. Experience from the US suggests that the reporting of such repayment information may facilitate the activities of unscrupulous lenders seeking to refinance such debts at high costs with the promise of a 'clean' credit file. In addition, in the US, repayment information reported on one accelerated debt has acted as a flag to other creditors who may then pursue legal enforcement to displace the creditor being paid and assume a preferential position. Providing discretion to exclude such accounts will minimise the use of legal enforcement and continue to deliver positive consumer outcomes.
    - Are subject to domestic violence orders.
- Clarifying the section on disclosure which could potentially duplicate provisions in the PRDE leading to some requirements being legislated and some being in the industry code.
- A more appropriate way of ensuring timely reporting can occur that allows for load balancing – the current requirement to provide data updates within 20 days of the end of the calendar month restricts data loads to two thirds of the month and restricts the ability of Credit Providers to align data supply to cycle dates through the month.
- Supporting the approach taken by the exposure draft that allows for credit reporting to evolve as technology develops and ASIC's ability to determine data supply and technical standards which could be subsequently transferred to a data standards body in the future (similar to what is proposed for open banking in the *Report into Open Banking in Australia*).

Further Consultation

Should Treasury wish to discuss our recommendations or require additional information, please contact Karl Turner, Associate Director – Policy (Acting) on 0417 496 151 or at karl@afia.asn.au.

Kind regards

Helen Gordon
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