Baycorp PDL (NZ) Ltd

Private Bag 92063
Victoria Street West
Auckland 1142
New Zealand

P: +64 9 356 5800
F: +64 9 356 5849

Competition and Consumer Policy Team
Building, Resources and Markets
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington
New Zealand
By email: consumer@mbie.govt.nz

Submission to the Ministry of Business, Innovation and Employment
Baycorp PDL (NZ) Limited

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INTRODUCTION

1. Baycorp PDL (NZ) Limited (**'Baycorp'**) appreciates the opportunity to provide to the Ministry of Business, Innovation and Employment ("**MBIE**") this submission in relation to the Exposure Draft of the *Credit Contracts and Consumer Finance Amendment Regulations 2020* (**"Regulations"**).

2. Baycorp supports the policy intent of the proposed amendments, being to reduce irresponsible and predatory lending and the resulting consumer harm, and to ensure that consumers receive adequate information prior to the commencement of debt collection, including information in relation to the composition of the debt, availability of financial mentoring services and access to external dispute resolution.

3. However, we have identified a number of practical concerns with the drafting of the proposed Regulations, which, if left unaddressed, will cause unintended outcomes to the detriment of consumers and unnecessarily increase compliance costs for industry, thus increasing the costs, and reducing the availability, of credit to consumers.

DISCLOSURE BEFORE DEBT COLLECTION STARTS

4. Baycorp is supportive of the obligations in relation to disclosures before debt collection starts. As the explanatory memorandum notes, much of the content required by Section 24 of the Regulations is already disclosed by responsible debt collection agencies. It is our view that Section 24 largely codifies existing good industry practice.

5. However, we submit that the obligation at Section 24(3)(a) creates a complex and onerous burden on debt collectors. That is because it requires debt collectors to incorporate into their initial notice, information for the period starting with the closing date of the period covered by the last continuing disclosure statement sent by the lender under Section 19 of the *Credit Contracts and Consumer Finance Amendment Act* 2003 (**"Act"**) and ending the date on which the disclosure under Section 132A of the Act is made.

6. The technical implementation associated with making such disclosures is likely to be challenging in circumstances where it requires the debt collector to provide detailed information in its initial notice in relation to transactions which pre-date the referral or assignment of the debt.

7. We submit that the better approach would be for a requirement for the debt collector to send:

   (a) a copy of the last disclosure statement sent by the lender before collection commences;

   (b) the current balance of the debt; and

   (c) information in relation to any costs which will be added from that date.

8. In relation to the balance of the obligations at Section 24, we believe the majority of these to be appropriate. However, we note that debt collectors or purchasers do not receive information relating to the debtor's purpose when entering the contract. It is our experience that consumers will readily recognise a debt from the other information required to be provided. Identification is never necessary. We recommend that subsection 24(1)(c) be removed.

9. Further, in some limited circumstances, the date the credit contract was entered into may also not be provided. Accordingly, we recommend that the words "where within the possession of the debt collector" be added to the drafting at the end of subsection 24(1)(b) to account for such circumstances.

10. To help reduce the burden of costs on industry and to provide consumers with timely notices through a convenient delivery channel, we submit that the Regulations should expressly provide that the notices under Section 24 be permitted to be made by electronic means.

11. We note that in the modern day, consumers are far more likely to read and respond to disclosures via an electronic delivery channel than traditional hand delivered mail. Consumers also prefer electronic delivery, as a record is generally retained which may be referred to in the event of a future dispute.

REQUIREMENT TO PROVIDE INFORMATION ABOUT DISPUTE RESOLUTION SCHEMES

12. Regulation 5A(2) inserts a new obligation to provide the following information about external dispute resolution schemes as soon as practicable after the creditor receives a complaint:

(a) *The name of, and contact details for, the dispute resolution scheme of which the creditor is a member;*

(b) *An explanation of what the scheme provides;*

(c) *That the scheme will not charge a fee to any complainant to investigate or resolve a complaint.*

13. There should be no obligation to disclose the details of an external dispute resolution scheme upon receipt of a complaint, until such time that the internal dispute resolution ('IDR') processes have been reasonably exhausted.

14. A creditor should be afforded a reasonable period of time in which to first resolve the complaint directly with the complainant through its normal IDR processes, prior to referral to an EDR scheme. This is likely to achieve the most efficient and expeditious resolution of the matters in dispute, improve customer experience and prevent the delays (which may result in increased interest accrual), that escalation to EDR may bring.

15. We note that the above recommendation is consistent with the practice of EDR schemes, being to allow an IDR process reasonable time to conclude prior to the escalation of the complaint.

16. We submit that the regulation should be amended such that the requirement to provide the details of the scheme not be required "as soon as practicable after the complaint has been received", but rather as part of the financial service provider's final IDR response, and in any event, within 45 days of receipt of the complaint.

17. Further, we note that the term 'complaint' is broadly defined, taking its meaning from the ISO10002:2018 definition, being "*an expression of dissatisfaction related to its services to which a response or a resolution is explicitly or implicitly expected."*

18. Such a broad definition of 'complaint', in conjunction with the obligation at 5A(2) creates an unintended and unworkable position for industry, whereby all expressions of dissatisfaction, regardless of whether they are resolved at the first instance, trigger the obligations to disclose the information contemplated by regulation 5A(2).

19. We note that under this broad definition of 'complaint', the most efficient internal dispute resolution processes occur on the operational floor. It is our experience that whilst minor expressions of dissatisfaction may occur regularly, with well-trained and empowered frontline operational staff, the significant majority of such expressions of dissatisfaction can be resolved to the complainant's complete satisfaction within the first interaction.

20. By way of example, this broad definition of 'complaint' would capture all instances of a customer expressing such things as confusion with documentation which has been provided, frustration with receipt of a collection call at an inconvenient time and issues accessing online technology systems. There are many similar examples which would all trigger the obligations at 5A(2). These issues are

readily dealt with on the frontline at the same time the 'complaint' is made and can be confirmed as resolved to the customer's satisfaction at that time.

21. We note that the obligation at 5A(2) is similar to that of the Australian Securities and Investments Commission Regulatory Guide 165 (ASIC RG 165)[1]

22. However, ASIC RG 165[2]expressly recognises that such a broad definition of 'complaint' may result in increased administrative burdens and compliance costs in relation to minor expressions of dissatisfaction. The section excuses financial service providers, in general circumstances, from formally responding and providing such external dispute resolution (**'EDR'**) details where the expression of dissatisfaction is resolved to the complainant's satisfaction by the end of the fifth business day.

23. Such an approach effectively balances consumer protection and accessibility of EDR, with limiting the administrative burden and related compliance costs.

24. Baycorp recommends that the regulation be amended to remove the obligation to provide such EDR information where the expression of dissatisfaction has been resolved to the complainant's satisfaction by the end of the fifth business day.

CONTENT OF ANNUAL RETURNS

25. Section 116AAA of the Bill inserts a new obligation for creditors to provide an annual return to the Commerce Commission in which statistical information about their business is provided.

26. The relevant provision states:

(1) Every creditor under a consumer credit contract must provide an annual return to the Commission in the prescribed manner.

(2) The prescribed manner may include a requirement to provide statistical information in relation to the creditor's business (including its loan book).

(3) The annual return must be provided before the prescribed date and relate to the prescribed 12-month period.

(4) Nothing in this section requires the creditor to provide—

(a) information about an identifiable individual; or

(b) information that is neither in the possession or control of the creditor nor reasonably ascertainable from information that is in the possession or control of the creditor.

27. The term 'creditor' is defined by the Act to mean *"a person who provides, or may provide, credit under a credit contract, if the rights of that person are transferred*

1 Australian Securities and Investments Commission Regulatory Guide 165 – Licensing: Internal and external dispute resolution at RG 165.90.

2 Australian Securities and Investments Commission Regulatory Guide 165 – Licensing: Internal and external dispute resolution at RG 165.80.

by assignment or by operation of law, includes the person for the time being entitled to those rights."

28. Accordingly a debt purchaser as an assignee of the rights of the credit contract is caught in scope of the annual return obligation at s116AAA.

29. We note that the Exposure Draft of the Credit and Consumer Finance Amendment Regulations 2020 Commentary and Request for Submissions[3] details the purpose of the annual return, being to support the Commerce Commission's monitoring and enforcement functions in relation to the consumer credit industry.

30. The information at paragraphs 128 to 162 of the explanatory memorandum, which is proposed to be included in future regulations made in respect of s116AAA of the Bill, is heavily weighted to originating financial service providers' lending practices, as I understand is the intent.

31. A debt purchaser is unlikely to have data sufficient to respond to many of the proposed areas. Where it does have data, it will be constituted of information which relates to the debts assigned by numerous assignors. Not only will it be onerous and costly for debt purchasers to obtain and collate all such information that is within their control, but the resulting dataset, when averaged across the numerous assigned portfolios, is unlikely to be of any meaningful assistance in informing the Commerce Commission in relation to the lending practices in the consumer credit industry.

32. Further, it would be a substantial administrative burden for contingent debt collectors to be required to contribute such data in respect of accelerated accounts which have been placed with it for collection. Whilst the obligation at law would remain with the creditor by whom the contingent collector is engaged, the practical impost would fall on the contingent collector who would be required to pass back numerous data fields to each referring creditor, adding to costs for the industry.

33. We note that any debt that has been charged off will have been subject to earlier disclosure by the original lender. For such accounts, the obligation is no longer "credit", in the sense that there is no longer any deferral of the liability, with the full amount having become due and payable in full.

34. We respectfully submit that the future regulations made in respect of s116AAA of the Bill carve out reporting obligations in respect of any account which:

    (a) has been accelerated with the full liability due under the terms of the contract; or

    (b) has been charged off and assigned to a debt purchaser.

3 at paragraph126.

35. We also note that the proposed content[4] of the annual return includes the number of complaints made to the creditor in the period and the number of complaints that were resolved internally in the period.

36. There will be substantially increased costs where creditors are required to capture, record and report on all minor expressions of dissatisfaction that meet the technical ISO10002:2018 definition of complaint.

37. We submit that the obligation to report complaint numbers be limited to those complaints which are not resolved to the complainant's satisfaction by the end of the fifth business day.

SCALABILITY AND PRESCRIPTIVENESS

38. We note in relation to the general responsible lending obligations proposed in the Regulations that there is no reference to the concept of "scalability".

39. Scalability is a well-established concept in responsible lending obligations internationally, including in the *Australian Security and Investment Commission's Regulatory Guide* 209[5]. It is our view that such a concept makes a great deal of practical sense.

40. The obligations of lenders must be scalable, relative to the risk of consumer harm.

41. Products carrying a higher risk of default, or which have more severe consequences upon default, such as the loss of a family home, or significant penalty interest, should be subject to a higher standard of lending assessment. Accordingly, the obligations in relation to products such as subprime mortgages or High Cost Credit Agreements (**'HCCA'**) should be more onerous, scaled commensurate to their risk.

42. A 'one size fits all' approach to responsible lending obligations will result in the costs of the credit assessment being universal, regardless of the loan size, risk and consequence of default. This will have a significant impact on the cost and availability of credit, which will disproportionately impact small amount loans which are not HCCA, likely rendering many such product offerings uneconomical and forcing consumers toward more HCCA where margins are substantially higher.

43. With the introduction of scalability into the Regulations, the more specific prescriptiveness currently contemplated in the draft can be applied to those products such as HCCAs where the risks are heightened.

44. Overly prescriptive laws and regulations demonstrably reduce competitive advantage, stifle innovation and may result in lenders being unable to capitalise on innovations such as open banking and future advancements in technology or product design. With the introduction of scalability into the Regulations, perceptiveness can be applied to high risk products such as HCCA and larger, longer duration credit products.

4 Exposure Draft of the Credit Contracts and Consumer Finance Amendment Regulations 2020 – Commentary and Request for Submissions – November 2019 at paragraph 160.

5 Australian Security and Investment Commission's Regulatory Guide 209: Responsible Lending Conduct at RG 209.81.

CONCLUDING COMMENTS

45. As noted, Baycorp is grateful for the opportunity to submit to MBIE in relation to the proposed amendments. We hope that this submission is of some assistance and will assist MBIE to make recommendations that achieve the best policy outcomes for all New Zealanders.

46. We have recently met with MBIE as part of the consultation process, but would be happy to discuss the Regulations and our submission in more detail if this would be of assistance to MBIE.

Best regards

Adam Carpenter
Head of Legal, Compliance and Operational Strategy
Baycorp PDL (NZ) Limited
E: acarpenter@creditcorp.com.au
D: +61 2 8651 5959
M: +61 425 809 853