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Submission on the Exposure Draft of the Credit Contracts and Consumer Finance Amendment Regulations 2020

1. Thank you for the opportunity to submit on the Exposure Draft of the Credit Contracts and Consumer Finance Amendment Regulations 2020 (“Draft Regulations”). I appreciate the work that has been done by the team.
2. I agree that the Draft Regulations relating to the “Assessment of likelihood of substantial hardship” should prescribe the steps that must be taken to fulfil the responsible lending obligations (sections 9C (3) (a) and 9C (5A) of the Credit Contracts and Consumer Finance Act 2003 (“CCCFA”). This is because the Responsible Lending Code (“current Code”) is a guide and therefore not binding. The Draft Regulations “set[s] out how lenders will be required to make reasonable inquiries to be satisfied that the borrower is likely to repay the loan without substantial hardship” (paragraph 33, Exposure Draft).
3. However this should not apply across the board. The prescriptive approach should only apply to the vulnerable borrower (and possibly guarantor – see my comments below) and high-cost credit agreements. This is as reflected in the current Code and the purpose of the Credit Contract Legislation Amendment Act 2019 (“Amendment Act”) as recited below.
4. Lenders who do not lend to the vulnerable or enter into high-cost credit agreements should be exempt (see below) or amendments should be made to the relevant provisions of the Draft Regulations to exclude those lenders.

Not every lender or consumer credit product is equal

5. In the Draft Regulations (“assessment of likelihood of substantial hardship”) applies to every lender of consumer credit products.
6. The purpose of the Credit Contract Legislation Amendment Act 2019 (“Amendment Act”) was described in the call for submissions (1 May 2019) on the then Bill as follows:

This Bill is the result of a review that identified ongoing issues in the credit market and significant harm to vulnerable consumers from problem debt. The issues identified included the excessive cost of some consumer credit agreements; continued irresponsible lending and other non-compliance, including by mobile traders; unreasonable fees; and irresponsible debt collection practices.

The main policy objective is therefore to protect the vulnerable.

7. The Draft Regulations (“assessment of likelihood of substantial hardship”) has been drafted so that applies to all consumer lenders. Not all lending products are pitched to the vulnerable.
8. I believe there is a risk that the Draft Regulations could have unintended consequences. For example:
 - a. Borrowers might end up with fewer funding choices. A “well-informed user of credit” might simply not wish to have the level of scrutiny suggested in the Draft Regulations. They might find it much less intrusive to borrow from the bank, e.g. by utilising an existing revolving credit facility or mortgage with her/his bank. Giving borrowers a choice as to when, how, why they get credit and from whom they get their credit is important. Banks don’t offer the whole range of credit products. The end result could be a lessening of competition in the consumer finance market.
 - b. Additional costs incurred by the lender in gathering and analysing the additional information will be ultimately borne by the borrowers. Approving the credit will also take longer.
9. The Draft Regulations (“assessment of likelihood of substantial hardship”) should, in my view, be amended accordingly. The definition of “vulnerable borrower” from the current Code should be included. However, I believe the definition should be expanded to capture other vulnerable persons. There will be other vulnerable persons who I don’t believe are covered under the definition in the current Code. A vulnerable person might include, for example, people with mental health issues and gambling addictions. Bank statements for people in either of those categories might reveal excessive spending at times. Of course the lender might not know but there may be circumstances where the lender ought to have known. When the current Code is amended there should be guidance around “where the lender knows or ought to know”.
10. I believe there is also a risk if consideration is given to excluding various consumer credit products.

11. Paragraph 4.7 of the current Code says:

4.7. A lender may undertake less extensive inquiries where there is a low risk that the agreement will not meet the borrower's requirements and objectives. This includes where: a. the agreement is a simple credit agreement that is widely understood, such as a credit card or overdraft; or b. the borrower is a well-informed user of credit.

A simple credit agreement might well be widely understood and meet the requirements and objectives of a vulnerable person but that should not mean that person should automatically "qualify" for a credit card or overdraft. It should not matter what the product is – the focus should be on the type of borrower – whether the borrower is vulnerable.

12. Assuming the suggested changes referred to above are not considered a viable option then an alternative suggestion would be to provide for an exemption of certain lenders to the relevant provisions of the Draft Regulations. This could be achieved by application to the Commerce Commission. The lender would have to supply whatever supporting items required by the Commission in order for it to determine whether the lender should be exempt. The exemption could apply for a specified period and the lender would have to apply for an extension towards the end of the period and so on.

Guarantors

13. The Exposure Draft also asks for feedback in relation to guarantees as the Draft Regulations do not include requirements for satisfying section 9C (4)(a) of the CCCFA. Under that section the lender must make reasonable enquires before the guarantee is given, so as to be satisfied that it is likely that the guarantor will be able to comply with the guarantee without suffering hardship.
14. I would have thought that once a lender has undertaken its extensive enquiries of the borrower and the borrower has "passed the test" so to speak then it would have no need for a guarantor (unlike a business loan to a company). If the lender requires a guarantor that might indicate they might not have lent to the borrower unless the loan was guaranteed in which case the same rigorous enquires should be made of the guarantor. Of course this might not be the case in all situations.
15. Some lenders might currently include the "guarantor" as a co-borrower under the loan even though she/he is not the user of the credit. The lender might just drop that person to the category of guarantor (which for all intents and purposes they are) to avoid the strict requirements under the Draft Regulations for a borrower. The unscrupulous lender might even treat the real borrower as a guarantor to avoid the strict requirements and have someone else step in (a parent say) as the borrower with a better credit history etc. The parent may feel (or be) pressured to be named as the borrower.
16. There will always be some unscrupulous lenders who will try and get around the rules. Guarantors should not therefore be excluded from the extensive enquiries in my view.

Annual Return

17. I am unsure as to the purpose of the Annual Return. S116AAA of the Amendment Act requires all lenders to provide an annual return and in the “prescribed manner”.
18. The Exposure Draft mentions that the Annual return “could support the Commerce Commission’s monitoring and enforcement function in relation to the consumer credit industry.” However it appears much of the content is statistical.
19. Many lenders already supply information to regulators under the Anti-Money Laundering and Counter Financing of Terrorism requirements. Some information could be shared.
20. I believe the Annual Return requirements should be considered further and maybe an exemption should apply in some circumstances.
21. Once again thank you for the opportunity to submit.

Kind regards

A handwritten signature in blue ink, appearing to read 'Gaduram', with a stylized flourish at the end.

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