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**Submission on the  
Pre-Contractual Disclosure and  
the Uniform Consumer Credit  
Code Consultation Package**

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## INTRODUCTION

We appreciate the opportunity to make a submission on the Pre-Contractual Disclosure and the Uniform Consumer Credit Code Consultation Package (the **Package**).

The comments in this submission are ours. They do not necessarily reflect the views of our clients.

Expressions of opinion or statements of interpretation in this submission are not intended as legal advice.

The requirement for a new, separate, document which contains a lot of customer specific information will mean credit providers need to build a new template document. They will need to program their systems to collect the relevant data (or extract it for the purpose of the document), make the required calculations and populate the document. This will have significant cost implications for credit providers. They are likely to need a significant lead time or transitional period to enable them to implement the necessary systems and other changes.

Many of the provisions of proposed regulation 13B require 'details' (for example, details of how rate changes are to occur, details of exceptions to interest free periods, details of how repayments will be applied, details of assumptions, details of how fees may be changed or imposed, details of mortgaged property). This suggests a required level of specificity which is inconsistent with a summary. If detail is required in each of these cases, and the document is in no less than 10 point font, then the requirement that the precontractual statement be no longer than 2 A4 pages will be impossible to meet (note that the list of requirements in section 13B in the Package itself covers almost 2 A4 pages). It is also not clear what level of detail is required. We have highlighted some particular difficulties with determining what is required in Part B of this submission. As a general comment we suggest that the use of 'details' be reconsidered as it is difficult to interpret and likely to lead to more text than will fit within the suggested 2 page maximum length.

You will see from our specific comments that we believe the draft regulations proposed in the Package contain ambiguities and/or lack sufficient guidance as to what is required in other respects. Our experience in the course of providing advice to credit providers is that when they have encountered an ambiguity they have tended to want to adopt an approach which avoids the risk of any penalty for non-compliance. In some cases that means they will err on the side of including more information rather than less. If the requirement for 'detail' remains, that will certainly be the case. Unless the terms of the new regulation are clear, and the information required is limited, the policy objective of the new regulation (improved understanding of key features, with less to read to obtain that understanding) will be defeated.

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## Part A – Consumer Credit Amendment Bill

4(5) – The word 'to' should be replaced with the word 'from'.

## Part B – Consumer Credit Amendment Regulation

1. **13(3)** – If a credit contract relates to more than one type of credit facility and a separate financial summary table and summary of other information is prepared for each facility, how will fees be addressed? Upfront fees are usually not specific to one type of credit facility. Some ongoing fees may not be specific to one type of credit facility either.
2. **13A(2)** – This section requires a 'description' of the type of credit facility being provided. The relevant 'descriptions' in the two example financial summary tables are very short so it seems that the requirement should be to name the type of credit facility rather than describe the type of credit facility.
3. **13A(4)(a)** – In our view it will be clearer if 'how each rate applies' is in column 2 rather than column 3 – see our comment 2 in Part C below.
4. **13A(4)(b)** – If a credit contract provides for a higher annual percentage rate on default, is this caught by draft regulation 13A(4)(b)? Either way, the position should be made clear.
5. **13A(4)(c)** – This section refers to where the credit contract 'permits' a person to change from a fixed interest rate to a variable interest rate or vice versa. Such a change is usually conditional on lender approval and/or the customer signing or completing some additional documentation. Is this section only intended to cover the situation where there is an unconditional right to switch from a fixed interest rate to a variable interest rate or vice versa?
6. **13A(5)** – Is the requirement to provide information about any interest free period only for continuing credit contracts? We note there is no 'Interest free period' row in the fixed term credit contract sample financial summary table.
7. **13A(5)(c)** – It is not clear what is meant by 'other purchases' in this section. If this means purchases other than the 'certain purchases' referred to in line 2 of 13A(5), then it would be misleading to say that 'interest will apply to other purchases' as interest may apply to all purchases, even those that are subject to an interest free period at some point.
8. **13A(6)(b)** – This refers only to 'government charges', but the sample financial summary table refers to 'government fees, charges and duties'. The broader expression should be used in the regulation.
9. **13A(6)(b) and (c)** – There is debate about whether duty payable on a transfer of land, when collected by a credit provider, is a 'credit fee or charge' for the purposes of the Consumer Credit Code (the **Code**). In our view the Code should be amended to make it clear that duty on a transfer of land is not a credit fee or charge at all, and no disclosure requirements should extend to that duty. Further, that duty is not the only upfront amount which credit providers collect in practice because they are taking control of the stamping and registration process, but which would be payable by the customer in connection with the purchase of an asset irrespective of whether that purchase was financed, and by whom. In addition to ad valorem duty on a transfer of land examples include:

- the registration fee payable on a transfer of land;
- the registration fee payable on a form notifying a change of name of the vendor of the land; and
- the fee payable in connection with the withdrawal of a caveat or the discharge of a mortgage granted by a vendor which must be removed at or before completion.

There is no valid basis for treating stamp duty on a transfer of land any differently from these charges. See also our comment in 19 below.

10. **13A(7)(a)** – We believe there should be a requirement to state in column 3 that the amount in column 2 is the minimum periodical repayment on a fully drawn credit limit.
11. **13A(7)(b)(ii)** – The requirement is for a 'brief statement setting out how repayments will be applied'. Some contracts which contemplate a number of purchases on a number of different payment plans have complex repayment provisions. A statement which adequately reflects those arrangements may not be brief.
12. **13A(8)** – In order to make a reasonable estimate of maximum repayment amounts for loans which are not continuing credit contracts but which are progressively drawn, such as construction loans, credit providers may need to make some assumptions (for example as to frequency of drawings, and amounts drawn on each occasion). Whether this is the case will depend on the terms of the contract. If a loan is interest only until the end of the progress draw or construction period, the assumptions can be relatively straightforward (that is, customer will pay interest when due during the period allowed for progress draws; customer will have drawn the full amount of credit on the last day of the progress draw period). However, as the Code currently expressly says that repayments are not ascertainable for those loans and therefore do not need to be disclosed (regulation 38(3)(b)), some credit providers will not currently have their systems programmed to calculate such an estimate for that loan type. See also our comment in 21 below.
13. **13A(9)** – There may be continuing credit contracts with a fixed term but the words in the second set of brackets in this section assume that continuing credit contracts will not have a fixed term.
14. **13A(10)(a)** – Are the fees in draft regulation 13A(10)(a) to include contingent fees? If so, are they to include only those not contingent purely on action by the debtor (consistent with the approach in 13A(10)(b))? There may be contingent fees where the contingency is not some action by the debtor, for example, a lenders mortgage insurance (*LMI*) premium may be contingent on the amount of a valuation to be conducted by the lender – such that if the valuation comes in above a certain amount, no LMI may be required. This section states what 'upfront fees and charges' are to include but does not define what the term means.
15. **13A(10)(b)** – This section states what the 'ongoing credit fees and charges' are not to include but does not define what the term means. Does it imply some regularity (eg a periodic account keeping fee) or is it just any fee which will definitely be charged during the life of the loan (including the discharge fee which will definitely be payable at the end of the loan term)?
16. **13B(2)(a)** – Is this section intended to include situations where the annual percentage rate *may* change under the contract (for example at the lender's discretion, or if the debtor

ceases to occupy the security property), rather than only whether the contract provides that there will be a change to the annual percentage rate?

17. **13B(2)(b)** – As with draft regulation 13A(4)(c), this section refers to where the credit contract 'permits' a person to change from a fixed interest rate to a variable interest rate or vice versa. Such a change is usually conditional on lender approval. Is this section only intended to cover the situation where there is an unconditional right to switch from a fixed interest rate to a variable interest rate or vice versa? See our comment 5 above.
18. **13B(3)(a)** – Providing details of exceptions to the application of an interest free period could be difficult as for some products the exceptions are very complex. In any case, it is not clear exactly what 'details' are required to be provided.
19. **13B(4)(b)** – This section refers to including the statement 'Ask your credit provider about other costs that you will incur in buying a property, such as duty on the transfer of land and fees ... and whether these costs will be passed on to you'. We do not believe such a statement should be included.

Duty on transfer of land is only an issue in some jurisdictions (in others, ad valorem duty is paid on the contract for sale, not the transfer). It should not be the credit provider's responsibility to inform and advise debtors on their stamp duty liability in relation to a purchase, nor to inform the debtor in relation to 'other costs' the debtor might incur – for example their solicitor's fees.

Further, the words 'whether these costs will be passed on to you' imply that it is the lender's decision whether or not the customer is required to pay these costs. That is creating a false impression because these amounts would be payable by the customer in connection with the purchase irrespective of whether that purchase was financed, and by whom. The only reason these amounts pass through the lender's hands is because the lender needs to control the process of registering its mortgage. The lender's security position can only adequately be protected if the lender also registers the transfer and ensures that their mortgage is registered immediately afterwards.

20. **13B(4)(g)** – It is not clear how much detail is required to satisfy this section. Would it be necessary to include details of the notice periods and methods of communication?
21. **13B(5)(a)** – It is not clear exactly what details are required to be provided. Also, the requirement to provide details of assumptions to calculate the maximum repayment amount is potentially an issue for construction loans and other progressive draw down loans. Many credit providers will not currently have the capacity to make that calculation for those products as the Code currently says that repayments are not ascertainable for those loans and therefore do not need to be disclosed (regulation 38(3)(b)). To what extent this is a problem for credit providers will depend on the way in which their systems are programmed and whether particular data fields and calculations are tied to product type. A reasonably lengthy lead time may be required for the necessary systems changes.

Also, it is not clear what assumptions would give rise to a reasonable estimate. One way of calculating a maximum repayment amount would be to ignore drawdowns, and any principal repayment obligations, during the progress draw or construction period. Most lenders specify a period within which progress drawings may be made. If they assume that

the loan will be fully drawn on the last day of that period, and that no principal repayments will be made during the construction period but interest will be paid during that period, then calculation of a maximum repayment amount will be relatively straightforward. However, it is not clear that assuming no principal reductions during the construction period will achieve a reasonable estimate if the relevant contract requires payments to include principal and interest during that period.

22. **13B(5)** – It would be useful to include a warning that actual repayments may be different to those set out in the pre-contractual statement because the repayments set out in the pre-contractual statement are calculated on assumptions which are unlikely to prove correct for the life of the loan. For example, interest rates may change and this may affect the repayments that must be made by the debtor.
23. **13B(5)(b)** – Rather than 'details of the assumptions made to determine', the requirement should be 'in general terms, the method of calculation of'.
24. **13B(5)(c)** – See our comment in 11 above.
25. **13B(6)(a)** – This provision requires 'details' of the mortgaged property. Section 15(M) of the Code currently required 'a description' of the mortgaged property. It is not clear what level of detail is required to be provided – for example, with a real property mortgage, will the street address of the property suffice, or are title particulars required; with a vehicle, is the make and model sufficient, or are registration or other details required?
26. **13B(6)(b)** – We suggest the word 'obtain' be replaced with the words 'pay for'. A debtor will never 'obtain' mortgage insurance. In addition, at the time of issue of the pre-contractual statement it may not have been ascertained whether mortgage insurance is required. See our comment in 14 above.
27. **13B(7)** – We assume that the expression 'may contain' means that the information in (a) and (b) is optional. We believe the disclosure date should be mandatory, so it is clear as at what date the information supplied was correct.
28. **13B(7)(a)** – It is not clear what the 'special features' of the credit contract would be and what would constitute a 'brief description'. Attempting to prescribe what might be 'special' and what is not, and attempting to set the level of detail required or permitted in relation to these features, will be problematic. Accordingly we agree this should be optional. However, if a credit provider took the view that the pre-contractual material would be misleading without information on a particular feature, including that information may mean the 2 page restriction is breached.

### **Part C - Sample financial summary table – fixed term contract**

1. In column 2 of the 'Annual percentage rate' row, it does not state that the 5.5% is a fixed rate. According to draft regulation 13A(4), column 2 should include 'whether the rate is fixed or variable'.
2. Column 2 of the 'Annual percentage rate' row states how the two rates apply (ie when they apply). According to draft regulation 13A(4)(a), this information ('how each rate applies') should be in column 3. That said, we believe it is clearer if column 2 rather than column 3

states how each rate applies, and we recommend that the regulation be amended accordingly. See comment 3 in Part B above.

3. The statement in column 3 of the 'Annual percentage rate' row does not comply with draft regulation 13A(4)(c). It is required to say whether a rate switch is permitted. Fees and charges are not mentioned in the requirement.
4. Column 2 of the 'Fees and charges' row states that the \$1250 total of upfront fees is 'bank' fees. A statement of whether the fees are retained by the lender or not is not required by draft regulation 13A(6). Further, upfront fees may include fees payable to third parties, such as valuation fees and lenders' mortgage insurance premiums. Section 13A(10)(a) suggests that fees of this type, even if payable to a third party, need to be included.
5. The first sentence in column 3 of the 'Fees and charges' row states that 'Fees may be varied by the credit provider'. Draft regulation 13A(6)(a) requires a statement to the effect that the amount or frequency of payment of a fee can be changed or that a new fee can be imposed. Does the statement required by draft regulation 13A(6)(a) need to state in which way fees can be varied?
6. The second sentence in column 3 of the 'Fees and charges' row refers to 'this' figure but column 2 actually has 2 figures, not just one.
7. Column 3 of the 'Fees and charges' row says 'This figure does not include Government fees, charges or duties'. This doesn't tell the customer whether government fees will or will not be payable. We would have thought the requirement in regulation 13A(6)(b) would be better met by 'Government fees, charges and duties are payable as well, but are not included in these amounts'.
8. The final sentence in column 3 of the 'Fees and charges' row is not required by draft regulation 13A(6).

#### **Part D - Sample financial summary table – continuing credit contract**

1. The first sentence in column 3 of the 'Annual percentage rate' row does not comply with draft regulation 13(4)(b). That regulation only requires a statement that the credit contract provides for a change to the annual percentage rate.
2. The second sentence in column 3 of the 'Annual percentage rate' row is not required by draft regulation 13A(4).
3. The first sentence in column 3 of the 'Interest free period' row does not comply with draft regulation 13A(5)(b). There should be a statement that interest will apply if the credit provided for a purchase is not fully paid within a specified period.
4. For completeness, the words 'or payment' should be added to the end of the second sentence in column 3 of the 'Interest free period' row. But in any case, draft regulation 13A(5)(a) requires a statement to the effect that there are exceptions to or conditions on the application of the interest free period, not a description of the exceptions or conditions.
5. The last sentence in column 3 of the 'Interest free period' row is not required by draft regulation 13A(5).

6. The first sentence in column 3 of the 'Fees and charges' row is not required by draft regulation 13A(6).
7. The second sentence in column 3 of the 'Fees and charges' row states that fees may be varied by the credit provider. Draft regulation 13A(6)(a) requires a statement to the effect that the amount or frequency of payment of a fee can be changed or a new fee can be imposed. Does the statement required by draft regulation 13A(6)(a) need to state the way in which fees can be varied?
8. The first sentence in column 3 of the 'Repayment' row should refer to a 'monthly' repayment (or whatever the correct payment period is). Although this sentence appears useful to have in column 3, draft regulation 13A(7)(a) only requires the minimum periodical repayment on a fully drawn credit limit to be set out in column 2, it does not require any information to be inserted into column 3.
9. It would be helpful to have an example of compliance with draft regulation 13A(7)(b).
10. The second sentence in column 3 of the 'Repayment' row is not required by draft regulation 13A(7).
11. The words 'by either party' should be added to the end of the words in column 2 of the 'Term of loan' row. These words are required by draft regulation 13A(9).
12. The statement in column 3 of the 'Term of loan' row does not comply with draft regulation 13A(9), which requires a reference to the provisions of the credit contract that deal with how the credit contract can be cancelled.
13. The second sentence in column 3 of the 'Term of loan' row is not required by draft regulation 13A(9).

**Allens Arthur Robinson**

20 March 2006