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Comments on the *Borrower Credit Code Amendment Bill 2007* and *Borrower Credit Amendment Regulation 2007* Consultation Package

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Amendments to s 11

The Consultation Package includes a proposal to remove the presumption relating to Business Purpose Declarations and associated provisions. In my opinion this is a desirable move which is important in better protecting vulnerable borrowers.

Section 11 Business Purpose declarations (BPD)

The UCCC applies to a credit contract entered into by a borrower where the credit is provided wholly or predominantly for personal, domestic or household purposes. Currently under s 11 of the UCCC, credit is presumed conclusively to be *not* provided wholly or predominantly for personal, domestic or household purposes where the borrower signs a declaration (a BPD) in a form prescribed by the UCCC before entering into the credit contract stating that the credit is obtained wholly or predominantly for business or investment purposes. The BPD will be binding upon the borrower (whether it is true or not) unless the borrower can establish that the credit provider (or any other relevant person who obtained the declaration from the borrower) knew, or had reason to believe, at the time that the declaration was made that it was false.

The use and misuse of BPD

The purpose of the provisions is to provide a straightforward way of characterising credit which does not involve extensive inquiries by the credit provider. This should, in theory, reduce the costs of lending. However, it appears that unscrupulous credit providers are using BPD to avoid application of the UCCC.[1] Credit providers may make use of finance brokers and unrelated parties such as solicitors to ensure that they are insulated from claims they had knowledge that a loan accompanied by a BPD was actually for household or domestic purposes. Where a borrower is introduced to a credit provider through a finance broker, a credit provider may claim it had no actual knowledge of the purpose of the loan. It will be the finance broker who has had the dealings with the borrower and discussed the purpose of the loan. The use of an unrelated third party such as a lawyer to obtain the business purpose declaration further insulates the creditor from allegations that it was aware of the purpose of the loan.

[1] See eg Niven & Gough, *The Operation of the Uniform Borrower Credit Code*, 2004. For an extreme example see e.g. *State of Queensland v Ward & Anor* (2002) ASC ¶155-055

Why go behind a BPD?

The UCCC prescribes the form of the BPD. The prescribed form includes statements to the effect that the document is Important and by signing the borrower will loose protection under the UCCC. The view might be taken that borrowers signing such documents must realise the significance of what they are doing and hence must have truthfully represented the purpose of the loan. The criticism of this approach lies in the relative inexperience of many borrowers in assessing the impact of a BPD on their interests. Under the UCCC a BPD must state that it is important the declaration is answered truthfully and must refer to the loss of rights under the UCCC. Borrowers desperate for credit for household or domestic purposes may nonetheless sign BPD for a number of reasons. For example, borrowers may sign such declarations because the credit provider makes clear they do not lend for non business purposes[2], because the borrower does not read the declaration and/or because the borrower does not understand the significance of the declaration.[3] In particular, borrowers may have little understanding of the type of protection that may be afforded by the UCCC and underestimate the risks involved in going outside the Code.

Comment on the proposed amendments

I would suggest some change to the proposed amendments on the following lines.

> **5 Amendment of s 11 (Presumptions relating to application of Code)**
>
> Section 11(2) to (4)—
>
> *omit, insert—*
>
> '(2) The contrary can be established for the purposes of subsection (1) only by establishing that—
>
> (a) the credit provider under the contract made reasonable inquiries about the purpose of the credit provided, or intended to be provided, under the contract; and
>
> (b) as a result of the inquiries, the credit provider was given information by or on behalf of the debtor which provided a reasonable basis for believing that the purpose of the loan was wholly or predominately for either or both of the following—
>
> (i) an identified business purpose;
>
> (ii) an identified investment purpose.'.

The suggested amendments make clear that before a loan is removed from the protection of the UCCC by reasons of its purpose, not only must a credit provider make inquiries about the purposes of a loan, that information must provide the credit provider with a reasonable basis for believing the loan is for business purposes. As

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[2] Cf *Neuendorf v Rengay Nominees P/L & Anor* [2003] VCAT 1732.
[3] Cf *Benjamin v Ashikian 012117/05, 2007 NSWSC 735*

currently drafted, the lender may ascertain a loan is for business purposes by relying on information provided 'on behalf' of a borrower. Under this formulation there may be some scope for unscrupulous brokers to mislead a credit provider as to the nature of a loan. The suggested amendments also make clear that only reasonable inquiries are expected of a credit provider. Credit providers should not be expected to go behind reasonable cogent evidence as to the purposes of a loan.