

Chapter 4

Possible conflict and uncertainty between Schedule 2 and other laws

4.1 As noted earlier in the report, the Government has banned exit fees for new home loans entered into from 1 July 2011. This policy was enacted by inserting regulation 79A into the regulations made under the NCCP Act (the National Consumer Credit Protection Regulations 2010, or NCCP Regulations).¹

4.2 The Bill, on the other hand, seeks to amend the Banking Act. It does not expressly repeal or amend regulation 79A.

Scope of each statute

4.3 Among other things, the Banking Act regulates a number of matters relating to banking, such as the granting of authorities to carry on banking business and prudential supervision requirements.

4.4 The NCCP Act (Schedule 1 to which contains the National Credit Code) implements a national consumer credit regime and imposes conduct obligations to regulate credit activity. The NCCP Act applies to the provision of credit that is wholly or predominantly provided for personal or household use.

Relevant matters covered by the existing NCCP Regulations

4.5 Section 329 of the NCCP Act outlines a broad regulation making power. It provides that:

The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

4.6 One matter the regulations clarify is the application of the NCCP Act. Subsection 6(13) of the Code allows that 'the regulations may exclude, from the application of this Code, the provision of credit of a class specified in the regulations ...'.² Regulation 65C was made under that power. That regulation exempts loans related to investment in residential property from the Code, provided

1 The amending regulations were the National Consumer Credit Protection Amendment Regulations 2011 (No. 2) and the National Consumer Credit Protection Amendment Regulations 2011 (No. 3). These were made on 23 March 2011.

2 National Credit Code, s. 6(13).

that the loan is not provided for investing in a single residence and the total amount of credit provided, or to be provided, is more than \$5 million.

4.7 Section 31 of the National Credit Code provides that the regulations may specify credit fees or charges or classes of credit fees or charges that are prohibited for the purposes of the Code. The ban on exit fees introduced by regulation 79A was made under this section. Subregulation 79A(1) provides that:

A credit fee or charge is prohibited if:

- (a) it is provided for in a credit contract entered into on or after 1 July 2011; and
- (b) it is to be paid on or in relation to the termination of the credit contract, whether the liability to make the payment is incurred at that time or at an earlier time; and
- (c) any of the amount of credit provided under the credit contract is secured over residential property.

4.8 This prohibition does not apply to:

- break fees—fees associated with the credit provider's loss as a result of differences in interest rates due to the early repayment of a fixed home loan;
- discharge fees—reasonable administrative costs of terminating a credit contract (in this context, an administrative cost is reasonable only if it does not exceed a reasonable estimate of the average reasonable administrative cost to the credit provider of terminating that class of credit contract); or
- fees incurred if a contract is terminated before any credit has been provided.

4.9 The Government's rationale for these exceptions is as follows:

Discharge fees cover administrative costs that are incurred as a result of terminating a loan. Break fees on fixed rate loans are not banned by the Regulations as this would risk eliminating these products, which provide flexibility to consumers. Fees for terminating a loan before it is drawn are also not be banned by the Regulations as they allow lenders to recover legitimate costs.³

Types of entities covered by the Bill compared to the NCCP Regulations

4.10 The Banking Act is relevant to authorised deposit-taking institutions (ADIs). The amendments to the Act proposed by Schedule 2 to the Bill will apply to *banks* (as defined by the Bill, but a narrower definition than ADI) that have a market share of more than 10 per cent. The National Credit Code imposes obligations on *credit providers*—persons that provide credit as defined by the Code (i.e. personal credit). This definition can include any ADI or non-bank financial institution that engages in credit activity (again, as defined by the Code).

3 *Explanatory Statement*, Select Legislative Instrument 2011 No. 40.

4.11 The Bill, therefore, appears to apply to a narrower group of entities than the existing NCCP Regulations.

Scope of products covered by the Bill compared to the NCCP Regulations

Meaning of 'any loan agreement or mortgage contract'

4.12 As chapter 3 discussed, the Bill would prohibit an early termination fee from being imposed in respect of 'any loan agreement or mortgage contract entered into by the bank' (emphasis added). The terms 'loan agreement', 'mortgage' or 'mortgage contract' are not defined by the Bill or in the Banking Act. As the Bill amends the Banking Act rather than the National Consumer Code, and in the absence of guidance from relevant definitions, it is likely that products and services outside the consumer credit sphere would be captured.

4.13 The regulations made by the Government to ban exit fees are more precise regarding the products and services covered. To restrict the scope of the ban to just home loans, the regulations make a credit fee or charge prohibited only if it meets certain criteria, including that 'any of the amount of credit provided under the credit contract is secured over residential property.'⁴

4.14 The Bill, therefore, applies to a much broader range of agreements, products and services than the existing NCCP Regulations. As noted at paragraph 3.30, the Australian Bankers' Association has expressed concern that a bank would not be able to charge a listed company an early termination fee on a corporate loan.

Meaning of 'early termination fee'

4.15 In a similar vein to the discussion above, another difference in terminology between the Bill and the regulations banning exit fees is in how the concept of an early termination fee is defined.

4.16 The Bill defines an early termination fee as meaning:

... any additional charge imposed on a borrower or mortgagor in any situation in which the borrower or mortgagor chooses to pay out the loan agreement or mortgage contract, as the case may be, ahead of the time specified in the relevant loan or mortgage contract.

4.17 The ban on exit fees in the NCCP Regulations, with some exceptions, effectively defines the same concept as follows:

(1) For section 31 of the Code, a credit fee or charge is prohibited if:

...

4 National Consumer Credit Protection Regulations 2010, paragraph 79A(1)(c).

- (b) it is to be paid on or in relation to the termination of the credit contract, whether the liability to make the payment is incurred at that time or at an earlier time; and
- (c) any of the amount of credit provided under the credit contract is secured over residential property.⁵

4.18 It is not clear whether the different definitions of early termination fee adopted by the Bill and the NCCP Regulations would further differentiate between the agreements and services covered by each.

4.19 In any event, it is clear that the continued existence of the ban on credit providers being able to impose exit fees for new variable home loans in the NCCP Regulations would prevent the Bill from achieving its objective. As the Australian Bankers' Association concluded:

Without repealing the regulation, smaller lenders will remain unable to charge exit fees due to the existence of the blanket prohibition.⁶

5 National Consumer Credit Protection Regulations 2010, r. 79A(4).

6 Australian Bankers' Association, *Submission 3*, p. 7.