



3 March 2021

Secretary
Senate Economics Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Secretary,

Thank you for the opportunity to appear before the Senate Economics Committee to provide evidence on the National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020.

I write to follow up the evidence I gave on Friday, 19 February and to clarify evidence provided by subsequent witnesses in relation to the redress options that will remain available for customers.

As outlined in the ABA submission, **customers** will retain clear recourse for review of lending conduct under the proposed reforms, through the following avenues:

1. A complaint to the Australian Financial Complaints Authority (AFCA).
2. An application to apply a provision of the Banking Code of Practice (Banking Code) to either AFCA or the courts.
3. An application to a court under the general conduct provisions listed at s47 of the *National Consumer Credit Protection Act 2009*.
4. An application for a court to reopen an unjust transaction under s76 of schedule 1 of the *National Consumer Credit Protection Act 2009*.

Both **ASIC and APRA** retain clear and broad enforcement powers and can take legal and administrative action, including:

1. APRA powers to supervise bank lending practices and compliance with prudential standards.
2. ASIC action for breach of s47 of the NCCP Act, either as a civil penalty proceeding in a court or through administrative actions such as application of licence conditions.
3. ASIC action for breach of the unconscionable conduct and consumer protection provision under the ASIC Act.

Customer recourse and redress

AFCA

AFCA is an external complaint resolution scheme providing a free service to complainants. AFCA is operated by an independent not-for-profit company that has been authorised to do so by the responsible Minister under the Corporations Act. Legal representation for complainants is not required.

C.1.3 of the AFCA rules sets out what will be taken into account when assessing a complaint:

'maladministration in lending, loan management or security matters, a complaint about a small business and the variation of a credit contract as a result of the complainant being in financial hardship.'

D.2.1 sets out options for the resolution of complaints which can include the payment of a sum of money, compensation for a non-financial loss, forgiveness or variation of a debt, repayment, waiver or variation of a fee.

In relation to a financial hardship complaint, AFCA can provide remedies including varying the credit contract, extending the period of the contract and reducing the amount of each repayment due under the contract, postponing repayments under the contract for a specified period, changing payment arrangements or reducing the loan interest rate for either a short or longer term.



A.14 The AFCA Decision Maker must do what the AFCA Decision Maker considers is fair in all the circumstances having regard to:

- a) legal principles
- b) applicable industry codes or guidance,
- c) good industry practice and
- d) previous relevant Determinations of AFCA or Predecessor Schemes.

The ABA's understanding of good industry practice is adherence with APRA standards, including APS 220 governing credit decisions of banks.

If a customer is unsatisfied with this process, they retain the right to take the matter as a civil proceeding to court.

General Conduct provision

The general conduct obligations of the NCCP Act (which are retained by the proposed reforms) require banks to take all steps necessary to ensure that the credit activities authorised by the licensee are engaged in "efficiently, honestly and fairly." Under these provisions licensees are also required to take reasonable steps to ensure that its representatives comply with the credit legislation, ensure that its representatives are adequately trained, have an internal dispute resolution procedure and have compensation arrangements in place.

Unjust Transactions

Another important legal recourse is available through s76 of schedule 1 of the *National Consumer Credit Protection Act 2009*.

If a court decides that a credit contract, mortgage or guarantee is unjust, it can order the contract to be reopened.

Banking Code of Practice

The Banking Code of Practice requires banks to act in compliance with the law, demonstrating the "care and skill of a diligent and prudent banker".

If a bank breaches the Code, a customer can bring breach of contract action in court.

Regulator action

APRA

The Banking Act requires that ADI's comply with APRA's prudential standards. APRA's existing lending standard—APS 220 Credit Risk Management, p39-45—requires lenders to undertake a credit assessment based on the level of risk involved. APRA requires banks to consider income, debts and expenses, and the purpose for which the consumer is seeking the loan. If APRA finds these standards are not being adhered to, it can impose significant financial penalties in the form of extra capital.

As the RBA Governor has noted;

'APRA is not going to be happy with financial institutions if they don't do credit assessment properly and they make a lot of bad loans. I think there is enough protection there from the regulated entities to deal with this through APRA's powers. If you accept the idea that we shouldn't try and over regulate and shouldn't kind of turn two principles into a hundred pages of guidance, I think this is the right direction to be heading in. I think it is worth, in the spirit of reducing unnecessary regulatory burden, doing something here¹.'

¹ https://parlinfo.aph.gov.au/parlInfo/download/committees/commrep/4c225357-9226-403c-b656-6ee06c9f2b2f/toc_pdf/Standing%20Committee%20on%20Economics_2020_12_02_8387_Official.pdf;fileType=application%2Fpdf#search=%22committees/commrep/4c225357-9226-403c-b656-6ee06c9f2b2f/0000%22



ASIC

ASIC will retain the ability to take an action where a licensee is considered to have breached section 47 of the NCCP Act, which sets out an obligation to 'act efficiently, honestly and fairly'. This includes matters involving lending misconduct considered in the Royal Commission.

ASIC is also responsible for enforcing the design and distribution obligations which come into effect on 1 October 2021 and can take action for breaches of these obligations.

ASIC can take action under certain provisions of the ASIC Act for unconscionable conduct, misleading or deceptive conduct, and breaches of implied warranties of due care and skill. Civil penalties apply for bodies corporate up to 50,000 penalty units, 10% of turnover, or three times the benefit gained, whichever is greater.

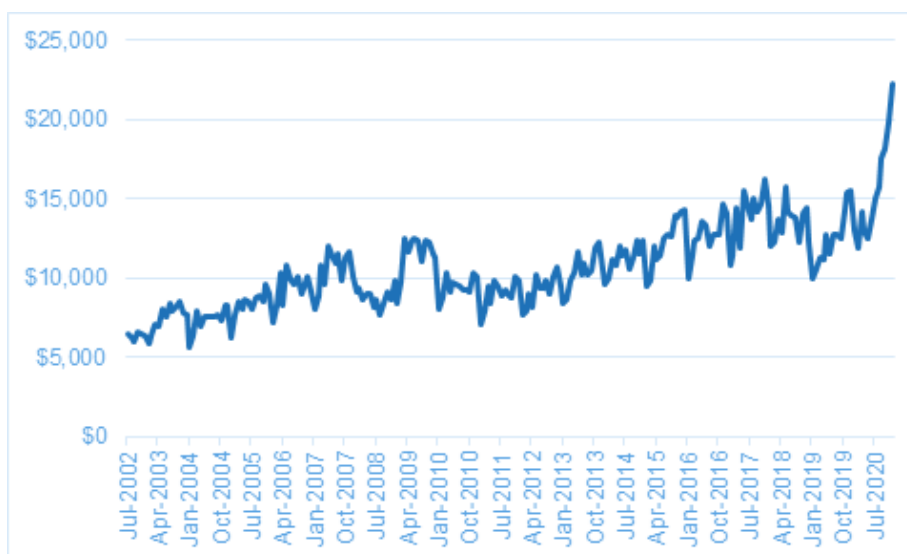
In addition, the Unfair Contract Terms provisions also apply, with ASIC having the power to apply to a court to remove such terms from credit contracts.

Question on notice

In relation to questions I took on notice concerning the value of new home loan commitments and small business I can inform the committee that in October 2020, new loan commitments for owner-occupiers (excluding refinancing) were \$18.1 billion. In December 2020, this figure had risen to \$22.3 billion as shown in figure 1.

However, new lending to small and medium businesses is not following the same trajectory as new lending to owner-occupiers as shown in Figure 2. New lending for owner-occupier housing grew by 75% between July 2019 and December 2020. In comparison lending to small business grew just 15% while new lending to medium business fell by 8%. This has led to total credit outstanding for businesses, regardless of size, not having risen at the same level as credit outstanding for housing purposes shown at Figure 3.

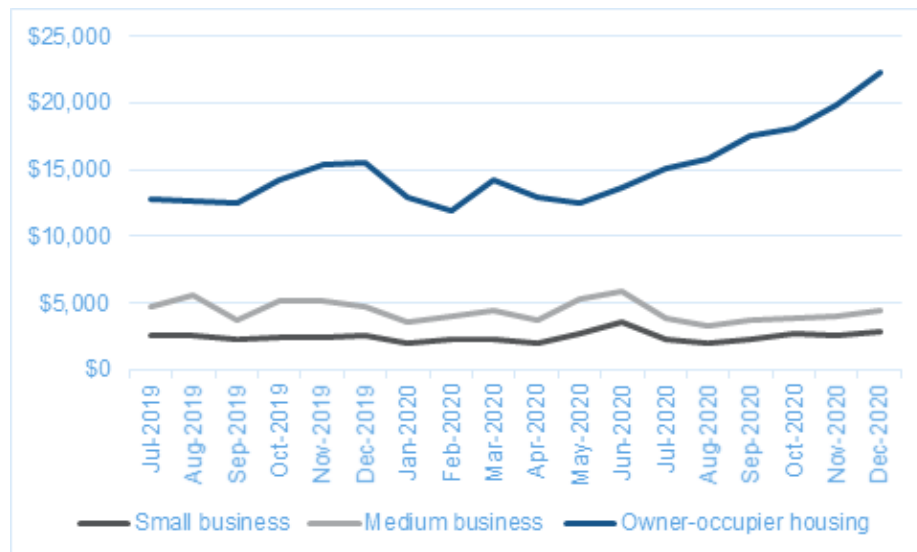
Figure 1: New loan commitments, owner-occupier (excluding refinancing), \$ million, July 2002 – December 2020



Source: ABS, Lending Indicators, Table 3

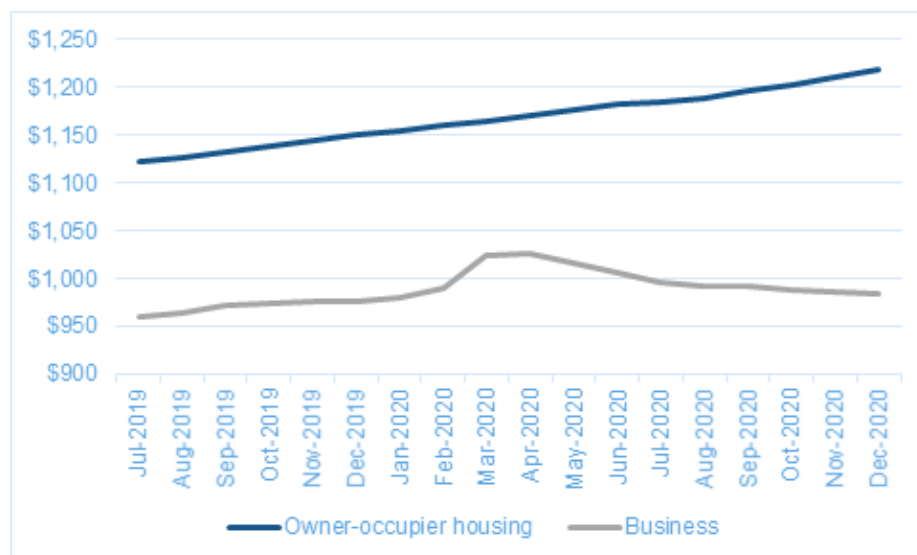


Figure 2: New loan commitments, owner-occupier housing (excluding refinancing), small and medium business fixed-term loans, \$ million, July 2019 – December 2020



Source: ABS, Lending Indicators, Table 3, Table 31, Table 33; ABA

Figure 3: Total credit outstanding, owner-occupier housing (excluding refinancing), all business, \$ million, July 2019 – December 2020



Source: RBA, Lending and credit aggregates, Table D2

Yours sincerely,

The Hon Anna Bligh AC
Chief Executive Officer