

24 April 2012

Mr Christian Mikula
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Dear Mr Mikula

CREDIT LICENCE CONDITIONS – STRICT LIABILITY FOR RECORD KEEPING

We refer to discussions that Mr John Anning, General Manager Regulatory Policy, Insurance Council of Australia (Insurance Council) and representatives of the Insurance Council members which provide lenders mortgage insurance (LMI) have held with you on the subject of credit licenses for LMI providers and also our previous submission of 12 May 2011.

As you will be aware, the Insurance Council and its LMI members sought an exemption for LMI providers from the record keeping obligations of section 132(2) of the *National Consumer Credit Protection Act 2009* ('the Act'). We understand Treasury does not support an exemption but is willing to consider removing the strict liability that would otherwise apply to an offence under this section.

Whilst an exemption remains our first preference, the Insurance Council recognises that the non-application of the strict liability provisions would be a definite improvement for members. To reiterate the reasons for seeking the exemption from our previous submission:

1. The original credit provider (being the person that undertook the credit assessment) remains subject to obligations imposed by section 132(2) of the Act, notwithstanding any rights of recovery obtained by an LMI provider.
2. There is a real risk to LMI providers that they may comply with their credit licence conditions but nevertheless be subject to civil and/or criminal penalties under section 132 of the Act. The risk arises because the original credit provider may not provide the credit assessment to an LMI provider within the statutory time limit (or at all) so as to enable the LMI provider to comply with a request under section 132(2).
3. In the event that the LMI provider was unable, through no fault of its own, to deliver the credit assessment to the consumer, the consumer would be entitled to make a formal complaint or bring an action against the LMI provider for non-compliance with section 132(2). These actions would require an LMI provider to cease all recovery action while the matter was being investigated.
4. As the LMI provider would not be the original credit provider, it will not necessarily know the date of the credit contract and therefore it may be unable to determine the applicable timeframe under section 132(2)(c) and (d) of the Act.

Strict Liability Civil and Criminal Penalties

Section 132(2) of the Act allows for the imposition of a strict liability civil penalty for a contravention of that section. Further, section 132(5) and (6) allows for the imposition of a strict liability criminal penalty for a contravention of section 132(2).

Strict liability is a serious penalty and it is therefore crucial to ensure it does not operate unduly harshly. We refer to the work of the Senate Standing Committee for the Scrutiny of Bills during the 40th Parliament (February 2002- August 2004). Chapter 7 of its Report considered the application of absolute and strict liability offences in Commonwealth legislation and stated:

“Strict liability should depend as far as possible on the actions or lack of action of those who are actually liable for an offence, rather than being imposed on parties who must, by necessity, rely on information from third parties in Australia or overseas.”

As the LMI provider is not the original credit provider, it does not conduct the credit assessment required under the Act. In order to fulfil a request made under sec 132(2) of the Act, the LMI provider must rely on the original credit provider for a copy of the credit assessment. The LMI provider has no control over whether the original credit provider provides the assessment within such a period of time (if at all). However, due to the strict liability associated with the offence, there is no defence available based on the reasonableness of the LMI provider’s actions in seeking the credit assessment from the original credit provider.

In our view, subjecting LMI providers to the requirements of section 132(2) unfairly exposes them to both civil and criminal penalties. As highlighted above, it is our preference that the Act be amended so that LMI providers are not subject to this provision. In the alternative, the Insurance Council requests that the strict liability associated with non compliance of this obligation by an LMI provider be removed.

If you require any further information, please contact Mr Anning on (02) 9253 5121 or janning@insurancecouncil.com.au.

Yours sincerely



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