



Australian Securitisation Forum

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Product Regulation
Strategic Policy
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001

By email: product.regulation@asic.gov.au

Dear Commissioner

Consultation Paper 325 (CP 325) – Product design and distribution obligations under Part 7.8A Corporations Act 2001 (DDO Provisions)

1. INTRODUCTION

The Australian Securitisation Forum (ASF) welcomes the opportunity to provide a submission to this consultation on behalf of its members. The ASF is the peak industry body representing the securitisation and covered bond industry in Australia and New Zealand. These sources of funding are a material source of funding for financial institutions (banks and non-banks), as well as assisting Australian banks for day-to-day cash and liquidity management and operating as part of the Reserve Bank of Australia's open market operations.

This submission provides an overview of how the proposed changes will impact the industry, and is divided into the following sections:

- (a) section 2 provides an introduction to the Australian Securitisation Forum (ASF);
- (b) section 3 contains an executive summary of this submission and recommendation; and
- (c) section 4 outlines the potential impact of matters contemplated in the DDO provisions, and the ASF's recommendations to address the issues raised by this submission.

2. INTRODUCTION TO THE AUSTRALIAN SECURITISATION FORUM

The Australian Securitisation Forum was established in 1989 to represent the securitisation and covered bond industry in Australia and New Zealand.

The ASF is comprised of a National Committee of 12 members, 10 task specific sub-committees and a national membership of 138 organisations. ASF members include Australian banks, domestic and foreign investment banks, building societies and credit unions, non-bank mortgage originators, investors and many other participants in the Australian financial system including organisations that provide professional services to the securitisation industry (such as trustee companies, mortgage insurers, ratings agencies and the major legal and accounting firms).

The ASF goals are to promote the development of securitisation in Australia by facilitating the formation of industry positions on policy and market matters, representing the Australian industry to local and global policymakers and regulators and advancing the professional standards of the industry through educational courses and market outreach initiatives¹.

3. EXECUTIVE SUMMARY AND RECOMMENDATION

The DDO Provisions impose a number of obligations on the issuer and distributors of credit facilities.

In respect of credit facilities funded under legal title securitisation transactions, where the lender of record has no contact with the relevant customer, the design and distribution obligations should be imposed on the originator of the loans – not the trustee lender of record, while the distribution obligations should not apply to the trustee lender of record solely because it enters into the credit facility with the relevant customer.

Accordingly, the ASF requests that the DDO provisions be amended to reflect the following:

RECOMMENDATION

If the lender of record under a credit facility is a special purpose vehicle, then the obligations under the DDO Provisions:

- (a) under Division 2 of Part 7.8A should apply in respect of the person who originates the relevant product, rather than the lender of record (i.e. the lender of record is not the "Issuer" for these purposes); and***

¹ You can find further information about the ASF, our members and core activities on [our website](#).

(b) under Division 3 of Part 7.8A should not apply to the lender of record solely because it enters into the credit facility with a retail client (ie the entry into the credit facility by the lender of record is not "retail product distribution conduct").

4. DDO PROVISIONS

The design and distribution obligations are set out in Part 7.8A of the Corporations Act 2001 (DDO Provisions).

The intention of the DDO provisions is stated to be to help consumers to obtain appropriate financial products by requiring issuers and distributors to have a consumer-centric approach to designing and distributing products.

"Financial products" is defined to include credit facilities under the ASIC Act, which would include real property mortgages (which are the primary asset class referenced in securitisation transactions), as well as equipment and auto vehicle financings.

A number of non-bank financial institutions provide finance to their customers through funding provided pursuant to legal title securitisations – that is, where funding is provided through a relevant lender of record that is a professional trustee acting in its capacity as trustee of a special purpose funding vehicle. The loans are sourced through an "originator", who is the party that, either directly or through brokers, has all contact with the relevant borrower and, among other things, approves entry into the relevant credit facilities and gives various representations to the special purpose trustee in relation to the credit facility (including compliance with laws). Although the trustee is legally the lender of record, it is merely a funding conduit and has not had dealings with the customer, nor does it have any input into (and it has no scope to vary) the terms of the credit facility or the origination policies of the originator.

As currently drafted, the DDO Provisions would potentially impose obligations on that trustee by reason of the broad definitions of "issue" and "retail product distribution conduct" – notwithstanding that it has no contact with the customer and does not prepare or review any documents or policies affecting the customer or the credit facility.

The ASF considers that the consumer protection intentions of the DDO Provisions could be satisfied through alternative means that better reflect the true nature and operation of the Australian consumer finance market. We set out details below.

4.1 Operation of the Australian securitisation industry

In Australia, third party professional trust companies act as trustee for various securitisation programs, with many billions of dollars of securitised loans held on trust. In securitisation programs, the underlying assets (loans and mortgages) are often regulated by the National Consumer Credit Protection Act 2009 (Cth) (**NCCP**).

In a legal title securitisation programme, the assets are originated in the trustee's name. The trustee is the named lender of record on the loans and related mortgages – that is, its name

appears as the lender on the loan contracts, and the mortgagee on the mortgage documentation. However, the trustee is not involved in the origination or day-to-day servicing activities and does not have any contact with the underlying customer. The origination activities are carried out by the appointed originator whose obligations to the trustee are specified in a legally enforceable origination agreement.

This split in responsibilities - as between the lender of record and the originator - has been reflected in other legislative areas, in order to reflect the realities of the Australian funding market. As an example, the NCCP recognises that securitisation trustees and 'special purpose funding entities' and 'securitisation entities'² under the NCCP ought to be exempt from the licensing requirements and obligations arising under the national consumer credit regime. This is because the securitisation trustee is not responsible for any commercial aspect of the loan, including matters such as its terms, its enforcement, and dealing with complaints and disputes. It is a fundamental characteristic of all securitisation programs that such matters rest solely with the originator pursuant to an origination agreement³.

4.2 Proposed solution

The ASF appreciates the consumer protection intention of the DDO Provisions.

The ASF believes that these objectives can be achieved - and indeed will be most appropriately achieved - if the DDO Provisions under Division 2 were to impose obligations on the originator, rather than the SPV.

Accordingly, the ASF considers that in circumstances where a credit product is originated on behalf of a special purpose vehicle, then that originator should have the responsibilities of the issuer that are currently contemplated to be imposed under the DDO Provisions.

Importantly, under this approach the relevant obligations proposed by the DDO Provisions would still need to be undertaken. However, they would be undertaken by the person best placed to do them - that is, the person actually responsible for, and with control over, the product development and distribution.

Similarly, where an SPV lender of record is merely entering into a credit contract that has been originated and distributed by a third party, it is that third party which should be subject to the relevant Division 3 distribution obligations, rather than the SPV lender.

The ASF considers that this approach would both achieve the consumer protection intent behind the DDO Provisions, whilst also reflecting the realities of the operation of the Australian financial markets.

² See subregulations 23B and 23C of the NCCPR

³ See 2 above

5. CONCLUSION

The ASF would welcome an opportunity to meet to discuss and elaborate on any aspect of the above if so required. In that regard, please contact either Chris Dalton at [REDACTED] or Robert Gallimore at [REDACTED]. In the meantime, could we please trouble you to acknowledge receipt of our submission by return email.

Yours sincerely,

[REDACTED]

Chris Dalton
Chief Executive Officer