Regulating the Index Mortgage

imco

BACKGROUND

> One of the unique features of Australian consumer credit law is that it has long included a regulatory regime specific to credit.[1]

The history of consumer credit legislation in Australia begins with the Uniform Credit Code of 1996. In 2008 that legislation was revisited, consequent upon a review by the Productivity Commission. Notably, the Commission emphasised the desirability of a separate regulatory regime for consumer credit.[2]

Hence, Australian law has long recognised a distinction between credit facilities and "financial products". Consistent with that, Chapter 7 of the *Corporations Act* 2001 (Cth) (the **Act**) never was intended to extend to credit facilities. Rather, it is directed to activities and services concerning "financial products", a term defined by the Act.

As the Revised Explanatory Memorandum to the Act states:

> … it is possible that certain credit arrangements could have fallen within elements of the general definition. For example, fixed rate loans could have been regarded as a facility for managing a financial risk … . For this reason credit facilities are specifically excluded from the definition of financial product.

CHAMELEON MINING

In *International Litigation Partners Pte v Chameleon Mining NL* [2012] HCA 45, the High Court of Australia was called upon to consider this exclusion of credit from the Chapter 7 regime. French CJ and Gummow, Crennan and Bell J observed that:

> Subdivision D identifies, or provides for the identification of, kinds of facilities that are not financial products. These facilities are not financial products:
>
> (a) even if they are within the general definition; and

---

[1] "Overview of Australian Law Regulating Consumer Home Loans, Credit Cards and Car Loans Background" and see Paper 4 prepared by the Royal Commission Into Misconduct in the Banking, Superannuation and Financial Services Industry, published on 13 March 2018.

[2] Productivity Commission, Review of Australia's Consumer Policy Framework, Inquiry Report No 45 (2008) Vol II, p.101

> (b) even if they are within a class of facilities identified as mentioned in subsection (2).
>
> …
>
> One such exclusion (identified in s 765A(1)(h)(i)) is "a credit facility within the meaning of the regulations (other than a margin lending facility [as defined in s 761EA(1)])".
>
> Subject to exclusions which do not apply, the provision of "credit ... for any period", ... is a "credit facility" (reg 7.1.06(1)(a)). The term "credit" is defined in reg 7.1.06(3)(a) as meaning a contract, arrangement or understanding under which payment of a debt to the credit provider "is deferred", and as including "any form of financial accommodation" (reg 7.1.06(3)(b)(i)). The use in this way of the concept "means and includes" is to avoid any doubt that what is identified by the inclusion falls within the scope of the designated meaning of "credit". The result is that a contract, arrangement or understanding that is any form of financial accommodation is "credit", and its provision "for any period" will be a "credit facility".

In a concurring judgement, Heydon J stated:

> Regulation 7.1.06(3)(b)(i) provides that "credit" includes "any form of financial accommodation". In ordinary usage, "accommodation" means anything which supplies a want. … "Accommodation" is a wide expression. As the appellant submitted, the words "any" and "form" in the expression "any form of financial accommodation" indicate that it is an expression to be construed amply.

CONCLUSION

An Index Mortgage is a "financial accommodation" and so is a "credit facility". Consequently:

(a) an Index Mortgage is not a "financial product"; and

(b) a dealing in an Index Mortgage is not a "financial service" requiring licensing under Part 7.6 of the Act.

Rather, like all mortgage loans, Index Mortgages are exclusively regulated by the *National Consumer Credit Protection Act* 2009 (Cth).

This requires compliance with a panoply of provisions as to responsible lending and the like, and so providers of the Index Mortgage must ensure that its unique features are properly explained and are "not unsuitable" to the borrower. But those features do not give rise to any qualitatively different or greater regulatory burden than does a traditional mortgage.

Of course, an Index Mortgage, like any credit facility, might be "missold". Correspondingly, lenders should give careful consideration as to how (and through whom) the Index Mortgage is promoted. For example, mere compliance with the regulatory regime does not exclude liability under statutes protecting consumers from false or misleading conduct.