Australian Finance Conference Level 7, 34 Hunter Street, Sydney, 2000. GPO Box 1595, Sydney 2001
ABN 13 000 493 907 Telephone: (02) 9231-5877 Facsimile: (02) 9232-5647 e-mail: afc@afc.asn.au

24 July 2009

Committee Secretary
Senate Standing Committee on Economics
PO Box 6100
Parliament House
Canberra ACT 2600 Email: economics.sen@aph.gov.au

Dear Senators,

National Consumer Credit Protection Bill 2009

The Australian Finance Conference (AFC) is a national finance industry association whose membership covers 60 plus general finance companies, manufacturer/wholesale financiers, other financial institutions in their capacities as financiers, debt collectors and credit reporting agencies.

The AFC supported the transfer of the consumer credit regulatory regime to the Commonwealth, was represented on the Treasury implementation reference group, making several detailed comments on preliminary draft positions and was most disappointed and concerned with the legislative package released in April, submitting to the Government accordingly.

By way of background, the Uniform Consumer Credit Code, reflecting the considerable effort invested by industry and regulators in its development, has worked particularly well as an efficient and effective nationally-uniform regulatory framework for the provision of consumer credit by mainstream lenders in Australia for over 12 years. What hadn't worked well, were the Ministerial Council on Consumer Affairs (MCCA) processes for keeping the Code up-to-date with market developments, particularly in the areas of mortgage brokers and fringe lenders. Several years of frustration with this ineffective process found voice in the Productivity Commission's Consumer Policy recommendations and in the Council of Australian Government's (COAG) communiqué in relation to the consumer credit transfer.

As indicated, AFC supported this transfer to the Commonwealth. However, instead of simply enacting the Code, several MCCA works-in-progress and other market interventions were bundled into COAG's already most ambitious time-frame (initially 1 July 2009 for phase one). This was the package released in April for consultation and comment and which in the AFC's view would have imposed an expensive and expansive regulatory regime with minimal consumer benefit but restricted and more costly credit.

AFC therefore welcomed the Government's late June package which, in response to the submissions, de-coupled (for 12 months review) the Point of Sale credit/broking activity and Responsible Lending provisions from the balance of the Bills. AFC believes that this review period will enable fulsome consultation to ensure that these new regulatory approaches can sensibly work in their commercial contexts.

This leaves the credit provider/mortgage broker registration and licensing/compulsory EDR and the Code transfer aspects of the package, including the MCCA part-formed additional disclosure requirements, for immediate attention given the stated time-frames. AFC comments are therefore directed at these and would ask that the Committee to consider the following key issues:

- Current operational uncertainty given possible amendments to the Bill and the staggered availability of the Regulations, which contain crucial operational and scope details and key exemptions
- Whether the compliance timeframe of 1 January 2010 is realistic given the operational changes involved
- Whether the proposed exemptions of vendor introducers from the "credit assistance" provisions is adequate to exempt them during the 12 month review period where they perform functions on behalf of the credit provider
- The need to clarify the law's interest charging regime to accommodate interest-in-advance residential property investment loans
- Streamlining the licensing process for existing Australian Financial Services (AFS) licence holders
- The continued ability of the States to enact credit related legislation which undermines the uniformity sought through a transfer of credit to the Commonwealth

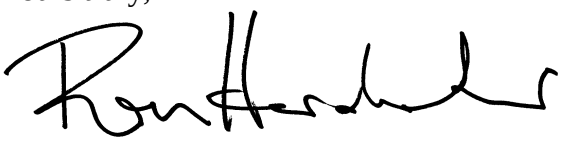
Our more detailed comments on these issues follow.

As a concluding matter, AFC would question the appropriateness of "protection" in the Bill's title. The legislation sets down the documentary and operational basis of the provision of consumer credit and the rights and obligations of all parties in this important driver of the economy which in Australia has for many years generated an overwhelming net benefit. Neither the Code, its predecessor, the Credit Acts, nor theirs, the Moneylending and Hire Purchase Acts needed to use this colour. Likewise the statutes which govern superannuation and margin lending manage to do so in neutral language.

AFC would be pleased to provide the Committee with further details or elaboration as required.

Kind Regards,

Yours truly,



Ron Hardaker
Executive Director

Senate Enquiry – National Consumer Credit Protection Bill 2009

1. Operational certainty – The Act & Regulations

With less than 6 months until the 1 January 2010 target commencement date, the status of the law and the significant and crucial gaps in knowledge of its detailed content make the ability to build a compliance program in the time most problematic.

When the Bill was introduced into Parliament, the Minister, in his Second Reading Speech and in the Explanatory Memorandum, indicated a number of significant exclusions from it. These included the short term exemption for vendors and debt collectors and deferral of the responsible lending provisions. Treasury has also indicated that other areas of operational uncertainty will be dealt with in the Regulations.

Consequently, the Regulations will contain crucial scope, exemption and operational content which must be known in order to achieve compliance. However, we understand the Regulations will not be published until the Parliamentary processes are finished and Royal Assent given.

While draft Regulations were made available during the consultation phase late April/early May, it is clear there have been crucial amendments to those drafts that impact on operations and implementation costs. The result is insufficient certainty for members to advance with any confidence compliance implementation, particularly given the significant costs involved.

Also, with the Senate Economics Committee process, as well as the debates in the House of Representatives and the Senate, the NCCP Bill itself may change. Industry should only be expected to commence compliance with a legislative regime once it is finalised.

The timeline to implement the Uniform Consumer Credit Code in the 1990s did not start until the final form of the Code and its Regulations were definitively known. Twelve months was then set as a reasonable time to allow for compliance to be achieved. Under the present NCCP process, compliance is expected immediately ASIC is in a position to provide key compliance guidance.

At this stage, ASIC is in the early stages of developing its policy positions and guidance on licensing and other requirements. Its recently released consultation and policy development time-frame indicate key compliance information will not be finalised until late in the year. Given that ASIC's policy positions on licensing requirements and processes are crucial to compliance, the late availability of this information reinforces the need to extend the commencement date to a more reasonable time-frame.

Our members will require time to take and consider advice, modify systems and documents, ensure risk, compliance and training systems meet licensing requirements, consult with introducers and service providers about the credit licensee/credit representative issues, implement new service level agreements and conduct due diligence to satisfy themselves of compliance with the new legislation and ASIC's policies and guidances.

Additionally, this process becomes highly problematic during the Christmas/New Year period. December to January is a peak processing time for our Members. During this time, many Members undergo a "system freeze". No changes are allowed to business systems to ensure they are stable and fully equipped to handle the high volumes of transactional activity over the holiday period.

All the key documentary provisions discussed in (2) below, require some degree of system work. To conduct systems development work during this high transaction period is to compromise compliance with the current legislative regimes that impact on our members' operations.

A more reasonable transitional period would also take into account the mandated use of Australian Credit Licence numbers in statements, contracts and prescribed forms (see also (2) below). The earliest those numbers could become available would be 1 July 2010. Unless a different approach is taken, licensees will be obligated to revise systems and reprint documents for implementation and then again when licence numbers are issued. The outcome is an unnecessary cost for business to bear.

Recommendation:
The AFC strongly recommends:

- The implementation of the National Credit Code should be set for 6 months after the final form of the NCCP Act and related Regulations, and relevant ASIC exemptions, modifications, policy statements and guidelines, are published

2. Documentation

The key NCCP documents that must now be developed and Code documents changed include:

- Credit Guides – new disclosure requirements
- Hardship application outcome notice – new requirements for all applications
- Postponement of enforcement proceedings notice – new requirements
- All statutory Forms - changed to include additional detail and changed numbering
- A new Form has been introduced – Direct Debit Default Notice
- New Business/Investment Purpose Declaration requirements
- Default notice – additional disclosure requirements and changed numbering

The AFC is most disappointed that the legislative package has renumbered the provisions of the Credit Code, its Regulations and Forms. This has significant operational impacts and also means texts and learnings on the Code will be of diminished value and/or more difficult to rely upon, simply to suit the parliamentary drafters. It is an unnecessary impost on industry for no material benefit to consumers.

We are also disappointed that the package proposes new documents in advance of the MCCA-commissioned research into the appropriateness of credit law disclosures which could lead to further revisions in form and content. In a similar vein, the fetish for the inclusion of ACL numbers (when issued) on the range of documents, simply adds to costs with no consumer benefit.

It should not be assumed that changes to an existing regime are easier to accommodate than the implementation of a new one. This is simply not the case. It can be far more expensive

to modify documents, operational policies and procedures, systems and training than to establish them given the structures already in place.

Our members incur significant costs in these seemingly minor amendments. This comes at a time when the finance industry is under major commercial restraints resulting from the global credit crisis and when it is subject to a major raft of legislative reforms such as Personal Properties Securities, the Australian Consumer Law, Unfair Contract Terms, Anti-money Laundering and Counter Terrorism Financing, and possibly Privacy and Bankruptcy.

Recommendation:
The AFC strongly recommends:

- Compliance with new and amended documentary requirements be set for 6 months after the final form of the NCCP Act and related Regulations, and relevant ASIC exemptions, modifications, policy statements and guidelines, are published
- The relevant NCCP provisions be renumbered to match those of the Code
- The use of ACL numbers in the range of forms and documents not be mandatory

3. Exemptions – Vendors

While it has been announced that vendor introducers will be exempt from compliance with the NCCP Act for a period of 12 months pending review, we believe vendor introducers may be unintentionally caught unless the exemption is wide enough to cover all the functions they may provide.

AFC very much supports the review period because vendors at point-of-sale operate markedly differently and under much shorter time-frames than do mortgage brokers. The exemption must be appropriately worded to exempt vendor introducers from the 'credit activity' provisions in addition to the 'credit assistance' provisions to ensure those industry groups have the benefit of the 12 month review period.

Vendors act as intermediary and can perform functions on behalf of credit providers and lessors. These functions include providing customers with documents (e.g. proposed credit contract, privacy consent), obtain customer signatures on documents and sign contract/lease documents when under the authority of the credit provider, lessor, mortgagee or beneficiary under a guarantee.

Unless vendor introducers are excluded from these 'credit activities', they will still require a licence. The only other option would be for credit providers to appoint vendor introducers as 'credit representatives', but to do so would undermine the value of the 12 month review. Also, credit providers are most reluctant to appoint vendor introducers as credit representatives, given the present wider liabilities that arise from that relationship.

This exemption is contained in the Regulations which are not yet available.

Recommendation:
The AFC strongly recommends:

- The vendor temporary exemption be sufficiently wide to avoid partial licensing during the 12 month review; vendors should only be licensed in this period if they actually provide finance.

4. Interest charging regime - Residential investment property loans

The present Credit Code prohibits the charging of interest in advance, with one small exception. As residential investment property loans will now be subject to the regime and as interest in advance can be a feature of this loan type particularly as pre-payment of interest has tax advantages for investors, the new legislation needs to accommodate these products lest they be withdrawn from the market.

Recommendation:

The AFC recommends:

- The Bill be amended to allow interest payments in advance for residential investment property loans

5. Licensing - Streamlining AFS Licence holders

ASIC has already indicated that it intends to implement an Australian Credit Licence (ACL) licensing regime very similar to that for Australian Financial Services licences (AFSLs). It intends to update its AFS *Regulatory Guide 104* (RG 104) to include ACL licensees.

Given the ACL licensing regime will be mechanically similar, if not identical, to that for AFSL s, it would be expedient to streamline the licensing process for credit providers that are current AFSL holders given that they already meet the majority of the licensing requirements, particularly those involving conduct, resourcing and financial standing.

Such streamlining will reduce costs to our members and to ASIC and will allow for a more time efficient process. As ASIC will be required to process thousands of licensing applications in a relatively short time-frame, any reduction in processing time, resources and costs will result in benefits to licensees and the regulator.

Recommendation:

The AFC recommends:

- ACL licences for AFS licensees be streamlined to avoid duplicate processes, to increase processing efficiency and to reduce costs

6. Concurrent jurisdictions - State legislative rights

The AFC is concerned that the States retain powers to legislate in the credit area. This defeats the purpose of national legislation as it creates the potential for differing and multiple regulatory compliance requirements.

Some States have already indicated they intend to proceed with legislation impacting on credit legislation, such as the recent application of unfair contract terms to credit contracts under the Victorian *Fair Trading Act.* While the concurrent power is based on an agreement that the States will only implement legislation that is “not inconsistent” with the NCCP Act, the readiness of those jurisdictions to influence the credit regime is already apparent.

This undermines the certainty and regulatory consistency intended by the transfer of credit to the Commonwealth. The potential outcome is any State or Territory depending on its economic size, could, in effect, regulate nationally by introducing its own credit-related legislation. Such an outcome has the potential to create a less workable credit regulatory environment than one the NCCP Bill seeks to replace. Such cascading of regulation will only add to credit transaction costs.

Recommendation:
The AFC recommends:

- The Commonwealth only has the power to legislate in the credit area.

1. List of AFC Members

AFC MEMBER COMPANIES

Advance Business Finance
Alleasing
American Express
Australian Finance & Leasing
Australian Motor Finance
Automotive Financial Services
Bank of Queensland
BMW Australia Finance
Capital Finance Australia
Caterpillar Finance Australia
CBA Asset Finance
Centrepoint Alliance
CIT Group
Citigroup
CNH Group
Collection House
Credit Corp Group
De Lage Landen
Dun & Bradstreet
Enterprise Finance
Esanda Finance
Flexigroup
Ford Credit Australia
GE Capital
General Motors Acceptance Corp
HP Financial Services
HSBC
Indigenous Business Australia
International Acceptance
John Deere Credit
Key Equipment Finance
Komatsu Corporate Finance
Leasewise Australia
Liberty Financial
Lombard Finance
Macquarie Group
Max Recovery
Members Equity Bank
Mercedes-Benz Financial
Nissan Finance
Once Australia
PACCAR Financial
Profinance
RABO Equipment Finance
RAC Finance
RACV Finance
Retail Ease
Ricoh Finance
RRAustralia
Service Finance
Sharp Finance
SME Commercial Finance
St. Andrews Finance
St. George
Suncorp
Suttons Motors Finance
The Leasing Centre
The Rock Building Society
Toyota Financial Services
Veda Advantage
Volkswagen Financial Services
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Westpac
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CHP Consulting
Clayton Utz
Corrs Chambers Westgarth
Finzsoft Solutions
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07/09