



22 July 2009

The Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: economics.sen@aph.gov.au

Dear Mr Hawkins

**Inquiry into the National Consumer Credit Protection Bill 2009 and
Related Bills – Margin Lending Regulation**

The Australian Financial Markets Association (AFMA) wishes to make a submission to the Committee's inquiry into the new national consumer credit regulatory regime. The matter of interest to us is Schedule 1 of the *Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009*, which deals with the regulation of margin lending. AFMA's members substantially account for the mainstream margin loan business written in Australia. They are also the major issuers of instalment warrants, some of which are affected by the legislation.

1. Policy Approach

AFMA supports the Government's policy objectives in introducing the Bill to regulate margin lending under a single, national regime. Our members believe this will provide better protection to retail investors and assist their business by establishing minimum industry standards (including responsible lending) and promoting investor confidence in the product. AFMA's members involved in the margin loan market aim to operate to a high standard and service their clients in an efficient and responsible manner. This necessarily includes procedures that support effective disclosure, proper margin call notification procedures and good lending practices.

Used appropriately, margin loans offer significant opportunities to investors seeking to grow their wealth and manage their financial affairs. Access to leverage enables investors to optimise the composition and size of their investment portfolio. Increasing the available pool of investment funds also enables investors to build a more diversified portfolio. Therefore, it is important to provide a regulatory framework for this business that allows

Australian Financial Markets Association

ABN 69 793 968 987

Level 3, Plaza Building, 95 Pitt Street GPO Box 3655 Sydney NSW 2001

Tel: +612 9776 7955 Fax: +61 2 9776 4488

Email: info@afma.com.au Web: www.afma.com.au

investors to access margin loans with confidence and enables lenders to manage their risk and service their clients in a cost effective manner.

2. Investor Regulatory Protections

The measures in the Bill provide for a significant improvement in consumer protection by introducing minimum operating standards that must be applied by all margin lenders, whether they are mainstream providers or otherwise, and requiring related financial advice to be soundly based and provided in a competent manner. The Bill also provides a framework for ASIC to ensure that margin lenders have adequate risk management systems, financial resources and other operating capabilities to provide margin loans in a secure, efficient and fair manner. This will close a gap in the regulatory system that last year left investors exposed to providers of non-standard margin loans whose business models were deficient. The Bill will ensure that the regulatory system provides consistent regulatory protection between the financial advice and loan provision phases of margin lending, where advice is sought independently of the margin loan provider.

In short, we believe the broad approach taken in the Bill will improve investor protection and, thus, help investors to make sound investment decisions and take responsibility for them on an assured basis.

3. Detailed Regulatory Provisions

We note that the Department of Treasury managed a helpful and effective consultation process during the preparation of the Bill, which identified several improvements that will enhance the practical application of the law. Notably, the decision to give margin lenders a 12 month transition period, rather than the three months originally proposed, and the exclusion of most wholesale business from the Bill's measures were important enhancements.

With the main policy issues resolved, AFMA's interest primarily lies in the technical design of the law and the practical issues that it may present to lenders and their clients when it becomes operational. However, a complete assessment of the regulatory regime for margin lending cannot be made until the proposed regulations are released for comment, as they are integral to its operation. AFMA will use the consultation process on the regulations to promote law that is well-targeted in protecting retail investors and is proportionate in the requirements it places on the industry.

The regulations may cover a range of matters. For example, they may prescribe particular situations in which a margin lending facility is taken to be unsuitable, as well as situations where it is taken not to be unsuitable, for a client. They may also refine the range of investors covered by the regulatory regime and the content of periodic statements required under s.1017D of the Corporations Act.

Some of the matters that require further consideration during the consultation process for the regulations include:

- ***Exclude capital protected loans and listed products***

There is no policy basis to bring loans within the margin lending regime where recourse is limited to the assets financed by the loan. This is because the investor's potential losses are limited to their initial investment and the loan amount is effectively capital protected. The same principle applies to other loan arrangements that afford the investor a high level of capital protection. With respect to listed products, it is impossible for a product issuer to conduct an unsuitability assessment on a product that is traded on the secondary market, as the issuer would be unaware of the details of potential buyers.

However, the provisions in the Bill would capture these products in some instances and we do not know if a regulation will be made to address this problem. This issue affects many common instalment warrant products that are both capital protected and listed, as well as unlisted capital protected products. Typically, these products are derivatives and are already adequately regulated under Chapter 7 of the Corporation Act (including Product Disclosure Statement requirements) and, in the case of listed products, are subject to the Australian Securities Exchange's rules.

The focus of the regulatory regime should be tightened through a regulation to exclude these products from the regime and better direct regulatory resources to objectives of the Bill. In its report, the Committee could promote better quality and targeted legislation by drawing the Government's attention to the need for this refinement.

- ***Personal Advice***

There is a need for clarity that the margin lending provisions do not create a situation where a margin lender is at risk of being considered to have given personal advice under the law, merely because it has made inquiries to satisfy its responsible lending obligations. The desired certainty for margin loan providers and their clients can be achieved by making an amendment to the definition of personal advice in section 766B(3) of the Corporations Act, similar to that made to avoid actions taken to comply with the Know-your-Customer rules of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 being treated as personal advice.

4. Concluding Comments

As outlined above, regulations have to be made to complete the operational elements of the new regulatory regime. The Committee can assist the regulatory development process by signalling its desire to the Government for these elements to be completed in a manner that is proportionate to the regulatory risks involved and takes account of the cost of the additional regulation to the industry and investors.

Thank you for considering this submission and we are available to assist the Committee further at your discretion.

Yours sincerely

A handwritten signature in black ink that reads "Duncan Fairweather". The signature is written in a cursive, slightly slanted style.

Duncan Fairweather
Executive Director