



OPTOMETRISTS
ASSOCIATION AUSTRALIA

Optometrists Association Australia
Submission to the Senate Inquiry into the
Consumer Credit Bills

July 2009

Introduction

This submission relates to the *National Consumer Credit Protection Bill 2009 (the Bill)* and the definition of ‘credit assistance’.

Optometrists Association Australia (Optometrists Association) is the peak professional body representing the interests of 96 per cent of practising optometrists in Australia. As part of our established membership benefits scheme, Advantage Program, the Association has negotiated a partnership arrangement with American Express.

This partnership arrangement allows our members to apply for an Optometrists Association Australia branded American Express card. In effect, Optometrists Association provides an introduction to American Express to members of the Association. This introduction does not involve the Association making any assessment about the suitability of any American Express products or the recommendation of any specific American Express product for the member however we acknowledge that the introduction is in some way an implicit recommendation of American Express products to our members.

In return for this introduction, the Association receives a commission based on the number of cards acquired and the spend per card. This revenue is important for the management of the Association which is a not-for-profit organisation, established as a company limited by guarantee. The Association currently has 3919 members.

Our relationship with American Express is not an uncommon and we are aware that there are other similar arrangements in place with other entities, some of which are also not-for-profit.

Definition of ‘credit assistance’

The Association’s concern relates to the definition of ‘*credit assistance*’ contained in the *National Consumer Credit Protection Bill (DEF8 Meaning of credit)* and the relevant sections of the Bill’s Explanatory Memorandum. See Appendix One for the relevant sections.

This broad definition and the text contained in the Explanatory Memorandum has the potential to regulate the marketing communications which Optometrists Association send to members which promote our membership advantages, including our partnership with American Express.

For example, the Explanatory Memorandum states:

1.27 The definition [of credit assistance] is intended to regulate every person who may be an intermediary between the consumer and the credit provider. Innovations in credit product design and delivery now mean that a consumer may pass through a number of hands between the first person they deal with and the lender, and may be uncertain as to the roles or functions of all these different parties. It is intended that the licensing requirements will apply to all these persons.

...

1.29 A person can act as an intermediary either directly or indirectly. The intention is to require a person to hold a licence even where they may have no direct or face-to-face contact with the consumer, but, nevertheless act as an intermediary by preparing or passing on information, and their role is wholly or partially to secure a provision of credit or a lease.

The broad drafting of the Bill and clear statements in the Explanatory Memorandum cast a very wide net with respect to which relationships and business models are caught by the credit licencing system proposed in the Bill. Optometrists Association does not provide personal advice to members about the suitability of these products or whether they have the capacity to repay any credit that they may seek from the credit provider. We act as a referrer.

As you will be aware, the Treasury consulted on the draft Bill, the Explanatory Memorandum and the Regulations earlier this year. The Exposure draft of the *National Consumer Credit Protection*

Regulations 2009 contained an exemption under the heading “Activities exempt from requiring a licence”. See Appendix Two for the relevant text. This exemption appears to provide an exemption for the relationship the Association has with American Express however it is not clear to us why the Bill and Explanatory Memorandum has such strong, unequivocal language which clearly indicates an intention “...to regulate every person who may be an intermediary between the consumer and the credit provider.”¹

The Regulations will not be tabled in a final form until after the consumer legislation is passed.² The Association therefore has no assurance that the exemption in the Exposure draft Regulations will be in the final form of the regulations, tabled in Parliament.

We note that as a result of discussion following the Exposure Draft consultation, in the Minister’s Second Reading Speech and Press Release, there was specific mention of an exemption which will be given to ‘point of sale retailers’ that facilitate credit assistance. This exemption will be reviewed within 12 months of the legislation being enacted. It is not clear how wide the ‘point of sale retailers’ exemption will be defined and whether this is in addition to, or instead of the exposure draft regulations.

Our relationship with American Express where we suggest to members that they consider a credit product provided by American Express could be interpreted as providing substantially less ‘credit assistance’ to a consumer than a retailer would be providing at the point of sale.

There does not appear to be any additional benefit to the consumer of including a professional association such as ours in these reforms given our limited involvement in referring members to American Express. American Express will be required to hold a Consumer Credit Licence and will have all the legal responsibilities surrounding the issuing of credit which is appropriate as they are a company specifically established to provide credit services. A not-for-profit professional Association such as the Optometrists Association is not.

Therefore we seek a refinement in the definition of ‘credit assistance’ and a statement in the Explanatory Memorandum clearly setting out that referral-type relationships are not intended to be covered in the *National Consumer Credit Protection Bill 2009*.

Consequences of not agreeing to an amendment

If an amendment to the Bill is not agreed, in order to continue to undertake our Advantage Program marketing communications and our relationship with American Express, the proposed Bill could be interpreted to require Optometrists Association to either hold an Australian Credit Licence (ACL) or be appointed a credit provider as a credit representative under their ACL.

If the Association is required to have an ACL or be appointed a credit representative, this would create an unnecessary compliance burden on our professional Association. The Association is not set up to have an ACL or to act as a credit representative so we would have to cease our relationship with American Express. The revenue associated with the relationship would therefore end and as a small not-for-profit professional Association, this loss of revenue would be significant.

Recommendation

Optometrists Association recommends that the definition of ‘credit assistance’ be re-drafted to ensure that business models which involve a referral-like relationship as described above are firmly outside the definition of ‘credit assistance’ in the Bill and a clear statement set out in the Explanatory Memorandum to the Bill in this regard.

¹ Paragraph 1.27 of the Bill’s Explanatory Memorandum.

² See Treasury webpage: “Regulations: Regulations to the Credit Bills will be tabled in Parliament after the enactment of the Credit laws.” <http://www.treasury.gov.au/consumercredit/content/legislation.asp>

8 Meaning of *credit assistance*

A person provides *credit assistance* to a consumer if, by dealing directly with the consumer or the consumer's agent in the course of, as part of, or incidentally to, a business carried on in this jurisdiction by the person or another person, the person:

- (a) suggests that the consumer apply for a particular credit contract with a particular credit provider; or
- (b) suggests that the consumer apply for an increase to the credit limit of a particular credit contract with a particular credit provider; or
- (c) suggests that the consumer remain in a particular credit contract with a particular credit provider; or
- (d) assists the consumer to apply for a particular credit contract with a particular credit provider; or
- (e) assists the consumer to apply for an increase to the credit limit of a particular credit contract with a particular credit provider; or
- (f) suggests that the consumer apply for a particular consumer lease with a particular lessor; or
- (g) suggests that the consumer remain in a particular consumer lease with a particular lessor; or
- (h) assists the consumer to apply for a particular consumer lease with a particular lessor.

It does not matter whether the person does so on the person's own behalf or for or on behalf of another person.

Extract of Explanatory Memorandum:

1.22 A person will be in the second category of persons who engage in credit activities, and will 'provide credit services' where they either:

- provide credit assistance; or
- act as an intermediary.

[Part 1-2, Division 3, section 7]

1.23 A person provides 'credit assistance' to a consumer where they:

- suggest that the consumer:
 - apply for a provision of credit (in respect of either a particular credit contract with a particular credit provider or a particular lease with a particular lessor);
 - apply for an increase to the credit limit of a particular credit contract with a particular credit provider; or
 - remain in their current credit contract or lease; or
- assist the consumer to:
 - apply for a provision of credit (in respect of either a particular credit contract with a particular credit provider or a particular lease with a particular lessor); or
 - apply for an increase to the credit limit of a particular credit contract.

[Part 1-2, Division 3, section 8]

1.24 A person will provide credit assistance regardless of whether they deal directly with the consumer or with the consumer's agent. This will cover the situation where, for example, the person is assisting an elderly parent to apply for a credit contract, but is dealing with their children.

1.25 The definition applies to situations such as:

- finance brokers where they recommend a particular credit contract or lease; and
- a person who suggests a consumer apply for a particular credit contract or lease, but does not necessarily proceed to arrange the credit contract for the consumer.

6.3 Activities exempt from requiring a licence

- (1) for @LIC410 (b) of the Act, this regulation exempts certain credit activities (an exempt credit activity) from:
 - (a) section LIC75 of the Act (which deals with the requirement to be licenced); and
 - (b) definitions in the Act, as they apply to references in the provisions referred to in paragraph (a); and
 - (c) regulations or other instruments made for the purposes of any of the provisions referred to in paragraphs (a) and (b).
- (2) A credit activity is exempted if:
 - (a) The activity consists only of:
 - (i) A person (person 1) informing another person (person 2) that a licensee or a representative of the licensee, is able to provide a particular credit activity or a class of credit activities; and Person 1 giving person 2 information about how person 2 may contact the licensee or representative;
 - (b) As the time the activity is engaged in, person 1 discloses to person 2:
 - (i) Any benefits including commission, that person 1 or an associate of person 1, may receive in respect of the activity; and
 - (ii) Any benefits including commission that person 1 or an associate of person 1, may receive that are attributed to the activity;
 - (c) The disclosure mentioned in paragraph (b) is provided in the same form as the information mentioned in paragraph (a).