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Mr John Hawkins
Committee Secretary
Senate Economics References Committee
Parliament House
Canberra ACT 2600

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

Dear Mr Hawkins

Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010

The Australian Finance Conference (AFC) appreciates the opportunity provided by the Committee to participate in its Inquiry on the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (the No. 2 Bill). We have been pleased to have participated in the policy development of these reforms including providing comment on the TPA Amendment (ACL) Act (No.1) implementing the first stage of this reform. The introduction of the No. 2 Bill, as the second stage of this reform, provides further opportunity in this regard.

By way of background, the AFC is the national finance industry association with a broad range of members that provide financial services to the consumer and commercial markets; including to enable customers to finance the acquisition of goods or services. The consumer protection provisions currently contained in the Trade Practices Act (TPA), the Australian Securities and Investment Act (ASIC Act) and the state equivalents are relevant to this business. The majority of AFC members operate on a national basis and have had to put in place a complex compliance framework to take into account these laws including intra-jurisdictional variations. As a matter of principle, AFC supports the reform of the law agreed to by COAG to create a single, national consumer law for Australia to replace this piecemeal approach. Consumers will benefit from a uniform law not subject to artificial geographic boundaries, as will government administrators and industry, including finance.

Our submission has focussed on the following aspects of the No. Bill:

- Firstly, because of their particular relevance to the financial services provided by AFC members, the amendments to the ASIC Act (contained in No. 2 Bill Schedule 3).
- Secondly, a general consideration of the Australian Consumer Law (to be enacted as Schedule 2 to the newly named *Competition and Consumer Act*) set out in Schedule 1 of the No. 2 Bill and consequent amendments to the TPA – with a particular focus on:
 - the new consumer guarantees and the linked credit provisions; and
 - the unsolicited consumer agreement provisions

in the context of our Members' provision of finance to acquire equipment or services (including potentially on an unsolicited basis eg via telemarketing).

Our submission consists of two parts; a summary of our general comments are followed by the issues we have identified together with a recommendation for resolution, where required.

Part 1: GENERAL COMMENTS

National Uniformity

We understand that the intention is that the generic ACL will apply as a single, national consumer law that is based on existing consumer protection provisions of the TPA and incorporates appropriate amendments reflecting best practice in State / Territory legislation. Further, that under the IGA the Australian Government and governments of the states and territories are to repeal or modify any laws which duplicate or are inconsistent with the ACL and, as a consequence, the states and territories will undertake the necessary legislative action to achieve this outcome (as is the Australian Government under No. 2 Bill and the No. 1 Act). We also acknowledge the need to maintain consumer protection provisions within the ASIC Act in relation to the supply of financial products or financial services.

However, we note that under the terms of the agreement that it is intended that industry-specific legislation will continue to apply in some areas to the extent that it does not duplicate or is inconsistent with the ACL; presumably at the state / territory level. We are concerned that this ability is not used by the states or territories to undermine the policy objectives of the ACL; namely:

- create national consistency; and
- enhance the current level of consumer protection while minimising business compliance costs.

AFC Comment

The objectives of national uniformity under the ACL should not be put at risk through use by the states or territories of their ability to continue to regulate industry-specific areas.

Definition of Consumer

We understand that the ACL consumer protection provisions are available to any person (without qualification) unless restricted to apply to a particular class of consumer as defined (eg under ACL s. 3). Some provisions are deliberately confined on the basis that it is not appropriate to extend the protection afforded by the relevant provision more broadly (eg ACL s. 3 Part 3-2 Div 1 consumer guarantees). We also note that the proposed definition of consumer would appear to be narrower than the definition that appears in the TPA. We acknowledge that this is likely to have been the outcome of a negotiated position taking into account interstate variations in the term in addition to the TPA definition. In this regard, we also note the variation in the definition in the context of the ASIC Act.

AFC Comment

While acknowledging the variation in definition, we appreciate that there is generally a sound policy basis to justify it.

Delineation of Application of Regulation to Financial Services – ASIC Act vs. ACL

We understand that the policy intention is that the ACL will regulate the conduct of corporations, except in relation to financial products and the supply, or possible supply of services, that are financial services (ExM Chapter 17, in particular 17.9) Financial products

and services are dealt with (and to continue to be dealt with) under the ASIC Act. However, the linked credit provisions under the ACL will apply.

AFC Comment

As a matter of policy, we support this position and understand that it has been reflected in amendments to Divisions 1 and 2 of Part XI of the CCA.

Part 2: SPECIFIC ISSUES

No. 2 BILL - SCHEDULE 3 – Amendments of the Corporations Legislation – ASIC Act 2001 & Corporations Act 2001

Subject to our general comments about the interface of the ASIC Act and the ACL and variation in definition of consumer, we do not propose to comment on the amendments to the ASIC Act contained in the No. 2 Bill. We understand that the amendments are consequent on the review and amendment of the TPA provisions in their inclusion in the ACL and are intended to align the consumer protection provisions of the ASIC Act with the ACL.

AFC Comment

The amendments largely reflect the outcome of consultation in which comments, including from AFC, were taken into account.

NO. 2 Bill SCHEDULES 1 & 5 – The ACL & Other Amendments to the TPA

No. 2 Bill Schedule 1 – CCA Schedule 2 ACL - Chapter 3 Part 3-2 Division 1 Consumer Guarantees & Chapter 5-4 Remedies relating to Consumer Guarantees

Policy

The ACL is to contain a single-set of statutory consumer guarantees (supported by statutory remedies) that will operate uniformly on a national basis. It is to replace provisions that imply conditions and warranties into consumer contracts that are currently within TPA Part V Div 2 and equivalent State and Territory FT and related Acts and not uniform. The intention is to modernise and use clear language to describe the various statutory guarantees, while, in substance, enacting the same rights and obligations that would apply under the current implied terms regime in the TPA. The intention is also to limit the application or availability of the guarantees to a defined class of consumers (ACL s. 3).

AFC Analysis of Proposed Amendments

ACL Part 3-2 Division 1 Consumer Guarantees coupled with Part 5-4 Remedies relating to guarantees, largely achieve the policy objectives of this aspect of the reform. The guarantee provisions are a modernised and more easily understood version of the TPA implied terms regime. We recognise that the class of consumer that has access to these rights (and the remedies which flow from them) is narrower than the class defined under the TPA. However, we acknowledge this is likely to be a reflection of the inter-jurisdictional variations (eg under the TPA and state / territory FT and related Acts) and possibly the need for compromise to achieve a uniform outcome. We also note that the right of a consumer to terminate a contract for the supply of services that are connected with rejected goods would not appear to apply to services regulated under the ASIC Act (eg lending of money). However, the financial service provider would be subject to any linked credit liability that may arise under ACL Part 5-5 Division 1 (discussed below).

Conclusion & AFC Recommendation

These reforms should assist consumers (as defined under the ACL) better understand the statutory guarantees available to them in contracts for the supply of goods or services and consequently be in a better position to exercise the remedies also provided.

No. 2 Bill Schedule 1 – CCA Schedule 2 ACL Chapter 5 Part 5-5 Liability of Suppliers & Linked Credit Providers

Policy

The ACL applies to financial services in relation to the application of Part 5-5 Liability of Suppliers & Credit Providers. The ACL linked credit provisions operate in tandem with the NCC linked credit provisions. An additional provision is to be included in the ACL (namely s. 286), the effect of which is that if a consumer has a right to terminate a linked credit contract under the NCC s. 135, then s/he is entitled to recover the same amount in proceedings under the ACL in relation to both the credit contract and the related sale contract as if the action were taken under NCC s. 135.

AFC Analysis of proposed amendments

Implementation of the policy is contained in ACL Part 5-5 Division 1 and CCA Part XI Division 1 and, in particular, s. 131A. With the exception of the new provision (s. 286) in the ACL, the linked credit provisions, in substance, appear to largely replicate the current TPA provisions. The new provision does not appear to give the consumer a right to more than they would be statutorily entitled to under the NCC, merely enables a streamlined and effective litigation process to resolve issues which cross between the ACL and the NCC.

Any change in potential application would again stem from the restriction of the term consumer to a defined class in the definition under the ACL (s. 3) which varies from that covered under the TPA (s. 4B).

AFC Comment

Beyond acknowledging the variations we have no comment to make on these provisions.

No 2 Bill Schedule 1 – CCA Schedule 2 ACL Chapter 3 Part 3-2 Division 2 - Unsolicited consumer agreement provisions – direct selling & telemarketing

Issue – Unsolicited Consumer Agreements - Inconsistent approach between related NCC-regulated credit contracts and commercial credit contracts

Issue

As presently drafted, ACL Chapter 3 Part 3-2 Division 2 may impose a greater compliance framework on a commercial credit arrangement with a sole trader or corporate customer than a NCC-regulated arrangement

Policy

The ACL will include a single, national law covering unsolicited sales practices, including door-to-door selling, telephone sales (to the extent not already covered by the DNCR act) and other forms of direct selling that do not take place in a retail context. The ACL is intended to regulate corporations, except in relation to financial products and the supply of financial services (other than the ACL Part 5-5 Linked credit provisions). Financial products and financial services are to be regulated under the ASIC Act. Consumer will generally encompass all persons, however, for the unsolicited consumer agreement provisions (ACL

Part 3-2) a defined class of consumer is relevant. The defined class is similar to the class covered under the TPA and includes a person acquiring a commercial road vehicle. The inclusion of a commercial road vehicle has a sound policy basis. Any current state or territory regulation of unsolicited sales will be repealed and replaced by the ACL.

AFC Analysis; Proposed Amendments

As a starting point, ACL Part 3-2 Division 2 Unsolicited consumer agreements – is intended to implement this policy. The carve out for regulation of financial services is dealt with in CCA Part IX Division 1, in particular s. 131A. We anticipate action by the states and territories to repeal relevant provisions relating to unsolicited consumer agreements within their Acts and replace them with the ACL provisions.

Part 3-2 Division 2 applies to an agreement with a “consumer” as defined in the ACL (s. 3). The definition potentially applies to individuals (in a personal or commercial sense) and companies. It distinguishes between an acquisition of goods and an acquisition of services. A supply of goods turns on the type of good (eg regulated goods being of a kind ordinarily acquired for personal or domestic use or consumption) and what the acquirer proposes to use it for (eg goods of a domestic nature acquired for re-supply or transformation in a commercial manufacturing process are exempt). In line with the current TPA provision (TPA s. 4B) goods have also been broadly defined to include a vehicle used for transporting goods on a public road (eg a truck). Therefore the acquisition by an individual or a company of a truck would appear to meet the definition of an acquisition by that individual / company as a consumer.

An agreement relating to the acquisition of the truck may meet the definition of an unsolicited consumer agreement and be subject to the ACL, in particular Part 3-2. Part 3-2 details a compliance framework that would need to be met. It also gives the consumer the right to terminate the agreement (s. 82). Any related contracts or instruments are also rendered void. Therefore, for example, should the acquisition be made on credit, then the credit contract would appear to be a related contract. However, if the credit contract meets the NCC s. 127(2) definition of a tied continuing credit contract or the NCC s. 127(3) definition of a tied loan contract, it is carved out of the definition and would not be regarded as a related contract. As a consequence, should the agreement to sell a truck on credit meet the NCC definitions, the termination of the truck sale agreement would not have the effect of terminating the NCC-regulated credit agreement.

Whether credit is NCC-regulated turns on the character of the debtor (ie an individual or a strata corporation) and the purpose for which the credit is obtained (ie a domestic / household purpose or residential investment property purpose). As a consequence, if the customer in the above example were a sole trader acquiring the truck for a commercial purpose or it was acquired by a corporate customer, the credit would not be NCC-regulated.

Conclusion and AFC Recommendation

As a consequence, as currently drafted the proposed Part 3-2 Division 2 would appear to impose a more significant compliance framework on the provision of commercial credit for our Members and their intermediaries (eg finance brokers) than if that credit were NCC-regulated. It is not uncommon for our Members (directly or through finance brokers) to contact existing commercial customers (ie sole traders or companies) (including via phone) on an unsolicited basis to enquire whether they would like to upgrade financed goods (eg upgrade their truck) and take out finance for the upgrade. The broad definitions including of negotiation, unsolicited consumer agreement and consumer would appear to potentially

capture the sales agreement and related commercial credit agreement that might follow from this contact.

As a matter of policy, we suggest that an outcome under ACL Part 3-2 that would impose a greater compliance burden on a commercial arrangement with an individual or a corporate customer than a consumer arrangement could not have been intended. We acknowledge that provision has been included to exempt through regulation agreements that would otherwise meet the definition of an unsolicited consumer agreement. While this may be a means of addressing this issue, our preference would be for the exemption to appear in the provisions of the ACL.

AFC Recommendation

For this reason, we submit that the current carve out of NCC-regulated credit be expanded to include an ASIC-regulated financial products or financial services.

Thank you, again, for the opportunity to provide comment on the No.2 Bill. We would be happy to provide additional information or clarification of the points we have raised, should the Committee require. Please feel free to contact me (ron@afc.asn.au) or Helen Gordon (helen@afc.asn.au), Corporate Lawyer, or either through 02 9231 5877 in this regard.

Kind regards.

Yours truly,

A handwritten signature in black ink, appearing to read 'Ron Hardaker', written in a cursive style.

Ron Hardaker
Executive Director

Attachments:

1. AFC Comments on TPA Amendment (ACL) Bill (No. 2) 2010
2. AFC Membership List



AFC MEMBERSHIP LIST

<p>Advance Business Finance Alleasing American Express Automotive Financial Services Bank of Queensland BMW Australia Finance Capital Finance Australia Caterpillar Financial Australia Centrepoint Alliance CIT Group Citi Australia CNH Capital Collection House Commonwealth Bank of Australia Credit Corp Group De Lage Landen Dun & Bradstreet Enterprise Finance Solutions Esanda FlexiGroup Ford Credit GE Capital Genworth Financial GMAC HP Financial Services HSBC Bank Indigenous Business Australia Institute of Mercantile Agents International Acceptance John Deere Credit Key Equipment Finance Komatsu Corporate Finance Leasewise Australia Liberty Financial Lombard Finance Macquarie Equipment Rentals Macquarie Leasing Max Recovery Australia</p>	<p>Mercedes-Benz Financial Services Nissan Financial Services Once Australia t/as My Buy PACCAR Financial Provident Capital Profinance RABO Equipment Finance RAC Finance RACV Finance Resimac Limited Retail Ease Ricoh Finance RR Australia Service Finance Corporation Sharp Finance SME Commercial Finance Solar Financial Solutions St. George Bank Suncorp Suttons Motors Finance The Leasing Centre The Rock Building Society Toyota Financial Services United Financial Services Veda Advantage Volkswagen Financial Services Volvo Finance Westlawn Finance Westpac Wide Bay Australia Yamaha Finance <u>Professional Associate Members:</u> Allens Arthur Robinson Bartier Perry CHP Consulting Clayton Utz Dibbs Barker Henry Davis York</p>
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