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Senator Annette Hurley
Chair
Senate Economics – Legislation Committee
PO Box 6100
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Dear Senator Hurley

I am writing to you following the Australian National Retailers' Association's (ANRA) appearance before the Senate Economics Legislation Committee's inquiry into the National Consumer Credit Protection Bill 2009.

During ANRA's appearance, a member of the Committee referred to Treasury advice to the Committee which suggested, in effect, that retail staff were already exempt from the Bill, obviating the need for a specific exemption for retailers. In discussions with a Treasury official after our evidence, it became clear that Treasury assumes that the general clerk/cashier exemption contained in Regulation 23(7) accompanying the Bill addresses retailers' concerns.

After the hearings, ANRA sought further legal advice on the scope of the Bill. The legal advice confirms that the clerk/cashier exemption is a very limited exemption which would NOT apply to retail staff promoting sponsored credit cards or retail point of sale finance. In support of this advice, I would refer the Committee to the Australian Securities and Investment Commission's (ASIC) narrow definition of the comparable clerk/cashier exemption in the Corporations Act 2001: this definition excludes activities other than routine administration and processing. A summary of our legal advice is attached as an appendix to this letter.

For these reasons, ANRA stands by its advice to the Committee that, without the retail exemption provided by the Government, retail staff would be captured by the Bill. Without a retail exemption, retail staff will need to be appointed representatives of a license holder and hold the relevant training or qualifications required by ASIC. A retail staff member will need to produce a written assessment of the appropriateness of each product for each customer.

Activities which would qualify as credit assistance under the Bill include:

- A staff member suggesting to customers that they consider applying for a store credit card or point-of-sale finance;
- A staff member advising customers about the nature of a store credit card or point-of sale finance, including its features and benefits;
- A staff member suggesting that customers compare the features and benefits of a store credit card with other credit cards in the customer's purse or wallet; and
- A staff member helping a customer to complete an application form including helping customers to make choices and select options within the form.

Should a customer wish to apply for credit, a staff member would need to conduct a detailed interview with the customer to obtain personal financial information (information which could not be verified by the staff member) and then, on the basis of that limited information, make an assessment that the credit option is "not unsuitable". The assessment would require the staff member to have financial expertise.

Retailers would need to train thousands of staff to meet ASIC requirements more appropriate for professional advisers in the financial sector. A PriceWaterhouseCoopers study estimates that 166,723 staff engaged in retail point of sale finance (excluding sponsored credit cards) would need to be trained. The study estimates that the regulations would add \$284 to each point of sale finance transaction. Similar costs would apply to other businesses offering deferred payment options, such as dentists, veterinary surgeons and tradespeople. These costs would inevitably have to be passed on to customers.

Placing these new requirements on retail staff will not improve consumer protection. Given the very limited information to hand for verification of customers details, any assessment conducted in store will be of little value and in any event would just duplicate the assessment by the credit provider. The credit provider will have access to more extensive, reliable information than a shop assistant. The credit provider will also have the expertise to guarantee a thorough, professional assessment. As the party which decides whether to extend credit or not, the credit party should be responsible for the credit assessment.

Unintended Consequences

ANRA is very concerned that these substantial changes in regulation are being proposed without a proper cost-benefit analysis. The Treasury has not provided evidence that there is likely to be a benefit from extending regulation beyond the activities of credit providers (and traditional finance brokers) that is necessary and proportionate to the new compliance burden on retailers that perform a comparatively minor role in providing credit. Such a significant increase to the regulatory burden on business deserves a demonstrated case that there is a net public benefit to be achieved.


In addition to the higher credit costs for customers noted above, ANRA would highlight two other significant costs arising from the new legislation: consumers losing access to competitive credit options and the subsequent loss of retail sales and jobs.

Reducing the capacity of retailers to offer credit will force customers to use other credit options which will be, in many cases, less attractive. Customers would lose the benefits provided by sponsored credit cards. The credit card market is already dominated by the four major banks which hold more than 75 per cent market share. Imposing costly regulation on retailers will put at risk one of the few competitive options to bank credit cards available to consumers. Co-branded credit cards are just beginning to make an impact in the Australian market but elsewhere, such as the United States, these cards account for about 45 per cent of the cards in circulation. There is a clear trend in Australia in favour of retail partnered cards because of the additional value offered to consumers. ANRA believes that this trend is promoting greater competition and should not be impeded.

Restricting access to credit for customers who can afford to borrow to make purchases will have a significant impact on retail sales. A large proportion of retail sales are linked to sponsored store credit cards and point-of-sale finance. For example, many stores can generate more than 50 per cent of sales from point-of-sale finance. In the current economic conditions, which have seen the loss of more than 34,000 full-time positions over the last twelve months, it would be dangerous to add to the pressure on employers who are struggling to retain staff.

In light of the very clear and significant risks to retail activity and jobs, and the very uncertain benefits for consumers, ANRA urges the Committee to support a permanent exemption for retail staff under the national consumer credit legislation. The focus of regulation should be placed firmly on the credit provider which is best placed to assess whether a credit option is suitable.

Yours sincerely



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CEO

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Australian National Retailers Association
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3 September 2009

Dear Sir

National Consumer Credit Protection Regulations

1 Scope

You have asked us to advise briefly on the relevance for the members of your association of the proposed exemption of ordinary activities of clerks and cashiers that is contained in Regulation 23(7) of the exposure draft of the National Consumer Credit Protection Regulations that was released on 14 August 2009.

In particular you have asked us to consider if typical activities of retail industry employees in connection with the offering of credit would be exempted from the operation of the National Consumer Credit Bill 2009 (NCCPB) by the proposed Regulation 23(7).

2 Advice

In summary, we consider that:

- some activities within the role of a retail industry employee would be covered by this exemption; but
- a significant number of important tasks currently carried out by retail industry employees would not be exempted (and so would be subject to the NCCPB including its licensing regime).

3 Context:

The NCCPB has had its second reading in the House of Representatives. For the purposes of the advice we assume that in all material respects the NCCPB will remain in its present form.

On that basis the activities of retail industry employees will be "credit activities" as defined in the NCCPB, and will be regulated.

Draft Regulation 23(7) exempts activities of clerks and cashiers in the ordinary course of their duties. There is no definition of clerks or cashiers in the draft Regulation nor is there any guidance to interpretation of these terms or what may be the nature of their duties in the ordinary course. To interpret the scope of the exemption we therefore need to look for guidance from sources external to the NCCPB and the draft Regulations.

4 Defining the key terms of the exemption:

Butterworths' Australian Legal Dictionary defines 'cashier' as follows:

"A person who receives and disburses money in a business institution. In Australia and in the United States, bank's cashiers are called tellers. In England

the term cashier is used. In the United States, the term cashier in banks denotes a senior officer responsible for the custody of the bank's assets and whose signature is required on all documents. Hence, the term 'cashier's cheque'".

We consider that the term cashier should be given its ordinary meaning; that is, a person who receives and disburses money in a business institution.

Butterworths' Australian legal dictionary does not provide a definition of 'clerk'.

Relevantly (in its fourth explanation of the definition of 'clerk') the Shorter Oxford English Dictionary (quoting from a version last revised in 1993) defines 'clerk' as follows:

"A person employed in a bank, office, shop etc, to make entries, copy letters, keep accounts and files etc."

It also notes the following definition of 'clerk' as a North American usage:

"An assistant in a shop or hotel".

Relevantly, the Macquarie Dictionary (2nd Edition) defines 'clerk' as follows:

- "1 one employed in an office, shop, etc to keep records or accounts, attend to correspondence, etc;
2. US: an assistant in business, especially a retail salesman or saleswoman."

There are other more specific examples which are not relevant here.

So it appears that we can point to an American usage of the word 'clerk' which would apply to counter-staff of a retailer, but no Australian usage of that kind. A court will prefer Australian usage in applying Australian legislation unless there is some compelling reason to think that another meaning is intended. This could occur, for example, if the Explanatory Memorandum to the proposed legislation indicated that the legislation was intended to implement a regime similar to one operating in the USA, and was adopting substantial parts of existing US laws. But there is nothing of that kind here.

To the extent that there is uncertainty in relation to the meaning of the words 'clerk' and 'cashier', and given that we are trying to rely on an exemption from a law that is otherwise generally applicable, a court is also likely to adopt a narrow interpretation of these words. In this case, the ordinary Australian usage is narrower than the American usage and we would expect this to be another reason for the court to apply it.

We doubt that promoting and selling credit would be characterised by a court as something carried on in the ordinary course of duties of most employees at retail point of sale in Australia. Although a sales assistant may sometimes receive payments or conduct administrative functions within the business, this is generally incidental to selling goods and merchandise and is not the core role of the relevant individual.

5 ASIC's likely views

There is a comparable piece of Australian legislation that gives us some helpful guidance on how ASIC is likely to approach the interpretation of what is meant by the expression 'done in the course of work of a kind ordinarily done by clerks or cashiers'.

The Corporations Act 2001 (Cth) regulates any dealing in or advising on financial products (eg deposit products, insurance products etc). Section 766A(3) exempts from the scope of that regulation anything 'done in the course of work of a kind ordinarily done by clerks or cashiers'.

In its Regulatory Guide 36, ASIC has elaborated its interpretation of this phrase in section 766A(3). RG 36.32 provides as follows:

RG 36.32 A person's conduct occurs in the course of work of a kind ordinarily done by clerks and cashiers (and, therefore, the person does not 'provide financial product advice') if it merely involves:

- (a) posting, handing out, or otherwise distributing or displaying, documents such as prospectuses, PDSs, Short-Form PDSs or Financial Services Guides (FSGs);
- (b) answering routine questions from consumers by giving factual information (see RG 36.21–RG 36.23), such as minimum investment amounts of funds accepted, whether a particular offer is still open or the nature of investments made by a specific trust;
- (c) collecting payments (e.g. subscription money) and issuing receipts;
- (d) performing the routine or administrative function of assisting consumers to complete application forms and send completed application forms to the relevant product issuer; or **Note: This applies only where the consumer has already made the decision to acquire the financial product. It does not apply where the person helps the consumer make their decision to acquire the financial product. [Freehills emphasis]**
- (e) performing other routine or administrative functions that do not involve a judgement about what financial products, or classes of financial products, are appropriate or should be considered by a consumer.

Note: This is not intended to be an exhaustive list of conduct that may fall within s766A(3). In interpreting s766A(3), it is important to note that the provision is prefaced with the words 'to avoid doubt'. Licensees must monitor and supervise their clerks and cashiers to ensure that the licensee complies with its obligations relating to the provision of financial services: see Regulatory Guide 164 Licensing: Organisational capacities (RG 164).

We believe that this policy can be applied by analogy to the role of a 'clerk' or 'cashier' who engages in 'credit activities' as defined in the NCCPB.

6 Analysis

When this ASIC approach is applied by analogy to the role of employees of a retailer, it is our view that Regulation 23(7) does not exempt a number of activities in a retail environment such as the following:

- Suggesting to customers that they consider applying for a store credit card or point-of-sale finance;
- Advising customers about the nature of the store credit card or point-of sale finance, including its features and benefits and persuading them to apply;
- Suggesting to customers that they compare the features and benefits of a proposed credit card or finance arrangement with other credit cards in the customer's purse or wallet; and,
- Helping the customer complete the application form and explaining important options and choices available to the customer such as whether or not to apply for a supplementary card for their spouse or partner.

The activities outlined above go beyond ASIC's view of the role of a clerk or cashier. Under the terms of the NCCPB, these activities would be characterised as providing credit assistance.

7 Consequences

ANRA's members would have to be licensed with a number of implications that you may consider to be impractical, costly and unnecessary (it can be strongly argued that they are unnecessary because they appear to provide no better protection or tangible benefit for the consumer than the consumer will have through regulation of the activities of credit providers).

If there is no exemption for their activities, retail employees would be required to take many compliance steps including:

Giving a Credit Guide to the customer concerning the "services" they are performing (this is in addition to a separate credit guide that must be given on behalf of the credit provider that contains information about the relationship between the credit provider and the retailer);

- Conducting a detailed interview with the customer to record personal financial information (which cannot then be verified in the retail environment);
- Using this information to make an assessment at the point of sale that the credit card or point-of-sale finance is 'not unsuitable' for a customer; and,
- Being trained to the level to adequately make this assessment of the suitability of the credit card for the customer.

You may think that the assessment of the suitability of the product at the point-of-sale is an unnecessary duplication of effort as validation and assessment of customer information is conducted by the credit provider centrally. Further, you may be concerned that customers would see such a point-of-sale assessment as inappropriate, confusing when there is a separate parallel role for the credit provider in the same transaction, invasive in the physical context of a retail environment, and unnecessary in the context of the probable amount of credit that is to be provided.

Yours sincerely



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