

29 July 2009

Committee Secretary  
Senate Standing Committee on Economics  
PO Box 6100  
Parliament House  
Canberra ACT 2600

**NATIONAL OFFICE**

Level 2, 255 George Street  
Sydney NSW 2000 Australia  
TELEPHONE 02 8248 6600  
FACSIMILE 02 8248 6633  
aicd@companydirectors.com.au  
www.companydirectors.com.au

**And by email:** [mailto:economics.sen@aph.gov.au](mailto:mailto:economics.sen@aph.gov.au)

[Meredith.Bond@aph.gov.au](mailto:Meredith.Bond@aph.gov.au)

Dear Sir/Madam,

**SUBMISSION – NATIONAL CONSUMER CREDIT PROTECTION BILL**

I refer to AICD's Submission of 24 July 2009.

AICD would ask you to please treat our submission of 24 July 2009, our submission of 22 May 2009 and our email to Treasury of 1 July 2009 as public submissions and place them on the Committee's website.

Yours sincerely,



Rob Elliott  
General Counsel

Cc The Manager Consumer Credit Unit  
Corporations and Financial Services Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600  
By email to [consumercredit@treasury.gov.au](mailto:consumercredit@treasury.gov.au)

24 July 2009

Committee Secretary  
Senate Standing Committee on Economics  
PO Box 6100  
Parliament House  
Canberra ACT 2600

**NATIONAL OFFICE**

Level 2, 255 George Street  
Sydney NSW 2000 Australia  
TELEPHONE 02 8248 6600  
FACSIMILE 02 8248 6633  
aicd@companydirectors.com.au  
www.companydirectors.com.au

**And by email:** [mailto:economics.sen@aph.gov.au](mailto:mailto:economics.sen@aph.gov.au)

Dear Sir/Madam,

**SUBMISSION – NATIONAL CONSUMER CREDIT PROTECTION BILL**

I am writing to you to raise the concerns of the Australian Institute of Company Directors (“AICD”) on the National Consumer Credit Protection Bill (“the Bill”), and its possibly unintended effects on affinity credit or charge card arrangements (“Affinity Arrangements”) and thank you for the extension to time until today to make this submission.

AICD made a confidential submission to Treasury dated 22 May 2009 which was followed by our email of 21 July 2009 and a copy of both of these are enclosed.

It seems from the Bill as introduced into Parliament that our concerns have not yet been taken into account.

**Background**

The Australian Institute of Company Directors (“AICD”) is the peak organisation representing the interests of company directors in Australia. Current membership is more than 25,000 individual members drawn from large and small organisations, across all industries, and from private, public and the not-for-profit sectors.

As raised in our previous submission, Credit and Charge Card holders are rarely able to exercise any bargaining power to get a better deal from Card Providers. However member based not for profit bodies (“Member NFPs”), mainly professional associations such as the AICD, have negotiated Affinity Arrangements with Card Providers which provide better terms for their members.

A wide range of Member NFPs have put these arrangements in place and we understand there are at least 13. There is a positive benefit to the community by supporting such Member NFPs.

The financial benefit earned by the Member NFP from the Affinity Arrangements are reinvested into additional membership products and services offered by the Member NFP. These fees are commonly returned to members as additional member services and benefits.

In AICD's case the members who benefit are likely to be directors and are therefore likely to be sophisticated consumers. This is likely to be true of other Member NFPs who have Affinity Arrangements such as the Law Societies of NSW, Queensland, Western Australia and Tasmania and the Law Institute of Victoria.

An important part of the commercial sustainability of Affinity Arrangements is that the information provided about the Card and the Card itself be identified to members as part of the Affinity Arrangement. Without this Affinity Arrangement may well not be viable at all.

Although the draft National Consumer Credit Protection Regulations in Regulation 6.2 and 6.3 outlined two possible exemptions which could apply, the position of Member NFP's in Affinity Arrangements with Credit Providers remains very unclear.

If it continues to be unclear AICD and other Member NFPs may well, to properly manage its possible compliance obligations under the Bill, see it is necessary to either obtain an Australian Credit Licence (ACL) or be appointed as a Credit Representative under the ACL obtained by the Credit Provider. Given our current understanding of the respective obligations, neither of the positions present as feasible, nor appropriate for activities conducted by AICD.

Like most Member NFPs, AICD is a not for profit body which performs a community function and obtaining an ACL would require AICD to move very far from its core activities. Similarly, it may also not be feasible for Member NFPs to be appointed as Credit Representatives. It would require the Member NFP to be appointed as a Credit Representative of each Credit Provider, and the Credit Provider would be required to accept joint liability for the all credit products and services provided by any Credit Provider. The individual Credit Providers understandably may not be prepared to accept liability for activities other than to their own and may not be prepared to appoint Member NFPs as Credit Representatives at all.

For all these reasons unless Member NFPs are clearly excluded from these obligations, the Bill may well be the end of such Affinity Arrangements.

Furthermore, even if AICD could be appointed a Credit Representative, given the very limited role AICD has under the Affinity Arrangement, the Consumer will receive no real gain from AICD becoming a Credit Representative. American Express would be required to assess and approve credit applications, provide the Credit Guide to cardholders and have mandatory membership to the an external dispute resolution body in any case. Given that AICD does not fill in or receive completed Credit Applications, there is no practical benefit to the consumer of the indemnity insurance, training requirements or employment screening.

The Bill would probably also have a similar impact beyond Affinity Arrangements.

## Submission

For the reasons set out in above AICD submits that:

1. all activities by Member NFP organisations (or activities on their behalf) under Affinity Arrangements should be exempted from the definitions of Credit Activity, Credit Service, and Credit Assistance. In light of the sophistication of members of Member NFPs and the limited role of NFPs in Affinity Arrangements, this exemption will not compromise the purpose of the Bill at all and will avoid an unnecessary compliance burden.
2. Alternatively, the fact that the Bill will operate on existing Affinity Arrangements to potentially damage their viability is fundamentally unfair. AICD submits that the Bill ought to have no application to existing Affinity Arrangements entered into with Member NFPs or renewals of them.

We also understand that a point of sale exemption for retailers who provide Credit Assistance such as car dealerships and retailers is being considered. By comparison the possible Credit Assistance activities of a Member NFPs under an Affinity Arrangement are minimal and we would submit that any point of sale exemption should also exclude Affinity Arrangements.

We would be grateful for an opportunity to meet with a representative of the Committee.

Yours sincerely,



Rob Elliott  
General Counsel

Cc The Manager Consumer Credit Unit  
Corporations and Financial Services Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By email to [consumercredit@treasury.gov.au](mailto:consumercredit@treasury.gov.au)



22 May 2009

The Manager  
Consumer Credit Unit  
Corporations and Financial Services Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

**NATIONAL OFFICE**

Level 2, 255 George Street  
Sydney NSW 2000 Australia  
TELEPHONE 02 8248 6600  
FACSIMILE 02 8248 6633  
aicd@companydirectors.com.au  
www.companydirectors.com.au

And by email: [consumercredit@treasury.gov.au](mailto:consumercredit@treasury.gov.au).

Dear Sir/Madam,

**CONFIDENTIAL SUBMISSION – NATIONAL CONSUMER CREDIT  
PROTECTION BILL**

I am writing to you to outline the views of the Australian Institute of Company Directors (“AICD”) on the National Consumer Credit Protection Bill (“the Bill”), and its possibly unintended effects on affinity credit or charge card arrangements (“affinity card arrangements”).

**Background**

As you may be aware the AICD is Australia's membership institute for directors. It is a member based not for profit organisation and is dedicated to making a positive impact on the economy and society by promoting professional directorship and good governance.

AICD delivers knowledge and continuing learning in the field of directorship; enriches the capabilities of members with information, services, events and networks; influences the corporate governance environment in Australia; and promotes understanding of and respect for the role of directors.

Although AICD frequently makes submissions in relation to corporate governance, on this occasion we seek to draw to your attention to an issue affecting it and other member based not for profit bodies and what we believe may be unintended consequences of the Bill.

## **The Possible Effects of the Bill**

Credit and Charge Card holders are rarely able to exercise any bargaining power to get a better deal from Card Providers. However, at present member based not for profit bodies ("Member NFPs") such as AICD can negotiate affinity card arrangements with Card Providers which provide better terms than might be available in the market generally. The terms might relate to card fees, supplementary card fees or reward programs. The Card Provider alone deals with all applications and whether applications are approved.

In addition, an affinity card arrangement allows the members of the Member NFP to indirectly provide some financial support to the Member NFP (which is commonly returned to members as member benefits) by the modest fees the Member NFP earns from the Card Provider by facilitating marketing to the Member NFP's membership base.

The Member NFP will typically inform its members about the affinity card arrangement and the availability of the card and depending of course on the circumstances provide other information or promotion. This might include information on the Member NFP's website or a mail out. In some cases marketing is done by the Card Provider on behalf of the Member NFP.

The legal regulation of this area has, until the present time, allowed Member NFPs to enter into affinity card arrangements and there have been some longstanding arrangements in place. Significant time, effort and costs go into negotiating and putting in place these arrangements. The members of Member NFPs appreciate and support these arrangements.

As we understand it, a wide range of Member NFPs have put these arrangements in place, we understand at least 13. These include for example Engineers Australia, the Institute of Chartered Accountants, Certified Practising Accountants Australia, the Law Society of NSW, the Australian Medical Association, Australasian Institute of Mining and Metallurgy and Association of Professional Engineers Scientists and Managers Australia. The members who benefit from such affinity card arrangements are not likely to be unsophisticated.

AICD entered into its first such arrangement in about 1995 and recently entered into a Marketing and Cooperation Agreement for American Express Affinity Cards with American Express on 13 February 2009.

Under the Bill, each Member NFP under such affinity card arrangements would, it seems, in all probability be taken to be "suggesting" that the consumer apply for a provision of credit under a particular credit contract with a particular credit provider for the purposes of DEF 7(a); or "assisting" the consumer to do so under (d). If so, the Member NFP would, it seems, be providing credit assistance and engaging in credit activity under the Bill.

The exemption in Regulation 6.3(2) of the National Consumer Credit Protection Regulations, 2009 (Cth) (“the Regulations”) exempts only “informing another person that a licensee, or a representative of the licensee, is able to provide a particular credit activity or class of credit activities”. So it might not adequately exempt affinity card arrangements.

For the Member NFP to continue with the Co-branded Card arrangement it seems that it may have to do one of two things. Either:

1. obtain an Australian Credit Licence (due to the requirements of LIC 75).

However Member NFPs are not financial institutions. They serve a community function and do not take on avoidable commercial risk. It seems to us a little implausible that they would generally take on the expense, costs and risks of maintaining such a licence so far outside their core activities; or

2. seek to be appointed a Credit Representative by the Card Provider.

If a Credit Representative, the Member NFP would seem to assume a number of significant obligations. One of these appears to be, for example, to provide the licensee’s credit guide and the Credit Representatives credit guide to members including all detailed information required by that guide; and failure to do so is an offence of strict liability: R330(6). This would require the legal and other costs of preparation and printing of the Credit Representatives Guide and the administrative costs of ensuring strict compliance with this obligation.

Also, as a Credit Representative it seems the Member NFP might be subject to the same remedies that the client would have against the licensee: LIC 310(1). By LIC 310 the Credit Representative also might be jointly and severally liable for anything the licensee is liable for: LIC 310(1) and (2). If so, this would completely alter the business risks to which a Member NFP professional membership organisation would normally be exposed. Would Member NFPs really take on the expense, costs and risks of doing so?

It seems to us that the additional costs and risks the Bill places on Member NFPs makes it reasonable to suggest that Member NFPs could well withdraw from affinity card arrangements.

If so, what might be lost is one of the few opportunities for consumers to negotiate a better deal against the financial service providers, the substantial collective investment of Member NFPs in such arrangements and financial support for the Member NFP.

We suggest that this loss is not really worthwhile given that the members of the relevant Member NFPs seem likely to be sophisticated consumers, will understand that it is part of an affinity card arrangement and usually would gain an indirect benefit from the affinity card arrangements through member benefits from the

Member NFP. Such a loss seems to be an avoidable and unintended consequence of the Bill.

### **AICD's submission**

AICD submits that all activities by Member NFPs (or activities on their behalf) under affinity card arrangements, including the marketing as part of an affinity card arrangement referred to above, should be excluded from the definition of Credit Activity in DEF 5 of the Bill.

Alternatively, the fact that the Bill will operate on existing affinity card arrangements to potentially damage their viability is fundamentally unfair. This is not lessened by the theoretical capacity of ASIC to exclude persons under LIC 405, as that discretion may never be exercised. AICD submits that the Bill ought to have no application to existing affinity card arrangements entered into with Member NFPs or renewals of them.

This is an area we believe warrants further discussion with Government. I or other AICD representatives would be happy to meet with you to discuss these issues in more detail.

Yours faithfully,



**Rob Elliott**  
General Counsel



**COPY OF EMAIL SENT 010709**

**From:** John Pender  
**Sent:** Wednesday, 1 July 2009 4:52 PM  
**To:** agallo@treasury.gov.au  
**Cc:** Gabrielle Upton; Lyn Dyer; Rob Elliott; Alison Brough; Marie Campion  
**Subject:** NATIONAL CONSUMER CREDIT PROTECTION BILL - AICD CONFIDENTIAL SUBMISSION OF 22 MAY 2009

Dear Alix,

I refer to AICD's submission sent on 22 May 2009, my subsequent email of 17 June 2009 and my telephone discussion with you on Friday 26 June 2009.

As outlined in greater detail in our submission (copy enclosed), AICD is a member based not for profit body ("Member NFP") and entered into its first an affinity card arrangement as a benefit to members in 1995. It recently entered into a Marketing and Cooperation Agreement for American Express Affinity Cards with American Express on 13 February 2009. Significant time, effort and costs have gone into negotiating and putting in place these arrangements.

This provides better terms to our members than might be available in the market generally including as to card fees, supplementary card fees or reward programs. AICD earns modest fees from Amex by facilitating marketing to AICD's membership base. This also allows the members of AICD, as it would any comparable Member NFP, to indirectly provide some financial support to AICD which is commonly returned to members as member benefits.

Amex alone deals with all applications and whether applications are approved.

AICD informs its members about the affinity card arrangement and the availability of the card and, depending of course on the circumstances, provides other information or promotion. This might include information on AICD's website or a mail out. In some cases marketing is done by Amex on behalf of AICD. AICD discloses to members that receives a financial benefit from members' use of this service.

Under the draft Bill, each Member NFP under such affinity card arrangements would, it seemed, in all probability be taken to be "suggesting" that the consumer apply for a provision of credit under a particular credit contract with a particular credit provider for the purposes of DEF 7(a); or "assisting" the consumer to do so under (d). If so, the Member NFP would, it seems, be providing credit assistance and engaging in credit activity.

Although we understand that the Regulations have not been made available in final draft form, the exemption which appeared in the earlier draft Regulation 6.3(2) of the draft National Consumer Credit Protection Regulations, 2009 (Cth) ("the Regulations") exempts only "informing another person that a licensee, or a representative of the licensee, is able to provide a particular credit activity or class of credit activities". So it might not adequately exempt affinity card arrangements.

For the Member NFP to continue with such a Co-branded Card arrangement it seemed to us on the basis of the draft Bill that it may have to either:

1. obtain an Australian Credit Licence.
2. seek to be appointed a Credit Representative by the Card Provider.

It seemed to us that the additional costs and risks the draft Bill and Regulations placed on AICD and others in its position made it likely Member NFPs such as AICD could well have to withdraw from affinity card arrangements.

What would be lost is one of the few opportunities for consumers to negotiate a better deal against the financial service providers, the substantial collective investment of Member NFPs in such arrangements and financial support for the Member NFP.

We suggested that this loss was not really worthwhile given that the members of the relevant Member NFPs seem likely to be sophisticated consumers, will understand that it is part of an affinity card arrangement and usually would gain an indirect benefit from the affinity card arrangements through member benefits from the Member NFP.

AICD submitted that:

1. all activities by Member NFPs (or activities on their behalf) under affinity card arrangements, including the marketing as part of an affinity card arrangement referred to above, should be excluded from the definition of Credit Activity.
2. alternatively, the fact that the Bill will operate on existing affinity card arrangements to potentially damage their viability is fundamentally unfair. This is not lessened by the theoretical capacity of ASIC to exclude persons as that discretion may never be exercised. AICD submitted that the Bill ought to have no application to existing affinity card arrangements entered into with Member NFPs or renewals of them.

Would you be able to let us know if the circumstances of Member NFPs such as AICD were taken into account in the Bill as introduced to Parliament and will AICD, and other not for profit bodies like it, be practically able to continue to offer this benefit for its members?

**John Pender**  
Legal Advisor

AUSTRALIAN INSTITUTE OF COMPANY DIRECTORS  
NATIONAL OFFICE  
LEVEL 2, 255 GEORGE STREET  
SYDNEY NSW 2000 AUSTRALIA

TEL: (61 2) 8248 6664  
FAX: (61 2) 8248 6633  
WEB: [www.companydirectors.com.au](http://www.companydirectors.com.au)

SYDNEY (HEAD OFFICE) | ADELAIDE | BRISBANE | CANBERRA | HOBART | MELBOURNE | PERTH



The information in this email is confidential. If you are not the intended recipient, you must not read, use, copy, disclose or disseminate this email, any attachments or information contained in this email and must delete it. The responsibility for virus detection is the recipients and we do not accept any responsibility for any loss or damage arising in any way from the use of this email or any attachments. Our Privacy Policy deals with how we collect, use and disclose personal information. If you would like to view our Privacy Policy please visit our website or request a copy by return email.  
<http://www.companydirectors.com.au/privacy.htm>