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26 February 2007

Mr David Sullivan
The Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Room SG. 64
Parliament House
CANBARRA 2600

By email to: corporations.joint@aph.gov.au

Dear Mr Sullivan,

***INQUIRY INTO EXPOSURE DRAFT – CORPORATIONS AMENDMENT
INSOLVENCY BILL 2007 & RELATED DRAFT REGULATIONS***

The Australian Finance Conference (AFC) is a national finance industry association. AFC Member companies (a current list accompanies) provide the full range of financial services for consumer and commercial purposes to individuals, partnerships, trusts or corporate customers. The reform of the insolvency regulation the subject of the Inquiry is relevant to our Members' financing business because of its potential impact on their relationships with their corporate customers. We therefore welcome the opportunity to provide comment on the Exposure Drafts of the Corporations Amendment (Insolvency) Bill 2007 and related Regulations.

On a general level we support reform to improve the operation of Australia's corporate insolvency laws and appreciate the extent of consultation on the draft framework to ensure the law, when enacted, is operationally effective and facilitates efficient compliance. In this regard we particularly welcome the Government's proposal to retain the existing priority on employee entitlements in insolvency while improving its operation and fairness. We also acknowledge the Government's commitment to establish a fund to finance preliminary investigations of "assetless" companies to curb fraudulent phoenix activities. On a technical level, we defer to legal, accounting and insolvency practitioners and others with greater day to day knowledge of the current insolvency provisions and consequently informed input on the technical aspects of the draft Bill and Regulations. However, an area of particular relevance to our Members' dealt with in the draft Bill relates to proposed changes to, and impacts of, the controller provisions in Part 5.2 of the Act. We would appreciate the Committee's consideration of these issues and the AFC recommendations for amendment.

Issue 1 – Equipment Financiers – Chattel Mortgages – Controller Provisions

Under the current insolvency framework, our Members when exercising their security rights against defaulting corporations, even in relation to minor items of secured equipment or plant, may be construed to be "controllers" and thereby currently required to meet stringent

requirements contained in Part 5.2 of the Corporations Act (eg opening of a bank account, reporting obligations). This is because under the Act, a controller of property is broadly defined to include **a person who (whether or not as agent for the corporation) is in possession of, or has control of, that property for the purpose of enforcing a charge** (Corporations Act s. 9). The wide definition of controller captures those who enforce mortgages or charges registered at land titles offices, ASIC and other government bodies, as well as those who enforce unregistered charges. The mortgage or charge may relate to only a small part of the assets of the company. For example, often the finance will involve a single-asset (eg loan secured by a chattel mortgage over a motor vehicle). However, currently the obligations imposed on a “controller” of a significant portion of the company’s assets are equally imposed on the single-security holder. We submit that in the latter case, these obligations are generally out of proportion to the “control” being exercised and unnecessarily add to the costs of the financier which are usually borne by the corporate customer (or others in the insolvency framework).

We also note that, if the customer had chosen to finance their equipment acquisition by way of equipment lease or hire-purchase, comparable forms of finance, these obligations would not arise for the financier when looking to protect its interests. Often the impact of other laws, for example GST and state tax, influences customer choice in favour of the chattel mortgage. However, for the reasons outlined above, the impact of the “controllers” provisions of the Corporations Act may mean this product is more costly for them in the long run as the increased compliance costs imposed on the financier are reflected in the pricing of the product.

As a consequence, the AFC has used a number of reviews and inquiries on reform of the insolvency provisions conducted by Government over the years to champion amendments to the controller provisions. Our object has been to amend the provisions so that they achieve an appropriate level of transparency, accountability and protection without imposing unduly onerous and costly compliance obligations on the controller of a single-financed asset secured by a chattel mortgage.

Proposed Amendments

We therefore welcome the proposed amendments to Part 5.2 contained in the draft Bill which should result in a number of the requirements imposed on “controllers” quarantined to “managing controllers” and, in particular, the requirement to open a bank account (s. 421). We also commend the omission of obligations to Gazette the fact of taking control contained in the proposed amendments to s. 427. These relatively minor amendments should enable compliance streamlining with the appropriate cost-savings to the benefit of our Members and their corporate customers.

However, while providing relief, we note that post-amendment our Members will still be required to comply with a range of notification and accounting obligations under Part 5.2 as controllers of specific-financed / secured assets. We query whether the value of these assets (eg a motor vehicle) and the relatively simple type of security involved (eg a chattel-mortgage) warrants this level of compliance obligation.

Issue 1 - AFC Recommendation

To address this, we suggest that the Committee give consideration to recommending that the definition of “controller”, in particular the second paragraph, be amended so that either:

- a) single-secured asset realisations are excluded from the controller provisions particularly when no other receivers or controllers have been appointed and the company is not otherwise in administration or the reporting; or
- b) a monetary threshold is included in the definition to effectively carve out this scenario (eg anyone else who...is in possession, or has control of that property for the purpose of enforcing a charge **in excess of \$100,000**). We would appreciate the opportunity to involve our Members in discussions on the appropriate level.

Issue 2 - Administrator's Notification to Financiers that are Owners / Lessors

Members of the AFC have experienced difficulties locating equipment financed by them by way of lease or hire-purchase that is no longer required by the Administrator where a company has voluntarily put itself into administration. Under the terms of these financing arrangements, the financier is and remains the owner of the equipment.

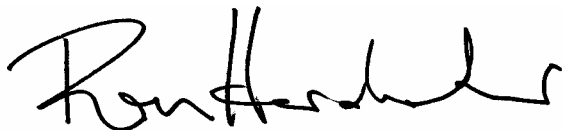
Issue 2 - AFC Recommendation

To address these difficulties, we recommend that Administrators should have a greater obligation to ensure that owners of equipment (including Lessors / Financiers) who have been notified that the company does not propose to exercise rights in relation to the equipment can quickly and easily repossess or recover it. In line with this, we suggest that Administrators should be required to detail the location of the equipment in the relevant notice (eg under s. 443B(3)) and to ensure that the equipment is available for collection at the location for a set time after service of the notice. Failure by the Administrator to ensure the equipment is at the location when the Owner / Financier seeks to recover it within the time frame should constitute use of the equipment and the notice cease to have effect.

Thank you for the opportunity to respond to the Inquiry. Should the Committee have any questions about our submission or require further information we would be happy to appear before it to respond. Alternatively, we would be happy to answer queries either through (02) 9231-5877 or email afc@afc.asn.au.

Kind regards.

Yours sincerely,



RON HARDAKER
Executive Director

Attachment:
List of AFC Members



AFC MEMBER COMPANIES

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|------------------------------------|--|
| Adelaide Bank | Lombard Finance |
| Australian Finance Direct | Mackay Permanent Building Society |
| Australian Integrated Finance | Macquarie Equipment Rentals |
| Australian Motor Finance | Macquarie Leasing |
| Automotive Financial Services | Members Equity Bank |
| Bank of Queensland | MotorOne Group |
| BankWest | ORIX Australia Corporation |
| Baycorp Advantage | PACCAR |
| Bidgee Finance | Pioneer Permanent Building Society |
| BMW Australia Finance | Profinance |
| Capital Finance Australia | RABO Equipment Finance |
| Caterpillar Finance Australia | RAC Finance |
| CBFC | RACV Finance |
| Centrepoint Alliance | Retail Ease |
| CIT Financial | Ricoh Finance |
| Citigroup | Sharp Finance |
| Collection House | SME Commercial Finance |
| Credit Corp Group | St. Andrews Finance |
| DaimlerChrysler Financial Services | St. George Bank |
| De Lage Landen | Suncorp |
| Dun & Bradstreet | Suttons Motors Finance |
| Elderslie Finance Corporation | The Rock Building Society |
| Esanda Finance Corporation | Toyota Financial Services |
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| GE Commercial | Westpac |
| GE Money | Wide Bay Australia |
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| Heritage Building Society | <u>Professional Associate Members:</u> |
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| Indigenous Business Australia | Australian Business Research |
| Integrated Asset Management | Bartier Perry |
| International Acceptance | Corrs Westgarth |
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| Key Equipment Finance | Finzsoft Solutions |
| Komatsu Corporate Finance | Henry Davis York |
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