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21 May 2009

Mr Geoff Miller  
General Manager  
Corporations & Financial Services Division  
The Treasury  
CANBERRA ACT 2600

Dear Geoff,

### **National Consumer Credit Protection Bill 2009**

The AFC takes this opportunity to provide further comment on the National Consumer Credit Protection Bill (the Bill) again stressing its inappropriateness for the regulation of credit.

We have already provided Treasury with detailed submissions on the first drafts of the licensing regime (Attachment A) and the responsible lending provisions (Attachment B). Appreciating the time constraints on Treasury for moving from drafts to Bill provisions, and given our position has not changed, we do not intend to revisit the issues raised in any detail in today's response; rather we re-submit them as the Attachments for consideration.

AFC appreciates the COAG process delivered Treasury and Minister Sherry an implementation task, not one of policy formation. As you know we have, and are, taking up our concerns with that process with other levels of Government. Even within this implementation confine however, we believe that the regulatory model as reflected in the Bill, is wrong.

Our members remain totally opposed to a legislative model that applies the same rule to associated but dissimilar activities, rather than applies the same rules to like products and services. In capturing everyone from merchants to tow truck operators involved in the credit cycle, the Bill and its implementation approach imposes unwarranted and inappropriate regulation on a range of service providers, many of whom are already heavily regulated at State/Territory levels.

The proposed model is inherently flawed in its application to, and beyond, the finance sector. Instead of removing the regulatory burden on business, as professed by the Minister and others, it will impose an expensive and expansive regulatory regime that will create more costs and mischief than that it purports to prevent.

Quite simply, the proposed Bill will result in:

- Decreased competition

- Small business failure & increased unemployment
- Restricted and more costly credit
- Consumer confusion & disempowerment

This submission is confined to addressing the policy and commercial issues which will adversely impact on all associated with the finance sector and consequently, the provision of credit in Australia. Part 1 addresses the licensing model, its capture of a huge range of service providers and its intrusion into commercial arrangements. Part 2 summarises our members' key operational issues with the Bill and recommends appropriate amendments, should Treasury insist on progressing it under the inappropriate FSR model.

Please note that in the short consultation time available, there has not been a realistic opportunity to consider the full ramifications of the draft legislation nor to assess its likely cost implications. Suffice to say, it is counter to all that the Government professes to achieve in promoting competition, in reducing regulatory burden and in stimulating the economy.

The AFC recommends Treasury –

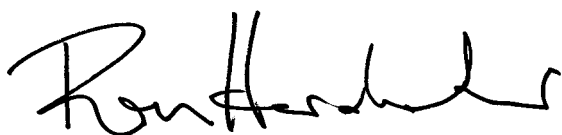
1. separate credit provision from broking;
2. align mainstream credit provider “licensing” to the current (last 12 years) successful UCCC negative licensing approach;
3. require credit provider EDR membership along the Victorian Review direction;
4. regulate/license mortgage brokers;
5. transfer the Consumer Credit Code, as it currently exists, to the Commonwealth; and
6. develop some realistic “responsible lending” rules for lenders.

All other issues can be addressed in Phase 2 in the context of a sound understanding of the finance sector and an open consultation process with all affected parties. Anything less will result in an inappropriate consumer credit regulatory environment, damaging to both consumers and to business and, consequently, to the Australian economy.

Should you wish to discuss our submission, please contact me on the above number or AFC's Legal & Market Consultant, Steve Edwards, on mobile 0414 232 562 or email [steve@sme-associates.com.au](mailto:steve@sme-associates.com.au).

Kind Regards,

Yours truly,

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

Ron Hardaker  
Executive Director

## **Part 1 – AFC Policy Concerns**

### **1. Licensing Model – Policy Basis**

Appreciating that Treasury does not need to provide a policy or market failure basis for licensing (it's COAG), the proposed model is ill-conceived. In taking an all-encompassing product/activities approach the legislation will apply not only to credit providers and finance brokers, but also to a huge range of service providers both in Australia and overseas. The legislative reach is well beyond that proposed by the Productivity Commission (the Commission).

The Commission, in its *Review of Australia's Consumer Policy Framework – Inquiry Report*, recommended a national licensing system for finance brokers and a licensing **or** registration system for credit providers that would give consumers guaranteed access to an approved External Dispute Resolution (EDR) scheme. Clearly, the focus was on EDR access rather than a licensing regime.

AFC members support a credit provider registration regime with EDR membership and sensible 'responsible lending' rules.

We do not support the imposition of a licensing regime and mandatory EDR membership on agents who provide services to credit providers/lessors, or on introducer merchants and dealers, given the adverse commercial consequences that will result.

### **Recommendations:**

The AFC makes the following recommendations:

- The Bill be amended to require credit provider registration, with compulsory EDR membership.
- The application be specific to credit providers so that agents and other service providers, and introducer merchants and dealers, are excluded from the regime.
- Credit providers should take responsibility for the exercise of rights and obligations under the credit or lease contract, regardless of who provides those services.

### **2. Principal / Agent Relationship & Introducers**

The principal and agent relationship in the credit cycle is multi-layered as each specialist function manages another range of specialist agent services on behalf of the credit provider. Regardless of the layering, the credit provider has primary responsibility for the conduct of its agents and, consequently, any service providers and sub-contractors to those agents.

Despite this, the licensing regime, by virtue of the DEF 5 'credit activity' application to a person who "... performs the obligations of, or exercises the rights of, a credit provider....." applies to every person who provides any form of service related to a credit or lease product. This is regardless of the regulation which already applies to that service or the principal/agent relationship which exists.

Consequently, the legislation imposes yet another regulatory regime on many who are already regulated (e.g. debt collectors, process server, auction houses, tow truck operators, etc) and intrudes into the principal and agent relationship on which many commercial arrangements in the finance sector are based.

The AFC requested 6 members to provide a snapshot of the Bill's reach. Three Deposit Taking Institutions and three financiers provided us with the numbers of their broader intermediary and service provider relationships.

While we acknowledge there may be some overlap in relationships, the results (below) speak for themselves about the complexity of relationships within the finance industry and the impact of the Bill. Extrapolation of the data in the tables below to cover the whole finance sector would provide an indication of the compliance task facing the sector and ASIC.

### NCCP Intermediary/Service Provider Impact – Numbers Provided 6 Members

<b>Introducer</b>	<b>Australian Businesses</b>
<b>Brokers</b>	7,614
<b>Sub-originators</b>	500
<b>Aggregators</b>	87
<b>Mortgage managers</b>	150
<b>Dealers</b> e.g. motor, boat, bike	630
<b>Retailers</b> e.g. computers, hi-fi, furniture, general, jewelers etc	12,400
<b>Referrers</b> e.g. accountants, lawyers etc	217
<b>Other vendors</b> e.g. medical services providers, door-to-door sellers, online etc	14
<b>Total:</b>	21,612

<b>Outsourced Services</b>	<b>Overseas Businesses</b>	<b>Australian Businesses</b>
<b>*Debt collection</b> e.g. written demands, field calls, telephone calls, repossession etc	-	41
<b>Call centre</b> e.g. sales,	-	2
<b>Back office</b> , e.g. financial calculations, document management, settlements, statement provision etc	2	12
<b>Account management</b> e.g. documents production and delivery etc		4
<b>Other services</b> – Solicitors, insolvency practitioners	-	18
<b>Other services</b> - Auctioneers		8
<b>Other services</b> (including property valuers)		187
<b>Total:</b>	2	272

\* NB: Debt collection agencies often outsource various functions such repossession, field calls and process serving around Australia so significantly more businesses are affected in the debt collection sector.

<b>Assignment</b>	<b>No. Overseas Businesses</b>	<b>No. Australian Businesses</b>
<b>Debt purchase</b> i.e. distressed debt	-	3
<b>Assignments - legal</b>	-	3
<b>Assignments - equitable</b>	1	4
<b>Securitisation</b>	-	2
<b>Total:</b>	1	12

As indicated above, and leaving aside brokers, thousands of service providers and merchant and dealer introducers will be required to be licensed (or authorised as credit representatives) and to be members of EDR schemes. The administrative and financial burden for all involved is disproportionate to the risk, particularly where the responsibility generally sits with the credit provider/lessor.

Overseas service providers may well withdraw key services to the finance sector. Securitisation is a service often provided by overseas service providers and crucial to the flow of credit in Australia. Should these service providers withdraw from the sector, credit will become even more restricted than it currently is, resulting in significant detriment to economic growth in Australia.

Other service providers, such as small business operators, will struggle to meet the licensing obligations and associated costs in addition to the State/Territory regulatory regimes that already apply to their functions. The consequences are business closure and loss of local employment. In turn, that leads to reduced competition and consumer choice and higher prices.

This is an unwarranted outcome from a regulatory regime imposed without consultation with service providers in the finance sector, many of whom are already licensed and/or subject to principal/agent agreements.

**Recommendation:**

The AFC strongly recommends a registration regime apply only to credit providers, not their agents, given consumers are protected through the principal/agent relationship.

The AFC also strongly recommends such a regime does not apply to merchant and dealer introducers, given consumers are protected by the linked credit provider provisions, especially s118, of the Consumer Credit Code.

**3. Credit**

The proposed regime will significantly reduce competition as smaller lenders and service providers exit the market. The costs of credit will rise significantly to cover the costs associated with licensing, documentation and systems changes, EDR membership, less effective creditor rights and a market where EDR processes can impede justified recovery processes.

Some consumers will be excluded from the market and those within it will pay for the costs associated with the new regime.

As Treasury acknowledges it is regulating for less than 5% of the credit market, it has an obligation to conduct a cost benefit analysis that considers the impact on all consumers and

the market itself, not just a minority of consumers. The anti-competitive, anti-jobs and consumer disempowerment aspects of this regulatory regime require close analysis to avoid years of regulatory amendment and adverse economic consequences.

**Recommendation:**

The AFC strongly recommends:

- Treasury conduct a cost benefit analysis to justify the Bill’s provisions and consider alternative approaches
- Treasury determine the competition and employment impacts of the Bill’s provisions, particularly given the current economic climate.

**4. Consumer Confusion & Disempowerment**

Treasury has moved well beyond the Commission’s recommendations for the finance broking and credit sectors. The Commission made recommendations based on services, not on activities. In regulating activities, Treasury has removed well understood service functions and bundled them together in a confusing “one size fits all” terminology. Consumers and the market will struggle to understand what service is being offered by whom, with all participants being either credit licensees or credit representatives.

In addition to the terminology issue, consumers may well object to the disempowering provisions of the Bill which require credit providers and brokers (credit assistants) to decide if the product is not unsuitable for the consumer and to refuse to offer application assistance and/or the credit/lease product if deemed unsuitable. Freedom of choice is surely a consumer right.

In addition, consumers will receive multiple credit guides at different stages in the credit cycle, which will confuse them about their credit provider/lessor and to whom they have obligations. Given no market failure has been associated with credit providers’ agents, consumers should not be subject to additional credit guides which are not directly relevant to the service provided. These services are provided to credit providers/lessors, not consumers. This is even more relevant when the Ministerial Council on Consumer Affairs is researching and reviewing the effectiveness of the current pre-contractual disclosure regime.

The Commission also noted the need for more evaluation of the effectiveness of mandatory disclosure requirements on their target audiences. Specifically, it recommended the broad content, clarity and form of disclosure should be consumer tested prior to, and after, implementation and amended as required.

Given the legislation is purported to be “consumer protection”, market research is required to determine if consumers will benefit from the new terminology, the product unsuitability provisions and the credit guide requirements. As recommended by the Commission, this should be tested both before and after implementation.

**Recommendation:**

The AFC strongly recommends:

- Treasury undertake market research to determine consumer benefits of the new terminology, the product unsuitability provisions and the credit guide requirements

## 5. Transition Period

As we understand relevant aspects of the Bill's implementation timetable –

- on 1 November 2009 all credit providers and consumer lessors must be fully compliant with the National Credit Code, including all amendments to the current uniform Code
- between 1 November and 31 December 2009, all businesses engaged in 'credit activities' must register with ASIC
- on 1 January 2010 any businesses not registered for the credit activities must cease those activities
- on and from 1 January 2010, a registered business cannot deal with another business that is not registered for the required credit activities
- on 1 January 2010, all businesses providing credit, consumer leases and credit assistance, must commence complying with the responsible lending conduct obligations
- by 30 June 2010, any business engaged in credit activities must have either applied for an Australian Credit Licence or have become a credit representative.

If Treasury proceeds with its current approach, a transition period must be allowed. There is simply not sufficient time for all businesses affected by the Bill to become fully compliant with its regulatory requirements. The Anti-money Laundering and Counter Terrorism Financing Act (AML/CTF Act) transitional provisions provide an appropriate model.

Our members will require time to take and consider advice, modify systems and documents, ensure risk, compliance and training systems meet licensing requirements, consult with introducers and service providers about the credit licensee/credit representative issues, implement new service level agreements and conduct due diligence to satisfy themselves of compliance with the new legislation.

These are complex, time consuming and costly processes, which require a reasonable transition period to ensure they are implemented correctly by introducers, credit providers and agents.

Also, where current introducers and service providers withdraw from the market due to the new provisions, credit providers will need time to source suitable alternative services.

The AML/CTF Act provided for an assisted compliance period of 15 months where reasonable steps to comply had been taken towards compliance.

Two compliance progress reports during that period provided AUSTRAC with a clear understanding of compliance progress.

Members report this transitional process provided a reasonable time frame in which to manage the operational processes and financial costs associated with implementation.

A more reasonable transitional period would also take into account the mandated use of Australian Credit Licence numbers in statements, contracts and prescribed forms. The earliest those numbers could become available would be 1 July 2010. Unless a different approach is taken, licensees will be obligated to revise systems and reprint documents initially for implementation and again when licence numbers are issued. The outcome is a totally avoidable and unnecessary cost for business.

**Recommendation:**

The AFC strongly recommends:

- The Bill provide for a transitional period similar to the approach taken by AUSTRAC for the introduction of the AML/CTF Act

**6. Penalties**

The penalties regime is completely disproportionate to the consumer detriment it seeks to address, particularly where the credit provider carries the financial risk. Jail terms of up to 5 years plus civil penalties of up to 10,000 penalty units (\$1,100,00) for companies and criminal fines of 2,000 penalty units (\$220,000) are proposed, with no proportionality between the types of breaches involved.

As examples, refer R290:

- failing to give a consumer a credit assessment attracts a civil penalty of 2,000 penalty units even though no consumer detriment is involved
- unsuitable credit contracts attract 200 penalty units or 5 years imprisonment or both

Should Treasury proceed with such a disproportionate regime, certain classes of consumers will have little, or no, access to credit as credit providers will take a very conservative approach to lending, limiting their target markets to those who pose little, or no, commercial risk.

Such an outcome conflicts with calls by Government to provide low income and disadvantaged consumers with limited access to credit.

From a credit provider's perspective, loss of capital if a debt is waived is the ultimate penalty.

**Recommendations:**

The AFC recommends the following:

- Remove all criminal penalties involving imprisonment
- Review the penalty regime in the context of consumer detriment, current Code penalties and comparative legislation e.g. Fair Trading Acts and Trade Practices Act

## Part 2 – AFC Recommendations – Specific Provisions

### KEY ISSUES - SUMMARY

The AFC recommendations contained in this summary should not be construed as supporting the NCCP Bill in its current form ('the Bill'). They are provided to assist Treasury appreciate the commercial impacts of the Bill and to provide constructive outcomes should the Bill proceed without reconsideration of its inappropriateness for the finance sector.

In this Part, the expression 'credit provider' also covers a lessor under a 'consumer lease'. Similarly, the expression 'credit contract' also embraces a 'consumer lease'.

Issue/Provision	Requirement	AFC Position	AFC Recommendations
<b>Structural Issues</b>			
DP5 Concurrent operation	States to retain powers to legislate in credit area – concurrent operation intended.	<b>Opposed</b> – totally at odds with industry support for national legislation – defeats the purpose of national legislation and leaves the potential for differing and multiple regulatory compliance.	The NCCP legislation prohibit the States & Territories from legislating in the area of credit.
Chapter 2 Licensing Model	FSR approach based on activities and products rather than services provided.	<b>Opposed</b> – the approach is anti-competitive, anti-jobs, increases the cost of credit and will result in reduced consumer access to credit.  Neither market failure nor a sound policy base have been identified to support the regime.  Productivity Commission Report recommended broker licensing and either credit provider registration or licensing.	Implement the Productivity Commission's recommendation for broker licensing and registration for credit providers – no case has been established for credit provider licensing.  Base regime on services provided (broking & credit), not activities and products.  Remove "credit activity" definition to cover services provided by

			<p>agents DEF5 – 1 (c), 3 (c), 4 (c) &amp; 5 (b)</p> <p>Responsibility for agent activity legally sits with the credit provider/lessor and should remain so.</p>
Jurisdiction	Jurisdictional test to determine whether the credit provider carries on business in Australia.	<b>Agreed</b>	
Outsourced Functions / Introducer merchants and dealers	<p>Raises questions re licensee v credit rep model</p> <p>Multiple licensing requirements for debt collectors – the Bill is imposed on top of State/Territory licensing requirements.</p>	<p><b>Opposed</b> – inherently anti-competitive with high economic impact. Affects brokers, merchants/vendors, securitisers, debt collectors, process servers etc.</p> <p>Responsibility for agent activity legally sits with the credit provider under principal and agent arrangements, on which substantive law is based.</p> <p>The administrative obligations and associated costs will result in small business failures, job losses and a refusal by vendors to offer point of sale credit. Market distortion will result.</p> <p>Overseas service providers may withdraw from the market.</p>	<p>Register credit providers only</p> <p>Amend “credit activity” definition to cover services provided by agents.</p> <p>Exempt debt collection agencies from the registration (licensing) regime as they are regulated under State/Territory laws.</p> <p>Refer also Part 1 of this submission.</p>
Registration (Licensing) Process	<p>Registration from 1 Nov – 31 Dec 2009</p> <p>Licensing applications before 30 June 2010.</p>	Timeframes acceptable for registration provided registration requirements are not onerous and compliance transitional	Registration by 31 December 2009 acceptable provided process not onerous and compliance transitional

		period given.	period given. Refer also Part 1 of this submission.
Compliance Timeframe	Must be “compliant” by registration – no 2 year transitional period except for including licence number on docs and removing references to States and Territories from current UCCC prescribed notices.	<b>Opposed.</b> Completely unrealistic timeframe.  The Anti-money Laundering & Counter Terrorism Financing (AML/CTF) Act implementation model is appropriate for consideration – allows for assisted compliance implementation over a reasonable timeframe.	AML/CTF implementation process provides an appropriate compliance implementation model. Compliance progress reporting can be part of the implementation process.  Alternatively, a timetable should be urgently negotiated with industry, taking account of compliance processes, need for advice, time for implementation and limited expert resources available.
<b>Licensing Requirements</b>			
General	Licence applicants must establish ability to satisfy general conduct requirements.	Does not take account of different sizes of business – there is concern with the apparent ‘one size fits all’ approach that could lead to unnecessary compliance expense or withdrawal from business.	Include specific direction to ASIC to ‘scale’ conduct requirements according to the circumstances of the licensee/applicant – e.g. business structure, business model, number of employees, extent of reliance on technology, geographic presence, turnover, proportion of business which is credit activity based, etc.
Conflicts of Interest	Adequate systems to ensure licensee’s “clients” not	<b>Opposed.</b> Concept is ill-defined and vague in intent for credit providers.	Remove conflict of interest provisions as commission disclosure

	disadvantaged by conflicts of interest	<p>Credit providers do not have ‘clients’, but brokers do. Credit providers have borrowers.</p> <p>Credit transaction &amp; associated processes, by their nature, is a conflict of interest.</p> <p>Provision is redundant given commission disclosure and product suitability requirements.</p>	and product suitability requirements address the transparency issue.
Compliance by representatives	“Reasonable steps” to ensure representatives’ compliance.	Current introducer and agent service level agreements address compliance standards and practices.	No additional provisions required as principal/agent relationships already establish the legal responsibility.
Risk & Compliance Management Systems	Adequate arrangements and systems, including written.	<b>Agree</b> – with credit providers and finance brokers having these in place, provides solid basis for control and responsibility – removes need for credit representatives.	N/A
Resources	Adequate financial, etc, resources to engage in, and supervise, credit activities.	Unnecessary requirement as resourcing is a risk issue and captured in the requirements for risk and compliance management systems.	Delete requirement as inherent in risk & compliance management systems.
Compensation Arrangements	“Adequate” compensation arrangements must be in place.	<p><b>Opposed.</b> Inappropriate concept for credit where loss is suffered by credit provider, not consumer.</p> <p>Financial standing of the business is best indicator of “compensation” capacity, rather than PI or other compensation</p>	<p>Remove ‘compensation arrangements’ as a mandatory requirement and disclosure to consumers as the risk sits with the credit provider.</p> <p>Alternatively, if licensing proceeds, ASIC can assess the financial standing of the business during the</p>

		arrangements.	licensing process. ASIC can require PI insurance or other compensation arrangements be put in place if financial standing deemed insufficient.
Training & Competency	Staff & Contractors – trained and competent.	<b>Agreed</b>	Leave content and standards open to allow businesses to develop according to business requirements.
IDR/EDR	IDR must meet <b>AS ISO Standard 10002 – Complaints Handling</b>  EDR must be ASIC approved Scheme.	<b>Agreed</b>	N/A
Shared Liability for credit representatives	Licensee shared responsibility for credit representative conduct, even if not related to licensee requirements.	<b>Opposed.</b> Unworkable model. Principal/agent arrangements clearly attribute responsibility and should remain.	Remove provision for shared responsibility for agents (credit representatives).  Principal/agent relationships and liabilities deal with the issue.
Credit representatives generally	Credit representatives can be appointed by licensees to act of their behalf. Corporate credit representatives can in turn appoint natural persons to also be credit representatives.	The requirements for appointing credit representatives are cumbersome and intrusive.  A licensee will, for instance, need to carry out a police check to ensure a prospective credit representative has not been convicted of serious fraud.  Also, a credit representative must belong to an EDR	Given the intrusiveness of this process, which must be undertaken by licensees, we believe a privacy impact assessment should be undertaken before the requirements are finalised.  Also, ambiguity about whether employees of credit representatives need to belong in their own to an EDR scheme should be clearly resolved to ensure that interpretation is not open.

		<p>scheme. This also applies to natural persons appointed by corporate credit representatives. AFC believes this could apply to employees of corporate credit representatives – but it is not clear. If AFC is correct in its initial view, this is a most inappropriate outcome for employees.</p>	<p>Overall, the AFC position is that EDR membership of credit representatives should be removed, with responsibility remaining with the licensee.</p>
<b>Operational Issues</b>			
Related Bodies	<p>Regulations provide an exemption to a company engaging in credit activities on behalf on a related licensed company</p>	<p>This exemption is supported, but should go further to accommodate corporate groups in which various companies engage in different credit activities, i.e. offer different products. These groups are typically managed as a single business, with overarching compliance, resources, policies and procedures. To require separate licences for each company create significant compliance challenges with documentation disclosures and EDR memberships, for instance, required for each company.</p>	<p>Permit group licences for related corporations where they are managed with group policies, procedures, resources and compliance.</p>
Businesses ceasing to provide credit & assignees (debt	<p>The performance of obligations and exercising of rights in relation credit</p>	<p>When a credit provider is no longer in the business of providing credit, it must remain licensed</p>	<p>Provide exemptions from those provisions of the Bill which are not applicable to receive</p>

purchasers)	contracts.	<p>while it continues to receive payments and enforce its credit contracts. It therefore must continue to maintain full compliance with the Bill. This is an unnecessary cost when it is no longer writing new business. This outcome is contrary to current policy in Victoria, ACT and WA which either register or license credit providers.</p> <p>Additionally, assignees of consumer debt should not be required to satisfy obligations that relate to credit assessment and contract formation. Their role is to collect debt due.</p>	payments and contract enforcement.
Investment Residential Property	<p>The Bill is to apply to individuals who borrow to invest in residential property</p> <p>Residential investment property loans can involve the payment of interest in advance.</p>	<p>The definition of residential property covers all types of land on which there is or will be a dwelling for residential use.</p> <p>However, the Commentary to the Bill provides that for the Code to apply, the property must be wholly or predominantly used as residential property. As far as we can see, there is no such requirement included in the legislation. This needs clarification as it is important in determining whether in fact the purchase of 'multi-purpose' property, e.g. farms and commercial apartments, by individuals may be caught – which</p>	<p>Introduction of a whole or predominant purpose test, will solve the problem in relation to multi-purpose properties, as they are not wholly or predominantly used as residential property.</p> <p>Amendments to the Credit Code are required to accommodate interest in advance residential loan products.</p>

		<p>we do not believe is intended.</p> <p>The Consumer Credit Code does not support the payment of interest in advance. This can have an adverse affect on investment property borrowers and in the availability of rental properties. The AFC has provided earlier advice to Treasury on this issue.</p>	
Responsible Lending	<p>Beyond capacity to repay - must assess whether product meets customer's "requirements and objectives".</p> <p>Must make reasonable enquiries about financial situation and take reasonable steps to determine financial capacity.</p>	<p><b>Opposed</b> to patronising approach to consumer choice.</p> <p>Unrealistic requirements given heavy reliance on customer to provide accurate information.</p> <p>Inability to verify customer's position, requirements, objectives or future capacity to comply.</p> <p>Risk management systems address these issues in different, commercially sensitive ways.</p> <p>Costs involved disproportionate to the risks involved depending on the transaction.</p> <p>Market failure, if any, is limited to small number of credit providers – robust enforcement can address.</p> <p>Refer to the previous AFC Submission on Responsible Lending,</p>	<p>Remove obligation to assess product suitability based on customer's stated requirements, objectives.</p> <p>Obligation should reflect current Code obligations to make reasonable enquiries of the debtor.</p>

		dated 20 April 2009, attached.	
Credit Assessment	<p>Must provide consumer with credit assessment up to 12 months after credit contract expires – pre and post contract.</p> <p>Must be provided within 2 business days.</p>	<p><b>Opposed.</b> Requirement has no purpose as credit is not a right.</p> <p>Credit assessments are internal decision making tools:</p> <ul style="list-style-type: none"> <li>▪ conducted using sophisticated electronic tools – no hard copy is available or producible</li> <li>▪ commercially sensitive</li> <li>▪ not open to challenge</li> <li>▪ only partially reliant on the information provided by the applicant</li> <li>▪ include repayment capacity as one of many criteria.</li> </ul> <p>Privacy Act requires customer notification if refusal to lend is based wholly or partly on a credit bureau report.</p> <p>To retain a credit assessment for the term of the loan serves no purpose. Home loans can run for 30 years and continuing credit products for the life of the customer.</p> <p>If evidence of credit assessment processes are required in the event of a dispute, then the onus is on the credit provider to demonstrate the basis for the lending decision.</p> <p>Timeframe of 2 days is</p>	<p>Remove the requirement to provide the customer with a copy of the credit assessment given it serves no practical purpose and only drives up the cost of credit.</p> <p>Alternatively, the credit assessment be limited to the processes undertaken during the credit assessment process e.g. review of financials, income and expenditure statements, consumer credit report, etc.</p> <p>If provision is retained, then time frames must be modified to reflect the current Code requirement re provision of copies of statements – within 14 days if within last 12 months or 30 days if longer.</p>

		<p>completely unrealistic</p> <p>Refer to the previous AFC Submission on Responsible Lending, dated 20 April 2009, attached.</p>	
Credit Guides	<p>Disclosure overload given credit guide requirements in addition to Code disclosure.</p> <p>Consumer confusion re services to be provided.</p>	<p><b>Opposed.</b> Additional written disclosure obligations are not in the consumer interest.</p> <p>Any additional information must be able to be given quickly and simply.</p> <p>No agent should be required to provide a credit guide, given the principal/agent relationship.</p>	<p>Finance brokers and credit providers only be required to provide the additional information.</p> <p>Delivery method must reflect the increasing use of technology in contract formation. Written, oral or onscreen acknowledgement etc must all be acceptable delivery methods.</p> <p>Credit providers to provide information in the pre-contractual disclosure document if preferred.</p>
Hardship threshold	Threshold increased to \$500,000.	<b>Agreed</b>	N/A
Prohibited security	Section 46 prohibits the taking of security over essential household goods.	<b>Agreed</b>	N/A
<b>Documentation</b>			
Licence Numbers	Must be on all docs within 2 years.	<p><b>Opposed.</b> Licence numbers on documents serve no practical purpose and are irrelevant to the consumer</p> <p>Process is expensive,</p>	<p>Remove the requirement for the licence number to be included on documents.</p> <p>The number can be available through the</p>

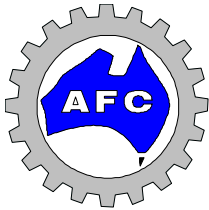
		given the systems issues involved, particularly if carried out after the other required amendments to Code documents.	ASIC website for any interested party.
Business Purpose Declaration	The business purpose declaration is presumptive rather than conclusive.	The current business purpose declaration does not reflect the form agreed between consumer advocates and industry representatives in 2008.	Amend the BPD to the form agreed by consumer advocates and industry.
Comparison Rates	The operation and application of comparison rates has been amended – the requirements for comparison rate schedules have been omitted.	<b>Agreed</b> – on the removal of comparison rate schedules. However, we <b>oppose</b> the continued requirement to disclose comparison rates in advertising.	Undertake further work with industry and consumers on comparison rates in advertising.
Contracts	Credit guide info should be included in the contract to ensure consumers have all relevant information in one document.	Consumers have under-disclosure through document over-disclosure.  Credit guides should be able to be given verbally and included in the pre-contractual statement where contracts are formed in writing.	Recommend the legislation makes it clear that credit guides can be given in the form that best suits the contract formation method.  The pre-contractual statement can include the credit guide information if the credit provider chooses.
Forms	Additional consumer protection info – especially re rights & EDR access, and compensation arrangements.  Undermining of creditor enforcement rights re referral to EDR – costs implications of consumers using	<b>Opposed.</b> The insertion of additional consumer protection information in the Forms leads to an imbalance in creditor/consumer rights. It detracts from the seriousness of the notice and misdirects consumer attention.  IDR, not EDR, must be the first point of contact	Remove the EDR notice and compensation details from the Forms.  Given EDR and compensations arrangements are both mandatory requirements for holding a licence, replace EDR with IDR as the most appropriate point of contact for any genuine

	<p>EDR to avoid enforcement or in general</p>	<p>for consumers with a dispute.</p> <p>Creditors must be given the opportunity to resolve any problem before EDR costs are incurred.</p> <p>EDR membership requires members to inform customers of its availability if IDR does not resolve the problem.</p> <p>Consumers will be misled about IDR/EDR processes if credit guides remains as is</p> <p>Promotion of EDR over IDR allows consumers to use this as a means to delay collections and enforcement activity and to drive up costs even where there is no genuine dispute.</p> <p><b>NB:</b> An EDR scheme will charge the creditor even if simply to refer the customer back to discuss the “dispute”. The cost of credit will be increased to cover the costs of unnecessary EDR contacts.</p>	<p>dispute.</p> <p>Licenses should be able to include contact details for their IDR procedures in prescribed forms – this appears not to be the case under current drafting.</p>
<p>Form 8 Notice</p>	<p>New form for first-time direct debit rejections.</p>	<p><b>Opposed.</b> This Form duplicates information already provided, delays resolving the problem and is operationally impracticable to manage.</p> <p>Written notice of a direct debit default is not in the interests of either the consumer or credit provider as it delays</p>	<p>Remove the requirement to send this Form as the customer has already received the relevant information at the agreement stage, as well as each time a new direct debit request is made by a borrower.</p>

		<p>dealing with the problem.</p> <p>Distinguishing a first time direct debit default from subsequent direct debit defaults is operationally difficult and expensive. The consequences are all direct debts dishonours will receive the notice and drive up the costs of credit.</p> <p>As the account will be in default from the direct debit dishonour, a phone call to the customer is the quickest way to resolve the problem – a standard procedure in many financial institutions.</p> <p>The direct debit service agreement, signed at the time the direct debit is given, already provides the information contained in this Form.</p>	
Commissions	<p>R280 - Commission requires pre-contractual disclosure of commission arrangements, including internal staffing arrangements, in addition to other commission disclosures in the contract documents.</p> <p>Penalties for non-disclosure under R280 are 2,000 penalty units and under the Code itself, a maximum penalty</p>	<p><b>Opposed.</b> Remuneration arrangements within businesses are commercially sensitive, impossible to calculate per transaction as they involve performance measures beyond sales performance and do not impact on customer choice.</p> <p>Customers have either approached the lender directly or come through a broker.</p> <p>Given the obligation to ensure the product is not unsuitable, the internal commission structure is</p>	<p>Remove the obligation to disclose credit provider staff incentive and remuneration arrangements.</p> <p>Bring non-disclosure penalties in line with current Code standards under s14 and ensure it applies only where there is evidenced material consumer detriment.</p> <p>Maintain for current approach of the Consumer Credit Code for commission disclosure, including exemptions for payments to staff and for</p>

	<p>of 100 penalty units.</p> <p>The concept of “commission” differs between the Bill and the Credit Code.</p>	<p>immaterial.</p> <p>Commission is only relevant where it influences choice e.g. brokers or other intermediaries.</p> <p>Penalties have no relationship to any possible consumer detriment.</p> <p>There is not apparent rationale for the differing definitions of “commission”. Also, obligations differ between the Bill and the Credit Code according to who is doing the disclosing and when. These differences are likely to confuse and lead to compliance problems.</p>	<p>merchant service fees.</p>
<b>Enforcement</b>			
Penalties	<p>Imprisonment for up to 5 years, depending on breach</p>	<p>Civil &amp; criminal penalties are completely disproportionate to breach or consumer detriment. Financial loss to credit provider is ultimate penalty.</p>	<p>Remove all criminal penalties involving imprisonment.</p> <p>Review penalty regime in context of consumer detriment, current Code penalties and comparative legislation e.g. Fair Trading Acts and Trade Practices Act.</p> <p>Refer also Part 1 of this submission.</p>

Transitionals			
Implementation of the Bill	Implementation transition period.	There is insufficient compliance implementation time allowed before the Bill takes full effect, including the amended National Credit Code.	Refer our comments in Part 1.
National Credit Code	Consumer Credit Code, Credit Acts & unregulated contracts	<p>There are inadequate transitional provisions for pre-National Credit Code contracts. The extensive and well-thought out Consumer Credit Code transitional regime has been omitted. There may be still credit contracts in existence written under the Credit Acts and there are certainly credit contracts written before the Consumer Credit Code which remain unregulated.</p> <p>Also, transitional provisions are needed to accommodate credit applications accepted before the Bill becomes law under which credit contracts are made and/or settled after it becomes law.</p>	<p>Reinstate the clear and extensive Consumer Credit Code transitional regime.</p> <p>Consumer credit contracts entered before the Code which were not regulated by the Credit Acts should remain unregulated.</p> <p>Credit contracts for residential investment property purposes made before the Bill becomes law should remain unregulated.</p>



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3 April 2009

Mr Geoff Miller  
General Manager, Corporations & Financial Services Division  
The Treasury  
CANBERRA ACT 2600

Dear Mr Miller,

**National Consumer Credit Protection Bill 2009: Licensing**  
*[Draft B09PG230.v30.doc 19/3/2009 12.11 PM]*

The AFC appreciates the opportunity to consider the draft licensing chapter of the proposed Bill ('draft legislation') and to provide this submission. The AFC would welcome this submission being made available to other stakeholders.

In the short time available, there has not been a realistic opportunity to consider the full operational ramifications or effectiveness of the draft legislation or to assess its likely cost implications. This is made all the more difficult as Treasury indicated, at a number of points during the 27 March teleconference on the draft legislation, it is considering and/or reconsidering various issues raised by the participants.

Based on the draft legislation, our initial assessment of implications is it –

1. Too broad and unclear in its scope and who will be affected
2. Will be costly for business to implement
3. Suffers from the absence of policy rationale against which such costs can be balanced
4. Is imprecise in what is required to meet a number of its obligations, particularly when sanctions for non-compliance include imprisonment
5. Many smaller businesses will not be able to realistically meet its obligations, resulting in them exiting the credit provider or broking markets
6. It will have negative affect on competition and consumer choice

The AFC believes this draft legislation is being produced with unseemly haste without regard to the potential adverse consequences on competition, consumer choice and the cost of credit. The credit industry is a significant part of the Australian economy. Its regulation needs to be appropriately and carefully developed, particularly given the current economic circumstances and the Government's aim to curtail 'red tape' and the costs of doing business.

It is for this reason AFC **recommends** the priority should be to transfer the Consumer Credit Code, as it currently exists, to the Commonwealth, with other issues to be assessed and developed with an adequate and open consultation process with all affected interests.

The AFC has had long history of involvement in consumer credit regulation and its reform. In our view, the draft legislation is repeating the same fundamental mistake that brought the Consumer Credit Code's predecessor, the Credit Acts, into disrepute as a regulatory model.

The Credit Acts were cast in broad terms, with exemptions needed to bring the scope of the Acts back to a sensible and justifiable policy basis. Exemptions continued for 11 years of the Credit Acts' operation as each unintended consequence came to light, resulting in around 90 exemptions. The AFC **recommends** a targeted regulatory approach rather than an all-embracing law to which there will be many exemptions. This will require a clearly enunciated policy rationale.

The fact we are providing comments on licensing should not be taken that AFC accepts licensing of credit providers is a justified policy. We do not as there is no demonstrable market detriment to support such a policy. I understand that you have received separate AFC material on this.

The balance of this submission is divided into 2 parts –

- Part 1 addresses key policy concerns with the approach of the draft legislation
- Part 2 deals with technical comment on specific provisions of the draft legislation

The AFC looks forward to assisting Treasury in achieving an appropriate regulatory environment in this country for consumer credit.

Yours sincerely



Steve Edwards  
Legal & Market Consultant  
Australian Finance Conference

## **Part 1 – AFC Policy Concerns**

### **Licensing Policy**

In the absence of an articulated policy objective for the licensing of credit providers (including debt purchasers), the AFC makes the following points –

1. The Treasury approach of ‘level playing field’ to licensing is without justification. Providers of credit and brokers/advisors of credit, deliver to consumers fundamentally different services, with very different obligations and rights between credit provider and debtor on the one hand and broker/advisor and client on the other – the players are not even on the same “field”
2. This has led to a generic application of requirements, rather than being targetted to specific needs and/or market failure
3. The AFC has not asked for credit providers to be licensed – in fact, the opposite, based on successful 12 years of largely negatively licensing regimes across the States and Territories
4. The AFC has not advocated for mortgage/finance brokers to be licensed, however, has accepted it as that is what their peak industry bodies have sought
5. The policy that brokers/advisors are to be licensed for the services they provide does not provide a justification for the licensing of credit providers, as suggested by Treasury during the 27 March teleconference on this draft legislation in furtherance of the ‘level playing field’
6. The reliance on the FSR licensing model has not been justified and is misplaced. That model is based on protecting consumers from the loss of their investments, superannuation, etc, often mandated by Government. Therefore consumer and Government risk is being protected. In the consumer credit context, the risk is the credit provider’s. It is the risk of non-payment by the consumer. When there is non-payment, the credit provider loses not only income, but also its capital. If a credit provider goes out of business, it is the credit provider’s problem, not the consumer’s, whose rights and obligations continue to be governed by the credit contract. The proposed licensing regime takes no account of this difference in where risk falls.

### **Market & Consumer Confusion**

The language of the draft legislation provides for a future of confusion by consumers in differentiating between services available to them. There is already sufficient confusion by consumers in determining whether a business with which they intend to deal is a credit provider or a finance/mortgage broker. To issue a generic licence, called an “Australian Credit Licence”, will ensure confusion will continue, as consumers are likely to believe they are dealing with a provider of credit when they may not be, or that a broker/advisor holding such a licence is representative of a credit provider.

This confusion is not overcome by disclosure, as by the time disclosure occurs, it is too late – it is preferable to know before making contact with a business whether it is a credit provider or a broker. As noted above, services and fees, etc, are very different, and so is the relationship with the consumer. If there is to be licensing of credit providers, we strongly

**recommend** providers be granted an “Australian Credit Providers Licence” and brokers/advisors be granted an “Australian Credit Brokers Licence”.

AFC’s concerns are compounded by the adoption of the expression “credit agent” to denote someone acting on behalf of a licensee, whether that licensee is a credit provider or a broker/advisor. That again suggests to consumers, the “agent” is an agent at law of a credit provider, when that will not necessarily be the case. As argued during the 27 March teleconference, the strong **recommendation** is to revert to the concept of “authorised representative”.

### **Credit activity – misunderstanding credit provider business**

The concept of “credit activity” divides the credit providing market into artificial segments, without commercial logic. As the draft legislation currently stands, a provider of security credit will need authorisation to engage in the distinct activities of credit contracts, mortgages and guarantees. The question of whether secured or unsecured credit is provided is one driven by provider credit policies. It may vary over time or market conditions.

Also, the segmentation proposed has consequences for the general conduct obligations (refer LIC170), particularly in terms of conflicts of interest, training, competence, resourcing and EDR membership. From a credit provider’s perspective, the business focus is on whether, and on what terms, it will provide credit – it is not in breaking down staff and resources into discrete segments of credit contract, mortgage and guarantee.

In addition, the role of staff and allocation of resources follows policies, procedures and technology. In many instances, credit decisions are made by decision-making technologies, not staff. Documents are produced by technology, consistent with what the applicant applied for and the terms on which credit was approved, e.g. whether secured or not. These are all determined by policies and procedures, embedded into technological support systems. Consequently, segmentation is an artificial construct as business operations are integrated, not siloed into separate “credit activities”.

Before finalising policy and drafting, we **recommend** Treasury gain a practical perspective of credit provider operations by visiting several credit providers. The AFC would be happy to facilitate this.

It is our view any segmentation should be consistent with market operations and by reference to the services provided. We **recommend** the only segmentation should be represented in the licence type –

1. Credit providers licence (which would include providers of consumer leases and assignees of consumer credit contracts)
2. Credit brokers licence (which would cover, as envisaged by the NSW November 2007 exposure draft finance brokers bill, providers of advice);

As stated in Part 2 of this submission, general information provided by a credit provider about its own credit products should not require licensing.

## Part 2 – AFC Comments – Specific Provisions

Provision	Issues/Concern	Recommendation
DEF1 – ‘credit agent’	<p>Discussed in Part 1.</p> <p>The word ‘credit’ confuses the service being provided. Also, the word ‘agent’ may not be truly representative of the legal relationship with the licensee.</p>	Substitute ‘authorised representative’.
DEF1 – ‘credit legislation’	<p>This definition suggests the States and Territories will continue to have a role in regulating consumer credit. We are most concerned with this suggestion, given there was broad consensus for that regulation to be within the Commonwealth’s legislative power alone, not the States and Territories as well.</p>	Clarify what is intended by paragraph (c) of this definition, both for policy reasons and for the reason it is a general conduct requirement for registrants and licensees.
DEF5 – ‘credit activity’	<p>Discussed in Part 1.</p> <p>‘Credit contracts’ includes administrative and outsourced function such as statement production.</p> <p>Contrary to earlier Treasury discussions, the 27 March teleconference suggested that outsourcing debt collection activity would require credit providers to appoint debt collection agents as their ‘credit agents’. These agents are already regulated by regulated and licensed by the States and Territories, as well as subject to ASIC and ACCC enforcement. There is no justification for requiring an additional regulatory environment for outsourcing collections.</p>	Exclude administrative functions and outsourcing.
DEF7 – ‘credit advice’	<p>Discussed in Part 1.</p> <p>‘Credit advice’ should not include information provided by a credit provider about its own products</p>	<p>‘Credit advice’ should not apply to credit providers.</p> <p>(Refer to the exemption similar to Reg 7.1.33H under the Corporations Regulations, which allows financial services providers to provide general information</p>

	<p>As drafted, 'credit advice' is very broad, potentially applying at any stage during the life of a credit facility, including negotiation of hardship arrangements. The 27 March teleconference suggested this broadness was unintended and was to be confined to credit advice prior to credit being approved.</p> <p>The broadness of 'credit activity' also captures lawyers and accountants, to whom prospective guarantors and borrowers might seek advice before entering their agreements.</p>	<p>about their own products without an Australian Financial Services Licence)</p> <p>If retained, 'credit advice' should be confined to broker advice</p> <p>Exclude independent advisors from the scope of licensable 'credit advice'.</p>
DEF8 – 'credit broking'	'Credit broking' includes the services provided by merchants and vendors to facilitate the sale of their goods and services. These have been exempt for many years of finance broker regulation – there has been no statement of policy to suggest this position can no longer be sustained. Merchants and vendors have not been represented or consulted on this significant change.	If continued to be licensed in Phase 1, consultation should immediately commence with merchant and vendor representatives.
LIC15, LIC35, LIC55, LIC75 – Engaging in credit activities	While these provisions make it clear a 'credit agent' of a licensee does not commit an offence, it appears employees of licensees can commit an offence unless the business is an exempt person.	<p>It must be made clear that representatives of credit providers, especially their employees and directors, including related companies (refer definition of 'representative' in DEF1), do not require licensing or appointment as a credit agent of a credit provider.</p> <p>Refer also to comments below on LIC95.</p>
LIC95	Exemptions from licensing and registration are yet to be articulated.	If people are to be exempted from the draft

	<p>AFC is of the view that, as much possible, exemptions should be in the primary legislation and carved out from the meaning of ‘engages in credit activity’.</p> <p>Discussed in Part 1.</p>	<p>legislation, as far as possible, it should be by way of exclusion from scope (i.e. not regarded as engaging in credit activity) than by exemption.</p> <p>This needs consultation with AFC and others to ensure the current broad scope does not have unintended consequences. This should be the subject of a priority policy paper to tease out those consequences.</p>
LIC120 (f), LIC170(1)(b)	<p>This obligation is not relevant for credit providers – it only has relevance in the broking context. Brokers have ‘clients’ – credit providers have ‘debtors’. The contractual relationship is very different – refer discussion in Part 1.</p>	<p>This should be a discrete registration and licensing condition applicable only to brokers.</p>
LIC126 & LIC186	<p>This imports breach reporting requirements from the FSR regime. There has been no discussion about this requirement in Treasury stakeholder meetings, let alone policy justification. Also, its policy approach is inconsistent with that of the Part 6 of the Consumer Credit Code dealing with civil penalties for contravention of ‘key requirements.</p>	<p>Omit these provisions.</p>
LIC155 & 157	<p>Creates an uneven playing field by permitting WA brokers &amp; ADIs to be streamlined, and not allow those credit providers that already hold licences to operate in WA. The WA credit provider licensing regime is a robust one with requirements for considerable information about the licensee, its directors and senior managements, including probity checks. The streamlining issue has been raised by AFC at almost every Treasury stakeholder meeting.</p>	<p>WA licensed credit providers should be similarly streamlined. There is, in AFC’s view, a strong case for streamlining WA licensing credit providers than WA licensed finance brokers. Credit providers have not been subject to ‘grandfathering provisions’.</p>

LIC 170	<p>The general conduct obligations in the draft legislation exceed those under consideration to date in the Treasury stakeholder meetings. The rationale for the extent of their application to credit providers is unclear.</p> <p>In relation to conflicts of interest management, refer to comments above at LIC120(f) &amp; LIC170(1)(b)</p> <p>Because the draft Bill has not been released in its entirety it is difficult to understand what the expected training requirements will be on ‘representatives’. AFC believes the training requirements for credit providers needs considerably more work, given the context of their business operations and the fact it is they are managing their own commercial risk.</p> <p>The consideration of financial resources for credit providers seems at odds with the fact it is the credit provider who provides the money. If they don’t have the money, then they cannot provide more credit. If they become insolvent, it does not adversely affect debtors as their rights and obligations remain governed by the credit contract.</p> <p>See also general discussion in Part 1.</p>	<p>There needs to be consideration of the relevance and application of the draft general conduct obligations to credit providers.</p> <p>Also, to avoid adverse market consequences as outlined in Part 1, Treasury needs to commission a cost/benefit analysis of its proposals. The AFC can assist with that.</p>
LIC175	<p>Compensation arrangements have not been raised as an issue in Treasury stakeholder consultations. No rationale has been expressed for the need for credit providers to provide a compensation fund.</p> <p>In AFC’s view, compensation arrangement obligations are not relevant for credit providers – they are more relevant in the broking context. It is credit providers who can be out-of-pocket because of non-payment by debtors.</p>	<p>There is no policy justification for credit providers to establish a compensation fund.</p>
LIC 195	<p>The requirement to record an Australian Credit Licence number on documents is an unnecessary administrative burden and cost with no consumer benefit. ASIC will have</p>	<p>Omit the requirement to record licence numbers in documents.</p>

	publicly available licensee details on its website. With the Government's position of reducing compliance burdens of business, this seems to AFC a good one to remove.	
LIC250 – LIC310	<p>The provisions dealing with credit agents and representatives are confusing. A number of the provisions appear to be brought over from the FSR regime and do not sit well with the creditor/debtor relationship between a credit provider and its customers. For instance, the use of the expression 'client' is descriptive of the customer of a finance broker/advisor, not of a credit provider. Development of a clear policy rationale would be appropriate.</p> <p>See also general discussion in Part 1.</p>	A rethink of the credit agents and representative provisions is essential.

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20 April 2009

Mr Geoff Miller  
 General Manager, Corporations & Financial Services Division  
 The Treasury  
 CANBERRA ACT 2600

Dear Mr Miller,

**National Consumer Credit Protection Bill 2009:  
 Responsible Lending Conduct**

*[Resp Lending Conduct DRAFT legis 8 April 09 INDUSTRY consult.doc - 8 April 2009 2:48 PM]*

The AFC appreciates the opportunity to consider the draft *responsible lending conduct* chapter of the proposed Bill ('draft legislation') and to provide this submission. We ask this submission being made available to other stakeholders.

As noted in earlier submissions, the AFC has serious concerns about the consultation process on core provisions, particularly those that impact on the commercial viability of lenders, consumer choice and non-disclosure by over disclosure. Treasury, in allowing only 5 business days to respond to provisions that significantly impact on the commercial basis of the consumer/lender relationship, limits informed discussion. This is crucial as the proposed *responsible lending conduct* provisions undermine the rights of all parties. They are counter to consumer interests and indicate a lack of understanding of the commercial environment.

In particular, the proposed *responsible lending conduct* provisions disempower consumers through

- over-disclosure – credit guides by multiple parties in addition to other pre-contractual disclosures under related legislation;
- overly bureaucratic processes;
- removing the freedom to contract as consumers see fit; and
- by confusing relationships and obligations between the parties involved

In effect, the provisions treat consumers as uneducated, ill-informed and incapable of making credit decisions in their own interests.

From a credit provider's perspective, the proposed *responsible lending conduct* provisions result in:

- unwarranted intrusion into commercially sensitive credit decisioning
- increased credit costs through duplicated disclosure and process requirements
- more subjective credit decisioning given the non-commercial criteria to be included

- slower credit approvals while subjective inquiries are made about consumer purpose/objectives and suitability
  - this has a flow-on effect on the economy
- lenders and brokers being placed in a paternalistic position where subjective judgments on purpose/objectives are made
- confusion between relationships and obligations between the parties involved
  - consumers are clear about the different roles of credit providers, finance brokers and collections agents
    - the proposed terminology has the potential to mislead consumers and will result in significant confusion about the services provided by those involved in the lending cycle
  - there is no contractual arrangement between debt collectors and consumers to justify a “credit guide”
    - there is only a principal and agent commercial relationship which should not be subject to a consumer credit regime

The balance of this submission is divided into 2 parts and includes recommendations –

- Part 1 addresses key policy concerns with the approach of the draft legislation
- Part 2 deals with technical comment on specific provisions of the draft legislation

As with the AFC’s 3 April submission on the draft licensing provisions, we recommend Treasury gain a practical perspective of credit provider operations by visiting several credit providers. Such an approach will assist in achieving an appropriate consumer credit regulatory regime. The AFC is happy to facilitate this.

Yours sincerely



Steve Edwards  
Legal & Market Consultant  
Australian Finance Conference

## Part 1 – AFC Policy Concerns

### ***Responsible Lending Policy***

The proposed *responsible lending conduct* provisions are without a legitimate policy basis to support the approach taken. Despite the “Global Financial Crisis”, AFC members report continuing low levels of arrears in consumer debt. In addition, Consumer Affairs agencies report few consumer credit complaints, particularly in relation to *responsible lending*. These are two clear indicators the majority of lenders are responsible. It is not in their commercial interests to be otherwise.

In commenting on the transfer of credit responsibility to the Commonwealth, Senator Sherry has publicly stated the removal of small lenders from the credit market would be a welcome outcome of the National Consumer Credit Protection (NCCP) Act. Media over this past week reports the purpose of the legislation is to curb predatory lending. Given the focus on credit assessment and customer purpose and objectives, the proposed *responsible lending* provisions appear part of the NCCP Bill’s legislative construct to achieve this outcome.

Where the Government’s policy agenda is to make it difficult for particular credit provider types to operate in the consumer credit market, a more transparent and targeted policy position would be appropriate. There is no significant market detriment to warrant the application of the proposed provisions to the majority of lenders.

Regardless, we comment on our other policy concerns with the approach taken to *responsible lending conduct*.

### **Credit Guides**

The *credit guide* concept is fundamentally flawed. In seeking to apply the concept to all parties involved in the credit process, it ignores the basic contractual relationship on which the FSR concept was based.

Credit guides only have relevance to the consumer where there is a direct contractual relationship involved. Where credit is concerned, this is with the credit provider or the broker (credit assistant). As there is no contractual relationship between consumers and introducers and debt collectors (credit agents), credit guides for these parties serve no useful purpose. They will simply confuse consumers and needlessly drive up the cost of credit.

### **Process Duplications**

The responsible lending provisions place the same obligations on credit providers and brokers (credit assistants) despite the significantly different services offered. Consumer confusion, market dysfunction and increased credit costs will result.

Brokers are responsible for:

- Determining an applicant’s loan requirements
- Sourcing one or more credit providers who offer products to suit

Credit providers are responsible for:

- Determining applicant suitability according to lending criteria
- Providing credit and managing the loan

Brokers are not credit providers' agents so do not have access to the information on which credit providers base their credit decisioning. Brokers are not in a position to approve or reject loan applications. Nor are they in a position to provide applicants with information as to their suitability for loan acceptance with any specific credit provider.

Only credit providers are in a position to conduct the credit assessment process and provide, if required, a basis as to why credit is offered or rejected.

To confuse two clearly distinct services and require the same process outcomes is detrimental to all involved in the process, including consumers. It also creates confusion around liability and accountability, something the previous credit regime did not. To lose that clarity is to set consumer protection and credit regulation on a backward path.

Multiple levels of disclosure of the same information result in non-disclosure as consumers will be overwhelmed by the amount of information provided

A consumer car loan, with 2 financed insurances, can result in 71 pages of disclosure documentation as follows:

- Broker (credit assistant) privacy consent - 2 pages
- Broker (credit assistant) credit guide - 6 pages
- Credit provider privacy statement & consent - 2 pages
- Credit provider credit guide - 4 pages
- Credit contract - secured - 10 pages
- Direct Debit Agreement - 2 pages
- Direct Debit Authorisation - 1 page
- Insurance – Financial Services Guide - 16 pages
- Vehicle Insurance – Statement & Policy - 18 pages
- Gap Insurance – Statement & Policy - 10 pages

### **Responsible lending and borrowing – balancing the interests**

Any approach to *responsible lending* must provide an appropriate balance between credit provider and consumer interests.

Factors that impact on *responsible lending* are far broader than debtor objectives or credit provider assessment processes. They include the broader regulatory environment, accurate consumer disclosures of financial position, positive credit reporting and introducer roles and responsibilities.

Consideration must be given to the following:

- Credit is not a consumer right – it is a commercial decision between two parties, one of which stands to lose its capital if the other defaults
- *Responsible lending* must be balanced with *responsible borrowing*
  - In the current legislative environment, “responsible” assessment processes are heavily dependent on consumers making full and accurate disclosures of their financial positions
  - It seems curious the proposed legislative regime requires credit providers not to trust what consumers tell them in that reasonable verification of consumer information must be undertaken
  - This is a matter for credit risk, not regulatory imposition based on the vague standard of “reasonable”

- A positive credit reporting environment is required to counter consumer under-disclosure of credit commitments
- Credit decisions are based on commercially sensitive criteria which cannot be made available to the consumer
  - As credit is not a right but a commercial decision, there is no benefit to the consumer in providing the reasons for the rejection of a credit application
    - The Privacy Act provides for the only appropriate notification – that the decision was based wholly, or in part, on a credit bureau report
  - Credit decisioning is made using a range of tools, including sophisticated credit scoring
    - The scorecard criteria is considered highly reliable in determining capacity at the point of entry into the contract
    - Generally, credit assessments are managed electronically - there is no hardcopy ‘credit assessment’
- Consumer protection provisions in a range of other legislation provide redress from unconscionable conduct, misrepresentation, misleading or deceptive conduct etc
- Concerns about consumer credit choices should be addressed through consumer education and financial awareness
  - Ultimately, the consumer has the right to choose whatever credit product he/she wishes, regardless of regulator judgment on “suitability”

Our comments in previous submissions to, and meetings with, Treasury on the overall approach to the FSR-type credit regime, including terminology which confuses relationships, over-disclosure as non-disclosure and overly bureaucratic processes that ignore the commercial reality, remain and are not reiterated here.

## Part 2 – AFC Comments – Specific Provisions

Provision	Issues/Concern	Recommendation
<p>@R30(1) – ‘credit guide’</p>	<p>In light of the Consumer Credit Code’s (“Code”) pre-contractual disclosure requirements, we see no consumer benefit in the ‘credit guide’ of credit providers – in fact, the contrary.</p> <p>A credit provider credit guide, in addition to contractual documentation, will result in debtors being confronted with too many documents to read, much less understand.</p> <p>Also, the trigger for giving the credit guide is expressed ambiguously, referring to “it becomes apparent to the licensee that it is likely to enter a credit contract”. That surely is after a credit application has been approved and the consumer has satisfied any approval conditions. If that is the case, then the timing should be expressed to be when a pre-contractual statement is provided to a consumer in accordance with s14 of the Code.</p>	<p>If the credit provider credit guide requirements are to be retained, any relevant disclosures be permitted to be incorporated in pre-contractual documentation required under the Code.</p>
<p>@R30(2)(c)</p>	<p>The requirement to state EDR membership and associated consumer rights is repetitive of what is to be required to be set out in the Consumer Credit Code’s Form 2 Statement of Things You Should Know About Your Proposed Credit Contract”.</p> <p>Also, if a credit consumer has a concern or complaint, they should be encouraged to first raise it with their credit provider. That would be consistent with the proposed licensing arrangements which will require internal complaint and dispute resolution processes. In addition, EDR schemes expect consumers to first raise concerns and complaints with their credit providers before pursuing EDR processes.</p> <p>Finally, inclusion of EDR details suggest, right at the beginning of a credit transaction, that their will be problems. This is contrary to experience which demonstrates most credit transactions proceed without complaints.</p>	<p>Remove the EDR detail requirement.</p>

<p>@R30(2)(d) – ‘compensation arrangements’</p>	<p>‘Compensation arrangements’ are not appropriate in the credit context in relation to consumers. Refer to AFC’s 3 April submission on draft licensing provisions for further comment on the irrelevance and inappropriateness of the proposed compensation arrangements.</p>	<p>Remove ‘compensation arrangements’ as a mandatory disclosure to consumers.</p>
<p>@R30(2)(e) – provide suitability assessment to the applicant</p> <p>@R70 – copy of assessment</p> <p>@R90 – unsuitability criteria</p>	<p>Unsuitability criteria involve a subjective judgment about whether a particular credit product meets the applicant’s stated purpose and objectives and commercially sensitive credit assessment criteria.</p> <p>Credit assessments are internal decision making tools:</p> <ul style="list-style-type: none"> <li>▪ conducted using sophisticated electronic tools – no hard copy is available or producible</li> <li>▪ commercially sensitive</li> <li>▪ not open to challenge</li> <li>▪ only partially reliant on the information provided by the applicant</li> <li>▪ include repayment capacity as one of many criteria.</li> </ul> <p>Given the technology used, there is no hard copy that can be provided, nor can any response be expected within 2 days of receipt. There is no basis for such a short time, when, at best, it seems to be intended to for record/evidentiary purposes.</p> <p>Receipt of a credit assessment serves no useful purpose as applicants:</p> <ul style="list-style-type: none"> <li>▪ must be responsible for their own financial situation</li> <li>▪ have no right to credit so cannot challenge a decision to refuse credit.</li> </ul> <p>The only reasonable disclosure is that an adverse credit report exists, as required under the Privacy Act.</p>	<p>Remove the requirements to provide:</p> <ul style="list-style-type: none"> <li>• a subjective judgment on product suitability</li> <li>• a copy of the assessment at any stage in the lending cycle.</li> </ul> <p>Amend the time in which to provide the assessment to 30 days, which is both realistic and in keeping with other Code requirements for document provision.</p>
<p>@R50(1) – contract suitability</p>	<p>A credit contract is to be assessed as unsuitable if it will be likely that the consumer will be "unable to comply with</p>	<p>Remove the obligation on credit providers to form subjective views</p>

<p>@R65</p> <p>@R90</p> <p>@R150(1)</p>	<p>the contract". This goes beyond whether the contract is affordable. Credit contracts have many ancillary obligations (eg maintenance of the security property). This will place credit providers in the position of having to consider for each loan application whether the consumer is likely to be able comply with all of those ancillary obligations. This is simply unworkable.</p> <p>Credit providers will effectively have to make a decision on the reliability of the information provided to us by a consumer (@R65(2)). While credit providers may undertake some enquiries in relation to the financial information provided (e.g. by way of pay slips, bank statements etc), how can credit providers decide whether to believe information they have been provided about the consumer's requirements and objectives? Credit providers should be able to rely on any information provided by a consumer about their objectives and requirements without having to consider whether to believe them or whether to make further inquiries.</p> <p>"Suitability" or "unsuitability" is highly subjective and a matter for the debtor, not the credit provider.</p> <p>Debtors have a range of reasons for choosing particular credit products. These reasons are broader than stated purpose and terms and conditions.</p> <p>In addition, a range of credit products can be suitable.</p> <p>No objective criteria is provided on which to form a 'suitability' test.</p> <p>Refer also to AFC general comments in Part 1.</p>	<p>about product suitability or unsuitability for a consumer.</p> <p>The assessment of unsuitability beyond consideration of a consumer's capacity to pay needs fundamental reconsideration, and, unless there is a sound policy basis, it should be abandoned.</p> <p>If there is inappropriate conduct by credit providers, the solution should be to pursue administrative and disciplinary action, rather than impose inappropriate regulation on the whole industry.</p>
<p>@R32(1) – provision of credit guide on assignment</p>	<p>Obligations on assignees fail to take into account the range of situations where debtor contact is not permitted e.g. accounts under bankruptcy administration.</p>	<p>Provision of the credit guide should:</p> <ul style="list-style-type: none"> <li>• only be required where it does not</li> </ul>

	Also, the proposal fails to take account of legal assignment requirements under State legislation, such as the NSW Conveyancing Act 1919.	<p>conflict with other legislative obligations</p> <ul style="list-style-type: none"> <li>• take into account other legal notification requirements.</li> </ul>
@R32(2) – compensation arrangements	Refer to our comments above on compensation arrangements.	Remove ‘compensation arrangements’ as a mandatory disclosure to consumers.
@R60 – ‘reasonable’ inquiries	<p>This provision has the potential to conflict with the Privacy Act obligation to keep personal and credit information confidential.</p> <p>‘Reasonable inquiries about...’ infers inquiries of third parties, rather than the consumer concerned.</p> <p>‘Reasonable inquiries about...’ the consumer’s objectives are an unwarranted intrusion into the consumer’s personal life and should not be included.</p>	<p>Amend the provision to read - Reasonable enquiries should only be made <i>of the consumer</i> in relation to requirements and financial situation.</p> <p>Remove requirement to make enquiries about the consumer’s objectives.</p> <p>Insert an obligation on the consumer to make reasonable disclosure of their requirements and financial situation.</p>
R70 – assessment to consumer	<p>Refer AFC comments in Part 1.</p> <p>In a number of circumstances, credit providers are required to provide a copy of an assessment to the consumer. The note to the section states that "the licensee is not required to give the consumer a copy of the assessment if the contract is not entered". However, the section itself states "if before entering the credit contract" the consumer requests a copy of the assessment we have to give it to them. The timing of this obligation needs to be clarified. We should only need to provide a copy of our assessment if the consumer enters into the credit contract.</p>	Remove requirement of provider assessment to consumer. Records of a credit provider should be sufficient if there is a need for court or enforcement action.
@R80 – commission disclosure	<p>Commissions are disclosed in the contract, as required by the Code.</p> <p>Also, the proposed disclosure is in direct</p>	Clarify policy objective and remove compliance inconsistencies.

	<p>conflict with a specific exemption from employee commission disclosure in Code s15(M).</p> <p>In addition, the Dictionary provisions of the NCCP Bill contain a definition of “commission”, as well as the definition for the same term in Code Sch 1. An unnecessary compliance management issue arises because of differing meaning for the same term.</p> <p>Regulations should not allow for disclosure in any other way to avoid duplication and confusion.</p>	<p>Regulations in relation to commission disclosure should limit disclosure to the credit contract</p>
@R90(5)(b) – unsuitability	<p>For many mortgage products, credit assessments are made more than 30 days before the contract is entered or the limit increased.</p> <p>Significant documentary requirements such as property valuations, council approvals etc delay the settlement process.</p>	<p>Extend time frame to 60 days to allow for the complexities associated with assessment and settlement phases of particular credit products</p>
Part 3 -3 Licensees who are credit assistants	<p>This proposal reinforces AFC’s long-held concern that credit providers and finance brokers needs to separately recognised and regulated differently.</p> <p>In AFC’s view, Part 3-3 cannot apply to a credit provider where a staff member is dealing with a consumer about that provider’s products. The credit provider, through the staff member, is not providing credit assistance, as we understand the concept.</p> <p>However, even if it were the case, most of the disclosure requirements of Part 3-3 are irrelevant, e.g. such as fees, panel credit providers, commission, prohibition on demanding payment of fees, unsuitability assessment. To the extent any of these could possibly be applicable, they would be covered by the credit providers obligations under Part 3-2 or the requirements of the Code.</p> <p>Also, currently finance broker laws require</p>	<p>Put beyond doubt credit providers are not “credit assistants”.</p> <p>Abandon the expression “credit assistant”. Use the commonly and well understood term, “finance broker”.</p>

	<p>equivalent disclosure when a broker is engaged by a client to provide broking services. AFC’s assessment of the likes of @R130 and @R135, taking into account the current Dictionary definition of “credit assistance”, is that the disclosures need only be made before introducing (or otherwise) a particular contract with a particular credit provider. AFC suggests this is too late, and should be initially provided at the time of client engagement.</p> <p>We have previously commented in the inappropriateness and confusion arising from the expression “credit agent”. The same misgivings arise from “credit assistants”.</p>	
	<p>As noted in previous submissions, consumers will be confused by both terminology and functions relating to finance brokers (credit assistants).</p> <p>Both credit providers and brokers have the same obligations under the proposed provisions, despite providing completely different services.</p>	
Part 3 - 4 Credit agents	<p>Credit agents are intended to be businesses acting on behalf of licensees. AFC’s comments on this issue will be confined to licensees who are credit providers.</p> <p>Under the current draft of the licensing provisions, credit providers are responsible for the conduct of their introducer “credit agents”. The credit guide for credit agents should reflect the responsibility between credit provider and credit agent. For instance, with credit agents being required to belong in their own right to an EDR scheme, confusion is bound to arise if the credit agent and the credit provider belong to different schemes.</p> <p>Consumers will be completely overwhelmed with documentation if credit agents are required to provide their own credit guide in addition to that of the licensee.</p>	<p>In the context of credit agents of credit providers, the credit guide should not be required. The key consumer benefit is in the credit provider being responsible for the agent and in the regulation of the credit product and the provider.</p> <p>AFC sees no merit in the credit guide of credit agents of credit providers.</p>

	<p>The credit provider licensee’s guide, contained in the pre-contractual statement, is the most important document as that is where the contractual relationship is formed.</p>	
<p>@R192(2) – suggestions to remain in a unsuitable credit contact</p>	<p>Judgments on suitability post credit assessment are problematic as debtor circumstances will impact on credit options.</p> <p>Confusing suitability with capacity to honour the contract at a particular point in time will lead to unrealistic expectations about outcomes.</p> <p>Where a consumer is unable to comply with a contract due to hardship or other reasons (loss of security etc), there may be no other financial alternative other than to remain in the contract and to discuss contract variations with the credit provider.</p> <p>To prohibit suggesting the debtor remain in the contract without allowing for consideration of situations where no other alternatives are available is not in the consumer interest.</p>	<p>Reword the section to avoid the prohibition if the debtor’s situation does not permit other viable credit alternatives</p>
<p>Part 3 - 5 Credit Guide of debt collectors</p>	<p>Debt collectors have no contractual relationship with debtors. They act as agents for credit providers.</p> <p>Consequently, a credit guide is of no consumer benefit</p> <ul style="list-style-type: none"> <li>• Collection fees and/or commissions are payable by the credit provider and disclosed in the credit contract</li> <li>• Disclosure of who else the agent acts for is irrelevant</li> </ul> <p>Debt collectors contact millions of debtors per annum. If required to provide a guide to each one, the costs of collections will escalate. These costs will be passed on to consumers, increasing their overall indebtedness. It is a counter-productive requirement for no consumer benefit.</p>	<p>Remove the requirement for debt collectors to provide debtors with a credit guide.</p>