



22 May 2009

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

By email: consumercrredit@treasury.gov.au

Dear Mr Miller

National Consumer Credit Protection Bill 2009

The Institute of Mercantile Agents (IMA) welcomes the opportunity to comment on the National Consumer Credit Protection (NCCP) Bill as we are of the view it should not regulate the debt collection industry. We seek modification of its scope, or a specific exemption, to avert the significant commercial consequences of another regulatory regime on our members, many of whom are small businesses.

As our industry is already regulated at the State and Territory levels, there is no market failure supporting inclusion in the NCCP regime and we were not included in the consultations, we believe its application to us is an unintended consequence of the drafting.

Our membership largely comprises small business service providers, with less than six staff members. Nearly a quarter of our members have an annual turnover (not profit) of less than \$100,000 per annum. They will struggle to comply with the licensing requirements of the regime.

For many, compliance with the NCCP regime will mean withdrawal from the market. In turn, that reduces competition and drives up pricing. There is no consumer or competition benefits in such an outcome.

Governments at both the Commonwealth and State/Territory levels have acknowledged the current debt collection regulatory environment places an unnecessary and anti-competitive regulatory burden on our members. There are a number of initiatives underway to achieve harmonisation or to implement a truly national regulatory regime. The NCCP Act, if it applies to our members, will further complicate a difficult regulatory environment.

As Treasury did not include our Association or any of our members in its consultation on the NCCP Bill, and the submission time frame has been exceedingly short, we have not been able to assess the impact on our members as thoroughly as we would wish.

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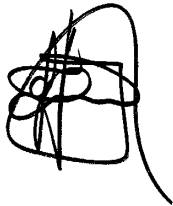
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Regardless, we provide Treasury with an overview of our industry and our main concerns with the licensing and credit representative provisions of the NCCP Bill, in particular. In our view, the NCCP Act will result in over-regulation of our members, anti-competitive outcomes and the loss of jobs where members are forced to withdraw from the market, particularly in rural and regional areas. This cannot be the outcome the Government intended.

Consequently, we seek an exemption from the NCCP Act on the basis we are already regulated at State/Territory levels, there is no market failure justifying further regulation and there are current policy initiatives aimed at harmonising our regulatory environment.

We would appreciate the opportunity to meet with you to explain our industry and regulatory environment.

Yours faithfully

A handwritten signature in black ink, appearing to be 'Alan Harries', written in a cursive style with a long tail extending downwards and to the right.

Alan Harries
Executive Director

National Consumer Credit Protection Bill

1. Introduction

The Institute of Mercantile Agents (IMA) was established in 1961 to represent collectors, investigators, process servers and repossession agents throughout Australia.

Our members generally work as agents for principals such as banks, credit providers, lawyers, insurers, government and the business community. Depending upon State regulations, most members hold a commercial agent, or private inquiry agent, licence or equivalent.

In addition to the licence(s) held in various jurisdictions, our members are subject to a range of legislative requirements at both Federal and State/Territory levels as well as contractual obligations to the principals who engage them.

Contractual arrangements between principals and their agents should also be taken into consideration in the development of any legislative regime as they impose conduct standards on agents to protect the reputation of the parties involved. In many respects, they set more appropriate benchmarks for agent conduct than any legislative regime.

Our response to the National Consumer Credit Protection Bill (the NCCP Bill) is based on the following policy principles:

- Any legislative regime should address demonstrable market failure or consumer detriment
- A nationally coherent approach is required to address cross-jurisdictional service delivery
- Any regulatory regime should look to decrease, not increase, the regulatory burden, particularly on small business
- Legislation must provide a competitive balance between small and large businesses operating in the same sectors
- Significant consultation is required to ensure Treasury has a sound understanding of how the industry operates so regulatory impact statements are soundly based

We request our submission be read in conjunction with the Australian Collectors and Debt Buyers' Association (ACDBA) submission. The ACDBA also represents the interests of the debt collection industry and has provided Treasury with a detailed submission.

Because of the consistent views held by both Associations, both in terms of the issues involved and preferred outcomes, our submission limits its responses to the broader perspectives of our members.

Our submission points out the NCCP Bill's most significant adverse impacts on members.

2. Member Profile

IMA membership encompasses the broad spectrum of industry participants from small businesses operating in rural and regional areas to large corporations offering services across all jurisdictions.

The majority of our members operate on a "general practitioner" basis with an emphasis on field agency work involving process serving and repossessions. Many also engage in debt collection and investigation activities particularly to provide those services to smaller communities.

The IMA conducted a member survey in May 2008. The results provide an overview of the IMA membership.

The key survey findings are:

- The majority of businesses employ less than 6 staff members
- Annual turnover for the majority of members is less than \$500,000, with 23.68% reporting a turnover of \$100,000 or less per annum
- The majority of members provide services in one State or Territory only, with 44.8% offering services across the majority of States/Territories

As the majority of members are small business operators, compliance with the NCCP Act significantly impacts on their viability and competitiveness.

3. Member Services

Debt collection is a descriptive category of a range of services dedicated to the recovery of outstanding debts. Service providers cover debt collectors, field callers, investigation agents and repossession agents.

Some of our members provide a range of services, others specialise in a specific function like field calls or repossessions. In turn, a specific function like repossessions may still require the support of other services such as tow truck operators and locksmiths.

The process flow is as follows:

Service	Purpose	Process	Businesses involved
Collections	To make arrangements to repay debts.	Demands can be made <ul style="list-style-type: none"> • In writing • By phone • Personal attendance 	Collection agencies
Field Call	<ul style="list-style-type: none"> • To confirm the address • To serve due process like legal documents or s.80 demand notices • To make a personal demand for payment • To interview the debtor regarding his or her financial situation and capacity to pay • To assess the environment and asset backing for credit worthiness • To assess the environment and asset backing for potential litigation 	Personal attendance on the debtor	Collection agencies Field callers Bailiffs

Repossession	To seize and sell secured property for sale – vehicles etc and land	To arrange the following: <ul style="list-style-type: none"> • tow truck operator to collect secured vehicle • for debtors to vacate secured property • locksmith to change locks • repairs and maintenance of secured goods and land • storage of goods • valuations of goods and land • auction/sale of goods and land • security of the premises 	Repossession agents Tow truck operators Locksmiths Plumbers, builders, electricians, handyman services etc Storage facilities Valuers Auctioneers Real Estate agents Security guards
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Given how broadly DEF 5 is worded, all of the service providers listed in the table above will be subject to the NCCP Act as they all *perform the obligations of, or exercise the rights of, a credit provider*. This is despite almost all service providers being licensed or regulated under State/Territory legislation.

4. NCCP Bill – Industry Impact

It is clear from the information above our members are predominantly small businesses with modest annual turnovers. The impact of the NCCP Bill on their financial viability is very significant. Members are clearly disturbed by the threat the NCCP Bill creates to business continuity. The Table below summarises our key concerns.

Issue/Provision	Member Impact
1. Scope	
DEF 5 – applies to all who “..perform the obligations of, or exercise the rights of, a credit provider”	Every member, regardless of service provided, will be required to comply with the licensing or credit representative requirements This increases business overheads and adds a further regulatory burden as all member services are regulated at State/Territory levels.

2. Licensing Requirements	
Risk & Compliance Management Systems	<p>Many small business operators do not have the resources available or experience to develop the sophisticated documentary requirements of such a provision.</p> <p>Documentation of business processes etc will require professional assistance. This is a significant financial burden on a small business operator for little, if any, consumer benefit, particularly as Service Level Agreements with principals establish service standards.</p>
Credit Guides	<p>Debt collectors are required to provide credit guides if seeking payment of a debt. “Debt collectors” is not defined so this provision could apply to field callers in addition to in-house collectors.</p> <p>This would require both debt collectors and field callers to meet licensing or credit representative obligations, including “compensation” arrangements and EDR membership when they are simply acting as an agent for a credit provider or another debt collector.</p> <p>Again, this drives up collections costs and will confuse the consumer about where their obligations lie and appropriate avenues of redress for any untoward conduct.</p> <p>It will also conflict with requirements under State laws for consumers to be directed to the Fair Trading/Consumer Affairs office if there is a complaint</p>
Conflicts of Interest – adequate systems	<p>Members provide services to a range of credit providers, not consumers. Providing services to competitors could be viewed as a conflict of interest as the application of the term is unclear.</p> <p>This also has the potential to be an anti-competitive provision which could limit to whom our members provide services.</p>
Dispute Resolution Requirements	<p>Membership of an External Dispute Resolution scheme imposes a significant cost on any business. It has a serious impact on the viability of a small business.</p> <p>As our members work under principal/agent Service Level Agreements (SLA), consumers with complaints are able to access the credit provider’s EDR scheme. For consumers, that makes the process clear.</p> <p>The credit provider, in turn, will take up any conduct issues with the service provider under the terms of the SLA, which is appropriate as non-compliant conduct has a commercial consequence.</p>

3. Credit Representatives	
Licensee agreement to all appointments	<p>If members choose a credit representative business model, they are subject to licensee agreement to all appointments. This has the potential to be anti-competitive as one licensee can, in effect, restrict to whom the member can provide services or the type of work to be undertaken.</p> <p>As our members work for multiple credit providers and/or debt collection agencies, this is an unacceptable outcome, particularly where there is no right of appeal against a licensee's right to refuse agreement to multiple appointments.</p> <p>To assist Treasury appreciate the inappropriate and unworkable requirement for a credit representative to have all licensees agree to additional licensee appointments, please refer to Annexure A.</p> <p>Annexure A documents the typical path of repossession instructions issued by a credit provider. A similar tortuous path is involved in respect to field calls undertaken on behalf of a credit provider for the purpose of making a face-to-face attendance upon a consumer to make a demand for payment of a debt. It also applies to process servers attending upon a consumer in respect to serving a notice pursuant to a credit provider's rights under the Code.</p>
Shared Liability	<p>Licensees are to be held jointly and severally liable for the conduct of credit representatives, regardless of the breach or the licensee instructions to which it relates.</p> <p>This also has the potential to be anti-competitive and lead to market distortion as licensees may limit who credit representatives can work for, or the type of work they can undertake, given concerns about shared liability.</p> <p>For those members who choose to become licensees, they also face the financial risk for credit representative conduct for which they are not responsible. This risk will impact significantly on all members but, in particular, small business members.</p>
4. Administrative Process	
Compliance Timeframe	<p>Registration is required by 31 December 2009 and full compliance is required at that time.</p> <p>Many of our members would not be able to comply in that time frame, given the administrative requirements of the licensing regime.</p> <p>Consequently they would be forced out of the market.</p>

5. Penalties	
Civil & criminal penalties	<p>The civil and criminal penalties under the NCCP Bill are excessive & disproportionate to other regulatory regimes, including the <i>Crimes Act</i>.</p> <p>The imposition of any of the civil penalties for small breaches would effectively terminate the businesses of many members.</p>

5. Summary

The IMA is greatly concerned with the financial and anti-competitive impacts of the NCCP Bill on its members. Many smaller members will be unable to comply and be forced out of the market, lessening competition and increasing unemployment. And for no consumer benefit.

We recommend Treasury either specifically exempt debt collectors from the NCCP regime or modify DEF 5 to exclude those who provide services, or exercise the obligations of a credit provider after the contract is formed.

Annexure A – Repossession Process

It is important Treasury appreciates the complex referral system under which field agents operate. They do not know from day to day who their clients will be. Engagements can be one off or for a specified period of time through Consortium Managers so there is no direct, or ongoing, relationship with any specific credit provider.

The work undertaken by a mercantile agent engaged in repossession work typically follows this path:

1. Throughout the entire process, the field agent acts under a strict "principal and agent" relationship - that is, the agent is never acting on his/her own account.
2. Instructions to the agent are matter specific - once the required task is completed there is no ongoing engagement of the agent in respect to that matter.
3. Credit providers generally have an established network across Australia of agents known as "Consortium Managers". Credit providers and consortium managers enter into formalised contracts referred to as Service Level Agreements (SLAs). SLAs set out the relationship between the parties and are set in place typically for a period of time. They are not matter specific.
4. Consortium managers and the field agents who they routinely engage to undertake specific assignments also enter into formalised contracts, again referred to as Service Level Agreements, which set out the relationship between the parties. Again, the term of the contract is time related rather than matter specific. Consortium managers contract to provide credit providers with field services, including repossessions, on either a whole of Australia or a multi-state basis.
5. As an individual matter is raised by a credit provider requiring a mercantile agent to attend on a "face to face" basis upon a consumer (the debtor) to make a demand for payment of arrears in respect to a finance contract, this comes in the form of new instructions from the consortium manager.

Such instructions provide all relevant details of the debtor's name, the address to be visited, the details of the credit contract as well as the arrears to be collected. There may also be a direction that if clear funds cannot be collected then the agent must proceed to repossess the security in respect to the credit contract e.g. a specific motor vehicle.

6. The actual work of attending upon individual debtors on a face to face basis may be undertaken by the employees or subcontractors working with the consortium manager. Alternatively, the consortium manager may contract the work out to another state or regionally based mercantile agent.

In the latter situation, the contracted mercantile agent may attend to the field work either by assigning an employee or subcontractor working with the agent to undertake the task or alternatively or may further contract the instructions on to another mercantile agent.

This further contracted mercantile agent will then attend to the field work either by assigning an employee or subcontractor working with the agent to undertake the task or alternatively may further contract the instructions on to another mercantile agent. The engagement process continues until reaching the final person who will actually knock on the door of the customer and attend to the instructions.

The work can be contracted out to a number of mercantile agencies until it reaches the agency most suited to delivering the service in a specific area.

This referral/contracting out process is necessary given service must be provided in all parts of Australia, including regional and remote areas.

7. From the perspective of the final person who actually knocks on the debtor's door, the situation it is not unlike a random person hailing a taxicab – one never knows who the passenger will be and in any event, the journey is short lived.
8. The agents who knock on doors to speak with debtors act intermittently under instructions from credit providers and other mercantile agencies. The flow of work varies from a “once off” engagement to regular ongoing engagement.
9. The number of principals (whether credit providers or other mercantile agents) for whom an agent acts can vary from only a few through to literally hundreds of different principals. Given how the work flow is allocated, at any point of time an agent is literally unaware for which principals he/she will act on any given day.

Comment:

To expect agents who operate under these complex referral arrangements to seek permission from each and every licensee to act as a credit representative of other licensees is simply, on any reasonable basis, impracticable and unworkable. The agents will not know, from day to day, for whom they will act.

The impracticability of the proposed system is further exposed when considering repossession work. It is usually issued on an urgency basis, requiring a response within hours to secure at risk leased/mortgaged items when a principal becomes aware the customer intends to decamp their known address or else to hide, damage or dispose of the security item.

Small business field agents servicing remote and regional Australia will be forced to become a licensee as the credit representative model is clearly unworkable. Many of them will not have the resources necessary to meet the sophisticated and complex licensing requirements of the NCCP Act regime.

The consequences of the licensing/credit representative model will be:

- Field agents forced out of business as they cannot meet the demands of either business model
- Less competition in rural and regional areas
- Higher enforcement costs, which the consumer will ultimately pay
- Higher unemployment – particularly in rural and regional areas

Treasury must reconsider its licensing/credit representative model to avoid unwarranted economic and personal costs to our members.