



The Australian National Retailers Association

**Submission
in response to the

National Consumer
Credit Protection Bill 2009**

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EXECUTIVE SUMMARY

The Australian National Retailers Association (ANRA) represents the leading retailers in Australia. Our members are trusted household names in all retail sectors – food retailing, department stores, household goods and clothing and soft goods. ANRA members employ about 450,000 Australians or almost one-third of employees in the retail sector. Retail is Australia’s largest single employer. Members have a combined annual turnover of about \$80 billion, accounting for one third of all retail trade.

ANRA supports the principle of national consumer credit legislation, replacing the patchwork of inconsistent State and Territory regulation. A national licensing system has the potential to simplify regulation of financial advisers and improve regulatory oversight of the financial sector.

Nevertheless, ANRA is very concerned that such significant legislation is being rushed into Parliament with minimal consultation. In the few days available to assess the detail of the National Consumer Credit Protection Bill 2009, ANRA has identified serious flaws in the legislation. In its present form, the Bill would impose significant, unnecessary regulatory costs and jeopardise consumer access to credit *without adding to consumer protection*.

ANRA’s concerns stem from the excessively broad scope of the Bill. As part of a new statutory duty of “responsible lending”, the Bill applies similar obligations, and liabilities, on retail staff engaged in essentially clerical roles as to financial sector professionals recommending major personal investments. Under the Bill, a retail sales assistant who *suggests* to a customer the option of a ‘white label’ credit card or point of sale finance for a purchase has the same obligations as the business providing the actual credit.

ANRA suspects that this absurd situation is an unforeseen consequence of the principles-based approach in the Bill. The focus of the Bill is conduct outside the retail sector, in particular ensuring that lenders do not encourage consumers to borrow beyond their capacity to repay and that financial advisers are not influenced by commissions when giving investment advice. Neither situation applies to retail staff: retail staff do not provide credit nor do they give financial advice. However, by defining credit services too broadly, the Bill inadvertently captures a host of clerical activities in the retail sector.

The result is regulatory overkill for the retail sector. The Bill does nothing to strengthen consumer protection: in the case of the credit contracts available in the retail sector, the key test of responsible lending is the conduct of the credit provider. Applying the same test to a sales assistant in a department store is pointless. The Bill will impose costs and create legal uncertainty for credit providers and retailers alike. Credit providers may decide to minimise these risks by withdrawing support from smaller retailers. Businesses dependent on point of sale finance will lose a major competitive advantage. The viability of white label credit card programs will be undermined. Consumers will lose attractive credit options. The consumer credit market will become less competitive.

Given the difficult conditions in the retail sector, the Government should not be adding to the already considerable pressures on businesses in the sector.

ANRA would urge the Government to address the flaws in the Bill before its introduction to Parliament. In this submission, ANRA proposes some possible solutions which should be explored to minimise the regulatory burden without weakening consumer protection. ANRA members would welcome an opportunity to discuss these issues with the Government.

MORE AND BROADER REGULATION

Under the National Consumer Credit Protection Bill 2009, a new statutory duty of “responsible lending” will apply to all persons involved in the promotion or sale of credit contracts.

Responsible lending will require lenders to only provide products to borrowers that are “not unsuitable”, taking into account the borrower’s capacity to repay. The policy intention of the legislation is clear – to ensure that credit providers and their representatives provide appropriate advice to consumers which should prevent consumers taking on excessive financial commitments. To the extent that it requires the disclosure of commissions and other factors which could distort professional advice, the Bill also reinforces a number of safeguards under existing legislation.

Responsible lending obligations would apply to both credit providers and credit service providers, as defined by the Bill.

ANRA has no detailed comments to offer on the regulatory requirements placed on credit providers. As the businesses which design financial products, assess applications for credit and actually provide the credit, credit providers should be the primary focus of credit regulation. Credit providers are already regulated and it may well be more efficient to extend existing licensing arrangements, such as the Australian Financial Services Licence. There is also the important question of striking the correct balance between the borrower’s responsibilities and those of prospective lenders, especially given the introduction of criminal penalties.

ANRA’s concerns relate to the very loose definition of credit service providers. According to the Bill, a credit service provider either provides “credit assistance” or acts as an intermediary for a credit provider. Credit assistance is defined in broad terms. A person provides credit assistance if they ‘suggest’ or ‘advise’ that a consumer apply for a specific credit contract, apply for an increased credit limit or even continue with an existing credit contract. There is no requirement that a credit service provider arrange the credit contract for the consumer.

Persons acting as intermediaries between consumers and credit providers are also regarded as credit service providers. This classification would seem to apply most readily to brokers. There is a narrow exemption for persons who provide only general information to a consumer about a range of credit products on offer.

Credit service providers and intermediaries must hold an Australian Credit License or act as the ‘credit representatives’ of a license holder. In the latter case, the representative can only undertake credit activities authorised in writing by the licensee. The licensee is responsible for the conduct of their representatives. Licensees may have their licenses suspended or cancelled if their representatives do not meet responsible lending obligations. All credit service providers will be required to be registered by 1 January 2010.

Credit service providers must be members of an external dispute resolution scheme approved by the Australian Securities and Investment Commission (ASIC).

The documents accompanying the draft legislation identify a range of roles which would qualify as credit service providers (e.g. mortgage brokers). In the case of the retail sector, the two activities most obviously captured by the provisions regulating ‘credit assistance’ are the offer of point of sale finance for the purchase of an item or the offer of a white label credit card.

POINT OF SALE FINANCE

Point of sale finance offers a consumer the option of financing the purchase of goods or services via a third party credit provider. The retailer does not assess the application for credit or provide the credit. At most, the retailer facilitates the transaction by passing the consumer's application to the credit provider.

This financial product offers consumers a cost effective and convenient alternative to the use of credit cards or more traditional personal loans. In general, the credit contract includes a small establishment fee and a regular account keeping fee. Interest is usually only charged in cases when the principal is not repaid within the period set by the contract. This 'zero interest' feature contrasts with the credit card alternative which would see interest charged daily on amounts outstanding beyond the initial interest-free period.

Point of sale finance has become a major feature of retailing. It is likely that more than 20,000 retail businesses offer point of sale finance. Point of sale finance is used widely in the key retail segments of household goods and department store sales. In these segments, businesses may generate as much as 50 per cent of sales from this finance option. In this context, it is relevant to note that retailers generally operate on tight margins: earnings before interest and tax in the sector are typically in the range of 2 to 4 per cent. The loss of a relatively small number of sales would place many businesses under pressure.

Many small businesses as well as larger retailers are dependent on the sales generated by point of sale finance. Many businesses outside the retail sector also offer point of sale finance, including health care professionals and trade contractors.

The Bill will introduce major compliance costs and new, uncertain liabilities which will discourage the use of point of sale finance. In the case of many small businesses, these changes may prompt credit providers to withdraw their service, threatening the survival of these businesses.

There seems little doubt that a retail sales assistant suggesting the option of point of sale finance would be deemed to be offering 'credit assistance' as defined by the Bill. Consequently, the sales assistant would need to be an appointed representative of the credit provider, satisfying any training or other conditions set by ASIC. A licensed credit provider is likely to set requirements for the sales assistant to meet its own obligations as a licensee and to minimise its liabilities.

Assuming that a consumer expresses an interest in point of sale finance, the sales assistant would be obliged to act in much the same manner as a financial services professional. The sales assistant would have to assess whether the suggested credit contract is suitable for the consumer, taking into account the financial position and needs of the consumer. This assessment would need to be recorded and available on request from the consumer.

In practice, assessing the financial situation of the consumer would be virtually impossible for the sales assistant or the retailer: retail staff would not have access to the necessary personal financial data or have the expertise to make a professional judgement on the consumer's capacity to pay.

In any event, neither the sales assistant nor the retailer would be responsible for approving the application for credit. The credit provider will repeat the assessment process, using its specialist knowledge and its access to the personal financial data of the applicant.

This assessment will be subject to at least the same level of regulatory scrutiny as the initial in-store process. Thus the Bill requires two separate assessments, one conducted by retail staff with only a bare minimum of information provided by the customer followed by a more rigorous professional assessment by the credit provider.

WHITE LABEL CREDIT CARDS

Some ANRA members participate in white label or “private label” credit card programs. These credit cards are issued by a bank or other financial institution but bear the brand of the sponsoring business (e.g. a major retailer). While the sponsor’s brand is prominent, the credit provider is the bank or financial institution. The bank or financial institution is clearly identified on the card and in the credit card contract. White label cards are popular with consumers seeking the extra value offered by reward programs and in-store benefits.

Unlike a contract with a credit provider used by a customer to finance the purchase of specific goods or services, a white label credit card is issued under a four party or three party card scheme (e.g. Visa, Mastercard or American Express) and may be used anywhere these schemes are accepted. The credit card application is made independently of a sale by the sponsor.

Sponsors promote credit card programs and offer limited clerical assistance to credit card applicants. This work is performed on behalf of the card issuers and does not involve a contract between the sponsor and the credit card applicant. Sponsors do not charge customers a fee for these services. Sponsors are not involved in the assessment of applications. Sponsors license the use of their brands and act as a distribution channel for application forms.

To date, sponsors of white label credit cards have **not** been regulated as finance brokers. It has long been accepted that sponsors do not merit regulation. As already noted, sponsors do not secure or provide credit.

The Bill reverses this longstanding position. Lending and broking activities will be tied to the same concept of “credit contract” as defined in the National Credit Code: for the first time, third party distribution for credit cards will be regulated together with traditional mortgage broking activities.

This regulation is likely to extend beyond any in-store handling of applications to other activities which can be construed as ‘suggesting’ a credit contract. One example would be advertising of the credit card using the sponsor’s brand. Under the Consumer Credit Code and the ASIC Act, the credit provider is responsible for advertising. But, by allowing its brand to be used, a sponsor could also be held to be engaging in a ‘credit service’ which would require a license or appointment as a credit representative. In effect, what is now a clear responsibility of the credit provider could be treated as a responsibility of both the credit provider and the sponsor.

ANRA is unaware of any evidence that measures designed to address misconduct by mortgage brokers or other professional financial advisers need to be extended to retail staff distributing applications for white label credit cards.

The most recent studies - the Consumer Credit Legal Centre report to ASIC on finance and mortgage brokers (March 2003) and the National Finance Broking Regulation: Regulatory Impact Statement Discussion Paper (October 2004)– do not mention credit card products. Even the commentary document accompanying the Bill hardly mentions credit cards.

The commentary makes 146 references to mortgages but only six passing references to credit cards. Three of these six references are found in paragraph 3.91 which explains that there is only a limited need to understand the cardholder's requirements and objectives (because credit cards have "no particular purpose").

OPTIONS FOR CONSIDERATION

ANRA would urge the Government to consider options which would clearly exclude retailers from the scope of the Bill. As ANRA has indicated above, far from weakening consumer protection, such a change would ensure consumers' continued access to a broad range of credit products. The general options suggested below are intended to stimulate discussion.

The simplest approach would be to exclude the retail sector from the provisions of the Bill, on the basis that retailers are not credit providers or financial advisers. ANRA recognises that this method would require adjustments to the principles-based drafting of the Bill. It would have the benefit of offering certainty to retailers, with consumer protection unaffected as credit providers would continue to be regulated.

The definition of 'credit assistance' could be amended to more effectively target responsible lending obligations to financial advisers and credit providers. Credit assistance could be defined in terms similar to s.766A (3) of the Corporations Act which effectively excludes work ordinarily done by clerks or cashiers. Financial services legislation already distinguishes between 'general' advice and 'personal' advice: a similar approach could be adopted with consumer credit.

A less straightforward option would be to allow a business to seek a public interest exemption from the Bill. This exemption would not be available to credit providers or intermediaries who are deemed to provide personal financial advice. Criteria for an exemption could be set via regulation. ASIC would be the responsible government agency and could be given the discretion to set conditions on the exemption which would ensure that consumers are not disadvantaged. These conditions could, for example, restrict the activities which retail staff could undertake in making available information on credit contracts. Such conditions would need to be framed to minimise unnecessary compliance costs.

These options are suggested in a spirit of constructive engagement. ANRA recognises that the National Consumer Protection Bill represents a significant step forward in consumer credit regulation. However, the Bill also creates significant new compliance costs and legal liabilities which, far from protecting consumers, will only restrict the credit options available to consumers.