Consumer Credit
Legal Centre NSW

March 2013

Submission in relation to the exemption of retailers from the *National Consumer Credit Protection Act 2009* by the Consumer Credit Legal Centre (NSW) Inc

Thank you for the opportunity to comment on the existing exemption of retailers who engage in credit activities in relation to the sale of goods and services under the *National Consumer Credit Protection Act 2009*.

General Comments

The Consumer Credit Legal Centre ('CCLC') has not supported the exemption of Point of Sale (POS) retailers from the National Consumer Credit Protection Act (Credit Act) at any time. CCLC considers the exemption to be a large loophole in the current consumer protections under the Credit Act.

CCLC strongly supports POS retailers being regulated under the Credit Act. It is essential that consumers are confident that they will have basic rights and protections when dealing with POS retailers. This is currently not the case. As a consequence, CCLC has had a number of cases where consumers have been in dispute with car dealers who acted as finance brokers (ie charging fees) but under the current legislation those consumers have no access to any external dispute resolution.

Research into consumer behaviour has shown that consumers are unlikely to be familiar with the cost or the terms of POS finance contracts, and because consumers tend to be psychologically committed to obtaining the product, they are vulnerable to signing up for a credit contract that they do not understand. POS retailers exercise substantial control over the terms of finance and credit for consumers, and there is significant risk that consumers will be steered towards more expensive finance options because retailers will receive higher commissions.

It is critical that the protections of the National Credit Act be extended to POS retailers that engage in credit activities in relation to the sale of goods and services, rather than allow this unsatisfactory gap in consumer protection to continue.

Summary of Specific Submissions

For the reasons explained above, CCLC strongly supports Option 2. Alternatively, CCLC would consider a modified and simplified scheme drawn from, but not identical to, Option 3 which is detailed later in this submission. CCLC considers Option 1 unacceptable.

Specific Focus Questions

1. *Are financiers able to provide information as to the number of vendor introducers who engage in credit activities in relation to their products?*

Not applicable to CCLC.

2. *Does the current exemption result in any additional problems that have not been identified in this discussion paper?*

The problems associated with the current exemption have been adequately covered in the Discussion Paper.

3. *To what extent has the introduction of the National Credit Reforms increased the level of scrutiny and supervision of vendor introducers by financiers? Does this vary between market segments?*

CCLC is unable to comment on this.

4. *What impediments currently exist to limit the capacity of holders of an Australian credit license to supervise the conduct of vendor introducers?*

CCLC is unable to comment on this.

5. *To what extend do the risks discussed in relation to commission-driven conduct occur in practice? What practices are currently adopted by financiers or vendor introducers to address these risks?*

CCLC contends that commission–driven conduct causes a range of problems for consumers. Because consumers are often focused on obtaining the product or service when they are at the point of sale dealership, they are vulnerable to signing up for whatever credit terms the retailer puts in front of them. Competition by finance providers for access to distribution channels then results in increased costs to the consumers and reverse competition in the market.

Some examples are:

1. Certain high cost finance companies offer car dealers a higher commission. This has meant that consumers are steered into relatively high cost car loans by the car dealer.

2. Some retailers appear to steer consumers towards leases instead of loans as the commission for referring to a lease is higher than for a loan.

Although CCLC has only anecdotal evidence of these practices, it does seem clear that commissions clearly drive referrals in POS. There are numerous studies available in financial advice that clearly show that the commissions paid drive referrals. The POS vendor introducer will always have an incentive to direct the consumer to certain credit products if they are being paid a commission. Until disclosure requirements are applied to these vendors, consumers will never have information that will enable them to shop around for the best deal, and this market will remain distorted and uncompetitive.

CCLC remains unconvinced that these risks can be managed in any meaningful way unless consumers have access to EDR and the regulator (ASIC) has clear powers to deal with misconduct in this area.

6. *Are stakeholders able to provide further information on the consequences of the introduction of an exemption for vendor introducers in addition to those described in the Discussion Paper?*

CCLC opposes the exemption continuing.

7. *Are stakeholders able to provide further information on the consequences and costs that would result if Option 2 were implemented?*

CCLC cannot comment on costs, however, we contend that the consequences would be adequate consumer protection legislation.

8. *To what extent do stakeholders consider that consumer demand for goods and services is inelastic or that it varies accordingly to the availability of point of sale finance?*

CCLC is unable to comment on this point.

9. *Are there any other impacts from this option in addition to those described above?*

No.

10. *How practical will it be to determine what obligations a vendor introducer is engaging in, and therefore what level of obligations they, and any licensee, should be meeting in relation to their conduct?*

CCLC believes it is impractical to have different categories of vendor introducers, and it will be very difficult to determine exactly what credit activities each vendor is engaging in and which are the corresponding obligations. The main problem with this option is that the vendor introducer will seek to get into the category with the least obligations.

The main disadvantages of option 3 would be:

a. It is confusing for consumers as to what their rights are;
b. It may be difficult for consumer advocates to establish the categories in legal argument;
c. It is not clear whether the consumer protections would be improved (particularly if loopholes were created in the legislation);

d. It is not clear that all consumer complaints will be able to be solved by EDR because of the absence of relevant parties (it is not clear either that one financier can be held responsible for the fact that a consumer would have been better off with a competitor's product and has been inappropriately steered);
e. It provides more work for the regulator, ASIC, in determining compliance and identifying misconduct;
f. It does not address the level playing field issues for industry, meaning that entities with lower regulatory commitments can compete with those with more stringent obligations to the detriment of consumers.

CCLC contends that there will be real practical difficulties in identifying categories and seeking appropriate remedies for consumers. However, we have proposed a modified version of Option 3 at the conclusion of this submission which may address some of these issues as a second-best option.

Case Study

Ms. A desperately needed a car and approached a dealership close to the NSW border in Queensland. Ms. A lived in NSW. A loan was arranged by a broker who seemed to work with the car dealer. The loan arrangements were conducted in a coffee shop. The loan arranged had an interest rate of 48% p.a. Ms. A never understood the relationship between the car dealer, the broker and the lender. It was all completely unclear. Ms. A also found out that the loan arranged included payment for an extended warranty she did not want and a broker fee of $990. The loan also contained a contractual term that allowed the lender to attach a tracking device to her car.

Ms. A approached CCLC for assistance. A review of the loan documents revealed that the loan including interest and fees breached the 48% p.a. cap in NSW. The broker was not licenced or in EDR even though it appeared they did not meet the current exemption (because the transaction occurred in a coffee shop and not on the premises of the car dealer). Raising a dispute with both the lender and broker did not clarify the issue in any way. Fortunately a settlement was arranged. CCLC made a complaint to ASIC about the broker not being licenced. Although in this case the broker was arguably operating outside the parameters of the current exemption, it seems nonsensical that the decision to conduct the business in the coffee shop rather than the car yard should have any bearing on the rights and obligations of the parties.

The above case clearly demonstrated for us that:

1. Consumers have no idea about who they are dealing with in arranging a loan
2. Consumer do not understand first choice arrangements
3. The consumer is unclear on whether the person who arranged the loan is a broker. The broker never explained their role
4. The consumer finds it impossible currently to remedy misconduct by a broker in the above circumstances as there is no access to EDR or even basic consumer protections
5. The broker seems to be able continue to act inappropriately with impunity.

11. How should the circumstances be defined where a vendor introducer should be regarded as acting on behalf of the consumer?

The circumstances should be defined as follows:

a. The vendor introducer charges a fee to the consumer
b. The vendor introducer holds themselves out as able to select a product based on the consumer's needs
c. There is a reasonable expectation that they are performing services on behalf of the consumer
d. There are several credit products that the consumer may be referred to
e. The Vendor introducer is receiving a commission for arranging the credit
f. The vendor introducer provides information on the credit being arranged to the consumer

It is essential that any situation where the vendor introducer is performing the same functions as a broker than that introducer should be regulated in exactly the same way.

If the introducer is not acting as a broker as defined above they are the agent of the lender and the lender should be fully responsible for all aspects of his or her conduct.

12. Should Option 3 be restricted to vendor introducers who only act under first or second choice arrangements or also apply where the vendor introducer may act as a broker if the consumer is not eligible for finance under the first or second choice arrangements?

The first and second choice arrangements should not be exempted from regulation unless the introducer is deemed to be the agent of the lender. CCLC submits that any version of Option 3 should only be possible where the vendor introducer only submits loans to one financier. Where this is the case consumers should be given clear and up front disclosure that only one finance option is available and if they want to shop around they will need to make enquiries elsewhere.

Where a vendor introducer submits applications to more than one financier, they should be required to be fully appointed ACL holders or Credit Representatives. If a licensee or Representative is subject to a First Choice arrangement, this should be disclosed and explained up front also.

13. Should licensees be required to determine whether supplier representatives do not meet any of the disqualifying criteria for credit representatives in section 65 of the Credit Act? If not, what alternative checks should be required?

See comments above.

14. Are licensees and vendor introducers able to provide further information on the consequences and costs that would result from Option 3 and from Proposals A to E?

Not applicable to CCLC

15. *Are there any other impacts from Option 3 and Proposals A to E in addition to those described above?*

Modified Option 3

CCLC proposes another option not considered in the paper although drawn from its elements.

- Car yard vendor introducers are either fully fledged ACL holders or appointed as Credit Representative (agents) of one financier (with full disclosure about there only being one option available)
- Other retail outlets (supplier representatives) would have modified obligations including-
    - EDR membership for the retailer (as opposed to individual staff members)
    - Modified responsible lending obligations as per Option 3, provided all financial details are taken directly from the consumer by the financier.

CCLC considers car yard finance an extremely high risk area for consumers and does not therefore support applying any "supplier representative" type model to car yard finance.

Thank you again for the opportunity to comment on the existing exemption of retailers who engage in credit activities in relation to the sale of goods and services under the *National Consumer Credit Protection Act 2009*. If you have any questions or concerns please do not hesitate to contact the Consumer Credit Legal Centre on (02) 9212 4216.

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Consumer Credit Legal Centre (NSW) Inc ("CCLC") is a community-based consumer advice, advocacy and education service specialising in personal credit, debt, banking and insurance law and practice. CCLC operates the Credit & Debt Hotline, which is the first port of call for NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. We provide legal advice and representation, financial counselling, information and strategies, referral to face-to-face financial counselling services, and limited direct financial counselling. CCLC took over 18,000 calls for advice or assistance during the 2011/2012 financial year.

A significant part of CCLC's work is in advocating for improvements to advance the interests of consumers, by influencing developments in law, industry practice, dispute resolution processes, government enforcement action, and access to advice and assistance. CCLC also provides extensive web-based resources, other education resources, workshops, presentations and media comment.