



Commercial Asset Finance Brokers Association of Australia Limited

ABN 32 129 490 133

National Professional Body of the Equipment Finance Industry

Attention: Mr Christian Mikula

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Manager
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National Consumer Credit Protection Act 2009 – Point of Sale (POS) Vendor Introducer Exemption – Discussion Paper Response

Introduction

The Commercial Asset Finance Brokers Association of Australia Ltd (CAFBA) welcomes the opportunity to provide comment on the Discussion Paper regarding the exemption of POS vendor introducer from the National Consumer Credit Protection Act 2009 (NCCP Act).

As you are aware prior to the commencement of the NCCP Act in 2010 the Government exempted POS vendor introducers who engage in credit activities at the point of sale from the requirements of the Act, including the credit licensing regime and the responsible lending obligations.

CAFBA members, who are professional equipment finance brokers are not exempt and are bound by the Act when arranging finance for consumers, providing protection for consumers and sector-wide standards for brokers of consumer finance.

The outcome is brokers of consumer finance fall into 2 broad classes; those who are required to be licensed and those who are not, simply because they are vendor introducers. In our view, a broad-based vendor exemption for consumer finance introduced at point of sale is no longer tenable. It was intended to be an interim exemption for 12 months to allow the Government to consider the market and processes in greater detail. It is now approaching 3 years, with deep and distinct consumer and competitive disadvantages to show for it, as articulated in the Discussion Paper and this submission.

The Discussion Paper sets out three options in relation to regulating vendor introducers to be considered.

CAFBA **recommends Option 2** be adopted, which **requires POS vendor introducers to comply with the NCCP Act**. Our recommendation applies to the 'motorised mobile equipment' POS vendor introducer market, as that is where licensed CAFBA members experience the inequities for them and consumers with the current POS vendor introducer exemption. We delve into this market and our concerns later in this submission.

CAFBA membership has little to no relevant experience with POS vendor introducers functioning through retailer, professional services providers or trade services providers. Accordingly, this submission does not address itself to that market.

About CAFBA

CAFBA is the peak national body in Australia representing Equipment Finance brokers, who arrange both consumer and commercial credit for their clients.

CAFBA represents more than 550 brokers. Many more are employed in these broking firms. Over recent years, CAFBA members have arranged in excess of \$6 billion of consumer and commercial finance.

CAFBA members with licences must meet the NCCP Act and ASIC's requirements. CAFBA requires those who do not need to hold a licence because they don't arrange consumer finance to meet similar standards, covering education, continuing professional development, professional indemnity insurance and membership of an external dispute resolution scheme.

The Current Exemption & Effects

The current exemption applies to POS vendor introducers on the basis of their status rather than according to their functions and avoids potential consumer detriment, allowing them to rely on the exemption even when they may have a significant role in product selection or otherwise performing a similar function to licensed finance brokers. This also creates a platform of unfair competition.

CAFBA members arranging consumer finance as licensees, as made clear in the Discussion Paper, must meet specified standards and comply with ongoing obligations as follows:

- Meeting general conduct standards, including acting fairly and honestly and managing any conflicts of interest so as not to disadvantage consumers;
- Maintaining their organisation's competence to engage in credit activities, including having responsible managers and adequately trained representatives;
- Maintaining adequate financial resources and risk management systems;
- Meeting responsible lending conduct obligations, including ascertaining and verifying a consumer's financial situation, and assessing whether the credit contract is suitable; and
- Belonging to an ASIC approved EDR scheme and lodging an annual compliance certificate with ASIC.

CAFBA also agrees with the Discussion Paper's assessment of the current situation arising from the exemption of POS vendor introducers specifically:

- They are not required to meet any entry standards and the Australian Securities and Investments Commission (ASIC) is also unable to exclude vendor introducers from the credit market (even if they engage in conduct that is incompetent or dishonest).
- They can select, recommend or propose credit products without having to conduct an assessment as to whether the product is suitable for the consumer, or meets their financial requirements or objectives.
- There are limitations on the ability of consumers to access remedies for the conduct of vendor introducers.

These characteristics are at odds with the requirements of finance brokers, such as many CAFBA members who are licensed to arrange consumer finance, complying with the Act and applying responsible

lending practices. The alternative to licensing is for brokers to act under the licence of a broker or a credit provider / lessor by being appointed its credit representative.

The exemption therefore does not provide any means of adequately regulating or controlling the activities of POS vendor introducers who may cause loss or damage to consumers, despite their linked credit providers / lessors being responsible for their conduct. Further, the risk of harm is more likely where the POS vendor introducer has selected the financier on the basis of the commissions they will receive if finance is approved, where those commissions increase to cost of finance paid by the consumer.

The exemption also means that there is a lack of competitive neutrality between POS vendor introducers and other businesses, like licensed CAFBA members, which are performing similar functions.

CAFBA's Position

It is CAFBA's position that where a vendor introducer is engaging in credit activities it should be required to:

1. hold an Australian Credit Licence; or
2. be appointed as a credit representative of a licensee; or
3. meet and operate within the specified criteria of an existing NCCP exemption that focuses on specific functions, e.g. referrer.

This would put vendor introducers in the same position as CAFBA members and others engaged in the finance industry providing similar services.

We believe the adoption of consistent regulation across the industry is necessary, not only to create a level playing field, but also provide adequate consumer protection. For obvious reasons, consistency of credit legislation has been a key aim in the reform process for many years, and the removal of the current exemption will assist in achieving this.

CAFBA agrees with the Discussion Papers Impact Analysis stating that consumers would be at less risk of suffering financial damage as a result of vendor introducers having to:

1. undertake a suitability assessment where they engage in product selection; and
2. meet higher standards of conduct (because of their greater accountability because of the risk of ASIC taking action in respect of their licence).

This would also provide consumers with the ability to seek redress through complaint to an EDR scheme where they have suffered loss or damage as a result of a vendor introducer's conduct, rather than indirectly through a linked credit provider.

Consumers who elect to finance their purchase through non-POS introduced finance would have to make a separate and active decision in relation to finance, and this may result in consumers making more efficient choices, by seeking out or being provided with finance which is cheaper or has better features. Consumers who use POS finance may have fewer choices in relation to the products being offered, and also may face higher charges.

As stated at the beginning of this submission, of particular concern to CAFBA is the broader motor industry, involving dealers selling the likes of motor vehicles, motor bikes, caravans, trailers, boats, jet skis, earth moving/digging equipment, ride-on lawnmowers, tractors, etc, all of which could be broadly described as 'motorised mobile equipment'. As can be seen from this description, it includes equipment

that can be towed.

As CAFBA sees it, basically there are 3 models for a dealer arranging finance or leasing for a consumer who requires it buy or lease motorised mobile equipment the dealer wishes to sell. These are described in the table below.

Table

Model	Description	Current NCCP Act Implications
<i>Model 1</i>	A dealer who has specialised personnel to arrange finance and/or insurance for consumers. The specialised personnel are commonly known as Business Managers or Finance & Insurance Managers	This is vendor introducer who currently enjoys the full benefit of the POS exemption
<i>Model 2</i>	A dealer who does not have specialised personnel	This is a vendor introducers who at best, has a business referral arrangement with a licensee, usually a broker (but not necessarily), utilising one of the referrer exemptions
<i>Model 3</i>	A dealer who is a single franchise dealer of a manufacturer or importer which has a captive financier	This is an arrangement where the vendor introducer can enjoy the full benefit of the POS exemption or act as a mere intermediary, between consumer and the captive financier

Model 1 is characterised with the following conduct and outcomes –

- Arranging/Selling finance and insurance is a key profit centre for the dealership, often being off-set against the price of a vehicle.
- The dealership gathers credit information from the consumer, usually inputting into a credit provider's computer system for assessment.
- Frequently, a dealership will charge a consumer a fee for arranging finance on behalf on their behalf. This service or administration fee is usually substantial, often in the range of \$700 - \$900, and is often financed by the credit contract.
- The price of finance to consumers is determined by the dealership, working from a base interest rate to a maximum rate set by a financier with whom the dealership has a commercial relationship.
- The dealership benefits under this arrangement as the higher the rate on the contract, the higher the commission earned by the dealership on that transaction. This process can result in consumers paying more for their credit than may otherwise have been the case, despite the fact, in many instances, the dealer is acting on behalf of the consumer.
- Other finance influencing factors on dealerships which can act to the disadvantage of consumers include wholesale finance (e.g. dealer floorplan) offsets, volume bonuses and penetration levels.
- The dealership makes the decision about which financier it will submit a finance application to. As well as the financial benefits, this is placement may also be influenced by commercial agreements with a financier under which that financier requires the dealership for first submit credit applications to it for consideration.
- There is no disclosure to consumers by dealerships of commission and other benefits. At best there is a disclosure by a credit provider in its credit contract with the consumer indicating commission is payable to the dealer but it is typically stated as being unascertainable as a result of commission structures.

Model 2 is characterised by the following conduct and outcomes –

- The primary focus of the dealership is making a profit out of selling motor vehicles and servicing them
- It may receive a referral fee from the licensee to whom it refers
- Under the NCCP referrer exemptions, the dealership discloses the referrer payments to the consumer
- The dealership has no role in setting the contract interest rate
- If the licensee to whom the dealership refers consumers is a broker, the broker complies with responsible lending documentation and procedures applicable to brokers
 - This will include disclosure of commission to be earned by the broker and fees to be paid by the consumer to the broker
- If the licensee to whom the dealer refers consumer is a credit provider or lessor, they comply with responsible lending requirements applicable to credit providers or lessors and the National Credit Code disclosures for their credit or lease contracts.

Model 3 may be characterised with either of the characteristics of *Model 1 and 2* or anything in between under its relationship with the captive financier.

In CAFBA's view, *Model 1* clearly demonstrates the consumer detriment and competitive distortions arising from the current POS exemption. There should be no place for exemptions for this kind the conduct and arrangements that take place under this Model. As we see it, credit providers and lessors control over dealerships operating under *Model 1* is at best limited, despite credit provider / lessor licensing obligations that cover their representatives, such as their dealerships. There is a demonstrably clear case for dealerships operating under this Model to be either licensed as brokers or appointed as credit representatives of licensees.

However, *Model 2* is entirely consistent with NCCP Act policy, where the dealership has no active role, other than referring a consumer to a licensee or performing a basic functionary role. This arrangement does not rely upon the current POS exemption.

As far as *Model 3* is concerned, CAFBA sees the dealers concerned having the choice, according to the scope of their functions. By this we mean –

- If a dealer operates as described for *Model 1*, then the dealer should be either licensed or appointed a credit representative of a licensed credit provider or lessor or broker.
- Given many of the dealers under this Model only introduce to one financier which is the captive financier of the franchise manufacturer or importer, appointment as a credit representative should in particular be an attractive solution, allowing the dealer to operate under the captive financier's licence.
- If a dealer acts as a mere intermediary, doing no more than functions which are already exempt from the NCCP Act, then the outcome is consistent with *Model 2*.

Competition and Consumer Act – Adverse Competition Reality

The Competitive and Consumer Act (C&C Act) promotes competition and fair trade markets to benefit consumers, businesses, and the community.

CABFA is of the strong view the current vendor introducer exemption to the NCCP Act is at odds with objectives of the C&C Act. Conduct by businesses in an Australian market is meant to be such that does not have a substantially adverse impact on competition or detriment to the broader consumer interest.

The only occasions on which conduct should run counter to this is if the law believes it is the public interest to do so. The Australian Competition & Consumer Commission, the Australian Competition Tribunal and the courts are arbiters of the public interest.

We understand specific law, such the POS vendor introducer exemption, can override the essential tenets of the C&C Act. But, as we said earlier, continuation of that exemption cannot be sustained in the public interest. The anti-competitive effect of continuing the exemption is the significant financial and compliance investment by licensed brokers in meeting their licensing and responsible lending obligations and in maintaining them over the longer term.

By comparison, POS vendor introducers merely have to follow what their linked credit providers /lessors train them in and instruct them to do. There is no investment in POS standards, consumer protection or consumer disclosure. And, at its worst, as we've outlined for *Model 1*, the structural issues can result in significant disadvantage by consumers paying more for their finance than they may have otherwise, resulting in potentially significant financial benefit to the POS vendor introducer.

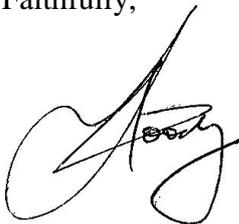
The anti-competitive consequences of the current POS vendor introducer exemption are very real to the consumer finance broker market. It is, to our mind, bad public and competition policy to have different regulatory models and outcomes for the same processes/services unless it is demonstrably in the public interest to do so. CAFBA does not see competition law public benefit in keeping the current POS vendor introducer exemption.

Conclusion

CAFBA believes the current exemption provided to POS vendor introducers in the motorised mobile equipment market creates an unfair advantage to those who hold an Australian Credit Licence to engage in exactly the same credit activities. It also significantly weakens the protection consumers should receive from the law when they obtain finance through these distribution channels. We therefore request that current exemptions for POS vendor introducers, at least for motorised mobile equipment, be removed from the NCCP Act.

Thank you for the opportunity to respond to the Discussion Paper, and we would be pleased to make ourselves available for further discussion on this important issue. To arrange this, please contact CAFBA's Chief Executive Officer, David Gill, on telephone 0412 290 097 or email ceo@cafba.com.au.

Yours Faithfully,



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