



Manager
Consumer Credit Unit
Retail Investor Division
The Treasury
Langton Crescent
PARKES ACT 2600

25 March 2013
Matter 82116391
By Email

By email
poscredit@treasury.gov.au

Dear Sir/Madam

**Submission on Discussion Paper
The exemption of retailers from the *National Consumer Credit
Protection Act 2009***

Herbert Smith Freehills is pleased to provide this submission in response to the Government's Discussion Paper entitled 'The exemption of retailers from the *National Consumer Credit Protection Act 2009*' dated January 2013 (**Discussion Paper**).

We provide this submission on behalf of our client, Wingate Consumer Finance Pty Ltd ACN 158 703 612 (**WCF**). The opinions expressed in this submission are the views of WCF.

1 General Comments

WCF has a number of concerns about the content of the Discussion Paper and the proposals for the future regulation of vendor introducers. These are set out in more detail in the submission below.

In summary:

- Vendor introducers who do not make any judgement about the suitability of the product for the customer should be distinguished from vendor introducers who are actively involved in product selection and delivery; and
- Vendor introducers who act only on behalf of one financier should remain exempt from the Credit Act.

2 WCF's business

A summary of our client's business is attached at Attachment 1.

In WCF's business model, the role played by retailers and other suppliers of goods and services is typical of the industry, and therefore our client is well placed to assess the assumptions and proposals contained in the Discussion Paper.

Our client and the suppliers with whom it contracts to provide limited services on its behalf, will be negatively affected by the removal or restriction of the exemption in Credit Regulation 23. Removal of the exemption would increase the cost of and decrease the efficiency of the provision of credit by requiring licensing of supplier entities that are only tangentially engaged in the process of origination of credit. This would impair the availability of convenient point of sale credit and expose suppliers of goods and services to greater costs and potential loss of business. WCF believes that ultimately this would have an adverse effect on retail and other sales.



3 Risks to consumers

3.1 Financial risk

The Discussion Paper is premised on the hypothesis that the current regulatory exemption for vendor introducers and the supposed resulting 'regulatory gaps' pose risks to consumers and therefore the regulatory landscape needs to be amended in some way.

The Discussion Paper assumes that the current environment poses a 'risk of financial harm to consumers' [(at 28)] and a 'risk of financial detriment' (at [36]). Under Option 1 (which is to maintain the existing exemption), the Discussion Paper states that consumers would be 'at continued risk of suffering financial damage' (at [63]).

We are not aware of any evidence to substantiate these 'risks' and WCF has seen no evidence that the status quo results in any harm to consumers. The Discussion Paper does not present any evidence that consumers are being harmed by the activities of vendor introducers.

Rather, the existence of the retail point of sale exemption ensures that small businesses and larger retailers who are dependent on the sales generated by point of sales finance are able to offer their goods and services, and the services of relevant financiers, in a streamlined, efficient and well-understood manner. This ensures consumers' continued access to a broad range of credit products.

3.2 Unsuitable loans

Treasury is apparently concerned about the possibility of consumers being encouraged by vendor introducers to apply for unsuitable credit products (at e.g. [35], [63] and [72]).

In response to this expressed concern, we note that credit providers themselves are required to undertake a suitability assessment in order to ascertain whether the credit product is unsuitable for the consumer and, under the current regulation, no consumer should ever be provided with a loan that is unsuitable.

Credit providers have appropriate responsible lending and other regulatory obligations which they carry out using:

- their specialist finance industry knowledge (not possessed by suppliers of goods and services); and
- access to personal financial data of the applicant.

We submit that the present regulation that applies to credit providers is sufficient to mitigate risk posed to consumers in the relevant circumstances, and ensures that consumers do not enter loans which are unsuitable for them.

4 The different roles played by retailers

As the Discussion Paper notes (at [13]-[14]), vendor introducers perform a range of functions. Their primary function is to facilitate the application for finance by passing the customer's application to the credit provider and many vendor introducers have an even more limited role than this.

4.1 The limited role of retailers

Generally, retailers and other suppliers of goods and services have a limited role in the credit application process. For example, the suppliers that contract with WCF undertake very simple and limited responsibility and activities.

Suppliers are not involved in the assessment of a customer's application, nor do they provide the credit or have an ongoing relationship with the customer in respect of any credit provided.

The role of retailers is acknowledged to be limited in the Discussion Paper (at [18]):



“The operation of POS finance in the retail store context has the following features:

- a) The amount of finance required by the consumer is based on the value of the goods or services being provided by the supplier, and is therefore usually, but not always, for relative [sic] small amounts.*
- b) There is a large workforce of retail staff who may engage in credit activities, with a regular turnover of such employees.*
- c) The role of the vendor introducer is relatively circumscribed, and is generally limited to assisting the consumer to select a finance product (where more than one option is available), and then arranging contact between the consumer and the financier.*
- d) The financier exercises control over the terms of the contract once the price of the goods or services and, therefore, the amount of credit required has been ascertained; that is, there is no capacity for the vendor introducer to negotiate on the terms of the contract.”*

The range of functions performed by vendor introducers is further detailed in Annexure B of the Discussion Paper. As is acknowledged in that Annexure, not all vendor introducers will undertake each specified activity. We would argue that many retailers and other suppliers will not undertake most of the activities. The retailers and suppliers who introduce consumers to WCF for example, do not assist customers to ‘choose between different finance options’, nor are they involved in ‘negotiating the terms on which credit can be provided’.

In our client’s experience, most retailers do not exercise any element of selection or recommendation between different credit providers and should therefore be distinguished from brokers.

Given this limited role of retailers in the consumer credit context, as acknowledged by Treasury, we submit that there is no need for reform of the regulation of retailers and suppliers.

4.2 The increased use of technology by retailers

To require vendor introducers to comply with the Credit Act – even in a limited fashion – would be to impose a layer of scrutiny and administrative burden which is disproportionate to the role most vendor introducers play in the credit initiation process.

The case is particularly strong in the case of retailers and suppliers who do no more than collect information from a customer and feed this information through to the credit provider. Increasingly, this is enabled using computer software which further minimises the role played by the retailer. Market trends indicate that the use of such processes is likely to increase and, as it does, the retailer becomes little more than an administrative step in the process.

As the Discussion Paper itself notes:

Technological developments are likely to diminish the role of these vendor introducers even further, so that consumers will increasingly deal directly with the financier through an in-store computer interface. Deloitte has been developing technology that will provide this facility and expects that it will be available through major retailers within approximately two years. (at [19])

The retailers and suppliers who enter into agreements with WCF use this type of electronic data collection and transmission process. The retailer is little more than a conduit for the passing of information between the customer and WCF.



Given the increased use of such software across the consumer goods sector, and the Treasury's acknowledgement that this diminishes the role of the retailers, we think this is an inopportune time to amend the regulatory landscape.

4.3 The vehicle dealership context

The Discussion Paper contrasts the role of retailers generally (at [19]) with the activities undertaken by vendor introducers in the vehicle dealership context (at [20]). Treasury describes these vendor introducers as being 'more actively involved' in the arrangement of credit and as exercising 'significant control over the terms on which credit is likely to be provided' (at [20]).

We infer from this juxtaposition – and from other references throughout the Discussion Paper (eg at [41]-[47], [66] and [96]) – that Treasury is more concerned about particular conduct in the vehicle dealership context than about the general retail market. If this is the case, then any amendments to the Credit Act should not be broader than is necessary to address Treasury's specific concerns about that conduct. Any changes to the regulatory regime should be targeted at that particular conduct and not at the vehicle dealership industry generally so that it remains possible for vehicle dealers to rely on the exemption from licensing in relation to credit for the supply of goods and services if their role is genuinely limited to a role similar to that of retailers in a typical in-store context.

5 The consequences of removing the exemption

For many retailers who have a minimal role in the origination of credit, the cost of compliance with the Credit Act would be too onerous. The complexity of the regulation and the possible liabilities to which they would become exposed may cause them to withdraw from their limited role in relation to point of sale credit. This would leave customers without an effective and convenient alternative to the use of credit cards or more traditional personal loans, and in some cases may threaten the survival of those retailers.

Furthermore, the abolition of the exemption will have far-reaching consequences for credit providers. The Discussion Paper notes that financiers may appoint a vendor introducer as a credit representative (at [81]). A financier is liable for the actions of its credit representatives, which are its agents. This has consequences for the level of risk for credit providers where the liability of the credit provider for the improper actions of the retailer or supplier could threaten the financial stability of the credit provider. Most likely it would cause many credit providers to cease to offer credit in the point of sale context.

For those credit providers that were willing to appoint a retailer/supplier as a credit representative, it would impose an additional burdensome and expensive layer of oversight and administration. As noted in the Discussion Paper (at [82]), this may also result in increased demands from retailers for additional commissions which would ultimately increase the cost of credit for consumers.

6 Alternative licensing exemptions

The Discussion Paper notes that '[w]here a person has limited involvement in the consumer obtaining credit or a consumer lease, they may be able to take advantage of other exemptions in the Credit Regulations' (at [146]). The examples stated are Credit Subregulations 20(13), 24 and 25.

We consider that there are, unfortunately, limited circumstances in which retailers/suppliers could avail themselves of these alternative licensing exemptions. WCF's retailers and suppliers, for example, are involved in the collection of identification and verification information from the customer. This is essential to ensure WCF can comply with its "know your customer" obligations under the Anti-Money Laundering and Counter-Terrorism Financing Act, as well as its responsible lending processes. It would be difficult, in practice, to collect this information in another way. These activities are



beyond the scope of the alternative exemptions suggested at [146] of the Discussion Paper and therefore cannot be relied on in a typical retailer/supplier situation.

7 Option 3: Apply function based regulation to vendor introducers

We advocate against the abolition of the exemption for point of sale retailers and suppliers of goods and services.

If, as a result of its consultation, Treasury considers it necessary to regulate vendor introducers, then it would be prudent and economically efficient to limit this regulation so that it applies only to those retailers who act more like traditional finance brokers rather than to vendor introducers generally.

We support a function based approach to regulation of vendor introducers as proposed by Option 3 of the Discussion Paper (at [84]-[133]) but think some of the detail of the needs to be reconsidered.

7.1 Regulation of vendor introducers which act only on behalf of one financier

Option 3 contemplates three levels of regulation:

- (1) Vendor introducers who act as brokers would be required to have an ACL or be a credit representative;
- (2) Vendor introducers which act
 - (A) only on behalf of one financier; or
 - (B) under 'first choice arrangements',would be regulated as modified credit representatives ('supplier representatives'); and
- (3) Vendor introducers with arrangements with more than one financier would be regulated as modified credit representatives with additional obligations.

Most retailers and suppliers that contract with WCF only act for one financier (that is, WCF) and currently they do not have first choice arrangements.

As described in Attachment 1, WCF's retailers and suppliers are a mere conduit between the consumer and WCF, and their role is to collect and pass on application information via an electronic interface. The retailers are not 'actively involved in product selection and delivery' (at [84]) and therefore on principle should not be caught by Option 3. Yet, on the current classification of vendor introducers, they would be subject to regulation as modified credit representatives (supplier representatives).

We submit that the inclusion in Option 3 of vendor introducers who act only on behalf of one financier (ie those in category (2)(A) in the list above), should be reconsidered.

Those introducers do not make any judgement about the suitability of the product for the customer and should therefore be distinguished from the other categories of vendor introducers in the list above. An exemption of the kind currently provided by Regulation 23 should continue to be available to them. They should not be treated as modified supplier representatives because their role in the origination of credit is so limited. In all relevant circumstances, because of that limited role, where there has been any irregularity in the credit origination process, a consumer will have a remedy directly against the credit provider. Therefore, no proper policy purpose is served by imposing a regulatory burden on the retailer/supplier.

Although not presently relevant to the business of WCF, we think that similar arguments can be made in relation to vendor introducers with 'first choice arrangements' where the vendor introducer is not making a selection but rather following a formulaic series of



steps. An applicant will go to the first choice credit provider unless rejected by that first choice credit provider. Only then would the vendor introducer refer the applicant to its alternative credit provider. It is clear that the vendor introducer exercises no judgement about product selection and its suitability for the consumer, nor does it give any recommendation in this process to the consumer. It is therefore not appropriate to add a regulatory burden to the vendor introducer.

7.2 Regulation of vendor introducers with arrangements with more than one financier and who engage in product selection

At Part 3.3, the Discussion Paper considers the regulation of vendor introducers who have arrangements under which they can arrange finance with more than one provider, and where no first choice arrangements apply.

Five different proposals are proposed to 'address the risk of consumers being steered into inappropriate financing options' (at [110]). We consider that, if (despite our comments in part 7.1 above, regulation of vendor introducers of this kind is considered necessary as a result of the consultation process, Proposal A (at [113]-[115]) would be the most feasible and appropriate. Under the proposal, vendor introducers would be required to give consumers a generic fact sheet. We expect that a fact sheet would provide consumers with all necessary relevant information and could be:

- prepared at a comparatively low cost; and
- efficiently distributed to consumers as part of existing processes for most retailers and suppliers.

We may wish to provide further comment on behalf of WCF if there is an opportunity to do so at any subsequent stages of this inquiry.

Please contact me on tony.coburn@hsf.com or +61 3 9288 1876 if you wish to further discuss the views of our client.

Yours faithfully

Tony Coburn
Consultant
Head of Banking Regulatory Team
Herbert Smith Freehills
+61 3 9288 1876
+61 402 206 377
tony.coburn@hsf.com

Kate Weinstock
Solicitor
Banking Regulatory Team
Herbert Smith Freehills
+61 3 9288 1309
kate.weinstock@hsf.com

Herbert Smith Freehills LLP and its subsidiaries and Herbert Smith Freehills, an Australian Partnership, are separate member firms of the international legal practice known as Herbert Smith Freehills.

Attachment 1



WCF's business

1 Licensing arrangements

WCF is the holder of an Australian Credit Licence (Licence Number 425142) (**ACL**). Under its ACL, WCF is authorised to engage in credit activities as a credit provided in accordance with the conditions of the ACL.

WCF provides credit under the branding "NOW Retail". That credit includes unsecured personal loans made by WCF to consumers to purchase consumer goods and services (for example motorbikes and push bikes) at selected retailers and service providers with whom WCF has a contractual relationship.

2 Relationship with retailers/suppliers

WCF has entered into Origination Agreements (**Origination Agreements**) with various retailers and suppliers which will enable customers of those retailers and suppliers to obtain personal loans from WCF to acquire goods and services from those retailers and suppliers.

The Origination Agreements specify the procedures to be followed by the retailer/supplier and its staff in relation to the origination of loans to customers by WCF. Those procedures are very prescriptive and limited in scope.

3 The role of retailers/suppliers

When a customer expresses interest in financing the purchase of goods or services, the staff member of the retailer/supplier discusses the option of applying for a personal loan from WCF. If the customer wants to proceed with this, the staff member communicates certain minimum eligibility requirements to the consumer and provides a system generated quote, which the retailer has no ability to influence.

If the consumer wants to apply, the staff member requests certain information about the customer and inputs that information into an IT system provided to the retailer/supplier by WCF, which includes (primarily):

- Proof of identity (drivers licence or passport);
- Residential details;
- Employment details (including length of each employment, employer name, suburb and contact number); and
- Certain income and expenses, including the applicant's income, the nature of existing mortgage and other loan repayments and combined credit card limits.

Following the input of that data, and authorisation from the consumer, the responsible lending processes of WCF are triggered and applied to the data.

If approved, the documentation is signed and delivered electronically to the consumer.