

ARTICLE

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RETAILERS' LOBBYING PAYS OFF: At Least for Now

The publication of the exposure draft *National Consumer Credit Protection Bill* (**exposure draft Bill**) on 27 April 2009 created a significant level of angst among retailers. Retailers were concerned that the exposure draft Bill would confer responsibilities on retail sales assistants similar to those of bank managers and financial brokers whose job it is to consider the credit-worthiness of a prospective borrower. Retailers queried how a sales assistant, who refers a consumer to or provides a leaflet about a third party credit provider, could know whether the consumer has the capability to repay any credit extended by that third party provider. A report commissioned by the Australian Retailers Association (**ARA**) estimated retailers could expend as much as \$760 million in compliance costs if the exposure draft Bill were enacted. But, for the time being at least, retailers can breathe a sigh of relief following their extensive lobbying. The Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen MP, recently exempted point-of-sale retailers from the obligations that will be imposed on third party credit providers.

The *National Consumer Credit Protection Bill* (**Bill**) was introduced to Parliament on 25 June 2009. The Bill outlines a new and comprehensive

national consumer credit regime. It launches a national licensing regime for people engaged in credit activities and will impose responsible lending requirements on licensees. Compliance with the responsible lending obligations requires licensees to assess whether the credit offered would be suitable for the consumer and whether the consumer has the ability to meet the financial obligations under the credit contract.

Credit activity is defined broadly in the Bill and encompasses credit providers who provide credit, those who suggest or assist a consumer applying for credit and those who act as an intermediary in securing credit for a consumer. The Bill clearly captures retailers who offer point-of-sale finance. If a retail sales assistant suggests to a consumer they can finance goods or services via a third party credit provider, that retailer could prima facie be obliged to comply with the responsible lending obligations under the Bill, even though they do not arrange or provide the credit for the consumer. Retailers consider this is an unintended consequence of the underlying policy of the new regime because retailers do not administer credit applications or provide the credit. Also, they are not given enough financial information to form an opinion on whether the



credit contract is suitable for the consumer. A retailer's role extends only to forwarding a consumer's credit application to third party credit providers. Retailers play no role in approving the credit application. By casting the net as wide as it has, the Bill, which was designed to ensure financial credit providers do not advance funds to consumers without the ability to repay, unintentionally caught retailers who offer point-of-sale finance.

Complying with the Bill would be very expensive. The ARA estimates retailers who offer point-of-sale finance may individually be up for \$27,000 in training costs to ensure their staff understand and comply with the new regime's obligations. This could jeopardise the viability of many small businesses. Because of this, retailers made many submissions urging the Government to exempt retailers from the application of the Bill.

The Minister announced in a media release on 25 June 2009 that point-of-sale retailers would be exempt from the requirements that relate to the facilitation of credit assistance to consumers. However, this exemption does not appear in the Bill; rather the media release proposed the exemption would be implemented through regulation. The media release also proposed a 12-month moratorium for point-of sale retailers from the application of the Bill, leaving the door open for retailers to be required to comply with the regime in the future.

On 14 August 2009 the Minister released the draft National Consumer Credit Protection Reform Regulations (**draft Regulations**). The draft Regulations exempt point-of-sale retailers from the licensing requirements where the retailer, a supplier of goods or services, engages in credit activities or acts as an intermediary between the consumer and credit provider, and there is an ongoing relationship between the retailer

and the credit provider. An ongoing relationship may comprise a contract, arrangement or understanding between the retailer and credit provider. It also includes retailers who regularly refer consumers to a particular credit provider and circumstances where consumers sign application forms or credit contracts at the retailer's premises. It is important to note the exemption will not apply where the retailer is a related body corporate of the credit provider because the actual lender of credit in the retail sector is not exempt from the new regime.

Significantly, the draft Regulations do not refer to a 12-month moratorium period as proposed by the earlier media release.

The Government's decision to exempt retailers, at least for the immediate future, from the new National Credit Consumer Protection legislation is welcome and appropriate. Retailers who offer point-of-sale financial assistance will not be required to obtain a credit licence under the new regime. The ARA maintains that *'the exemption means retailers will be able to continue to provide consumers with finance options'* and they will not be required to undertake onerous and expensive training of staff under the new regime.

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