1 July 2008

Financial Services and Credit Reform Green Paper
Corporations and Financial Services Division
Treasury
Langton Crescent
PARKES ACT 2600

EMAIL TO financialservicesgreenpaper@treasury.gov.au

Submission on Financial Services and Credit Reform Green Paper June 2008

Thank you for the opportunity to provide comments on the Financial Services and Credit Reform Green Paper.

Aussie Home Loans (Aussie) is one of Australia's leading finance brokers. Established in 1992, Aussie initiated some big changes in the home loan market that have made the dream of home ownership more accessible for all Australians, including true interest rate competition.

Aussie participates in the credit industry as:

- a mortgage broker for home loans;
- a mortgage broker for investment and business finance;
- a mortgage manager for mortgage loans; and
- a distributor of white-labelled credit cards, car and personal loans and referral of home insurance.

Aussie is a long standing member of the Mortgage & Finance Association of Australia (MFAA) and the ASIC approved alternate dispute resolution scheme, Credit Ombudsman Services Limited (COSL). We are a compliant organisation that always aspires to industry best practice, and can proudly stand on our record.

We welcome the Commonwealth's initiative to assume responsibility for regulation of credit and finance broking. The current mixture of federal, state, and territory laws:

- adds significantly to the cost and complexity of conducting business for national organisations, which has the effect of increasing costs to consumers and is a disincentive for competition in some jurisdictions;

Voted Best Mortgage Broker: Australian Banking & Finance Magazine Awards 2006.
Head Office: 363 George St, Sydney NSW 2000. Locked Bag 19, Royal Exchange NSW 1225.
Tel: 02 8297 0000 Fax: 02 8297 0333 Email: aussie.info@eaussie.com.au Web: www.eaussie.com.au
Trade mark of AHL Investments Pty Ltd. ABN 27 105 265 861. AFS License No. 246786.

- does not provide proper regulation of the finance broking or credit industries, due to inconsistencies and varying standards of application and enforcement between the states and territories. For example, dishonest operators who are blacklisted in one state or territory are able to move to another state or territory to set up business; and

- does not provide simple, adequate and robust protection for consumers in today's complex credit environment.

We have carefully considered the three options for reforming credit in the Green Paper, i.e.:

- Option 1 – retain the status quo;

- Option 2 – Commonwealth take over of regulation for all credit and broking services provided to consumers – ie UCCC regulated lending;

- Option 3 – Commonwealth regulates credit secured by mortgages only and associated broking services.

Aussie does not consider Option 1 to be a viable alternative for the reasons discussed earlier.

Aussie strongly opposes Option 3 in that it would add significantly to cost, complexity, and confusion by overlaying another level of regulation by the Commonwealth ***on top of*** the existing state, territory, and federal laws. Lenders and brokers who offer mortgage and non-mortgage products and services would have to implement compliance regimes and train staff to satisfy both federal and state and territory laws, and this will significantly increase operating costs and lessen competition for consumers.

Aussie submits that Option 3 is unworkable because so often, mortgages are bundled with other types of consumer credit like credit cards or other loans to provide greater flexibility for consumers. Many consumers prefer to bundle their credit, or to deal with a single lender for all of their credit needs, as this allows them to more easily manage their finances, or to benefit from fee waivers and other loyalty programs. It would be counterproductive to have credit legislation which does not align with consumer needs for more flexible and innovative credit products.

Aussie also submits that Option 3 would make it harder for consumers to refer complaints and to seek redress for credit-related matters because consumers will be faced with different complaints and compensation mechanisms, depending on the type of credit.

Aussie strongly supports Option 2, under which the Commonwealth will take over regulation of consumer credit and consumer finance broking (ie loans regulated by the UCCC). We envisage a national licensing scheme and a uniform simple disclosure regime including:

- national licensing of finance brokers as contemplated by the NSW Draft Finance Broking Bill (subject to some fine tuning and simplification of that Bill as contemplated in our submission on that Bill dated 15 February 2008, which is attached);

- compulsory membership by lenders and finance brokers of an ASIC approved ADR; and
- Commonwealth takeover of the UCCC.

It is unclear in the Green Paper as to whether the options would extend beyond UCCC regulated lending. As the main purpose of the regulation is to protect consumers, we submit the regulation should be confined to UCCC regulated lending.

Only Option 2 will provide a single set of laws for consumers which deal with credit, and provide a single regime to regulate both lenders and brokers providing consumer credit and services.

It is particularly important that the new federal legislation is specifically designed to regulate credit. Aussie submits that it is inappropriate to slot credit into the complex Financial Services Reform (FSR) regime, bearing in mind that borrowing money is entirely different from making an investment and therefore, the licensing and disclosure regimes should be completely different. Implementation of credit legislation to protect consumers must be balanced with the need to promote competition in the industry, which could diminish if complex legislation creates a barrier for responsible participants to operate.

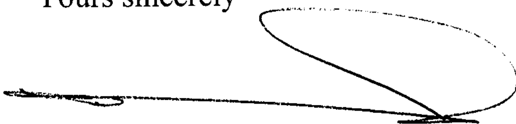
I fully endorse the comments made by Senator the Honourable Nick Sherry, Minister for Superannuation and Corporate Law at the recent MFAA conference where he called for disclosure to meet the "Burnie Pub Test". The legal structure behind the disclosure should also pass the Burnie Pub Test and only Option 2 achieves that.

The government has a great opportunity to remove the existing mishmash of legislation, some of which is set out in the attached Appendix. Replacement legislation must not be rushed and must not add complexity. The Commonwealth needs to grasp the opportunity to provide Australian consumers, lenders, and brokers with a single, simple licensing and regulatory scheme which work for all stakeholders.

Finally, it is important to recognise that the devil is often in the detail. Once Option 2 is adopted as the only sensible way forward, Aussie is keen to work with Government to develop the specifics of that regulation. We envisage a cost effective simple regime that adequately serves consumers and industry alike. As Australia's leading broker, with a great reputation, we are uniquely placed to contribute to that debate.

I am happy to meet to expand on my thoughts.

Yours sincerely



John Symond
Chairman and Chief Executive Officer
Aussie Home Loans

Complex current legislation **Appendix**

Consumer Credit Administration Act 1995 (NSW) – negative licensing for finance brokers

Consumer Credit (Administration) Act 1996 (ACT) – registration of finance brokers and UCCC regulated lenders

Consumer Credit (Victoria) Act 1995 – negative licensing and automatic disqualification of finance brokers

Consumer Credit (Queensland Act) 1994

Consumer Credit (Victoria) Act 1995 – requires registration of UCCC regulated lenders

Credit Administration Act 1995 (SA)

Credit (Administration) Act 1984 (WA) – requires licensing of UCCC regulated lenders

Consumer Affairs and Fair Trading Act (NT)

Finance Brokers Control Act 1975 (WA) – licensing of finance brokers for all types of credit

Trade Practices Act 1974

Australian Securities and Investments Commission Act 2001

Fair Trading Acts (State based)

Uniform Consumer Credit Code (UCCC) – with a number of state-unique provisions adding to cost, complexity and inconsistent consumer protection

Privacy Act 1988

Industry codes of conduct (eg MFAA's Code of Practice)

Door to Door Trading Acts (WA, TAS and ACT)

The hawking prohibitions in the Corporations Act 2001

E-marketing Code of Conduct

Spam Act 2003

Debt Collectors Licensing Legislation

ACCC and ASIC Debt Collection Guideline for Collectors and Creditors

15 February 2008

Senior Project Manager (Credit)
Policy & Strategy Division
NSW Office of Fair Trading
PO Box 972
PARRAMATTA NSW 2124

By email to policy@oft.commerce.nsw.gov.au

Dear Sir/Madam

Finance Broking Bill 2007

Thank you for the opportunity to make a submission on the Finance Broking Bill 2007 (Bill).

As you are probably aware, Aussie is a major participant in the mortgage broking market and is a strong advocate of regulation for the industry. However, we believe that regulation of the industry must be consistent across all jurisdictions and should also be balanced, otherwise it will add significantly to the costs of national operators like Aussie, which will impact competition and penalise consumers.

Aussie has been the leading mortgage broker in Australia since 1992. We were the first to introduce securitised lending to mainstream residential borrowers. This resulted in increased competition and interest margins on home loans reduced quite substantially. There is no doubt we have done much to benefit competition and Australian consumers generally.

Importantly, we believe these benefits would not have been achieved if we had been placed at a competitive disadvantage compared to lenders who distribute direct without the intervention of brokers. Some of the proposals in the Bill do place brokers at a competitive disadvantage to direct lenders, in particular, the requirements for brokers to verify capacity to repay, justify refinancing purely on cost, and the complex disclosure requirements. Our strong objections to this unnecessary and unprecedented regulatory intervention is described in detail below.

We have been at the forefront of pushing for best practice in the industry. We had significant input to the NSW legislation and strongly support honest and transparent business practices.

In the absence of robust and uniform regulation for mortgage brokers, Aussie has implemented its own procedures to regulate the over 500 independent mortgage brokers who contract with Aussie. For example, Aussie lodged a Notification with the ACCC in February 2007 to compel its brokers to become members of the peak industry body, the Mortgage and Finance Association of Australia (MFAA), and we have extensive training and compliance

Voted Best Mortgage Broker: Australian Banking & Finance Magazine Awards 2006.
Head Office: 363 George St, Sydney NSW 2000. Locked Bag 19, Royal Exchange NSW 1225.
Tel: 02 8297 0000 Fax: 02 8297 0333 Email: aussie.info@eaussie.com.au Web: www.eaussie.com.au
Trade mark of AHL Investments Pty Ltd. ABN 27 105 265 861. AFS License No. 246786.

procedures. In addition and despite no legislative requirement for entering into Finance Broking Agreements (FBA) with consumers outside New South Wales, Victoria and Western Australia, Aussie required its brokers to enter into FBAs with consumers nationally since December 2007.

Naturally, we are aware of some unfortunate practices by brokers and lenders in relation to predatory lending. Obviously we do not condone that kind of conduct. Although we believe that the national regulation of mortgage brokers will address these problems to some extent, any initiative to raise the bar and to increase consumer confidence of this important industry is welcome.

We have left detailed drafting submissions on the Bill to the MFAA. Instead, this document focusses on the major commercial issues. Our senior executives are of course happy to meet to discuss this proposal and elaborate on it.

1. Clause 3 Definitions

Comment
There is no definition of intermediaries in the Schedule 1 Exemptions of the Bill.

Recommendation
Due to the different operating structures adopted by various mortgage brokers, we recommend that the Bill include an exhaustive definition of intermediary. This will assist organisations like Aussie to clarify the relationship between an aggregator such as Aussie, and our independent mortgage broking contractors. We note that as currently drafted, the Bill does not make it clear whether aggregators such as Aussie:

- are exempt from the Bill as "intermediaries";
- are regulated by the Bill as "licensees"; or
- have a choice to become licensees (and to appoint their independent mortgage brokers as "broker representatives"), or are exempt from the Bill as "intermediaries" (and in turn require its independent mortgage brokers to become licensees).

2. Section 27 Licensing authority to be notified of reportable acts

Comment
Section 27(3)(c) requires the licensee to provide written notice within 24 hours, to the appropriate regulatory authority and to each credit provider with which the licensee conducts business, as to the reasons for the revocation of the representative's appointment.

We consider that the Bill does not go far enough in imposing the same obligation where licensees contract under an aggregation model and the aggregator licensee terminates the contract of a contract broker licensee for misconduct. The absence of such an obligation could allow dishonest and tarnished licensees to continue to operate in the industry, to the detriment of consumers.

Recommendation
We strongly suggest that the reporting obligations in section 27(3)(c) be extended to include aggregator licensees which contract with broker licensees under an aggregation structure.

We also suggest that the following provisions be included:

a) Insert a section 27(4) The licensee with the obligation to make the written notice has qualified privilege in respect of the written notice given under section 27(2).

b) A new section 27A The licensee whose obligation it is to make the written notice is not liable to compensate any person for loss or damage arising from anything done by the licensee in complying with this Division.

3. Section 31 Matters to be complied with before finance broking service is provided

Comment
Section 31 provides that ***before*** providing a finance broking service the broker must:

i. give written notice of the broker's details as specified in section 32;
ii. ascertain both the consumer's credit requirements and the consumer's capacity to repay; and
iii. enter a finance broking agreement and give a copy to the consumer as specified in section 34.

This provision will require the broker to conduct a thorough due diligence before finalising the agreement between the consumer and the broker. A consumer will be better served by a simple process of single disclosure by the broker, as is the common practice in other consumer contracts.

Recommendation
We recommend that the requirement to ascertain the consumer's capacity to repay be removed from section 31 so that in a single contract the finance broker can:

(a) give written notice of the broker's details as specified in section 32 (in the same document); and

(b) enter the Finance Broking Agreement and give a copy to the consumer as specified in section 34.

4. Section 32 Finance broker's details and section 35 Matters to be complied with in relation to credit proposals generally

Comment

Section 32(1)(c)(ii) requires the broker to disclose in writing to the consumer, the commissions received from credit providers if credit is secured. We understand that the commission disclosure is designed to help consumers identify whether the broker's recommendation is biased because of commission levels.

As part of Aussie's self-regulation to address concerns about brokers acting in self interest, Aussie applies a uniform payment matrix to pay commissions to its brokers, irrespective of lender from the range of lenders on its panel. Our contractors use Aussie's proprietary Mortgage Explorer software to help consumers select the loan that best meet the consumer's needs, after the consumer has specified his/her requirements.

We note that section 35(2)(f) appears to require disclosure of the commission received by the broker (ie the individual dealing with the consumer) and any commissions received by entities up the line. It is unclear whether up the line commissions must also be disclosed under section 32(1)(c)(ii).

We consider the disclosure of commissions at two or more levels of the broker chain to be counterproductive because the additional information will merely confuse the consumer. Furthermore, large organisations like Aussie have very complex contractual arrangements with lenders, such as volume overrides and other incentives. It is impractical and meaningless to disclose this information to individual consumers when the parties up the line have no influence over the consumer's decision regarding the credit selection.

We understand there might be circumstances where up the line entities could influence the broker's recommendation, and this is presumably the reason why the Bill proposes disclosure of up the line commission.

We think that the legislative intention will not be achieved by disclosure of up the line commissions and indeed, this will only create confusion for the consumer, add to compliance costs and increase non-compliance.

Recommendation

We recommend that commissions disclosure should only occur at the loan writer level as is currently the case in NSW. The Bill includes sufficient other protections and remedies if a broker acts other than in the best interests of the consumer.

5. Section 33 Consumer's credit requirements and capacity to repay credit

Comment

We strongly oppose the requirement for brokers to establish the consumer's capacity to repay in the terms of the proposed Bill.

We presume the provisions in section 33 are aimed at the inappropriate selling of Low Doc and No Doc Loans. The assumption that there is something wrong with Low Doc and No Doc Loans, or that consumers and brokers are prepared to conspire to obtain a loan by fraud, is misconceived. Although there has been some abuse of Low Doc and No Doc Loans by irresponsible brokers and lenders, in many cases these loans have performed better than fully verified loans.

If the requirement to verify affordability remains, we consider there will be a significant lessening in competition for Low Doc and No Doc Loans, because brokers will not be able to sell these loans while lenders can continue to sell them direct to consumers.

Aussie notes that this proposal did not form part of the Regulatory Impact Study, and so no study has been done on the commercial effect on business and the cost to industry of the change. There would be a substantial lessening in competition and increase in cost. If the proposal proceeds, there will be a fundamental and adverse impact on a large number of lenders, brokers and consumers.

As an example:

Bill, aged 60, is buying a holiday home in Cairns for $2 million and propose to mortgage it for $1 million. He owns a significant home in Melbourne. The fact that he intends to sell the investment, or his current home in due course, cannot be taken into account in determining whether Bill can afford the loan. It would be unfair if this type of consumer is deprived credit. Of particular note, section 33(3)(ii) states that the value of any asset which could be sold to repay the debt must be ignored.

The severe nature of the proposal is further demonstrated by the requirement for the broker to make enquiries from third parties to verify the consumer's affordability, and this further entrenches the perception that Australian consumers cannot be trusted to correctly declare their income.

We believe it is inappropriate for a broker to undertake a comprehensive assessment of the customer's ability to repay the loan, because the broker does not possess the appropriate expertise, nor the relevant information such as the consumer's credit history (which is governed by Privacy legislation) to do so. As an intermediary between consumer and lender, the broker's role is to collect relevant and proper information from the consumer and introduce the customer to the lender.

In addition, each lender has its own tests for affordability. If this requirement remains, the broker does not know which affordability test he/she should apply for each consumer.

As Aussie takes compliance very seriously, we would need to implement significant training and system changes to replicate processes for reviewing consumers' capacity to repay credit, which are presently undertaken by lenders. The additional costs will price some brokers out of the industry, and lessen overall competition and choice.

Aussie submits that as lenders already undertake extensive loan servicing and affordability tests, which will continue as part of the lenders' own prudent lending, the proposal in the Bill creates significant and unnecessary duplication of work, and is also inconvenient to consumers.

Recommendation
We suggest that instead of an affordability test, the Bill:

- impose a clear provision that when introducing credit to a consumer, a broker must always act fairly and responsibly towards the consumer; and
- specify that the broker must not supply the lender with any information which the broker knows is incorrect, misleading, deceptive, or inaccurate.

These two key provisions do not appear in the current Bill and provide a much better formulation of how a broker should act in introducing a loan to a lender. Arguably, the most objectionable thing a broker can do is to encourage a borrower to act dishonestly and then to pass incorrect information on to the lender. There is no express prohibition of this conduct in the Bill. Such an express prohibition would be more effective than the very onerous and unworkable capacity to repay provisions.

6. Choice only brokers

Comment
Many of our customers come to us having already decided which lender they wish to deal with. They simply want Aussie's help to arrange a loan with that lender rather than deal direct with the lender.

Aussie's fundamental business model is premised on allowing consumers choice of product and lender. Our entire systems, processes and proprietary Mortgage Explorer software have been developed, at very substantial costs and resources, to support the proposition of consumer choice. This is a very important part of our business and the current Bill would prohibit it.

Consumers would be significantly disadvantaged because they would not be able to seek the help of brokers like Aussie to arrange their finance.

Recommendation
We strongly recommend that the consumer be entitled to select the lender he/she wishes to deal with, in which case the broker's obligations are correspondingly changed.

7. Section 35 Matters to be complied with in relation to credit proposals generally, section 36 Matters to be complied with in relation to multiple credit proposals and section 38 Matters to be complied with in relation to credit proposals

Comment
Section 35(3)(b) requires a broker to put forward all proposals that are available to the broker.

This is entirely impractical and unworkable. Most consumers are eligible for loans from very many lenders. It would be very counterproductive for all proposals to be presented, particularly if all the information regarding commissions for those lenders must also be set out as specified in section 35(2)(f).

It is also impractical and would add costs to consumers if the broker must provide a written comparison of the costs and benefits of each proposal, and the reasons for recommending one of the proposals.

The requirement in section 36(2) that a broker must not recommend one proposal over another unless the credit is more suitable, ignores the fact that:

(a) some borrowers choose the lender they wish to deal with;

(b) consumers/brokers choose lenders based on circumstances quite apart from price – for example superior customer service, speed of credit approval, availability of loan features.

The same issues arise in relation to refinances. The requirement in section 38(2) (that a broker must not put forward a credit proposal for a refinance unless the new proposal is more suitable and the consumer has a greater capacity to repay the new loan) ignores the fact that refinances may be appropriate for a variety of other reasons.

Recommendation
Instead of the form as drafted in the Bill, we suggest that sections 35, 36 and 38 be amended to the following provisions:

- a broker must only put forward proposals which are suitable for the borrower's credit requirements;
- a broker must not improperly or unfairly fail to provide details of credit which would suit the consumer (but this does not require the broker to put forward all complying credit proposals);
- in making recommendations, the broker must not place his/her interests before the consumer's interests;
- the broker must record the reasons why it is in the interests of the consumer to refinance.

8. Section 54 Stay of enforcement action

Comment
Section 54 enables the borrower to apply to the Supreme Court for a stay of enforcement proceedings brought by the mortgagee, where there is a unresolved dispute before a court or an External Dispute Resolution scheme between the borrower and a broker.

Borrowers can already obtain a stay of enforcement from the Supreme Court in appropriate circumstances. Enshrining this right in legislation with particular reference to the conduct of brokers may unfairly limit consumer's rights, while placing an inappropriate legislative spotlight on broker conduct. This may cause professional indemnity insurers to escalate premiums or to restrict the availability of insurance for brokers. It may also lead some lenders to avoid the broker channel altogether. All of these consequences are anti-competitive and should be avoided.

Recommendation
We suggest that section 54 be deleted in full.

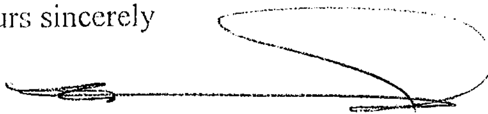
Conclusion

Aussie stands on its record as a compliant organisation which has invested substantially in its training and self-regulatory processes to improve the standards within the mortgage broking industry.

Some of the initiatives in the Bill described above would strike at the heart of our business model, increasing costs and reducing competition.

We strongly urge you to make the changes suggested in this submission.

Yours sincerely



John Symond
Chairman and Chief Executive Officer