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MTAA Initial Submission to ASIC on Consultation Paper 309 (CP309) re: Updating Regulatory Guide 209 (RG209) for Credit Licensing - Responsible Lending Conduct

The Motor Trades Association of Australia Limited ([MTAA](#)) appreciates the opportunity to make this initial submission to ASIC on CP309 regarding updating RG209 for *Credit Licensing - Responsible Lending Conduct*. MTAA is a federation of various State and Territory Motor Trades Associations and Automobile Chambers of Commerce. MTAA is the national voice of, the 69,365 automobile sector businesses which employ over 379,000 Australians and contribute around \$37.1 billion to the Australian economy equating to about 2.2% of GDP. MTAA member constituents include automotive retail, service, maintenance, repair, dismantling recycling and associated businesses that provide essential services to a growing Australian fleet of motor vehicles (MVs) fast approaching 20 million by 2020. Auto retail, in turn, includes the sale of new and used MVs, more often than not with the assistance of credit. MTAA provides the following observations and comments in regard to the consultation paper.

1. Regulated

ASIC states on page 2 of CP309 that: “Regulatory guides give guidance to regulated entities[.]” Clearer guidance is still needed on which specific types of businesses and persons are regulated entities, and to what extent and nature, especially when it comes to “credit assistance providers”, “licensees that provide credit assistance in relation to credit contracts” and other key terms. This was originally noted in the 2010 *Regulation Impact Statement* (RIS): “The main issues raised by respondents [included] the distinction between credit providers and credit assistance providers, and the different expectations for these groups of licensees in meeting the responsible lending obligations[.]”

2. Interpret

ASIC states on page 2 of CP309 that: “Regulatory guides...[explain] when and how ASIC will exercise specific powers under legislation [and] how ASIC interprets the law[.]”

Executive branch agencies like ASIC are clearly tasked with “exercising” powers under law/legislation but are far less clearly tasked with “interpreting” such law/legislation. As pointed out by the Parliament of Australia in [Infosheet 20](#) *The Australian System of Government*: “The *Constitution of Australia* establishes the Federal Government by providing for the Parliament, the Executive Government and the Judicature (more usually called the Judiciary)—sometimes referred to as the ‘three arms of government’. ... Political theory recognises three powers of government—the legislative power to make laws; the executive power to carry out and enforce the laws; and the judicial power to interpret laws and to judge whether they apply in individual cases.

The principle of the separation of powers is that, in order to prevent oppressive government, the three powers of government should be held by separate bodies—the Legislature, Executive and Judiciary—which can act as checks and balances on each other. With parliamentary government the legislative and executive functions overlap[.]” Former Justice of the High Court of Australia, Michael Kirby, wrote in a 2011 [essay](#) entitled *Statutory Interpretation - The Meaning of Meaning* that: “The basic principles governing statutory interpretation are repeatedly stated, without apparent disagreement, in decisions of the High Court of Australia. [T]hey involve deriving meaning from close consideration of the text, context and purpose (policy) of any contested provisions. But the process is an art and not a science[.]”

3. Principles

ASIC states on page 2 of CP309 that: “Regulatory guides...[describe] the principles underlying ASIC’s approach[.]” There are no readily apparent principles in either CP309 or RG209. Although the latter does state the following in paragraphs 12 and 14 respectively: “The objective of the responsible lending obligations is to ensure that credit licensees do not suggest, assist with or provide a credit contract or consumer lease to a consumer that is unsuitable for the consumer. ... We will administer the responsible lending obligations to reduce the risk of consumers being offered credit contracts or consumer leases that they cannot afford to repay or that are otherwise unsuitable for them, and to promote th[is] objective[.]” This is in the context of both the *National Consumer Credit Protection Act 2009* (NCCP Act) and the *Australian Securities and Investments Commission Act 2001* (ASIC Act). Section 111 of the NCCP Act lays out that: “[Responsible lending conduct] rules are aimed at better informing consumers and preventing them from being in unsuitable credit contracts.” And s 1 of the ASIC Act provides that: “ASIC must strive to... maintain, facilitate and improve the performance of the financial system and the entities within that system [and] promote the confident and informed participation of investors and consumers in the financial system [as well as] consider the effects that the performance of its functions and the exercise of its powers will have on competition in the financial system.” Principles are thus needed within, and to inform and frame, RG209.

4. Practical

ASIC states on page 2 of CP309 that: “Regulatory guides...[give] practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).” Section 1 of the ASIC Act provides that: “ASIC must strive to...administer...with a minimum

of procedural requirements[.]” RG209 does not sufficiently: give “practical guidance” “with a minimum of procedural requirements”; describe “the steps of a process”; or give “practical examples of how regulated entities may decide to meet their obligations”.

This is especially the case for the small (and even medium sized) businesses, that make up the vast majority of the auto sector. And RG209 is far from being in [plain English](#), especially compared to the guides provided by other regulators like the Australian Competition and Consumer Commission (ACCC). In his 2011 *Statutory Interpretation essay*, Kirby J mentioned that: “The growth in the quantity of the written law has led to demands for plain English expression.” The Australian Public Service Commission’s (APSC’s) [website](#) says: “Plain English is [nowadays] the Australian Government standard for communicating with the public.” The Office of Best Practice Regulation’s (OBPR’s) *Guidance Note* of September 2017 on [Small Business](#) says: “If you decide to engage directly with small business, information should be easily accessible, simple, and in plain English.” The Australian Government’s *Digital Guides website* adds: “Government content needs to communicate in a way that most people understand. The best way to do this is by using common words, or plain English. Writing in plain English means using simpler and more direct language. It does not mean ‘dumbing down’ information. Plain English helps people make decisions and builds trust.”

5. Consultation

ASIC states on page 4 of CP309 that: “[T]he proposals in this paper...are only an indication of the approach we may take and are not our final policy. ... Your comments will help us develop our policy on responsible lending.” ASIC sets out on page 5 the current (four-stage) consultation process for updating RG209. Best practice consultation by Australian government agencies and regulators, like the ACCC or Productivity Commission (PC), provide stakeholders with multiple opportunities for input, both written and verbal, as well as both formal and informal. This usually involves the opportunity for at least two rounds of formal written submissions, one to an initial issues document and one to a draft position document. In addition, this often involves the opportunity for at least one round of formal hearings and/or other style of face-to-face engagement with key/interested stakeholders like conferences.

6. Specifics

ASIC makes note on page 4 of CP309 of: “[R]esponding to the specific proposals and questions[.]” RG209 refers to “car” only once in paragraph 99 on page 35. CP309 refers to “car” three times, once respectively on pages 23, 38 and 39. OBPR says in a *Guidance Note* of February 2016 on [Best Practice Consultation](#): “[As per the *Australian Government Guide to Regulation*,] policy makers should consult in a genuine and timely way with affected businesses, community organisations and individuals. ... Consultation with key stakeholders should be continuous[.]” OBPR goes on to also say: “Policy agencies should evaluate their consultation processes and continue to examine ways of making them more effective [and] can include examining the number and types of responses[.]” Although this relates to a different ASIC function, Part 3 of the ASIC Regulations refers to both submissions and conferences.

Therefore, ASIC should consult face-to-face (perhaps in Stage 2 and/or 3 to start with) in some sort of conferences around the country with “credit assistance providers” and “licensees that provide credit assistance

in relation to credit contracts” such as those small businesses in the auto sector. MTAA and the state and territory MTAs and ACCs could, of course, assist in that regard.

7. Alternatives

ASIC states on page 4 of CP309 that: “[W]e also ask you to describe any alternative approaches you think would achieve our objectives.” This and future ASIC regulatory consultations and processes should consider adopting some sort of [‘Red versus Blue Team’](#) approach— eg free market v government intervention, financial stability v market competition, small business v big business, etc. Such a *Red v Blue* approach is currently being explored by the US Federal EPA, as the ‘new wave’ of world best practice for evidence based policy.

8. Impacts

ASIC states on page 4 of CP309 that: “We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on: the likely compliance costs; the likely effect on competition; and other impacts, costs and benefits. Where possible, we are seeking both quantitative and qualitative information.” Section 1 of the ASIC Act refers to: “[I]n the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy[.]” MV dealers are generally concerned about, on the cost-side, growing regulatory burdens and, on the revenue-side, declining sales. Both are due in part to credit access. This needs to be explored further by ASIC in subsequent (more-detailed) submissions by, and (in-depth) conferences with, MTAA and its members.

Also note that the quantified costs and benefits will be specific to the circumstances and can change over time. Because undertaking proper cost benefit analysis (CBA) requires specialised skills and experience as well as being time-consuming and expensive, this requirement could unfairly favour big businesses (like banks and insurers) over smaller ones (like MV dealers). CBA should involve an independent entity to not only accept submissions from the stakeholders like “credit providers” and “credit assistance providers” on benefits and the costs, but to lead the CBA itself. The leading candidates are the ACCC, PC or the Parliamentary Budget Office (PBO).

Conclusion

Please accept this initial MTAA submission to ASIC on this crucial issue of “responsible lending conduct” for those small and medium sized businesses selling new and used MVs involving “credit assistance”. MTAA looks forward to being fully engaged for the remainder of this consultation process. Any questions or comments regarding this submission may, at first instance, be directed to Mr Darren Nelson, MTAA Director of Policy and Industry Relations on 0479 001 040 or Darren.Nelson@mtaa.com.au.

MTAA Limited
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