Working in a Regulated Environment

February 2013
Legislation

In your role as Business Manager, there are several key acts of law that you need to have a good understanding of, including...

• National Consumer Credit Protection Act 2009
  - National Credit Code
• Competition and Consumer Act 2010
  - Australian Consumer Laws
• Anti-Money Laundering and Counter-Terrorism Financing Act 2006
• Corporations Act 2001
• Privacy Act 1988

NOTE: Regulation in relation to insurance products will be covered in a separate module.
Legislative Reforms

- Financial Services Reform Act
- Uniform Consumer Credit Code
- Trade Practices Act 1972

Corporations Act 2001

National Consumer Credit Protection Act 2009

National Credit Code

Competition and Consumer Act 2010

Australian Consumer Laws
The Australian financial and credit services industry is largely regulated by two independent regulators...

- Australian Securities and Investments Commission (ASIC)
- Australian Competition and Consumer Commission (ACCC)
Regulatory Framework

The Australian Securities and Investment Commission (ASIC) was set up under, and administers the Australian Securities and Investments Commission Act 2001 (ASIC Act).

ASIC is Australia's corporate, markets, financial and credit services regulator, regulating Australian companies, financial markets, financial services organisations and professionals who deal and advise in investments, superannuation, insurance, deposit taking and credit.

As the consumer credit regulator, ASIC license and regulate people and businesses engaging in consumer credit activities (including banks, credit unions, finance companies and mortgage and finance brokers), ensuring licence standards are met, including the responsibilities to consumers under the National Consumer Credit Protection Act 2009.
Regulatory Framework

ASIC administers (among others) the following legislation, as well as relevant regulations made under it...

- Australian Securities and Investments Commission Act 2001
- Corporations Act 2001
- Insurance Contracts Act 1984
- National Consumer Credit Protection Act 2009
Regulatory Framework

In administering the various laws, ASIC has the regulatory and enforcement powers to...

• Grant Australian Financial Services Licences (AFSL) & Australian Credit Licences (ACL)
• Suspend or cancel AFSL’s and ACL’s
• Deal with the issue of financial services products under defective disclosure documents
• Investigate suspected breaches of the law
• Issue infringement notices in relation to alleged breaches of some laws
• Ban individuals from engaging in credit activities or providing financial services
• Seek civil and criminal penalties from the courts
The Australian Competition and Consumer Commission which was formed in 1974 to administer the Trade Practices Act 1974, which was replaced by the Competition and Consumer Act 2010 (CCA) on January 1st 2010.

- The ACCC promotes competition and fair trade in the market place to benefit consumers, business and the community.
- It’s prime responsibility is to ensure that individuals and businesses comply with the Commonwealths competition, fair trading and consumer protection laws.
- The CCA provides the ACCC with increased powers to deal with contraventions of consumer law, including substantiation notices and infringement notices.
The National Consumer Credit Protection Act 2009 (NCCP) was introduced in 2010, replacing the Uniform Consumer Credit Code (UCCC) and other state based consumer credit regimes as a national regime.

The NCCP is regulated by ASIC and among other things aims to...

- Boost consumer protection
- Introduce standards to encourage prudent lending
- Curtail undesirable practices
Working in a Regulated Environment

National Consumer Credit Protection Act 2009

The NCCP also incorporates the National Credit Code (NCC), which replaced the previous Uniform Consumer Credit Code.

Changes under the NCCP include...

- Introduces a licensing regime for all providers of consumer credit and services
- Introduces responsible lending conduct requirements
- Mandatory membership to an approved external dispute resolution scheme
- Provides ASIC with improved sanctions and enforcement powers as the regulator
National Consumer Credit Protection Act 2009

National Licensing Regime

The NCCP requires all persons engaged in credit activities to hold an Australian Credit Licence, and imposes standards for licensing and ongoing standards of conduct.

Among other provisions, the Licensee must...

• Do all that is necessary to ensure the credit activities authorised by the licensee are engaged in efficiently, honestly and fairly

• Ensure that representative are adequately trained and competent to engage in the credit activities authorised by the Licensee
National Consumer Credit Protection Act 2009

National Licensing Regime

A licensee can authorise third parties to engage in credit activities on their behalf.

- Licensee’s are liable for the conduct of their representatives. This is the case whether or not they are acting within the authority granted them by the licensee.
- This includes making the licensee liable for any loss or damage suffered as a result of the representatives conduct.
- Credit representatives of TFA must satisfy the fraud and credit requirements.
- Credit representatives must maintain the competence to engage in the credit activities authorised by the Licensee.
Responsible Lending Conduct

The NCCP requires all persons engaged in credit activities to meet specific obligations in regards to responsible lending, including not providing consumer credit to a consumer if that credit contract is unsuitable for the consumer.

There are two main issues to consider in determining that a credit contract is unsuitable...

- Can the consumer meet their financial obligations under the contract without financial hardship?
- Does the credit contract meet the consumers requirements and objectives?
National Consumer Credit Protection Act 2009

Responsible Lending Conduct

Credit providers need to take reasonable inquiries about a consumer’s financial situation, including...

- Make reasonable inquiries of the consumer about their financial situation and their requirements and objectives in relation to the credit contract e.g.
  - The consumer’s current amount and source of income (this includes the nature and length of their employment e.g. – full/part time, casual, seasonal or self employed)
  - The extent of the consumer’s current and variable fixed expenses (rent, existing debts such as credit card/s, child support)
  - The consumer’s current circumstances (age, marital status, number of dependants)
  - The extent to which any existing debts will be repaid from the credit advance

- Based upon these inquiries, assess whether the credit product is unsuitable for the consumer and only proceed if the credit product is not unsuitable; and give the consumer a copy of the assessment if requested.
Dispute Resolution

Under the NCCP, all Australian Credit Licensee’s are required to have a two tiered dispute resolution process to handle complaints or disputes with consumers.

- Internal dispute resolution (IDR) procedures that meet ASIC requirements
- Membership of an ASIC approved external dispute resolution (EDR) scheme

TFA is a member of the Financial Ombudsman Service (FOS).

- FOS is an independent organisation that resolves disputes between consumers and member financial services providers
- Determinations made by FOS are binding on the financier, however the customer can decide to take further action
Customer Protection under the NCCP

Consumers are afforded additional protection under the NCCP, such as but not limited to...

- Full disclosure of fees and charges prior to entering into a credit contract
- Relief under hardship provisions, including extension of time and varying the original terms of the contract
- Negotiate reduced payments or delayed payments for a period of time
- Minimum 30 days to rectify a repayment default
- TFAL has to apply to the courts to repossess where the consumer has repaid more than 75% of the loan or the vehicle is on private property
National Consumer Credit Protection Act 2009

Potential penalties for individuals for breach’s of the NCCP

Civil and criminal penalties can be imposed.

ASIC may make a banning order...

• Against an individual they believe has or is likely to contravene a provision of any credit legislation

• Are not a fit and proper person to engage in credit activities

A banning order is a written order that prohibits a person from engaging in any credit activities or specified credit activities.

The order may prohibit the person against whom it is made from engaging in credit activity...

• Permanently

• For a specified period
National Credit Code

Related Insurance Contracts

TFAL will only finance the following approved insurance products, issued by approved underwriters...

- Motor Vehicle Insurance
- Consumer Credit Insurance (CCI)
- Finance GAP Cover
- Extended Warranties

The inclusion of insurance products (GAP, PPI & Warranty) in a finance contract cannot be mandatory.

Tyre and rim insurance MUST NOT be financed.
Related Insurance Contracts

The NCC replaces the Uniform Consumer Credit Code (UCCC) regime, however largely replicates the provisions of the UCCC.

Among other provisions, the NCC regulates related insurance contracts under consumer credit contracts, and in the case of CCI...

- Limits the maximum commission to 20% of the premium (net of Govt. charges)
  - Includes “soft” commissions such as vouchers, incentive trips, gifts, lunch etc.
- A credit provider or any such supplier must not accept a commission exceeding the maximum value.
  - Criminal Penalty: 100 penalty points
  - Strict Liability offence applies
National Credit Code

Related Insurance Contracts

To avoid a possible breach of this commission capping in regards to consumer credit insurance, it is recommended you follow the following rule...

Consumer Loan = Consumer Credit Insurance
CONSUMER OR BUSINESS USE?
Consumer or Business use?

National Credit Code

The NCC assumes that a vehicle financed under a regulated credit contract is for personal use unless it is used predominantly for business purposes (greater than 50%).

- Prior to July 2010 a business purpose declaration was conclusive evidence of business usage unless the business manager or TFAL knew that this was not the case

- From July, 2010 the law changed. A business purpose declaration is no longer conclusive and the predominant business usage must be established before you can proceed with an application for business finance

- If predominant business usage is not proven, you cannot proceed with a business vehicle loan, the purchase agreement or finance lease for an individual. You must proceed with a consumer credit contract
Verifying Business Use

National Credit Code

You must verify that the customer is in fact carrying on a business activity and that the vehicle will be used predominantly for business purposes – i.e. greater than 50%. Evidence of the business activity must be obtained from the customer. This will include...

- An active ABN and where turnover exceeds $75,000 the customer must be registered for GST
- Verification that the customer is actually carrying on business through verification of business income and business expenses
Verifying Business Use

Why is an active ABN not sufficient.

There are many ABN’s stored in the ABN look up database. Many of them may not even be utilised.

- Paul Williams the GM of TFA Dealer Sales had 217 ABN’s that matched his name.

- Does that mean he operates a business? NO.

ABN’s can remain idle and by themselves are not sufficient to verify business use.
Why Confirm Business Use?

The requirement to confirm business usage determines whether a customer is protected by the National Consumer Credit Protection Act 2009 (NCCP).

Consumer Protection under the NCCP is wide ranging and includes protection to consumers in relation to marketing, disclosure of fees and charges, protection in relation to assessment of the loan application, assistance in times of hardship and certain requirements imposed in case of collection.

TFA and its authorised representatives must make reasonable enquires to confirm if the applicant is eligible for a business loan facility. If the eligibility cannot be satisfactorily proven, then the applicant must be given a consumer loan.

TFAL will be held liable for damages and may face civil and criminal penalties for failure to undertake its responsibilities in this regard.
## Verifying Business Income

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<th>For Individuals trading as Sole Traders</th>
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<td>- Supplementary business section of their tax return</td>
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<td>- Business Activity statements</td>
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<td>- Financial statements for the business</td>
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<td>- Confirmation of predominant business usage from an accredited accountant – CPA or Chartered Accountant</td>
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<th>Partnership or individuals</th>
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<td>- Business activity statements</td>
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<td>- Financial statements for the partnership</td>
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| Company (Ltd and unlimited) | A company is a separate legal entity and will not need to provide evidence of income. A company is automatically eligible for the commercial products. |
Verifying Business Use

- **Is Customer Self Employed?**
  - Yes → **Can business activity be verified?**
    - Yes → **Can business use for vehicle be verified?**
      - Yes → **Commercial Loan type**
      - No → Consumer Loan
    - No → Consumer Loan
  - No → Consumer Loan
Remember...

Under your authorisation with TFAL, you act on behalf of TFAL. This means there are certain things you must do.

- Always act fairly, honestly and efficiently
- Ensure customers are not disadvantaged by conflict of interest
- Ensure the customer has sufficient time to review the financial options and seek independent advice
- Provide all required notices and documents as required
- Abide by the reasonable lending provisions
Remember...

There are things you must not do.

- Provide advice on finance
  - Cash or mortgage conversions fall under the definition of advice
- Do not hide or quote excessive interest rates
- Do not mislead or set out to deceive
TFAL Finance Options

TFAL offer the following finance options.

**Consumer Loan**
Consumers are individuals that purchase goods predominately for personal, household and domestic purposes.

**Business Vehicle Loan**

**Term Purchase**
Commercial Loan Types must be used predominately for business use i.e. greater than 51% of usage.

**Finance Lease**

**Operating Lease**
COMPETITION AND CONSUMER ACT 2010
Competition & Consumer Act 2010

The Competition and Consumer Act 2010 (CCA) replaced the Trade Practices Act (TPA) on January 1\textsuperscript{st} 2010.

The Australian Consumer Laws (ACL), are a national uniform set of laws that have been specifically designed to give greater protection to consumers and provide businesses with a common set of obligations.

The ACL covers consumer good and services (new or used) purchased after January 1\textsuperscript{st} 2011 which are less than $40,000 in value.

Goods over $40,000 are also covered where they are for of the type generally used for personal, domestic and household purposes.

Vehicles and trailers acquired for domestic use are covered regardless of value.
Australian Consumer Laws (ACL)

The consumer protection provisions that were in the Trade Practices Act (TPA), are now contained in the ACL and are in Schedule 2 of the CCA, which...

- Introduces a single national consumer law
- Replaces the TPA implied warranties and conditions with **statutory consumer guarantees**
- Contains a new provision in relation to **false and misleading representation**
- Prescribes requirements relating to the form of **warranties against defects**
- Introduces a **national unfair contracts regime**
- Creates a **national legislative scheme for consumer product safety**
- **Enhances the powers of the ACCC** to deal with contraventions of consumer law, including substantiation notices and infringement notices
The Consumer Guarantees

The following are the 9 statutory consumer guarantees relating to the supply of goods and services that apply under the ACL...

• Goods will be of an acceptable quality
• Goods will be fit for a specified purpose
• Goods will correspond with their description
• Goods will match any sample or demonstration model
• Suppliers and manufacturers will comply with extra promises made about goods - express warranties
• Suppliers guarantee they have the right to sell the goods (clear title)
• Goods are free from undisclosed securities, charges or encumbrances
• The consumer has the right to undisturbed possession of goods
• The manufacturer of goods will ensure that repairs and spare parts are reasonably available
Remedies Available to Consumers

A consumer has the right of remedy if goods and services do not meet a consumer guarantee.

The consumer guarantees apply to both major (serious) and minor problems. The type of remedy, and who must provide it, will depend on the problem and which consumer guarantee was not met.

Depending on the circumstances and whether or not the failure under the consumer guarantee is major or minor, the consumer may be entitled to either...

- Repair
- Replacement
- Refund, and/or
- Compensation
Compensation for Consequential Loss

A consumer can claim compensation for consequential loss from a supplier who failed to meet one or more of the consumer guarantees.

Consequential loss is the cost to a consumer indirectly resulting from the failure and include, among other things, lost profits and expenses.

Compensation should put the consumer in the position they would have been in if the goods or services had met the consumer guarantees.

A supplier will have to pay for losses that...

• Could have been expected to result from a failure to meet a consumer guarantee
• Are reasonably foreseeable
False or Misleading Representation

The CCA sets out penalties if a business tells a consumer that a guarantee does not exist, may be excluded or may have a particular effect including a business representing that it will not be responsible for reasonably foreseen consequences.

• Maximum penalties of $1.1 million for corporations and $220,000 for individuals may apply for committing this offence

The ACL states that a term of a contract that purports to exclude, restrict or modify the operation of the consumer guarantees is void.

A supplier must also not represent to a consumer that they are required to pay for a right or remedy under an extended warranty, to which they are entitled to under the ACL.

• Strict liability offences apply
Competition & Consumer Act 2010

Misleading or deceptive conduct.

- Your conduct can be misleading or deceptive if you remain silent, only tell half the truth, give an impression by body language

Unconscionable conduct.

- Any conduct that takes an unfair or unreasonable advantage over the consumer

Unfair contract terms.

- Where any term of the contract is one sided and favours either TFAL or the Dealer, there is no commercial reason for the term, and the consumer will suffer financial loss or hardship if the term is enforced
What could be considered misleading, unconscionable or unfair?

• Telling a customer that they need to include a related insurance contract in the application as it will make the application more attractive to the financier

• Charging an excessive interest rate where the customer does not fully understand the finance industry

• Inclusion of additional products that significantly increase the amount the customer needs to borrow to purchase their vehicle

• Not giving the customer sufficient time to consider whether they indeed need to take out insurance related products with their finance

• Not disclosing to a customer what is “included” in a repayment
Form of Warranties Against Defects

From 1 January 2012 a warranty against defects must be in writing and...

- Be expressed in a transparent way – in plain language, legible and presented clearly
- Contain the warrantor’s name, business address, phone number and email address
- Set out relevant claims periods or procedures
- Include a statement that rights under the warranty sit along side the consumer guarantees, which can not be excluded – “Prescribed wording”

Potential penalties of $50,000 for corporations and $10,000 for individuals exist where a warranty against defects document does not comply.
THE PRIVACY ACT
The Privacy Act


It established a national scheme to regulate private sector organisations' handling of personal information.

The legislation was designed to bring Australia in line with international standards on personal information and to instil confidence in how Australian businesses handle personal information.

The National Privacy Principles (NPPs) are legally binding.
The Privacy Act

What does the Privacy Act cover?

The Privacy Act regulates how individuals personal information is handled. For example it covers...

- How individuals personal information is collected (e.g. the personal information provided when they fill in a form)
- How it is then used and disclosed
- Its accuracy
- How securely it is kept
- Their general right to access that information
The Privacy Act

Who has rights under the Privacy Act?

Individuals have rights under the Privacy Act which give them greater control over the way their personal information is handled.

The Privacy Act allows individuals to...

- Know **why** their personal information is being collected and **how** it will be used
- Ask for **access** to their records (including health information)
- Stop receiving unwanted **direct marketing** material
- **Correct** inaccurate information about you have about them
- Ensure their information is only **used** for purposes you have been told about
Who, What & When

Who do the private sector provisions of the Privacy Act apply to?

The private sector provisions of the Act apply to private sector organisations with a link to Australia, including...

- Individuals who collect, use or disclose personal information in the course of a business. For example, a dealer’s business activities will be regulated (unless it's a small business), but information gathered outside business activities won't be.

- Bodies corporate

- Organisations outside Australia must comply with the provisions in some circumstances. Sending information out of Australia is also regulated.
Who, What & When

What is protected?

The Act regulates the way in which private sector organisations collect, handle, disclose, use and store personal information.

So what is personal information?

Basically any information - including an opinion - that can be used to identify a person. It could simply be their name, address, telephone number or date of birth.

There are extra protections for sensitive information such as information about an individual's race, sexual preference or health.
The NPPs

NPP 1 - Collection

An organisation must only collect personal information that's necessary for one or more of its legitimate functions or activities.

At the time of collection (or as soon as practicable afterwards) it must take reasonable steps to ensure that the individual is given details of the organisation and why the information is being collected.

Where practicable, an organisation should collect personal information directly from the individual.
The NPPs

**NPP 2 – Use and Disclosure**

As a general rule an organisation should only use or disclose personal information for the purpose for which it was collected.

An organisation can use or disclose personal information about an individual for another purpose if the individual has consented or the secondary purpose is related (or could be reasonably expected to be related), to the primary purpose.

Direct marketing is a secondary purpose and consent is mandatory.

Special rules apply to health information.

Also note the Spam Act, which further regulates the sending of unsolicited commercial electronic messages.
The NPPs

NPP3 – Data Quality

An organisation must take reasonable steps to ensure that the personal information it collects, uses or discloses is accurate, complete and up-to-date.

NPP4 – Data Security

An organisation must take reasonable steps to protect the personal information it holds from misuse, loss and unauthorised access, modification and disclosure. It must destroy personal information - or make it impossible to identify the person it relates to - if it is no longer needed for any purpose in accordance with NPP 2.
The NPPs

NPP5 – Openness

Organisations must prepare clearly expressed policies on the management of personal information which must be available on request.

If requested by an individual, an organisation must take reasonable steps to let the individual know more detail about the sort of personal information it holds, the purpose for which the information is held and how the information is collected, used, stored and disclosed.
The NPPs

NPP6 – Access and Correction

As a general rule, an organisation must, upon request, give the individual access to any personal information held about them unless...

- It would be unlawful to provide the information
- It would pose a serious and imminent threat to the life or health of any individual
- It would have an unreasonable impact upon the privacy of other individuals
- The request is frivolous or vexatious

An individual can request information held by an organisation be corrected if it is not accurate, up to date or complete.
The NPPs

NPP7 – Identifiers

An identifier is a number used by a government agency (or its agent or contractor), to identify an individual such as a Medicare number, tax file number or pension number. An organisation must not adopt an identifier like this as its own identifier.

NPP8 – Anonymity

Wherever it is lawful and practicable, individuals must have the option of not identifying themselves when entering transactions.

NPP9 – Trans Border Flows

An organisation in Australia must take steps to protect an individual's privacy if personal information is sent outside Australia.
The NPPs

NPP10 – Sensitive Information

Generally, an organisation is not allowed to collect sensitive information from an individual unless...

• The individual has consented
• Collection is required or authorised by law
• The information is required to establish or defend a legal or equitable claim
• The individual is incapable of consenting and the information is needed because of a serious and imminent threat to the life or health of the individual
ANTI-MONEY LAUNDERING & COUNTER-TERRORISM FINANCING ACT (AML/CTF)
INTRODUCTION

On 12 December 2006, the Federal Government's new Anti-Money Laundering and Counter-Terrorism Financing Act came into effect. The Act is supplemented by AML/CTF Rules (which together with the Act is known as the AML/CTF laws).

These laws apply to and affect almost all providers of financial services in Australia, including Toyota Finance Australia Limited (TFAL).

Compliance with the AML/CTF laws is regulated by the Australian Transaction Reports and Analysis Centre (AUSTRAC).
What is Money Laundering

Money laundering is a significant problem. Some sources estimate that over A$1.5 trillion is laundered worldwide every year. Of that amount, it is estimated that A$200 billion is laundered in the Asia-Pacific region alone and $4.5 billion in Australia.

Money laundering is the process by which the money obtained through criminal activities is given the appearance of having come from a legitimate source.

The money in question may have come from drug trafficking, terrorist activities, tax evasion or other crimes. It will usually be in the form of large quantities of cash, which need to be introduced into the legitimate financial system.
Why is money laundered?
Money is laundered in order to...
• Avoid prosecution
• Increase profits
• Avoid seizure of accumulated wealth
• Appear legitimate
• Evade taxes

What problems are associated with money laundering?
• Undermining of the financial system
• Expansion of crime
• Financing terrorism
Know Your Customer (KYC)

Under the AML/CTF laws TFAL must not provide a financial service to a customer until it has properly identified the customer so that it is reasonably satisfied that the customer is who they claim to be (and in the case of customers that are not individuals that certain information about the customer has been provided).

This is known as the principle of ‘Know Your Customer’ (KYC).

'Know Your Customer' is a series of processes, systems and controls which, when followed, will help your organisation to be satisfied that the customer is who the customer says they are.
Know Your Customer

Business Managers must take certain steps to identify customers for TFAL as part of the credit application process and are required to...

• COLLECT, and in some circumstances VERIFY, the minimum KYC information for each customer type as required by the AML/CTF laws

• NOTIFY TFAL if, during the course of identifying a customer or verifying KYC information, there are reasons to suspect that the customer may not be who they claim to be, or that any information or documentation provided by the customer is forged, false or otherwise not authentic

• FORWARD a copy of any documentation provided by a customer to TFAL (the AML/CTF laws require that TFAL retain all records of this nature for at least 7 years)
Know Your Customer

You must collect a...

- Customer's full name
- Customer's date of birth
- Customer's residential address

The information must be verified and based on...

- Reliable and independent documentation
- Reliable and independent electronic data
- A combination of reliable and independent documentation and electronic data
Non-Compliance

WHAT ARE THE CONSEQUENCES OF NON-COMPLIANCE?

The AML/CTF laws provide a civil penalty framework for non-compliance with regulatory obligations.

Companies could be liable for pecuniary penalty orders of up $11 million in the event that it if found to have breached these civil penalty provisions and individuals may be liable for penalties of up to $2.2 million.

- Dealerships are formally appointed as TFAL's agents for the purpose of complying with its AML/CTF customer identification obligations
- The effect of this is that TFAL is also likely to be held directly responsible for any breach of the AML/CTF laws by its dealerships, even where such breaches are not intentional
Working in a Regulated Environment