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National Consumer Credit Protection Bill 2009

PaoYi Tan
Law and Bills Digest Section

Contents

National Consumer Credit Protection Bill 2009

Date introduced: 25 June 2009

House: House of Representatives

Portfolio: Treasury

Commencement: Sections 3 to 337 and Schedule 1 commence on a day to be fixed by Proclamation, or 6 months after Royal Assent, whichever occurs first. The rest of the Act commences on the day on which it receives Royal Assent.

Links: The relevant links to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at http://www.aph.gov.au/bills/. When Bills have been passed they can be found at ComLaw, which is at http://www.comlaw.gov.au/.

Purpose

To implement the new national consumer credit regulation framework, which will replace the current State based regulatory framework known as the Uniform Consumer Credit Code.

Background

Basis of policy commitment

What is consumer credit?

Consumer credit is money loaned to individuals under a contract, for domestic or personal purposes. These include mortgages on a person's house, their personal credit card, personal loans for cars, etc. Under this Bill, it will also include mortgages over residential investment properties. It does not include credit provided from one individual to another under a personal contract, but instead covers credit provided by lenders that are in the business of providing credit.

Current regulatory framework

Currently, regulation of consumer credit is the responsibility of the States and Territories. This was achieved through the establishment of a code system—a single regulatory code enacted by one jurisdiction (Queensland), with all other jurisdictions enacting enabling legislation, to enforce the Queensland code within their State or Territory. This is known

as the Uniform Consumer Credit Code (UCCC).[1] Policy development of the UCCC is negotiated between the States and Territories through the Ministerial Council for Consumer Affairs (MCCA).

Administration of the UCCC is described on the UCCC website as follows:

> The legislative structure of the Code is based upon a template scheme. This means that template legislation has been passed (in Queensland: Consumer Credit (Queensland) Act 1994 and the Consumer Credit Regulation (Queensland) 1995).
>
> All States and Territories have passed enabling legislation which adopts the template legislation and applies it in the State or Territory as "in force from time to time". By doing this, any amendments (changes) to the Code or Regulations only need to be made to the template legislation; they will then automatically apply in other states without amendment to those States' Enabling Acts.
>
> Under the Uniform Consumer Credit Laws Agreement 1993 (AUCLA) the Ministerial Council for Uniform Credit Laws (an offshoot of the Ministerial Council on Consumer Affairs) has to agree to amendments to the Code by a two-thirds majority.
>
> All states and territories are required by the AUCLA not to introduce legislation into their parliaments which conflicts with or negates the Code.

Over the years, problems emerged with the operation of the UCCC. Despite the purpose of the UCCC being to ensure consistent regulation across borders, there was, in reality, no guaranteed consistency between jurisdictions. Western Australia's failure to enact the UCCC (and instead enact 'equivalent' legislation in that State) created a dual regulatory system. Also, all States and Territories are at liberty to enact 'complementary' legislation on ancillary consumer credit issues (for example, some, but not all, jurisdictions have enacted legislation to cap interest rates[2]). Consequently, while the bulk of credit providers' statutory obligations are consistent, there are slight variations in regulation between jurisdictions.

The debate about whether consumer credit regulation should be a Commonwealth matter has been ongoing for many years, and crossed both sides of politics. In her 2nd reading debate speech to the House of Representatives, Belinda Neal (Member for Robertson) stated:

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1. Information about the UCCC is available on the Credit Code website, viewed 9 September 2009, http://www.creditcode.gov.au/
2. Treasury, *Financial Services and Credit Reform Green Paper*, Canberra, June 2008, p. 13, viewed 9 September 2009, http://www.treasury.gov.au/documents/1381/PDF/Green_Paper_on_Financial_Services_and_Credit_Reform.pdf

> ... this has been an aspiration of the Australian Labor Party since I was the consumer affairs shadow minister back in 1996.[3]

The Hon Judi Moylan (Member for Pearce) stated:

> ... it is important also to note that this was not the first attempt to reach such an agreement at COAG level. The coalition government's efforts to establish national uniform laws in this regard were hampered by disagreement among many of the Labor controlled state governments while we were in office federally...[4]

While the move towards federal regulation of the industry has been long debated, other factors became apparent in recent years to encourage a review of the regulatory framework. The emerging industry of finance broking established a major presence in the finance sector, and was for many years largely unregulated. While an attempt to form a unified regulatory response was made by the States and Territories in MCCA, the process was slow and resulted in only some jurisdictions regulating that industry, in a variety of forms.[5] The risks associated with the continued lack of comprehensive government supervision of finance broking practices drew a high level of media attention.[6]

Additionally, governments experienced increased pressure to protect consumers from onerous mortgages. With housing prices increasing and interest rates peaking at the highest rate since the mid 90s, mortgage regulation was also an issue that drew increasing attention. Overseas in late 2007 and early 2008, the sub-prime market problems in the United States unfolded and caused major disruptions to the country's economy (and eventually the world's economy). While it was well established that Australia did not have a significant sub-prime problem,[7] the combination of issues had drawn sufficient attention

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3. B Neal, 'National Consumer Credit Protection Bill 2009', House of Representatives, *Debates*, 20 August 2009, p. 19.
4. J Moylan, 'National Consumer Credit Protection Bill 2009', House of Representatives, *Debates*, 20 August 2009, p. 16.
5. This attempt took form as the *Finance Broking Bill 2007* (NSW). Information about the Bill, and the exposure draft, are available at http://www.consumer.gov.au/html/latest_news.htm, viewed 9 September 2009.
6. For example, see B Brown, 'Buyer beware: We need uniform laws to rein in dodgy mortgage brokers', *The Weekend Australian*, 9 June 2007, p. 41, viewed 9 September 2009, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FFPBN6%22 and A Sampson, 'Legislation should spell the end of rogue brokers', *Sydney Morning Herald*, 1 December 2007, p. 49, viewed 9 September 2009, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FVD4P6%22
7. Dr Guy Debelle, Assistant Governor of the Reserve Bank of Australia, noted that 'sub-prime lending makes up a very small share of the Australian mortgage market'. G Debelle, *Comparison of the US and Australian Housing Markets*, Address to sub-prime mortgage meltdown symposium, 16 May 2008, p. 42, viewed 9 September 2009,

to the consumer credit regulatory framework to warrant a significant review of the policy. With the recently elected Australian Labor Party (Labor) government experiencing a supportive all-Labor Council of Australian Governments (COAG), the conditions for reaching an agreement on reforms were highly improved.

The Productivity Commission (the Commission) was engaged in 2006 to report on Australia's consumer policy framework.[8] This included examination of both the regulation of consumer credit, and potential regulation of the emerging credit-related industry of finance broking. The Commission released their report, *Review of Australia's Consumer Policy Framework* in May 2008.[9] The Commission recommended that:

> Responsibility for the regulation of credit providers and intermediaries providing advice on credit products ('finance brokers') should be transferred to the Australian Government, with enforcement to be undertaken by the Australian Securities and Investments Commission (ASIC).
>
> Amongst other things, the new national credit regime should:
>
> - cover all consumer credit products and all intermediaries providing advice on such products (including through electronic or other arms-length means);
> - retain the Uniform Consumer Credit Code (UCCC) as a self standing set of requirements within the broader financial services regulatory regime;
> - incorporate changes to the Code that have been agreed to by the Ministerial Council on Consumer Affairs (MCCA), but not yet implemented;
> - incorporate requirements from state and territory credit legislation outside of the code, where these pass a benefit-cost test;
> - include a national licensing system for finance brokers, and a licensing or registration system for credit providers that would give consumers guaranteed access to an approved dispute resolution service; and

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http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fjrnart%2F6Q1R6%22

8. P Costello (Treasurer), *Productivity Commission inquiry into Australia's consumer policy framework*, media release, 11 December 2006, viewed 15 September 2009, http://www.treasurer.gov.au/DisplayDocs.aspx?pageID=&doc=pressreleases/2006/133.htm&min=phc

9. Productivity Commission, 'Review of Australia's Consumer Policy Framework', *Inquiry Report no. 45*, 30 April 2008, viewed 9 September 2009, http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport

- allow, over time, for the streamlining of the current UCCC in the light of requirements within the broader financial services regime, where net benefits are likely.

Also, CoAG should give consideration to implementing the new national regime in a phased way, including as initial steps:

- importing into the Australian Government's jurisdiction the current UCCC — modified to reflect changes agreed to by MCCA, but not yet implemented — and making ASIC responsible for its enforcement; and

- introducing an interim, ASIC enforced, national licensing arrangement for finance brokers, based on the draft proposal developed by MCCA.[10]

At the COAG meeting on 2 October 2008, the Governments of the Commonwealth and States and Territories reached an agreement that the Commonwealth should take over regulation of consumer credit. The new regulatory framework would replicate the UCCC, create a new licensing system, impose responsible lending requirements, and extend regulation to apply to the finance broking industry. The new framework would be administered by the Australian Securities and Investments Commission (ASIC).

Committee consideration

The Bill was referred to the Senate Economics Legislation Committee (the Senate Committee) for inquiry. Details of the inquiry, and the final report, are at the Senate Economics Committee webpage.[11] The report was tabled on 7 September 2009.

The Senate Committee recommended that the Bill (and accompanying bills) be passed, subject to some recommendations made in the report.

Fifty-eight submissions were made to the Senate Committee. A selection of the submissions is discussed below.

Position of stakeholders

Overwhelmingly, industry is supportive of the proposed new regulatory framework. However, as evidenced in the submissions made to the Senate Committee, many stakeholders have commented on certain aspects of the Bill that they find problematic, in particular:

- the use of displacement provisions under **clauses 23–26** of this Bill

10. Productivity Commission, recommendation 5.2, p. 66.

11. Senate Economic Legislation Committee, Inquiry into the National Consumer Credit Protection Bill 2009 and related bills, viewed 9 September 2009, http://www.aph.gov.au/senate/committee/economics_ctte/consumer_credit_09/index.htm

- **subclause 130(3)**, which waives the requirement for credit providers to verify a consumer's financial situation where a credit assistance provider has recently done so, and

- the extension of the monetary limit for application of hardship provisions, up to $500 000, being non-applicable to existing credit contracts.

These issues are discussed under 'Key Issues' (below). The following outlines other general positions of stakeholders.

General support for regulatory reform was expressed by most industry groups. Abacus – Australian Mutuals Limited stated:

> Abacus and its members support placing conduct obligations on licensees as part of the consumer protection framework. Regulating what lenders and brokers actually do (conduct obligations) is a more effective consumer protection tool than merely regulating what they say (disclosure obligations), especially when consumers are given the right to seek redress against lenders and brokers through low-cost EDR.[12]

The Australian Bankers Association stated:

> The ABA strongly supports the Commonwealth Government assuming sole responsibility for the national regulation of consumer credit. A single, nationally consistent regime for the regulation of consumer credit will be an important contribution to the Australian economy. It recognises that consumer credit is a national market for greater efficiency and consumer certainty requires national regulation. The critical factor in achieving sound economic outcomes and consumer benefit is to ensure that the regulation achieves the right balance.[13]

Typically there was no objection to the structure of the reforms proposed; however, the issue of whether a separate regime is needed was raised during consultation. For example, Minter Ellison stated in their submission to the Committee:

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12. Abacus – Australian Mutuals, Submission to Senate Economics Legislation Committee, *National Consumer Credit Protection Bill 2009 and related bills*, 23 July 2009, p. 2, viewed 9 September 2009, https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=cc010826-4534-49c8-89c7-258949d4a177

    Abacus – Australian Mutuals is the industry body for credit unions, mutual building societies and friendly societies.

13. Australian Bankers Association, Submission to Senate Economics Legislation Committee, *National Consumer Credit Protection Bill 2009 and related bills*, 24 July 2009, p. 1, viewed 9 September 2009, https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=504b5a85-4eeb-4f14-992c-fe7a1a221506

> We are not convinced that there is sufficient justification to establish a separate licensing regime under a separate statute. Given the nature of the proposed credit licensing regime, there does not seem any reason not to regulate credit through the Australian financial services licence (AFSL) regime in Chapter 7 of the *Corporations Act 2001* (FSR).... we are concerned that the proposal for a separate regime has made it harder to identify the differences between the regimes and also meant that the Government has not explained why many of those differences are appropriate. [14]

In response to this concern, Treasury stated in its submission to the Economics Committee:

> Whether or not credit should simply be included as a financial product within the Corporations Act, and the existing system for holders of an Australian financial services licence (AFSL) was considered. It was acknowledged that having credit come under the AFSL would mean that existing legal concepts and standards of conduct would apply. However, the different characteristics of credit products would mean that there would be a consequent need to modify elements of the Corporations Act, diluting this effect and potentially increasing confusion for industry and consumers, where products under the same licence were treated differently.[15]

Treasury pointed out in the submission that the Credit Bills take a different approach from the *Corporations Act 2001* (the Corporations Act) to reflect particular differences between credit and other financial products, for example, the less onerous requirements for financial records relating to providing money to, rather than accepting money from, the consumer.

Commencement date for responsible lending conduct provisions

Some stakeholders expressed concern with the proposed commencement date for the Responsible Lending Conduct provisions of January 2011, in relation to its application to certain licensees, particularly brokers. For instance, the National Legal Aid Secretariat said:

> Some States (such as NSW ACT VIC and Western Australia) have varying degrees of broker regulation at present. However if these States relinquish this responsibility at the commencement of the Bill in January 2010, there will be no regulation of the

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14. Minter Ellison, Submission to Senate Economics Legislation Committee, *National Consumer Credit Protection Bill 2009 and related bills*, 17 July 2009, p.1-2, viewed 9 September 2009, https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=729e8c66-c33b-464d-b793-597107375a9b

15. Treasury, Submission to Senate Economics Legislation Committee, *National Consumer Credit Protection Bill 2009 and related bills*, August 2009, p. 13, viewed 9 September 2009, https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=db6ecc2d-f4b0-4ff7-8ff2-4e1b33a9e028

> conduct of brokers anywhere (including in the some (*sic*) of the most populous States) for 12 months. This will result in a very significant gap in the protection of consumers, at a time when consumers are more vulnerable to unjust lending practices due to the tightening availability of credit through more mainstream credit providers.[16]

The Mortgage and Finance Association of Australia (MFAA) commented on the delay of the responsible lending provisions:

> These provisions of the Bill are the heart and soul of the legislation, so a decision to delay their operation is tantamount to a decision to delay consumer credit protection for 12 months.... in those states and territories where there is already operative broker legislation, viz WA, NSW, Victoria and ACT, consumers will be in a worse position than they currently are... [17]

However, the deferral of the commencement date for credit providers was considered valuable by that part of the industry. Westpac commented:

> One of the principal reasons for the deferral of the responsible lending obligations was the linking of the bill to comprehensive credit reporting laws. We welcome the deferral on this basis. Westpac's previous submission to the Government highlighted the importance of linking consumer credit law reforms with a system of comprehensive credit reporting, making the point that the policy aims behind the responsible lending obligations of the bill will not be fully realised without this alignment.[18]

Subsequently, the Minister announced intended changes to the commencement date of the responsible lending conduct requirements, bringing it forward for brokers and some

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16. National Legal Aid, Submission to Senate Economics Legislation Committee, *National Consumer Credit Protection Bill 2009 and related bills,* 17 July 2009, p. 2, viewed 9 September 2009, https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=2c1363a3-71af-4771-ab11-768babe254c5

17. Mortgage and Finance Association of Australia, Submission to Senate Economics Legislation Committee, *National Consumer Credit Protection Bill 2009 and related bills,* 24 July 2009, p. 2, viewed 9 September 2009, https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=92cec61d-c385-4b96-8ead-c0e90fd89f70

18. Westpac, Submission to Senate Economics Legislation Committee, *National Consumer Credit Protection Bill 2009 and related bills,* 24 July 2009, p. 2, viewed 9 September 2009, https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=42bdb180-b248-43e8-bd9b-9550a554a49c

lenders to 1 January 2010.[19] For Authorised Deposit-taking Institutions and Registered Finance Companies, the requirements will still commence on 1 January 2011.

Financial implications

The Explanatory Memorandum states:

> The Government has provided $70.2 million over four years to implement the decision of COAG as part of the 2008-09 Mid-Year Economic and Fiscal Outlook. This Bill includes measures to give effect to the transfer. The funding will support the establishment of a national licensing regime for providers of credit and credit services, with ASIC as the sole national regulator. It will also support the national regulation of mortgages, margin lending, personal loans, credit cards and pay day lending. The funding will be partially offset by revenue raised from fees required to be paid by persons regulated by the national framework, payment of which commences during the 2009-10 financial year. The amount of revenue generated from these fees will depend, in part, on the number and type of persons seeking to be licensed.[20]

In relation to the financial impact on businesses:

> The main compliance cost impact arises in relation to the licensing regime. This will primarily involve the initial costs associated with applying for an ACL (Australian Credit Licence) which include the payment of fees to lodge application documentation with ASIC, annual compliance costs and costs of EDR (External Dispute Resolution Scheme) membership.[21]

The fees associated with licensing under the new system are set out in the National Consumer Credit Protection (Fees) Bill 2009.

Key issues

The interaction of Commonwealth and state and territory law under the proposed regulatory framework

Under the Commonwealth Constitution, the Commonwealth does not have the power to legislate to establish a comprehensive national consumer credit regulatory scheme. Rather,

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19. C Bowen (Minister for Financial Services, Superannuation and Corporate Law), *Timetable changes to the National Consumer Credit Protection Reform Package*, media release, 14 August 2009, viewed 9 September 2009, http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/009.htm&pageID=003&min=ceba&Year=&DocType
20. Explanatory Memorandum, National Consumer Credit Protection Bill 2009, p. 7.
21. Explanatory Memorandum.

the regulation of consumer credit is currently the responsibility of the States and Territories. In order for the Commonwealth to acquire the necessary power, the States and Territories agreed at COAG to refer the appropriate matters to the Commonwealth so that it could then utilise section 51 (xxxvii) of the Constitution.[22]

The use of this method to achieve a national regulatory scheme is not an unusual exercise—similar referrals of power have been exercised before, most notably for the regulation of corporations under the Corporations Act. In recent years, suggestions for similar referrals of power have been made regarding other areas wholly or partly outside of direct Commonwealth jurisdiction, such as the proposed nationalisation of health and education systems.

As is typical for referrals of this nature, the legislation includes 'displacement provisions'—that is, provisions which allow for the States and Territories to enact inconsistent credit laws which override the operation of the Commonwealth laws, or concurrent credit laws which may operate alongside the Commonwealth laws (see **clauses 23–26** of this Bill). For many stakeholders, the presence of displacement provisions in the Bill is a key issue. Displacement provisions are typically used where powers have been referred under section 51 (xxxvii) of the Constitution. The Bill's referral and displacement provisions have been modelled closely on those in the Corporations Act.

This matter was identified by a large number of stakeholders during the consultation process. Westpac stated:

> We remain concerned at the capacity of states and territories to introduce jurisdiction-specific changes on top of the legislative model agreed by COAG. This will continue to undermine the rationale for a uniform law (which was a critical failing of the UCCC model in its operation) and risks eroding the national character of the law over time.[23]

Minter Ellison stated:

> We submit that there should be a clear exclusion of State or Territory legislative power in relation to credit activities, subject only to the power of a State to terminate its referral of power to the Commonwealth.[24]

However, the Treasury submission to the Senate Committee discussed referrals of power, and the use of displacement provisions with such referrals, in response to the stakeholder

22. Council of Australian Governments, 'Financial Regulation and Consumer Protection', *Communique*, 2 October 2008, viewed 15 September 2009, http://www.coag.gov.au/coag_meeting_outcomes/2008-10-02/index.cfm#regulat

23. Westpac, Submission to Senate Economics Legislation Committee, p. 2.

24. Minter Ellison, Submission to Senate Economics Legislation Committee, p. 6.

comments. In order to understand how the referral and displacement provisions might operate, an examination of current practices is beneficial.

> This relationship between the Commonwealth and the States and Territories is usually outlined in a model set of provisions, which is contained in the substantive Act, called the "inconsistency" or "displacement" provisions. The leading model is the Corporations Act, enacted following the referral of State constitutional power in respect of the incorporation and regulation of corporations. This model has been refined in minor respects in subsequent referral in other areas.[25]

The identified 'leading model', the Corporations Act, was developed in a highly consultative way between the jurisdictions. Operating under an Intergovernmental Agreement (between the Commonwealth, States and Territories), all jurisdictions are members of the Ministerial Council for Corporations (MINCO). MINCO meets regularly to develop policy and legislative changes to the Corporations Act. The Intergovernmental Agreement outlines how policy and legislative changes are agreed to (usually based on number of votes), how disputes are dealt with, and importantly, includes an agreement that the referring States and Territories not legislate on the matter while the referral is current. The referrals are re-examined and renewed regularly. Consequently, in this case, the displacement provisions in the Corporations Act have never been used, despite their presence.

While the explanatory materials do not indicate so, the Treasury submission to the Committee states that an Intergovernmental Agreement will be used for the Commonwealth credit laws as well.

> (the legislation will be) supported by agreement on the arrangements involved in 'switching-off' state responsibilities for credit regulation and 'switching-on' national credit laws with the commencement of the national credit regime. States and Territories have indicated commitment to the COAG credit reform agenda and to focus their policy efforts to supporting the reform's agenda. **To that end, they have agreed to refrain from legislating in the area of consumer credit after the transfer of state powers to the Government.**[26] (*emphasis added*)

and

> Supporting the enactment of the Credit Package is an intergovernmental agreement (IGA). This IGA provides a political compact amongst the Commonwealth, State and Territory governments dealing with various arrangements underpinning the operation of the Credit Package. The IGA will contain safeguards and consultative arrangements to be followed by signatories including:

25. Treasury, Submission to Senate Economics Legislation Committee, p. 11.

26. Treasury, Submission to Senate Economics Legislation Committee.

- Mandatory consultation mechanism about any legislative changes to the scheme; and

- Resolution procedures in relation to potential inconsistency between relevant State and Commonwealth laws. [27]

While it is not yet revealed what the specifics of the IGA will entail—for instance, if the number of votes required for policy and legislative changes are equal to those in the Corporations Act – it can be expected that the general operation of the credit laws IGA will be similar to that of the Corporations Act. This would suggest that while the concerns expressed about the displacement provisions are legitimate and logical, in reality, the threat of any real risk of State-based inconsistent legislation being developed is minimal.

No requirement for credit providers to verify consumer's financial situation when a broker has already done so

Many stakeholders expressed concern with **subclause 130(3)** of the Bill. This provision deals with responsible lending conduct. Part of the new responsible lending conduct requirements include making an assessment of the suitability of a credit contract for the consumer, whether a party is providing credit, or credit assistance. However, **subclause 130(3)** exempts credit providers from verifying a consumer's financial situation, where a similar assessment has already been made under the Part in the past 90 days (for instance, by a finance broker).

While the measure reduces red tape for credit providers, a number of stakeholders expressed the opinion that it creates complications regarding liability in the event that a consumer enters an unsuitable credit contract which causes them to default.

For example, the submission to the Senate Committee from the National Legal Aid Secretariat stated:

> The unusual provisions in s130 directly challenge the legislative intent of the Bill by, for the first time, endorsing a new culture in lending where credit providers will be permitted to outsource their assessment of risk where credit is provided through credit assistance providers such as broker services.
>
> This provision might also result in consumers being forced to bear the risk because:
>
> - Credit providers will seek to avoid risk of liability for an unsuitable loan by pointing to the activities of credit assistance providers;
>
> - Credit assistance providers often do not have the financial resources to pay successful claims for damages by consumers; and

27. Treasury, Submission to Senate Economics Legislation Committee, p. 12.

- Consumers cannot stop enforcement action by the credit provider whilst they take legal action against the credit assistance provider (this means they could lose the house that they live in despite ultimately having a decision made in their favour against the credit assistance provider).[28]

And from the Mortgage and Finance Association of Australia (MFAA):

> (section 130(3)) seems to allow a lender to abrogate its responsibility to make the ultimate assessment. No licencee (*sic)* should be able to escape their obligations. Lenders should be responsible for lending, servicing and collections. Brokers should be responsible for broking. No doubt prudent lenders will have their own practices to ensure all information is appropriately verified, but it leaves the door open to poor practices under which predatory lending and broking, which this Bill is clearly focussed on protecting consumers from, can thrive.... section 130(3) should be deleted, because there should be no case when the lender can escape liability.[29]

It should be noted that civil penalties are used in the Bill to deter contravention of the responsible lending conduct provisions—up to 2 000 penalty units can be used to punish non-compliance with the unsuitability assessment requirements.[30]

Although the requirement for a credit provider to conduct an assessment of unsuitability is waived under **clause 130(3)**, credit providers are still prohibited from entering unsuitable contracts under **clause 133.** Additionally, **clause 133** does not excuse or defer liability for those who have relied upon clause 130(3). Therefore, there is still scope for consumers to rely on the actions of credit providers under these provisions.

However, the Senate Committee came to the conclusion that **clause 130(3)** should be omitted from the Bill, citing the potential for this clause to be exploited by predatory lenders as a defence for not undertaking assessments as the reason.[31]

Increased monetary threshold for hardship provisions

The Bill seeks to increase access for consumers to the hardship provisions of the Credit Code under **item 72** of the **National Credit Code (**the Code**)** set out in **Schedule 1** of the Bill. The new Code would allow debtors to seek changes to their credit contracts on the grounds of hardship (due to illness, unemployment or other reasonable causes). Known as

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28. National Legal Aid, Submission to Senate Economics Legislation Committee, *National Consumer Credit Protection Bill 2009 and related bills,* 17 July 2009, p. 4

29. MFAA, Submission to Senate Economics Legislation Committee, p3.

30. According to section 4AA of the *Crimes Act 1914, **'penalty unit'*** means $110. Note that where the corporation – as opposed to a natural person - has committed a criminal offence, the maximum pecuniary penalty may be five times than that ordinarily specified. Thus a corporation could face a maximum penalty in some cases of 10 000 penalty units.

31. Senate Economics Legislation Committee, p. 25.

the 'hardship threshold', the upper threshold for credit contracts which are eligible for such applications is currently set at $345 290.[32] The new Code increases the threshold to $500 000 (or a prescribed higher amount).

However, the Bill only applies the new hardship threshold to new contracts—existing credit contracts will continue to follow the lower UCCC threshold. Many stakeholders objected to this restricted application of the new threshold.

National Legal Aid Secretariat stated:

> Without making any comment on the legal basis for making this change in the Bill, the operation of a two-tiered cap will be at best confusing for borrowers.[33]

The Senate Committee also recommended that the increased hardship threshold apply to all contracts, not only new ones.

It appears that the application of the new hardship threshold has been framed so as to not remove existing rights to credit providers based on credit contracts formed under the current UCCC. Therefore, it has been framed so as to avoid any possible contravention of section 51 (xxxi) of the Constitution.

Treasury explained in response to the concerns:

> Certain provisions in the Credit Bill and National Credit Code (Code) may not apply to existing credit contracts. The Commonwealth's ability to apply certain provisions, such as increased thresholds for hardship variations and stays of enforcement (subsection 72(5) and 94(4) of the Code) to existing credit contracts is restricted due to the acquisition of property issue under the impact of section 51 (xxxi) of the Constitution.... there is a significant risk that the application of new requirements to existing contracts, could infringe (that section).[34]

Whether or not there is a real risk of breaching section 51 (xxxi) of the Constitution depends on whether there would be a real risk of acquiring property (otherwise than on

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32. See http://www.creditcode.gov.au/display.asp?file=/content/hardship_threshold.htm for information about the floating threshold limit on the hardship provisions under the UCCC.

33. National Legal Aid, Submission to Senate Economics Legislation Committee, p. 5.

34. Treasury, Submission to Senate Economics Legislation Committee, p. 12. Subsection 51(xxxi) of the Constitution provides that the Commonwealth may make laws with respect to acquisition of property on just terms from any State or person for any purpose in respect of which the Commonwealth has the power to make laws.

just terms) as a result of the hardship provision applying to existing credit contracts.[35]. If the provision were to apply to existing contracts, it would operate as follows:

- A debtor who is experiencing hardship due to illness, unemployment or another reasonable cause, and cannot reasonably meet their obligations under a contract, may apply to the credit provider for changes to be made to the contract.
- The credit provider is not obligated under legislation to accede to the application; it is required to provide the debtor with a written notice advising them of whether they agree to the change.
- If an application is refused, the debtor may apply to the Court to change the terms of the contract under item 74 of the Code.

If **item 72** was framed so that the credit provider was automatically stripped of property (assuming the contractual rights of the credit provider was considered to be property within the meaning of 51 (xxxi)) —such as the right to refuse to change the credit contract to the debtor's benefit, or the right to the amount due to them under the contract— then there would be a real risk of breaching section 51 (xxxi) of the Constitution. However, in the Code's proposed form, a credit provider does not automatically lose any property if the provision were exercised by an existing debtor. It would still be at liberty to deny the application from the debtor. Also, where there is a refusal and subsequent application to the Court, it is the Court which will consider the circumstances and make an order that it thinks fit—not the Commonwealth.

On this basis, it appears possible for the increased hardship threshold of $500 000 to apply to all credit contracts—not just new ones—without the risk of breaching the Constitution.

ASIC—Licensing and regulation

On the whole, the regulatory scheme presented in the Bill for ASIC is in line with ASIC's current powers for Australian Financial Services Licence (AFSL) regulation. In particular, search and investigatory powers are identical to those already held by ASIC in relation to its regulation of financial services.

Perhaps the only significant difference that the credit industry will experience from these reforms is increased consistency. Current regulation of the industry is the responsibility of Fair Trading and Consumer Affairs agencies of State and Territory Governments. While the legislative capabilities of these agencies are generally similar, variations including factors such as funding, resources, the size of the jurisdiction and internal working policies

35. 'Property' for the purposes of section 51 (xxxi) of the Constitution can be interpreted widely – it means any tangible or intangible thing which the law protects under the name of property (McTiernan J, *Minister of State for the Army v Dalziel*, (1944) 68 CLR 261 at 295). In this situation, the 'property' at risk of acquisition could include be the right to future earnings by the lender, or the right to refuse an application for changes from the debtor.

of the various governments, are all influencing factors. The Senate Committee quoted Mr John Brady of the National Financial Services Federation, by way of example:

> It is harder to get a licence in WA than it is to do almost anything else. There is a six-week period between making an application and getting a licence. They have regular audits. They turn up and look at files. It is very good, and hopefully this system will be at least as good as that. To get a licence in Victoria you write a letter and the licence comes back in the mail the following day. The ACT has a similar documentary requirement to WA, but from what I can gather—and I apologise in advance to the ACT regulators if I am wrong about this—they do not look at the documents that are given to them; they just issue the licence in any event. In the ACT there is no-one, really, who is a lender just in the ACT. They are always outside the ACT as well. WA is very good; the rest are at least equivocal.[36]

Elimination of these varying practices of each jurisdiction's office will ensure that a single consistent regulatory system is in place. The increased consistency should amount to better protection for consumers across all jurisdictions, and more predictable interactions with the regulators for licensees.

The regulatory style of ASIC, who will be the new single regulator of the credit industry, has been described as follows:

> ASIC's Chairman... has described the Commission's regulatory task in terms of a pyramid divided into three layers. At the bottom of the pyramid are those who comply with the law. For this group, ASIC's role 'is to provide guidance to help them continue to comply'. The middle band contains opportunists who are 'prepared to bend the rules if they can get away with it'. ASIC's strategy is to influence their views and conduct. At the top of the pyramid is the smallest layer – those who engage in improper and illegal behaviour. 'ASIC uses its full enforcement strength to regulate this group'.[37]

ASIC's prosecution strategy is determined in consultation with the Director of Public Prosecutions, whose policy is to prefer the laying of criminal charges where recommended (presumably as opposed to civil penalties).[38] It has been said that:

> ASIC has acknowledged that enforcement actions 'will only ever catch a relatively small number of offenders, often after the horse has bolted'. Its long-term strategy is to inform the financial services sector of recent legislative changes and to promote

36. Senate Economics Legislation Committee, p. 8.

37. R Grant, *Australia's Corporate Regulators – the ACCC, ASIC and APRA*, Research brief, no. 16, 2004–05, Parliamentary Library, Canberra, 2005, viewed 9 September 2009, http://www.aph.gov.au/library/pubs/rb/2004-05/05rb16.pdf

38. Australian Securities and Investments Commission, 'ASIC Annual Report 2002–03', *Commonwealth of Australia*, 2003, p. 6.

public awareness about scams and frauds as part of (their) consumer education strategy.[39]

Main provisions

Consumer Credit—who is covered?

The scope of the Bill's application is outlined in a number of areas of the Bill. Key provisions are **clauses 6-9** of the Bill and **items 4 – 6** of **Schedule 1** of the Bill.

Clauses 5 – 9 and 11 – 15 of the Bill provide definitions of terms for the Bill. Some key definitions include *credit activity* (**clause 6**), *credit service (***clause 7**), *credit assistance* **(clause 8)** and *acts as an intermediary* **(clause 9)**. These definitions are of particular importance as they define the application of the Act.

Engaging in ***'credit activity'*** is defined to mean the following:

- providing credit under a credit contract (such as a credit card)[40]
- being the lessor under a consumer lease, or carrying on a business that provides consumer leases
- being the mortgagee under a mortgage
- being the beneficiary of a guarantee, and
- most significantly for this Bill, being a person who provides a ***'credit service'***. This is defined under **clause 7** as either providing ***'credit assistance'*** to a consumer, or ***'acting as an intermediary'***.

Under **clause 8** the term ***'credit assistance'*** extends from providing actual assistance to a consumer in apply for a particular credit contract to suggesting to a consumer that they apply for a particular credit contract or an increase to the credit limit of a particular credit contract.

The provisions in the Bill impose a wide range of penalties for non-compliance, with many obligations for licensees framed with both civil penalty provisions and criminal penalty provisions (imposing penalty units and/or imprisonment). The range of penalty options presented gives the regulatory body, ASIC, flexibility in their choice of method for

39. R Grant.

40. A 'credit contract' under the NCC is a contract to which the Code applies. Therefore it refers to any contract for credit, including credit cards, mortgages, personal loans and guarantees, irrespective of the variety of terms that can be used for these different types of contracts.

enforcement of the provisions. For more information, **Chapter 4** of the Bill outlines the rules relating to the civil penalty provisions, civil proceedings and criminal proceedings.

Application of the Act—Constitutional issues and State and Territory laws

Clause 18 of the Bill sets out the constitutional basis for the Act. It states that the application of the Act(s) in a referring State is based on the combination of the legislative powers contained in section 51 of the Constitution (other than paragraph 51(xxxvii)), and those it has as a result of the relevant referral paragraph 51(xxxvii) of the Constitution. **Subclause 18(2)** provides that the application in a Territory is based on the legislative powers in sections 51 and 122 of the Constitution.

Clause 19 sets out the meaning of ***'referring state'***. It specifies that a State is a 'referring State' if it has referred its own Parliaments' power to legislate on specific matters to the Commonwealth – in this case, the power to make laws about *referred credit matters* (**clause 20**) such as:

- the regulation of credit or personal property leases
- the regulation of securities (including mortgages), guarantees or insurance that relates to credit or personal property leases
- the regulation of credit activities, and
- consumer leases (the sale or supply of goods or services which has been financed by the provision of credit)

A state ceases to be a referring state if its' reference terminates (including the termination of any amendment reference made to cover future amendments to the Act).

Clause 20 outlines the meaning of ***'referred credit matters'***, bringing the following credit matters into the scope of the Commonwealth legislation:

- regulation of credit or personal property leases
- regulation of securities (including mortgages) guarantees or insurance insofar as they relate to credit or personal property leases
- regulation of credit activities, and
- sale of goods or supplies of services which are financed by provision of credit, under some circumstances.

Division 3 of Chapter 1 of the Bill sets out the interaction between the Commonwealth credit legislation and State and Territory laws.

Clause 23 states that concurrent operation between the Commonwealth credit legislation and any State and Territory laws is the intention of the legislation. Therefore, the legislation is not intended to override any State or Territory laws, to the extent that they are not directly inconsistent with the credit legislation: **subclause 23(3)**. Subclause 23(2)

provides that where an act or omission is both an offence under relevant Commonwealth or State or territory law, and a person is convicted in one of those jurisdictions, that person is not liable to be convicted for the same offence in the other jurisdiction.

Clause 24 allows for the non-application of the credit legislation, in whole or in part, if a referring State or Territory has declared a matter to be an 'excluded matter' from the credit legislation. This replicates provision in section 5F of the Corporations Act. Regulations under the Act can affect the operation of this clause: **subclause 24(3)**.

Clause 25 deals with direct inconsistencies between the credit legislation and State or Territory laws. It applies to 'displacement provisions' which have been created and declared as such by a State or Territory, and which is not capable of concurrent operation with a credit legislation provision. The effect of a displacement provision is that the credit legislation provision will not operate inconsistently with the displacement provision. Therefore it is the State provision in that case that will prevail. The provision states that it has effect above anything else in the credit legislation.[41]

Clause 26 allows for regulations to be made to modify the operation of the Commonwealth credit legislation in relation to State or Territory laws, in order to prevent inconsistencies or 'doubling up' of laws. However, this regulation could not be used to override **clause 25 (**by virtue of **subclause 25(1)**) and therefore could not be used to make a provision of the credit law prevail over an inconsistent displacement provision.

Licensing

The licensing scheme for the new credit laws are contained within **Chapter 2** of the Bill. **Clause 35** sets out the definition of an ***Australian credit licence*** (ACL) and clarifies that they only authorise licensees to engage in the particular credit activities specified in the licence.

Clause 29 sets out penalties for a person who engages in credit activity if they have not been licensed to do so. The activity attracts a civil penalty of 2 000 penalty units, or a criminal penalty of 200 penalty units or 2 years imprisonment (or both). This offence applies on and after 1 July 2011 (or a later day if prescribed by regulation) (**clause 28**). **Subclause 29(3)** clarifies that employees or credit representatives of a license holder do not also need a licence when acting on behalf of that license holder.

Other prohibited conduct for people not holding a licence includes:

- falsely holding out or advertising that they are licensed to engage in credit activity (**clause 30**)

41. See the discussion about displacement provisions under 'Key Issues' of this Digest.

- conducting business in a way that causes an unlicensed person to engage in credit activity (**clause 31**)
- charging a fee for engaging in future credit activity (**clause 32**)

It is also an offence to give misleading information in the course of conducting credit activity (**clause 33**). The prohibited conduct outlined in **clauses 30-33** carries civil and/or criminal penalties.

Clauses 36 – 44 set out how to get an ACL. Of note are **clauses 37 and 38** which set out when ASIC must grant a licence, and what ASIC must have regard to, in processing license applications for non-ADIs and ADIs respectively. For non-ADI applicants, ASIC must not have a reason to believe that the applicant will contravene their general obligations or that they are not a fit and proper person to engage in credit activities; additionally, ASIC must have regard to past suspensions, contraventions, banning orders, disqualifications, etc., and must consider any criminal convictions and other matters,. **Clause 37** empowers ASIC to request additional information from a non-ADI applicant for the purposes of assessing their application.

In contrast, **clause 38** provides that an ADI must simply provide a statement with their ACL application to the effect that it will comply with its license obligations. ASIC is required to licence any ADI that does so. Presumably the rigorous examination of the applicant is not needed for ADIs, as they have already been scrutinised for the purposes of registering as an ADI.

Clause 40 contains an exception to the rule in clause 38 in that it prevents licences from being granted to applicants with current banning or disqualification orders, or a prescribed State or Territory order, in force. However, applicants must be given a hearing before a licence can be refused (**clause 41**).

Clauses 45–46 deal with the conditions on an ACL. **Clause 45** enables ASIC to impose, vary or revoke conditions on licences, and requires ASIC to give notice to the licensee if it has done so. Licensees must also be granted a hearing before new, varied or revoked conditions take effect on an existing licence: **subclause 45(3)**. **Clause 46** sets out special procedures for imposing, varying or revoking licence conditions, where those changes might affect the licensee's APRA-regulated or other banking business. Steps must be taken by ASIC to consult with APRA under **subclause 46(1),** or by the Minister to consult with ASIC under **subclause 46(2)** respectively in relation to those licence conditions.

The general conduct obligations of licensees are set out in **clause 47** and include the following:

- ensuring clients are not disadvantaged due to any conflicts of interest that the licensee or their representative may have
- complying with licence conditions and credit legislation

- maintain the competence to engage in its licensed credit activities, and ensure their representatives are adequately trained and competent
- have an internal dispute resolution procedure as well as membership to an approved external dispute resolution scheme
- have adequate resources and risk management systems (for non APRA-regulated bodies) to engage in the credit activities authorised by the licence
- have compensation arrangements (as set out in **clause 48**).

Clauses 49–53 set out obligations for licensees in relation to their ACL. These deal with providing ASIC with information and assistance. **Clause 49** deals with providing a statement or obtaining an audit report in response to a written notice from ASIC. Non-compliance with that notice attracts a civil penalty of 2 000 units. The requirement has also been framed as an offence punishable by 25 units or 6 months imprisonment (or both), or a strict liability offence punishable by 10 penalty units. **Clause 50** deals with licensees' obligations to give ASIC any information required by regulations under the Act. It is framed similarly to **clause 49**, with comparable penalties. **Clause 51** deals with licensees' obligations to provide ASIC with assistance if ASIC 'reasonably requests assistance'.[42] It is also framed similarly to **clause 49**, with comparable penalties (but without the strict liability offence). **Clause 53** requires licensees to lodge an annual compliance certificate, with a civil penalty of 2 000 units, and a strict liability offence punishable by 60 penalty units.

Clauses 54–62 deal with suspension, cancellation and variation of licences. The clauses set out ASIC procedures for making such changes to licences, and deal with issues such as the offering of hearings to licensees, and special procedures for APRA-regulated bodies (which includes consultation with APRA or the Minister, if required). In particular **subclause 55(1)** empowers ASIC to suspend or cancel an ACL where, amongst other things:

- ASIC has reason to believe that the licensee has contravened, or is likely to contravene one of the obligations set out in clause 47, or
- ASIC has reason to believe that the licensee is not a fit and proper person to engage in credit activities.

Where a belief must be based on 'reasonable grounds', it has been held that, while the notion imports an objective test, 'reasonable' involves a value judgment.[43] The decision

42. While there is no definition of 'reasonable assistance', the Explanatory Memorandum states that this means 'conduct such as making and keeping appointments with ASIC staff, and cooperating in a reasonable way with requests by ASIC for assistance': Explanatory Memorandum, p. 56.

43. Greiner v Independent Commission Against Corruption (1992) 28 NSWLR 125, 167.

of ASIC that a person is likely to contravene an obligation under clause 47, will only be open to challenge if the decision was one that ASIC could not have lawfully made on the basis of the materials before it.[44]

Clause 64–72 deal with the authorisation of ***credit representatives***. Credit representatives are those people who have been authorised by a licensee to engage in specified credit activities on their behalf (such as employees). Of note are **clauses 69 and 70**, which restrict licensees from making ineffective authorisations,[45] or to fail or vary or revoke an authorisation that ceases to have effect. Both clauses carry civil penalties of 2 000 units or criminal penalties of 100 units, or 2 years imprisonment (or both). Also of note is **clause 71** that obligates licensees to notify ASIC about authorisations, sub-authorisations, and changes in details, carrying civil penalties of 2 000 units. **Clause 71** has also been framed as a strict liability offence with criminal penalties of 25 units, or 6 months imprisonment (or both).

Clause 73 enables ASIC to give a licensee personal information about a known, suspected or potential representative of the licensee, if ASIC believes on reasonable grounds that the information is true. The clause dictates how licensees and courts may use that information —licensees may only use it to make a decision about taking action against the representative, or to give it to another person or a court for that same reason. The clause also states that a person has qualified privilege in relation to the sharing, recording or use of the information as allowed by the section.[46]

Clauses 74–78 deal with the liability of licensees for representatives. The clauses apply to any conduct of a representative of a licensee that relates to a credit activity, on which a client could reasonably be expected to (and ultimately did) rely in good faith.[47] The

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44. Minister for Immigration & Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259, 275-6.

45. **Subclause 64(5)** of the Bill sets out the circumstances when an authorisation is of no effect. This includes when a license does not permit the authorised credit activities; when a person is not a member of an approved EDR scheme; or when a person is banned by law against engaging in credit activity.

46. 'Qualified privilege' is defined by the Butterworths Concise Australian Legal Dictionary as 'a privilege offering protection in an action in defamation where the person who made the communication had an interest or a duty – legal, social or moral – to make it to the person to whom it was made, and the person to whom it was made had a corresponding interest or duty to receive it.'

47. Butterworths states that in banking and finance, 'good faith' is based on the distinction between a person who is honestly blundering and careless, and a person who has a suspicion that something is wrong but refrains from asking questions. The latter conduct amounts to bad faith or dishonesty: *Jones v Gordon (1877)* 2 App Cas 616. Additionally, the Explanatory Memorandum notes that in the application of clause 74, where there is a reliance (by a consumer) it would be unusual for it not to be in good faith – Explanatory Memorandum, p. 65.

clauses clarify the liability where there is a single or multiple licensees to a representative (that is, where the representative might represent more than one licensee) and where the conduct is covered by only one authority, or multiple (in which case, the authorising licensees might be jointly and severally liable—see **subclauses 76(3)** and **(4)**). **Clause 77** expressly states that the responsibility of a licensee under this Division of the Act extends so as to make the licensee liable to the client for loss or damage suffered by the client resulting from the representative's conduct.

Clauses 80–85 set out provisions about banning orders. Banning orders prevent a person from engaging in (some or all) credit activities, whether permanently or temporarily (**clause 81**). **Clause 80** enables ASIC to make a banning order against a person if:

- ASIC has suspended or cancelled that person's licence
- the person becomes insolvent (other than trustees of a trust)
- the person is a natural person and is convicted of fraud
- the person has contravened the credit legislation, or was involved in another person's contravention of the credit legislation (or if ASIC has reason to believe they are likely to do so)
- ASIC has reason to believe they are not a fit and proper person to be engaging in credit activities
- if a prescribed State or Territory order is in force against the person, or
- if another circumstance prescribed by the regulations permits it.

For all persons, the opportunity to appear at a private hearing and make submissions to ASIC must be afforded before a banning order can be made: **subclause 80(4)**. However, this does not apply to those convicted of serious fraud, or those whose licence was suspended or cancelled without a hearing: **subclauses 80 (5)** and **(6).** Contravention of a banning order is a civil penalty punishable by 2 000 units and a criminal penalty punishable by 100 units, or 2 years imprisonment (or both): **clause 82**. Any decision to make a banning order must be accompanied by a written statement of reasons: **clause 85**.

Clause 86 enables ASIC to apply to the court for an order, if ASIC has cancelled a licence or made a permanent banning order against a person. The court can make an order disqualifying the person (permanently or temporarily) from engaging in some or all credit activities, or any other order the court considers appropriate. Although not required to give effect to a banning order under clause 80, a disqualification order by the court would provide authority where an administrative decision may not suffice or be appropriate.

Clauses 88–106 deal with financial reports, trust accounts and audit reports. The Guide to the Part (**clause 87**) summarises the clauses as dealing with:

- the requirements for licensees to keep certain financial records, as well as how those records must be kept

- the requirements in relation to trust accounts kept by licensees that provide credit services and receive money on behalf of others (and are therefore required to maintain a trust account). The requirements include how to deal with trust account money, statements and audit reports, and
- the requirements relating to audit reports that are required under the Act.

Clause 110 contains a regulation-making power for the Minister to exempt or modify the operation of the provisions relating to licensing under Chapter 2. The Minister, in commenting to the Scrutiny of Bills Committee about the very wide power under this clause, noted:

> This arrangement will facilitate a flexible approach to the application of licensing requirements and reflects the Government's decision to adopt the broad definition of 'engaging in credit activities' and exclude activities that should not be subject to licensing requirements. This broad approach may capture activities that should not be regulated and will need to be addressed through appropriate exemptions.[48]

Subsequently, the Scrutiny of Bills Committee requested that the Explanatory Memorandum be amended to include this information about **clause 110**.[49]

Responsible Lending Conduct

The responsible lending conduct provisions in **Chapter 3** of the Bill set out the required conduct for licensees in relation to their dealings with consumers. The parts of the chapter are divided by reference to particular groups of licensees, as follows:

- **Part 3.1** – licensees providing credit assistance on a credit contract for which they are *not* the provider (for example, finance brokers)
- **Part 3.2** – licensees that are credit providers (i.e. the actual lender)
- **Part 3.3** – licensees that provide credit assistance on a consumer lease for which they are *not* lessor under that lease
- **Part 3.4** – licensees that are lessors under a consumer lease
- **Part 3.5** – credit representatives
- **Part 3.6** – debt collectors

Some elements of responsible lending conduct are consistent through most, or all, of the groups of licensees. For instance, every group is required to give a credit guide[50] to

48. Scrutiny of Bills Committee, Tenth Report of 2009, 9 September 2009, p. 374.
49. Scrutiny of Bills Committee.
50. The contents of the credit guide are set out in each authorising section; they provide, in general terms, information about the licensee; fees, charges and commissions; and

consumers as soon as practicable after it becomes apparent that their services are to be rendered (see **clauses 113, 126, 136, 149, 158 and 160**). To contravene this may be both a strict liability criminal offence (punishable by a fine of up to 50 penalty units) or a civil penalty offence (punishable by a fine of up to 2 000 civil penalty units).

Those groups providing credit assistance (as opposed to actual credit) are required to provide a quote to the consumer for the provision of that assistance. **Clauses 114 and 137** set out the particulars of those obligations and civil penalties for their contravention.

All groups (except credit representatives and debt collectors) are obliged, before providing the credit/credit assistance, to make an assessment of whether the credit contract is unsuitable for the consumer (see **clauses 115–119, 128–131, 138–142,** and **151–154**). The Bill's provisions relating to credit assessments state:

- the assessments must be conducted whether a consumer is entering a new credit contract, or increasing the credit limit of an existing contract. (For providers of credit assistance, an assessment must also be conducted before making a recommendation to remain in an existing contract.)
- The licensee must make reasonable inquiries into the consumer's requirements, objectives, financial situation, etc. before making the assessment
- Assessments must be made no more than 90 days before providing the credit or credit assistance
- Assessments are conducted to determine unsuitability of the credit contract or credit increase. 'Unsuitability' is measured by two key indicators—the likelihood of creation of substantial hardship (which is presumed if the consumer would have to sell their principal place of residence in order to meet the contract's obligations),[51] and whether the credit contract/increase meets the requirements or objectives of the consumer. The regulations may prescribe additional circumstances for determining unsuitability.
- **Subclauses 130(3)** and **153(3)** provide exceptions to the requirement for conducting an assessment. These paragraphs allow a credit provider to forgo verification of a consumer's financial situation (required by **subclauses 130(1)** and **153(1)** respectively) if a preliminary assessment has already been made in relation to that credit contract / increase in credit. Therefore, credit providers that have their consumers referred by finance brokers need not perform verifications of financial situation if the broker has already done so (provided that assessment did not show that the contract/credit increase would be unsuitable, and was made no more than 90 days before entering the contract or increasing the limit).

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information about dispute resolution. The regulations under the Act may prescribe extra information to be included.

51. See subclauses 118(3), 141(3) and 154(3).

- If an assessment concludes that a credit contract/increase is unsuitable, licensees are prohibited from entering, or assisting the consumer to enter, the credit contract/credit increase. Where the assessment concludes that a consumer remain in an existing credit contract that is unsuitable, the Act prohibits a person providing credit assistance (such as a broker) from suggesting that the consumer remain in the contract.

Remedies – Jurisdiction, courts, use of civil penalties

Chapter 4 deals with remedies. **Clauses 166–175** outline the treatment of civil penalty provisions. Only ASIC may apply to a court for a declaration that a person has contravened a civil penalty provision. The time limit within which ASIC must instigate proceedings is six years: **clause 166**. Once a declaration is made the court may order payment of pecuniary penalties for those contraventions: **clause 167. Clause 172** provides that proceedings for either a declaration that a person has contravened a civil penalty provision or an order to pay a civil penalty are stayed if criminal proceedings are brought in respect of the same conduct. **Clause 174** prevents evidence given in proceedings for pecuniary penalty orders from being used in criminal proceedings.

The power of the court to grant remedies is set out in **clauses 177–184.** The court can grant injunctions under **clause 177** on the application of ASIC or any other person; compensation orders under **clause 178**; and orders in relation to engaging in credit activities while not holding an ACL under **clause 180** as the court considers appropriate (including orders to prevent profiting, or preventing loss or damage likely to be suffered). The court may also make an adverse publicity order upon application by ASIC (**clause 182**).

Clause 183 enables the court to relieve a person from liability for contravention of a civil penalty provision, if in a court proceeding against that person it appears that the person acted honestly, and ought to be fairly excused from the contravention. The relief may be whole or partial, and can be sought by application to the court for such relief (**subclause 183(2)**).

Clause 184 provides that a court may grant multiple remedies.

The jurisdiction and procedure of the courts is set out under **clauses 186–202. Clause 187** outlines the limits to each court's jurisdiction in relation to civil matters. There are no limits to the jurisdiction of the Federal Court; the Federal Magistrates Court does not have jurisdiction exceeding $750 000; and lower courts, including State and Territory courts, have the limits that they usually carry, based on locality and subject matter. The provisions also deal with cross-jurisdictional appeals (**clause 189**) and transfers between the courts **(clause 191–198**).

Criminal proceedings, including the criminal jurisdiction of courts and how laws are to be applied are dealt with in **clauses 203–208**.

Administration—ASIC issues

Chapter 5 of the Bill deals with Administration of the Act. The Chapter outlines ASICs role in administering the legislation, including:

- providing that ASIC must maintain a credit register that is publicly accessible. The register will show licensees and their credit representatives, as well as persons against whom a banning order or disqualification order has been made: **clauses 213** and **214**
- providing that ASIC may maintain a non-public register of documents: **clause 219**, for which licensees can be required to provide documents (with civil and criminal penalties): **clauses 218** and **220**, and that information gathered from any such register can be used as evidence in a court proceeding: **clause 221**
- providing ASIC with wide powers to determine what documents and information will be eventually required for the purposes of the document register: **clause 219**
- creating civil and criminal offences against falsification of information by licensees: **clause 225**.

Compliance and enforcement

Chapter 6 deals with compliance and enforcement. On the whole, the chapter replicates existing provisions contained in the *Australian Securities and Investments Commission Act 2001* for enforcement of the corporations law, including existing offences and penalty amounts. Therefore, the matters set out in **Chapter 6** are standard powers which are already exercised by ASIC in relation to corporations.[52] Credit providers that are already registered as corporations under the *Corporations Act 2001* will be familiar with the style and scope of ASIC's compliance and enforcement regime.

Miscellaneous

Chapter 7 include miscellaneous provisions, including a regulation-making power, provisions enabling applications to the Administrative Appeals Tribunal for review of decisions, and the Minister's authority to delegate certain functions and powers.

The National Credit Code – Schedule 1

The new National Credit Code, which sets out requirements for credit contracts, is set out in **Schedule 1** of the Bill. On the whole, the new Code generally replicates the existing code which operates in all States and Territories. However, some minor amendments have been made to the Code, to reflect new Commonwealth policy and to make amendments that had already been previously agreed to by the States and Territories. These include:

52. The standard powers are set out in Part 3 (Investigations and information–gathering) of the *Australian Securities and Investments Commission Act 2001*

- Including mortgages for residential investment properties as a type of credit to which the Code applies – see **items 5 and 13**
- New powers to ASIC to exclude certain types of credit and consumer leases from provisions of the Code (**items 6** and **171)**, make applications to the court for hardship cases (**item 79**),
- new offences for false or misleading declarations (**items 13 and 172)**
- an increase to the cap of credit for hardship cases, from $125 000 or the amount prescribed by regulation,[53] to $500 000 or an amount prescribed by regulation(**item 72)**
- expanded default notice requirements (**item 88**)

53. This amount is currently prescribed at a higher amount. See the discussion under 'Key Issues' and http://www.creditcode.gov.au/display.asp?file=/content/hardship_threshold.htm for information about the floating threshold limit on the hardship provisions under the UCCC.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2699.