



National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009

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Law and Bills Digest Section

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National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009

Date introduced: 25 June 2009

House: House of Representatives

Portfolio: Treasury

Commencement: Schedules 1 and 3 commence when section 3 of the *National Consumer Credit Protection Act 2009* (the Main Act) commences. Schedule 2 commences on the day the Act receives Royal Assent, or the day on which section 3 of the Main Act commences, whichever is later.¹ 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 provide the transitional and consequential arrangements to support the transfer of regulation of credit from the State and Territories to the Commonwealth.

Background

Basis of policy commitment

This Bill was introduced in a set of bills comprising of:

- the National Consumer Credit Protection Bill 2009 (the Main Bill)
- the National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009 (the Transitional Bill), and
- the National Consumer Credit Protection (Fees) Bill 2009.

Collectively, these bills are known as the National Credit Legislation.

1. However, Schedule 2 of the Transitional and Consequential Provisions Act will not commence at all if section 3 of the main Act does not commence.

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For the policy background to this Bill, please refer to the [Bills Digest](#) for the National Consumer Credit Protection Bill 2009.²

Committee consideration

The National Credit Legislation bills were 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](#).³ The report was tabled on 7 September 2009.

The Senate Committee recommended that all three bills comprising the National Credit Legislation be passed subject to some recommendations made in the report.

Fifty-eight submissions were made to the Senate Committee about the National Credit Legislation package. The Bills Digest for the Main Bill contains a discussion of the submissions.

Main provisions

The Transitional Bill sets out a number of provisions for the transitional and consequential arrangements to support the enactment of the Main Bill.

Clause 4 of the Transitional Bill contains a Dictionary of relevant terms. In particular it defines *'the old Credit Code'* by specific reference to the State and Territory legislation which is to be replaced by the enactment of the National Credit Legislation.

Clause 4 also defines the term *'National Credit Act'* which means the *National Consumer Credit Protection Act 2009* and includes instruments made under that Act.

Clause 6 provides that regulations may be made by the Governor-General to deal with transitional matters under the Transitional Act. The clause allows some regulations to have retrospective effect; however it does not allow that retrospectivity to cause a person to be liable for criminal or civil penalties under the National Credit Legislation: **subclause 6(5)**.

The Senate Scrutiny of Bills Committee made the following comments about clause 6:

Subclause 6(2) provides that regulations may prescribe matters of a transitional nature and that the regulations have effect 'despite anything else in this Act'. There is no

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2. P Tan, *National Consumer Credit Protection Bill 2009*, Bills Digest, no. 30, 2009-10, Parliamentary Library, Canberra, 2009, viewed 15 September 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillsdgs%2F0NOU6%22>
 3. Viewed 9 September 2009, http://www.aph.gov.au/senate/committee/economics_ctte/consumer_credit_09/index.htm

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explanation of this provision in the explanatory memorandum. Subclause 6(3) provides that: '(t)he regulations may provide that certain provisions of this Act are taken to be modified as set out in the regulations. Those provisions then have effect as if they were so modified'. Similarly, there is no explanation for this 'Henry VIII' clause in the explanatory memorandum. Subclause 6(6) provides that '(t)he provisions of this Act that provide for regulations to deal with matters do not limit each other'. Again, the explanatory memorandum provides no explanation for the existence of this provision.

Since all these provisions purport to authorise a regulation to amend the Act, or purport to authorise a regulation that is beyond the scope of the Act, the Committee **seeks the Treasurer's advice** on why such a broad use of the regulation-making power is considered necessary in the circumstances.⁴

The response from the Treasurer was as follows:

Given that the basis of the new national credit law scheme emanates from a referral of State constitutional power and involves transferring law from eight jurisdictions, it is necessary that subclause 6(2) be included in the National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009 (Transitional Bill) to deal with matters of a transitional nature because:

- it is not possible to consider all of the transitional issues at the time of enactment which emanate from the referral of constitutional power and the transfer of the eight regulatory regimes into one national scheme;
- the need to ensure that any necessary consequential amendments that are inadvertently not provided for in the Credit Bill and the Transitional Bill can be made without the need for the enactment of another Act; and
- the requirement to maintain a comprehensive national law on credit regulation which provides certainty for industry participants and consumers.

Subclauses 6(3) and 6(6) explain the legal effect of the making of these regulations. These subclauses are necessary to ensure that the matters under the regulations achieve their policy intent.⁵

Subsequently the Scrutiny of Bills Committee requested that the explanatory memorandum to the Bill be amended to include this information in order to provide context for the use of the regulation-making power in the circumstances.⁶

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4. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 9 of 2009*, 12 August 2009, p. 67, viewed 15 September 2009, <http://www.aph.gov.au/Senate/committee/scrutiny/alerts/2009/d09.pdf>
 5. Senate Standing Committee for the Scrutiny of Bills, *Report No. 10 of 2009*, 9 September 2009, p. 392, viewed 15 September 2009, <http://www.aph.gov.au/Senate/committee/scrutiny/bills/2009/b10.pdf>

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Clause 7 states that a provision of the Transitional Act does not apply to result in an acquisition of property from a person otherwise than on just terms. This provision puts beyond doubt the intention of the Commonwealth Government that no provision of the Transitional Act is to operate as an acquisition of property other than on just terms in accordance with the requirements of paragraph 51(xxxi) of the Constitution of Australia.

Schedule 1 of the Bill provides for the transition from the old Credit Code to the '*new Credit Code*'.⁷ **Item 3** of **Schedule 1** applies the new Credit Code to old instruments and contracts that were in force at the time the new Credit Code is introduced, subject to the exceptions set out in **subitem 3(3)**. The exceptions ensure that certain changes to the Credit Code are not applied retrospectively (such as including credit for residential investment properties, or the increased hardship threshold).

The remainder of Schedule 1 deals with the treatment of court and tribunal proceedings brought under the old Credit Code (**items 4–7**), and the application of the National Credit Act. **Item 18** provides that the National Credit Act does not apply to a credit contract made under the old Credit Code, except when proceedings are brought under the new Credit Code in relation to that old credit contract. The Schedule also sets out transitional provisions allowing for regulations to be made about the transfer of information to the Australian Securities and Investments Commission (ASIC) from referring States and Territories (**item 22**). **Item 23** clarifies ASIC's role in relation to appeal, review and enforcement proceedings.

Schedule 2 of the Transitional Bill sets out the transitional provisions relating to registration of persons who engage in credit activities. The Guide to the Schedule (**item 1, Schedule 2**) explains that the registration provisions are provided as a transitional authorisation for industry until the provisions for the Australian Credit Licence (ACL) come into effect. Therefore, the provisions in Schedule 2 are equivalent to an interim licensing scheme.

Item 4 of **Schedule 2** makes it an offence to engage in credit activities if not registered or licensed between 1 January 2010 and 30 June 2010. Similarly, **item 6** of **Schedule 2** creates a similar offence for the period between 1 July 2010 and 30 June 2011, for those who are not registered, licensed, and have not applied for a licence. The criminal and civil penalties are equivalent to those in the Main Bill for engaging in credit activities without an ACL (**clause 29** of the Main Bill).

Items 11–31 of **Schedule 2** deal with the registration process, the conditions of registration, obligations of registered persons, and suspension or cancellation of registrations. The provisions mimic Chapter 2 of the Main Bill in relation to licensing.

6. Senate Standing Committee for the Scrutiny of Bills, *Report No. 10 of 2009*.

7. This term is defined in **clause 4** as Schedule 1 of the Main Bill.

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Item 41 enables ASIC to exempt or modify the application of **Schedule 2**, including exempting classes of people from the provisions of the Part, or creating special rules in relation to offences. This provision mimics clause 109 of the Main Bill.

Schedule 3 makes minor amendments to the *Australian Securities and Investments Commission Act 2001* and the *Corporations Act 2001* which are consequential to the enactment of the National Credit Legislation. In particular, it includes the Main Bill and this Bill in the list of legislation under which ASIC has functions and powers.

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