



National Consumer Credit Protection Amendment Bill 2010

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Contents

Purpose.....	2
Uniformity of Australian laws—brief outline	2
Referral of power by the States.....	3
Background to the National Consumer Credit Protection Bills	4
The need for a referral of powers.....	5
Rationale for this Bill	6
Committee consideration	7
Financial implications	7
Main provisions	7

National Consumer Credit Protection Amendment Bill 2010

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House: House of Representatives

Portfolio: Treasury

Commencement: On the day of 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

The purpose of the Bill is to make amendments to the *National Consumer Credit Protection Act 2009* (the National Credit Act) to ensure the constitutional soundness of the referral of consumer credit powers to the Commonwealth by the States.

Uniformity of Australian laws—brief outline

The need for the adoption of a national regulatory approach to important social and economic issues ... has wide support in Australia. Such an approach is considered to offer the best opportunity for producing a fair and equitable society which can meet the challenges of globalisation.¹

Prior to 2000, the Commonwealth and the States were able to achieve uniformity of laws in Australia by the enactment of a *'template'* (known as a model law, or mirror legislation) by one jurisdiction and its adoption and application, as amended from time to time, by the other participating jurisdictions. In most cases, it was the Commonwealth which was the enacting jurisdiction.² In a few cases, however, a State has provided the model law which the Commonwealth and other states have adopted.³

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1. R Owens, 'Unfinished Constitutional Business: Building a National System to Regulate Work', *Australian Journal of Labour Law*, Vol. 22, No. 3, December 2009, pp. 258–283 at p. 258.
 2. C Saunders, 'A New Direction for Intergovernmental Arrangements', *Public Law Review*, Volume 12, December 2001, pp. 274–287 at p. 275.
 3. For example, South Australia is the enacting jurisdiction for the Gas Pipelines Access arrangements. The template legislation is the *Gas Pipelines Access (SA) Act 1997*.

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Another way to achieve uniform legislation involved the establishment of an administering agency or regulator by one jurisdiction, allowing the others to confer power on it.⁴ This was known as a *'bucket'* arrangement.⁵

Such schemes were generally accompanied by an intergovernmental agreement to:

- identify the manner in which the initial template may be approved for enactment
- identify the conditions under which it may be amended
- make provision in relation to appointments to the administering authority or regulator, and
- allocate responsibility for funding.

Unfortunately the schemes ran the risk that the quality of decision-making was affected by the need to achieve agreement between all, or at least a majority, of the participants. The decisions concerned extend from amendment of the legislation to appointments to the regulatory body.⁶

However, the decision of the High Court in *Wakim*⁷ disclosed a limitation on the extent to which complete uniformity could be achieved by either of these means. The Corporations Law as it existed in the late 1980s was dealt a blow by this decision as the High Court held that Federal courts could not exercise state jurisdiction—a core aspect of the uniform Corporations scheme which was basically a template law model.

Referral of power by the States

Section 51(xxxvii) of the *Commonwealth of Australia Constitution Act* (the Constitution) allows the Commonwealth to make laws with respect to:

matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.

This is known as the 'referral' power. Once a reference is made and a Commonwealth law enacted in accordance with it, the difficulties associated with 'template' and 'bucket' arrangements are overcome in many respects. Nevertheless, there is continuing debate

4. For example, in the case of the Corporations Law, the regulator is the Australian Securities and Investment Commission (formerly the Australian Securities Commission).

5. C Saunders, op. cit.

6. Ibid., p. 277.

7. *Re Wakim; Ex parte McNally* [1999] HCA 27, 17 June 1999, viewed on 16 February 2010, <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1999/27.html?&nocontext=1>

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and uncertainty about the legal operation and effect of the referral power.⁸ The most significant issues are:

- whether a reference can be revoked by a State
- whether a referral deprives a State of the legislative power to make laws on the same matter—that is, whether the Commonwealth acquires an exclusive power to make laws on the matter referred, and
- the continuing constitutional status of federal laws made by reason of a referral if the reference were to be revoked or otherwise expire.⁹

The answers to these vexed questions are beyond the scope of this Digest. However, it is important to understand that this is the context in which referrals of power to the Commonwealth by the States occur.

As a way to avoid these problems, section 51(xxxvii) of the Constitution allows a State or States to adopt a Commonwealth law.¹⁰ In that case at least one State must have referred a matter to the Commonwealth. The Commonwealth is then empowered to enact a law about that matter which will also apply in the referring State. Once that has occurred, any other State or States can adopt the new Commonwealth law by passing a State law setting out the extent of the adoption and annexing the relevant Commonwealth law.

Background to the National Consumer Credit Protection Bills

In March 2008, the Council of Australian Governments (COAG) committed to a comprehensive microeconomic reform program including a regulatory reform agenda to help deliver significant improvements to Australia's competition, productivity and international competitiveness.¹¹

As part of these reforms, COAG agreed on 3 July 2008 that responsibility for the regulation of credit and finance broking should be transferred from the States and

8. P Tate, 'New Directions in Co-Operative Federalism: Referrals of Legislative Power and their Consequences', *Speech delivered to Constitutional Law Conference*, Sydney, 18 February 2005, viewed on 15 February 2010, http://www.gtcentre.unsw.edu.au/publications/papers/docs/2005/5_PamelaTate.pdf

9. *Ibid.*, p. 3.

10. For example the *Trans-Tasman Mutual Recognition (NSW) Act 1996* (NSW), *Trans-Tasman Mutual Recognition (Queensland) Act 1999* (Qld), *Trans-Tasman Mutual Recognition (Tasmania) Act 1998* (Tas) and *Child Support (Adoption of Laws) Act 1990* (WA).

11. Council of Australian Governments, *Communiqué*, Adelaide, 26 March 2008, viewed 15 February 2010, http://www.coag.gov.au/coag_meeting_outcomes/2008-03-26/docs/communique20080326.pdf

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Territories to the Commonwealth. The rationale for such a measure was described as follows:

National regulation through the Commonwealth of consumer credit will provide for a consistent regime that extinguishes the gaps and conflicts that may exist in the current regime. The new regime is anticipated to introduce licensing, conduct, advice and disclosure requirements that meet the needs of both consumers and businesses alike.

A seamless national regime will assist in ensuring that consumers are better protected in their dealings with credit products and credit providers, including brokers and advisers.¹²

At the COAG meeting of 2 October 2008, it was agreed that there would be a phased implementation plan. Phase one comprised the transfer from the states to the Commonwealth of responsibility for trustee companies and existing key credit regulation, including the Uniform Consumer Credit Code. The regulation of remaining areas of consumer credit, including pay-day lending, credit cards, store credit, investment and small business lending, and personal loans, would comprise phase two.¹³

As a consequence of that agreement, the National Consumer Credit Protection Bill 2009 and two other consequential Bills were introduced into the House of Representatives on 25 June 2009.¹⁴

The need for a referral of powers

In the absence of a referral of powers from the States, the Commonwealth does not have sufficient legislative power to enact a comprehensive regulatory framework for consumer credit to operate nationally.

That being the case a referral of power is needed. The reference can be either by ‘subject matter’—for example the reference of the matter of ‘air transport’ by Queensland to the Commonwealth in 1943 and 1950; or by ‘text’ so that the power that is referred is

12. Council of Australian Governments, *Communiqué*, Sydney, 3 July 2008, viewed 15 February 2010, http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/docs/communique20080703.pdf

13. Council of Australian Governments, *Communiqué*, Perth, 2 October 2008, viewed 15 February 2010, http://www.coag.gov.au/coag_meeting_outcomes/2008-10-02/docs/communique20081002.pdf

14. For further information see P Tan, ‘National Consumer Credit Protection Bill 2009’, *Bills Digest No. 30 2009–10*, Parliamentary Library, Canberra, 15 September 2009, viewed 15 February 2010, <http://www.aph.gov.au/library/pubs/bd/2009-10/10bd030.pdf>

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confined to the text of a Bill.¹⁵ According to reports, NSW Attorney-General John Hatzistergos has stated:

... NSW is no longer willing to make subject-matter referrals of power to the Commonwealth in the face of lopsided federal government power in the federation ... The days of full subject referrals, in the light of experience, are unlikely to recur.¹⁶

Already, Tasmania has passed referral legislation.¹⁷ The reference is confined to the text of the original enactment of the National Consumer Credit Protection Bill 2009 and the National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009 by the Commonwealth Parliament and to express amendments to the National Credit legislation.¹⁸ The Queensland Government has introduced the relevant bill into its Parliament but the bill has not yet been passed.¹⁹ At the time of writing this Digest none of the other States has passed referral legislation.

The legislation will be underpinned by the National Credit Law Agreement between the Commonwealth and the States.²⁰

Rationale for this Bill

The Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen has stated:

As the Commonwealth's legislative powers alone are not sufficient to enact a nationally comprehensive consumer credit regulatory framework the States have agreed to refer their powers to the Commonwealth, under section 51 of the Constitution, by passing relevant referral legislation in their respective Parliaments ...

In response to state concerns raised in December last year, the Commonwealth and State Governments agreed to modify the terms of the amendment power in the Referral Bills (the Bills to be enacted by the States to refer power to the

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15. R S French, 'The Referral of State Powers', *University of Western Australia Law Review*, Vol. 31, No. 1, 2003, pp. 19–34 at p. 32.
 16. J Evers, 'NSW puts its foot down on state powers', *Australian Financial Review*, 6 January 2010, p. 8.
 17. *Credit (Commonwealth Powers) Act 2009* (Tas), viewed 15 February 2010, http://www.austlii.edu.au/au/legis/tas/num_act/cpa200951o2009340/
 18. *Credit (Commonwealth Powers) Act 2009* (Tas), section 4.
 19. *Credit (Commonwealth Powers) Bill 2009* (Qld), viewed 15 February 2010, <http://www.legislation.qld.gov.au/Bills/53PDF/2009/CreditCwlthPB09.pdf>
 20. National Credit Law Agreement 2009, viewed 16 February 2010, http://www.coag.gov.au/coag_meeting_outcomes/2009-12-07/docs/iga_nat_credit_law.pdf

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Commonwealth) to allow certain subject matters (such as State taxation) to be excluded from the scope of the amendment power.

[This will] enable an effective reference of State power to be made either with or without exclusions to that power.

The amendments in this Bill will also allow the States to refer their regulatory powers in relation to consumer credit by ‘adopting’ the Commonwealth’s legislation and referring an amendment power. This will ensure the constitutional soundness of the referral of consumer credit powers.²¹

The reference in the Minister’s media release to ‘state concerns’ is a direct reflection of those issues already discussed under the heading ‘Referral of power by the states’ above.

Committee consideration

At the time of writing this Digest, the Bill had not been referred to any Senate committee for inquiry.

Financial implications

According to the Explanatory Memorandum, the measures in the Bill will not have a financial impact.²²

Main provisions

Items 1 and 2 repeal the definitions of ‘*initial National Credit Act*’ and ‘*initial Transitional Act*’ respectively. The reason for the repeal is that the Bill will insert a new definition of ‘relevant version of this Act’ and ‘relevant version of the Transitional Act’.

Section 18 of the National Credit Act provides the constitutional basis for that Act and the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*.²³ Currently section 18 is limited to referrals only by the States. **Items 3–5** amend

21. C Bowen, (Minister for Financial Services, Superannuation and Corporate Law), ‘Amendments to ensure and effective referral of consumer credit powers to the Commonwealth’, *Media Release No. 010*, 9 February 2010, viewed 15 February 2010, <http://mfsscl.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2010/010.htm&pageID=003&min=ceba&Year=&DocType>

22. Explanatory Memorandum, p. 2.

23. For further information see P Tan, ‘National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009’, *Bills Digest No. 33 2009–10*, Parliamentary Library, Canberra, 16 September 2009, viewed 15 February 2010, <http://www.aph.gov.au/library/pubs/bd/2009-10/10bd033.pdf>

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section 18 so that the application of the Acts is based on either a reference or adoption by the referring States under section 51(xxxvii) of the Constitution.

Item 6 repeals and substitutes **proposed subsections 19(1) and 19(2)** to provide for an expanded meaning of '*referring State*'. The Explanatory Memorandum states:

As a result of the agreed changes to the Referral Bill it is necessary to extend the definition of a 'referring State' in the [National] Credit Act to accommodate those States which intend to use a Referral Bill excluding those limited subject matters; and to enable a State to adopt the National Credit legislation and refer an agreed amendment power.²⁴

Proposed subsection 19(1) provides that a State is a *referring State* if, for the purposes of paragraph 51(xxxvii) of the Constitution, the Parliament of the State has adopted the National Credit legislation and has referred an amendment power to the National Credit legislation.

Proposed subsection 19(2) further provides that a State is a *referring State* even if the State's referral law provides that:

- the reference to the Commonwealth Parliament is to terminate in particular circumstances, or
- the adoption of the National Credit legislation by that State is to terminate in particular circumstances.

Under **proposed paragraphs 19(2)(c)(i)–(iv)**, the reference to the Commonwealth Parliament excludes the following matters:

- the matter of making provision with respect to the imposition or payment of State taxes, duties, charges or other imposts
- the matter of making provision with respect to the general system for the recording of estates or interests in land and related information
- the matter of providing for the priority of interests in real property, or
- the matter of making a law that excludes or limits the operation of a State law, to the extent that the State law makes provision with respect to the creation, holding, transfer, assignment, disposal or forfeiture of a State statutory right.

Item 9 repeals and substitutes subsection 19(5). **Proposed subsection 19(5)** sets out the circumstances in which a State ceases to be a *referring State* where a reference to the Commonwealth Parliament terminates, or where the adoption of the National Credit legislation terminates.

24. Explanatory Memorandum, p. 5.

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Items 15, 16 and 19 insert new definitions into existing subsection 19(8) to make reference to ‘relevant versions of this Act’ which will accommodate references of State power with or without the exclusions allowed by proposed subsection 19(2).

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