2008-2009

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

NATIONAL CONSUMER CREDIT PROTECTION BILL 2009

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be moved on Behalf of the Government

(Circulated by the authority of the
Minister for Human Services
Minister for Financial Services, Superannuation and Corporate Law
the Hon Chris Bowen, MP)

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Glossary

The following abbreviations and acronyms are used throughout this supplementary explanatory memorandum.

Abbreviation	***Definition***
AAT	Administrative Appeals Tribunal
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
Code	National Credit Code in Schedule 1 to the National Consumer Credit Protection Bill 2009
Corporations Act	*Corporations Act 2001*
Credit Bill	National Consumer Credit Protection Bill 2009
Referral Bill	State Bill referring powers over credit matters to the Commonwealth pursuant to section 51 (xxxvii) of the Constitution
Transitional Bill	National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009

General outline and financial impact

Amendments to the National Consumer Credit Protection Bill 2009

The amendments to the National Consumer Credit Protection Bill 2009 (Credit Bill) respond to concerns raised about the Credit Bill, in particular recommendations of the Senate Economics Legislation Committee; take into account other developments since introduction; and make technical corrections. The amendments include:

- changes to certain definitions;
- changes to provisions that bind the Crown;
- an additional defence to the offence of engaging in a credit activity without a licence;
- adjustments to exemptions from licensing, responsible lending conduct obligations and the National Credit Code (Code);
- changes to the ability of credit providers to rely on preliminary assessments;
- confirmation of the reviewability of decisions made by the Australian Securities and Investments Commission (ASIC) (including enforcement decisions) by the Administrative Appeals Tribunal (AAT);
- clarification of the operation of certain remedy provisions;
- enabling forms issued by ASIC to be prescribed in regulations;
- powers to make regulations in relation to interest for credit provided for investment in residential property;
- requiring credit providers to give reasons when not agreeing to hardship variations and stays of enforcement; and
- certain minor technical amendments.

Date of effect: The amendments take effect when the affected provisions in the Credit Bill take effect. Those dates are specified in the explanatory memorandum to the Credit Bill.

Financial impact: The amendments do not affect the financial impact statements included in the explanatory memorandum to the Credit Bill.

Compliance cost impact: A regulatory impact statement is included in the explanatory memorandum to the Credit Bill.

Chapter 1
Amendments to the National Consumer Credit Protection Bill 2009

State reference (amendments 1 to 3 and 11 to 14)

1.1 Since the introduction of the Credit Bill, the form of the anticipated reference of legislative powers from States to the Commonwealth, relating to the provision of credit and in accordance with section 51 (xxxvii) of the Constitution, has altered. The amendments relating to the State reference respond to this development.

1.2 Amendment 1 inserts the definition of ***'initial National Credit Code'*** which is part of the definition of the term ***'referred credit matter'*** in section 20 of the Credit Bill.

1.3 Amendments 2 and 3 replace the term ***'referred credit matters'*** with ***'referred credit matter'***, and amendment 14 inserts a revised definition of that term, to ensure consistency with the form of the anticipated State Bill to refer legislative powers regarding credit to the Commonwealth (Referral Bill). It is expected that each State will enact a Referral Bill. It is possible that in one or more States, this may follow the original enactment of the Credit Bill and National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009 (Transitional Bill).

1.4 Amendment 13 omits the term ***'Trade Practices Act'***. This definition is no longer necessary as amendment 11 removes that term from the scope of laws to which express amendments can be made under the Referral Bill. Amendment 12 revises the definition of the term ***'express amendment'*** given the *Trade Practices Act 1974* is no longer referred to.

Binding Crown (amendment 15)

1.5 Amendment 15 changes the application of the Credit Bill to the Crown, and allows for the application of the Credit Bill (except for the Code) to the Crown to be able to be determined by regulation.

1.6 It is expressly provided that the Code binds the Crown in each of its capacities ***[subsection 22(3)]***. This maintains consistency with the way in which the Uniform Consumer Credit Codes in force as State or Territory law currently apply to the Crown.

1.7 The Crown is expressly stated not to be otherwise bound by the Credit Bill or the Transitional Bill. ***[subsection 22(1)]***

1.8 However, the Bill allows for this position to be varied by regulations, so that these Bills, or specified provisions, may bind the Crown either in right of the Commonwealth or in all of its other capacities ***[subsection 22(2)]***. It is considered preferable to allow for this by regulation rather than in the Act itself, as this gives greater flexibility in adapting the law so that the Crown is bound in appropriate circumstances.

1.9 The amendment retains the provision specifically providing that nothing in the Credit Bill or the Transitional Bill renders the Crown liable to be prosecuted for an offence or to a pecuniary penalty. ***[subsection 22(4)]***

Defences (amendments 16 and 17)

1.10 Section 29 of the Credit Bill provides that a person commits an offence when they engage in credit activities without a licence.

1.11 Amendments 16 and 17 insert an additional defence against that offence for representatives of persons who are exempt from requiring a licence where they are acting within authority.

1.12 Such an exemption could be granted by ASIC under paragraph 109(1)(a), or as a result of a class order exemption by ASIC under paragraph 109(3)(a), or an exemption by regulation under paragraph 110(a).

1.13 This defence places the onus of proof on the defendant. The reason for this approach is that a defence of this type may raise complex factual matters that cannot be readily established by ASIC, but will be within the knowledge of the relevant employee or director. For example, that person will be in the best position to prove that their conduct has been authorised by their principal.

Implementation timetable (amendment 18)

1.14 Amendment 18 relates to the deferral of the implementation timetable. Specifically, this amendments defers the day a person may apply for a licence to 1 July 2010, or later day prescribed by the regulations.

ASIC exemptions (amendments 22 and 25)

1.15 Amendments 22 and 25 modify ASIC's ability to exempt people from the need to be licensed to engage in credit activities under paragraph 109(1)(a), or from the responsible lending conduct obligations under paragraph 163(1)(a).

1.16 As currently worded the provisions only allow ASIC to exempt a single person. This restriction limits the utility of the exemption mechanism in providing relief in appropriate circumstances.

1.17 The revised wording will allow ASIC to exempt either a person, or a person and all their credit representatives. The effect of the amendment is that ASIC does not need to exempt each credit representative individually, where they are engaging in credit activities on behalf of a principal who has been exempted.

1.18 These revisions do not affect the status of these exemptions under the *Legislative Instruments Act 2003*, as noted in subsections 109(2) and 163(2). That is, these sections remain merely declaratory of the existing position.

Responsible lending conduct (amendments 23 and 24)

1.19 Amendments 23 and 24 remove subsections 130(3) and 153(3) of the Credit Bill, which excuse credit providers and lessors from having to verify information where a preliminary assessment has been made that assesses the contract, or lease, as not being unsuitable and had been undertaken within the previous 90 days.

1.20 Removing these reliance provisions responds to concerns that they could be deliberately misused.

Remedies (amendments 26 to 28)

1.21 Amendments 26 to 28 insert notes to sections 178, 179 and 180 of the Credit Bill to clarify that the general remedy provisions can be used to obtain redress for loss or damage as a result of a contravention of a civil penalty, regardless of whether a declaration of contravention of a civil penalty has been made under section 166 of the Credit Bill.

1.22 This addresses concerns that the remedy provisions suggest that a declaration of contravention has to be made by the court (following an application to the Court from ASIC under section 166) before a consumer compensation order can be made or sought.

1.23 Applicants seeking a general remedy will still have to prove a nexus between the contravention and any loss and damage that resulted from it.

1.24 This is consistent with the operation of similar provisions in the Corporations Act (sections 1317H, 1317HA and 1325) on which the general remedy provisions were modelled.

Prescribed forms (amendments 29 and 32)

1.25 Sections 253 and 284 of the Credit Bill allow ASIC to issue a written notice to require a person to provide reasonable assistance and appear at an examination, or a written summons to require a person to attend a hearing respectively.

1.26 Amendments 29 and 32 correct a drafting error to provide that these documents must be issued by ASIC in the form prescribed by the regulations, rather than as approved by ASIC.

1.27 These amendments will ensure the Credit Bill takes an approach consistent with the *Australian Securities and Investments Commission Act 2001* (ASIC Act) in regard to documents issued by ASIC.

Technical amendments (amendments 4 to 10, 19 to 21, 30, 31, 37 and 44 to 47)

1.28 Amendments 4 to 9, 20 and 21 omit the words ‘for or’ from various provisions in the Credit Bill to maintain consistency throughout the Credit Bill when a person acts on behalf of another person.

1.29 Amendment 10 makes a technical amendment to subsection 19(3) of the Credit Bill by omitting the phrase ‘making laws’ and substituting ‘the making of laws’ so that it uses the same phrase in the Referral Bill and subsection 19(4) of the Credit Bill.

1.30 Amendment 19 amends the grounds on which ASIC can suspend or cancel a licence under section 54 of the Credit Bill to include instances where a person does not engage in credit activities, as well as ceases to engage, in credit activities. This drafting alteration ensures that, if no credit activities have ever been engaged in by a licensee, ASIC may still suspend or cancel the licence.

1.31 Amendments 30 and 31 correct cross references in Chapter 6 of the Credit Bill. Specifically, the note in subsection 274(4) should refer to section 290, instead of section 63, and subsection 274(5) should refer to an offence under subsection 290(2), instead of subsection 63(3).

1.32 Amendment 37 inserts the subheading ‘*Definitions*’ into section 6 of the Code.

1.33 Amendments 44 to 47 remove the word ‘civil’ from the headings and titles in Part 6 of the Code so that the headings provide an accurate description of the provisions. In addition, this will minimise the potential for confusion about a consumer’s access to remedies provided in Chapter 4 of the Credit Bill.

AAT review of ASIC decisions (amendment 33)

1.34 Section 327 of the Credit Bill currently provides for a review by the AAT of a decision made by ASIC, other than in relation to a decision made by ASIC dealing with approved codes of conduct or a decision to make a determination under subsection 328(3). Amendment 33 extends the list of ASIC decisions which are excluded from review by the AAT.

1.35 The effect of amendment 33 is that ASIC’s compliance and enforcement decisions (including decisions made in relation to infringement notices) will not be subject to review by the AAT. This approach is consistent with the ASIC Act which effectively excludes the large majority of ASIC decisions made under that Act from AAT review.

1.36 The amendment also excludes from AAT review all ASIC decisions made by legislative instrument, which are already subject to Parliamentary review under the *Legislative Instruments Act 2003*.

Exemptions from the National Credit Code (amendments 34 to 36 and 48 to 51)

1.37 Amendments 34 to 36 and 48 to 51 amend the circumstances in which persons providing credit or consumer leases can be exempted from the Code.

1.38 Subsections 6(13), (14) and (17) of the Code allow for exemptions from either the Code in its entirety or only specified or limited provisions. Amendments 34 to 36 delete the phrase 'all or any provisions of' from these subsections. The effect of this change is that these subsections can now only be used to create exemptions from the Code in full (whether by regulation or by ASIC, in relation to either a specific credit contract or a specific class of credit contracts)

1.39 Amendments 48 to 50 have an identical operation in respect of the power to exempt consumer leases from the Code under subsections 171(3), (4) and (6).

1.40 Amendment 51 introduces two new provisions into the Code:

- section 203A — exemptions by ASIC; and
- section 203B — exemptions by the regulations.

Exemptions by ASIC

1.41 Subsection 203A(1) enables ASIC to exempt, from any or all of the provisions of the Code, a specific person, contract, mortgage, guarantee or consumer lease.

1.42 It is expressly stated that such an exemption is not a legislative instrument under the *Legislative Instruments Act 2003*. This statement is declaratory of the existing position.

1.43 Subsection 203A(3) enables ASIC to exempt, from any or all of the provisions of the Code, a class of persons, contracts, mortgages, guarantees or consumer leases.

1.44 Subsection 203A(4) enables exemptions to be made either unconditionally or subject to specified conditions. A person who is exempt subject to conditions must comply with the specified conditions, and, should they fail to do so, ASIC can apply for a court order to require compliance.

Exemptions by the regulations

1.45 Section 203B enables regulations to be made to exempt, from any or all of the provisions of the Code, a person, contract, mortgage, guarantee or consumer lease, with these defined either individually or as a class.

Residential investment property interest (amendments 38 and 39)

1.46 Sections 25 and 26 (in Division 2) and Division 3 of the Code contain requirements in relation to the way in which lenders advance capital without deducting amounts for interest (other than for the first interest payment), attribute repayments made by the borrower and calculate interest.

1.47 Following the extension of the application of the Code, these requirements, unless modified, will apply where the credit is provided for persons investing in residential properties. Amendments 38 and 39 provide a power to make regulations to modify the application of these provisions in relation to credit provided for residential properties. Modifications may be necessary to accommodate lending and taxation arrangements commonly associated with investment in residential property in Australia.

Giving reasons for refusal (amendments 40 to 43)

1.48 Sections 72 and 94 of the Code give consumers with credit contracts under which the maximum amount of credit that may be provided is not more than $500,000 (or a higher amount as prescribed in the regulations) the right to request a hardship variation or stay of enforcement.

1.49 Amendments 40 to 43 amend those provisions so that, when a credit provider does not agree to an application for a hardship variation or stay of enforcement, they must give reasons to the consumer as to why the request was refused.

1.50 This will provide consumers a basis on which to dispute such a decision in external dispute resolution or the courts.

Predominantly residential purposes (amendments 52 to 56)

1.51 Amendments 52 to 56 amend the definition of '***residential property***' in section 204 of the Code to ensure that the Code is only extended to credit provided to purchase, renovate, improve, or refinance residential property for investment purposes when this property is used *predominantly* for residential purposes.

1.52 The definition in the Credit Bill captures all properties that have any residential dwelling affixed, irrespective of whether the predominant use of the property is for residential purposes. This could, for example, include farms with a farmhouse or a commercial building with a caretaker's cottage.

1.53 The amendments modify the definition of residential property as land, a lease of land, a licence in relation to land, a share in, a right to occupy or an equity of redemption in relation to land on which a dwelling is or will be affixed predominantly for residential purposes.