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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

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NATIONAL CONSUMER CREDIT PROTECTION BILL 2009

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EXPLANATORY MEMORANDUM

(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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# ***Table of contents***

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Glossary .....	1
General outline and financial impact .....	3
Chapter 1      Introduction .....	11
Chapter 2      Licensing of persons engaging in credit activities .....	27
Chapter 3      Responsible lending conduct .....	81
Chapter 4      Remedies .....	119
Chapter 5      Administration .....	155
Chapter 6      Compliance and enforcement .....	169
Chapter 7      Miscellaneous .....	233
Chapter 8      National Credit Code .....	239
Chapter 9      Regulation impact statement.....	321
Chapter 10     Attachment A: Regulation impact statement .....	363



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# Glossary

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

<i>Abbreviation</i>	<i>Definition</i>
AAT	Administrative Appeals Tribunal
ABN	Australian Business Number
ACL	Australian credit licence
AD(JR)	<i>Administrative Decisions (Judicial Review) Act 1977</i>
ADIs	Authorised deposit-taking institutions
Agreement	Uniform Credit Laws Agreement 1993
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ASX	Australian Securities Exchange
COAG	Council of Australian Governments
COAG agreement	Agreement by COAG to the Commonwealth assuming responsibility for regulating mortgage credit (including non-deposit-taking institutions) and advice, including persons and corporations engaged in mortgage broking activities. The agreement also extends to the Commonwealth regulating margin loans.
Code	National Credit Code
Consumer Credit Protection Reform Package	National Consumer Credit Protection Bill 2009, National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009, and the National Consumer Credit Protection (Fees) Bill 2009
Corporations Act	<i>Corporations Act 2001</i>
Credit Bill	National Consumer Credit Protection Bill 2009
Crimes Act	<i>Crimes Act 1914</i>

<b><i>Abbreviation</i></b>	<b><i>Definition</i></b>
EDR Scheme	External Dispute Resolution Scheme
EFT Code	Electronic Funds Transfer Code of Conduct
Fees Bill	National Consumer Credit Protection (Fees) Bill 2009
FSR	<i>Financial Services Reform Act 2001</i>
GST	goods and services tax
IDR	internal dispute resolution
LVR	loan to value ratio
MCCA	Ministerial Council on Consumer Affairs
MCR	mandatory comparison rates
Minister	Minister responsible for administering the Credit Bill determined in accordance with section 19A of the <i>Acts Interpretation Act 1901</i>
PC	Productivity Commission
PC Report	Productivity Commission's report on the Review of Australia's Consumer Policy Framework
Referral Bill	State Bill referring powers over credit matters to the Commonwealth pursuant to section 51(xxxvii) of the Constitution
the Council	Ministerial Council for Uniform Credit Laws
Transitional Bill	National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009
UCCC	Uniform Consumer Credit Code enacted in Queensland by the <i>Consumer Credit (Queensland) Act 1994 (Qld)</i> and applied in States and Territories since 1996
VCAT	Victorian Civil and Administrative Tribunal

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# **General outline and financial impact**

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## **Outline**

The National Consumer Credit Protection Bill 2009 (Credit Bill), the National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009 (Transitional Bill) and the National Consumer Credit Protection (Fees) Bill 2009 (Fees Bill), (collectively the Consumer Credit Protection Reform Package) outline a new national consumer credit regime. The new regime:

- gives effect to the Council of Australian Governments' (COAG) agreements of 26 March and 3 July 2008 to transfer responsibility for regulation of consumer credit, and a related cluster of additional financial services, to the Commonwealth; and
- implements the first phase of a two-phase Implementation Plan to transfer credit regulation to the Commonwealth endorsed by COAG on 2 October 2008.

The Consumer Credit Protection Reform Package establishes the key components of the proposed national credit regime which include:

- a comprehensive licensing regime for those engaging in credit activities via an Australian credit licence (ACL) to be administered by the Australian Securities and Investments Commission (ASIC) as the sole regulator;
- industry-wide responsible lending conduct requirements for licensees;
- improved sanctions and enhanced enforcement powers for the regulator; and
- enhanced consumer protection through dispute resolution mechanisms, court arrangements and remedies.

The regime also replicates the Uniform Consumer Credit Code (UCCC), enacted in the *Consumer Credit (Queensland) Act 1994* (Qld) and applied in the States and Territories since 1996, into Commonwealth law. It also expands the scope of regulation to cover credit for residential investment properties.

## **National licensing regime**

The proposed reforms introduce a comprehensive national licensing regime, which is to be distinguished from the current regulation of financial services under the *Corporations Act 2001* (Corporations Act). This arises because credit involves consumers receiving money that they must repay, rather than the purchase of, or investment in, a financial product that generally includes the expectation of a benefit or return from the payment. The ACL is tailored to meet the issues arising in the credit context.

The key elements of the new licensing regime are that:

- it requires persons who engage in credit activities to, initially, be registered with ASIC, and to subsequently hold an ACL;
- it imposes entry standards for registration and licensing, and enables ASIC to refuse an application where the person does not meet those standards;
- it requires registered persons and licensees to meet ongoing standards of conduct while they engage in credit activities; and
- it provides ASIC the power to suspend or cancel a licence or registration, or to ban an individual from engaging in credit activities.

## **Responsible lending conduct**

In addition to licensing obligations, the Credit Bill includes a collection of conduct obligations applicable to all holders of an ACL, which apply responsible lending conduct requirements. Broadly, the responsible lending conduct obligations set in place expected standards of behaviour of licensees when they enter into consumer credit contracts or leases, where they suggest a credit contract or lease to a consumer, or assist a consumer to apply for a credit contract or lease.

The key obligation on licensees is to ensure they do not provide a credit contract or lease to a consumer or suggest or assist a consumer to enter into a credit contract or lease that is unsuitable for them. This obligation requires licensees to assess that the credit contract or lease is not unsuitable for the consumer's requirements and that the consumer has the capacity to meet the financial obligations under the credit contract or lease.



## **Sanctions and remedies**

The Credit Bill establishes a civil penalty and consumer remedy framework that promotes strong consumer protections, including a civil enforcement regime and broad civil remedies. The key provisions:

- enable ASIC to seek a court declaration of contravention for a civil penalty and to seek a pecuniary penalty;
- set out the administrative provisions in relation to a civil penalty;
- enable the court to grant remedies to consumers for loss or damage suffered as a result of a contravention of the Credit Bill, including through varying the contract as well as monetary redress;
- enable the court to grant relief to consumers for unlicensed conduct; and
- permit infringement notices to be issued by ASIC for strict liability offences and civil penalties as provided by regulations.

## **Dispute resolution and the courts**

A key feature of the Credit Bill is the improved accessibility to dispute resolution in terms of location, procedural simplicity and lower costs.

Consumers will have access to a three-tiered dispute resolution process for credit issues. They will have access to the credit provider's and credit service provider's internal dispute resolution process as a first point of dispute resolution.

More importantly, to obtain a licence to provide credit or credit services, the credit provider and credit service provider will be required to have membership of an ASIC-approved External Dispute Resolution Scheme (EDR Scheme).

Therefore, if consumers are not satisfied with the review outcomes from the internal process, they may access the licensee's EDR Scheme.

In addition, consumers will retain access to the courts to seek redress. Neither internal nor external dispute resolution processes will remove a consumer's right to seek redress directly from a court.

Other key provisions in the Credit Bill to promote accessibility in terms of location, procedural simplicity and costs of dispute resolution include:

- access to all relevant Commonwealth, State and Territory courts;
- delineation of civil and criminal jurisdiction, including transfer and appeal arrangements;
- ‘opt-in’ streamlined court procedures for certain consumer remedies; and
- a presumption that a court may not impose an adverse cost order for a hardship application or a variation of a contract unless vexatious or without reasonable cause.

### **National Credit Code**

Schedule 1 to the Credit Bill contains the National Credit Code (Code) which largely replicates the State and Territory based UCCC. The objectives of the Code remain the same as those when the UCCC was first enacted, namely, to ensure strong consumer protection through ‘truth in lending’, while recognising that competition and product innovation must be enhanced and encouraged by the development of non-prescriptive flexible laws. The Code regulates many aspects of the provision of certain types of credit, including upfront and ongoing disclosure obligations, changes to the credit contract, advertising and marketing requirements, termination of the credit contract and penalties and remedies.

The Code also governs consumer leases, and extends the scope of credit contracts covered by the Code to contracts where the credit is provided to purchase, renovate or improve a residential investment property.

The approach of the Code is for it to be as similar to the UCCC as is practicable, except where the Commonwealth has specifically decided to amend or extend its operation.

***Date of effect:*** The short title and commencement provisions of the Credit Bill commence on Royal Assent. The remaining provisions commence on a single day to be fixed by Proclamation.

***Proposal announced:*** The proposal to transfer responsibility for regulating consumer credit to the Commonwealth was announced by COAG on 26 March, 3 July and 2 October 2008.

**Financial impact:** 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 that 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 to be paid by persons regulated by the national framework, payment of which commences during the 2010-11 financial year. The revenue generated from these fees will depend, in part, on the number and type of persons seeking to be licensed.

**Compliance cost impact:** 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, which include the payment of fees to lodge application documentation with ASIC, annual compliance costs and costs of EDR Scheme membership.

## Summary of regulation impact statement

### Regulation impact on business: National licensing regime

**Impact:** The new national licensing regime will affect consumers of credit; industry participants including providers of credit and credit services; the Government and ASIC.

**Main points:**

- The main group affected is industry participants who will need to become holders of an ACL in order to continue engaging in credit activities.
- The most significant impact will be on those who only conduct business in States or Territories where there is currently no licensing or registration scheme. These businesses may face significant transitional costs.
- Licensing will involve one-off costs associated with applying for a licence, together with ongoing fees for lodging various documents. There will also be costs of complying with the ongoing obligations associated with the licence, including, in particular:
  - training and supervision costs; and

- maintaining adequate compensation arrangements (for example, professional indemnity insurance).

### **Regulation impact on business: Responsible lending conduct**

**Impact:** The groups affected by the responsible lending requirements are consumers of credit; industry participants in particular, providers of credit and credit assistance; the Government and ASIC.

**Main points:**

- The costs on holders of an ACL associated with complying with the responsible lending conduct requirements primarily relate to the development of adequate systems and resources to undertake and provide compliant suitability assessments that will meet the requirements not to provide or suggest unsuitable credit contracts.

### **Regulation impact on business: Sanctions, remedies dispute resolution and the courts**

**Impact:** The groups affected by the new regime of consumer remedies and ASIC enforcement powers would be: consumers of credit; industry participants, including providers of credit and credit assistance; and the Government and ASIC.

**Main points:**

- The costs of both the regulator and the industry from an expanded enforcement framework are expected to be less than using the limited enforcement avenues that currently exist. Cost savings can be expected where administrative actions may be used as an alternative to civil and criminal sanctions. However, this may not necessarily lead to any change in the costs of a defended action.
- While broader enforcement powers carry some potential additional compliance costs for industry participants, this outcome is expected to deliver greater net benefits for consumers particularly over time, through overall improvements to standards of industry behaviour.

### **Regulation impact on business: National Credit Code**

***Impact:*** The groups affected by the Code would be consumers of credit; industry participants (principally credit providers and, indirectly, credit service providers); and the Government and ASIC.

***Main points:***

- As the Code largely replicates the State-based UCCC, the activities of credit providers are for the most part currently regulated consistent with this aspect of the proposed credit regime. Therefore, regulatory impact for industry is expected to be minimal.
- Industry will now need to comply with the Code where credit for residential investment properties is provided but the impact on industry compliance is expected to be minimal.



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# **Chapter 1**

## **Introduction**

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### **Outline of chapter**

1.1 Chapter 1 of this explanatory memorandum outlines the preliminary provisions, dictionary and application provisions established in Chapter 1 of the National Consumer Credit Protection Bill 2009 (Credit Bill).

### **Context of new law**

1.2 At its meeting on 2 October 2008, the Council of Australian Governments (COAG) agreed that the Commonwealth would assume responsibility for the regulation of consumer credit.

### **Summary of new law**

1.3 Chapter 1 of the Credit Bill covers the following:

- the preliminary matters such as the short title and commencement of the Credit Bill;
- defined terms and other definitions for the Credit Bill;
- the constitutional basis and application of this Credit Bill; and
- the interaction between Commonwealth credit legislation and State and Territory laws.

1.4 The Credit Bill and the National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009 (Transitional Bill) are based, in part, on a referral of constitutional power by the States.

1.5 The relationship between the new Commonwealth Act and State and Territory legislation is dealt with in a set of provisions, contained in the Credit Bill, called the 'inconsistency' provisions. These provisions deal with how any inconsistencies between Commonwealth, and State and

Territory law are treated. The purpose of these legislative provisions is to provide a mechanism to allow certain potentially inconsistent State and Territory laws to operate, notwithstanding the application of section 109 of the Constitution. Section 109 provides that where a State law is inconsistent with a Commonwealth law, the Commonwealth law prevails and the State law, to the extent of the inconsistency, is invalid.

1.6 The definitions provisions contain terms that apply to the interpretation of the Credit Bill which assists in clarifying the operation and effect of these provisions.

## **Detailed explanation of new law**

### **Part 1-1 — Preliminary**

#### *Division 1 — Preliminary*

##### *Commencement*

1.7 Sections 1 and 2 of the Credit Bill commence on the day on which it receives Royal Assent. The remaining provisions commence on a day to be fixed by Proclamation. Provisions that do not commence within six months after the commencement day of the Credit Bill commence the day after that period. [*Part 1-1, Division 1, section 2*]

1.8 In relation to the new licensing regime, a two-phase approach is being adopted on commencement of the Credit Bill. Credit providers and credit service providers will be required to be registered with the Australian Securities and Investments Commission (ASIC) by 30 June 2010, and to have applied for a licence by 31 December 2010 in order to engage in credit activities.

1.9 Some responsible lending conduct obligations in Chapter 3, such as the requirement not to arrange or provide credit that is unsuitable, will commence for non-ADIs and non-RFCs from 1 July 2010. Those responsible lending conduct obligations will commence for ADIs and RFCs on 1 January 2011.

1.10 Additional responsible lending obligations such as disclosure requirements, including the provision of quotes, credit guides and assessments will commence on 1 January 2011 to give industry time to put in place the systems and training needed to comply with their new obligations.



1.11 Schedule 1 to the Credit Bill which contains the National Credit Code (Code) has effect as law of the Commonwealth. *[Part 1-1, Division 1, section 3]*

## **Part 1-2 — Definitions**

### *Division 2 — The Dictionary*

#### *Explanation of the use of defined terms in the Bill*

1.12 The Credit Bill and Transitional Bill specify the regulatory requirements applying to persons engaged in credit activities. A person will need a licence if they engage in credit activities.

#### *When does a person engage in a credit activity*

1.13 The Dictionary in the Credit Bill contains detailed definitions of when a person will engage in credit activities, and therefore when the requirements to be registered and licensed arise. This chapter of the explanatory memorandum contains a detailed explanation of these provisions.

### *Division 3 — Definitions relating to the meaning of credit activity*

1.14 There are two broad categories of persons who engage in credit activities:

- the first category primarily covers lenders and providers of consumer leases, but is extended to also cover activities in respect of mortgages and guarantees where they are taken to secure or guarantee obligations under a credit contract *[Part 1-2, Division 3, items 1, 3, 4 and 5 in the table in subsection 6(1)]*; and
- the second category is defined as persons who provide credit services, and primarily, but not exclusively, covers *[Part 1-2, Division 3, item 2 in the table in subsection 6(1)]*:
  - finance brokers and other intermediaries where they have a role in relation to securing credit for a consumer; and
  - persons who assist consumers in relation to a particular credit contract with a particular credit provider.

1.15 Whether or not a person engages in a credit activity will therefore depend both on the activity they are performing and whether it is in relation to a credit contract, a consumer lease, a mortgage or a guarantee that is regulated by the Credit Bill. This means that a person will not engage in credit activities as defined in the Credit Bill:

- where they engage in credit activities but not in respect of a credit contract, consumer lease, mortgage or guarantee as defined in the Credit Bill — for example, they lend money but it is for business purposes and therefore not regulated; or
- where they engage in an activity in respect of credit as defined in the Bill but it is not a specified credit activity — for example, where a person provides credit assistance but not in relation to a particular credit contract with a particular credit provider.

1.16 In order to determine whether a person is engaging in credit activities it is necessary to consider the definitions of:

- a credit contract;
- a consumer lease;
- a mortgage; and
- a guarantee.

1.17 A ‘credit contract’ is defined in section 5 of the Credit Bill as having the same meaning as in section 4 of the Code, and this in turn defines it ‘as a contract under which credit is or may be provided to which the Code applies’. In broad terms, the Code will apply to the provision of credit where:

- the debtor is a natural person or a strata corporation; and
- the credit is provided wholly or predominantly for:
  - personal, domestic or household purposes; or
  - to purchase, renovate, improve or refinance a residential investment property; and
- a charge is made for the credit.

1.18 A ‘consumer lease’ is defined in section 5 of the Credit Bill as a consumer lease to which Part 11 of the Code applies. Section 170 of the

Code provides that consumer leases are leases with the following characteristics:

- the goods are hired wholly or predominantly for personal, domestic or household purposes; and
- a charge is or may be made for the hiring of the goods and the charge, together with any other amount payable under the consumer lease, exceeds the cash price of the goods.

*[Credit Bill, Schedule 1, section 170]*

1.19 A ‘mortgage’ is defined in section 7 of the Code as a mortgage to which the Code applies, that is, a mortgage:

- that secures obligations under a credit contract or a related guarantee; and
- where the mortgagor is a natural person or a strata corporation.

*[Credit Bill, Schedule 1, section 7]*

1.20 A ‘guarantee’ is defined in section 8 of the Code as a guarantee to which the Code applies, that is a guarantee:

- that guarantees obligations of a debtor under a credit contract; and
- where the guarantee is given by a natural person or a strata corporation.

*[Credit Bill, Schedule 1, section 8]*

1.21 The definitions in the first category mean that a person will engage in credit activities where:

- they are credit providers who provide credit, or lessors who provide consumer leases (as defined in the Code). They will continue to engage in credit activities as long as they are a party to a contract. The need to be licensed will therefore remain while they are still collecting money due under credit contracts or leases, even where they no longer enter into new credit contracts or leases *[Part 1-2, Division 3, paragraphs 1(a) and 3(a) in the table in subsection 6(1)]*;
- they carry on a business of providing credit or leases, and will therefore need to hold a licence where they engage in

pre-contractual conduct before entering into credit contracts or leases *[Part 1-2, Division 3, paragraphs 1(b) and 3(b) in the table in subsection 6(1)]*;

- they perform obligations or exercise rights in relation to a credit contract or lease, or a proposed credit contract or lease *[Part 1-2, Division 3, paragraphs 1(c) and 3(c) in the table in subsection 6(1)]*. This applies to:
  - persons performing statutory obligations arising before a credit contract or lease has been entered into; and
  - mortgage managers where they are managing the credit contract on behalf of the credit provider;
- they are either *[Part 1-2, Division 3, item 4 in the table in subsection 6(1)]*:
  - a mortgagee under a mortgage that secures the obligations of a borrower under a credit contract; or
  - they perform obligations or exercise rights in relation to a mortgage;
- they are either *[Part 1-2, Division 3, item 5 in the table in subsection 6(1)]*:
  - the beneficiary of a guarantee that guarantees the obligations of a borrower under a credit contract; or
  - they perform obligations or exercise rights in relation to a guarantee; and
- a person who receives, by assignment, the rights of a credit provider or a lessor, will be engaging in credit activities where they exercise those rights *[Part 1-2, Division 3, section 10]*. This requirement arises irrespective of whether they receive the rights directly from the credit provider or lessor, or from a person who was themselves as assignee.

1.22 The definitions in respect of mortgages and guarantees are intended to regulate the following situations:

- where the same person is the credit provider, the mortgagee and the beneficiary of the guarantee; or

- where the credit provider is a different party from the mortgagee and a beneficiary of a guarantee. This is intended to cover two situations:
  - it addresses the risk of the licensing requirements being able to be avoided by the transaction being structured so that the credit provider or lessor is a different person from the mortgagee or the beneficiary of the guarantee; and
  - it will mean that a person needs to hold a licence where they are an assignee only of rights under a mortgage or a guarantee, but not under the credit contract. They will only need to meet the obligations in a more limited way in relation to this activity only, should this be the case.

1.23 A person will be in the second category of persons who engage in credit activities, and will ‘provide credit services’ where they either:

- provide credit assistance; or
- act as an intermediary.

*[Part 1-2, Division 3, section 7]*

1.24 A person provides ‘credit assistance’ to a consumer where they:

- suggest that the consumer:
  - apply for a provision of credit (in respect of either a particular credit contract with a particular credit provider or a particular lease with a particular lessor);
  - apply for an increase to the credit limit of a particular credit contract with a particular credit provider; or
  - remain in their current credit contract or lease; or
- assist the consumer to:
  - apply for a provision of credit (in respect of either a particular credit contract with a particular credit provider or a particular lease with a particular lessor); or
  - apply for an increase to the credit limit of a particular credit contract.

*[Part 1-2, Division 3, section 8]*

1.25 A person will provide credit assistance regardless of whether they deal directly with the consumer or with the consumer's agent. This will cover the situation where, for example, the person is assisting an elderly parent to apply for a credit contract, but is dealing with their children.

1.26 The definition applies to situations such as:

- finance brokers where they recommend a particular credit contract or lease; and
- a person who suggests a consumer apply for a particular credit contract or lease, but does not necessarily proceed to arrange the credit contract for the consumer.

1.27 A person will 'act as an intermediary' where they act as an intermediary between a credit provider and a consumer for the purposes of securing a provision of credit, or between a lessor and a consumer for the purposes of securing a lease. *[Part 1-2, Division 3, section 9]*

1.28 The definition is intended to regulate every person who may be an intermediary between the consumer and the credit provider. Innovations in credit product design and delivery now mean that a consumer may pass through a number of hands between the first person they deal with and the lender, and may be uncertain as to the roles or functions of all these different parties. It is intended that the licensing requirements will apply to all these persons.

1.29 A person will act as an intermediary notwithstanding that the type of credit or the identity of the credit provider is not yet known. It differs from the definition of 'providing credit assistance', as it does not require a person to engage in an activity in relation to a particular credit contract with a particular credit provider, or a particular lease with a particular lessor. It may be, for example, that it is only the intermediary who finally deals with the credit provider who determines or is aware of the particular credit contract to be arranged.

1.30 A person can act as an intermediary either directly or indirectly. The intention is to require a person to hold a licence even where they may have no direct or face-to-face contact with the consumer, but, nevertheless act as an intermediary by preparing or passing on information, and their role is wholly or partially to secure a provision of credit or a lease.

- 1.31 The definition is intended to apply to situations such as:
- finance brokers where, after recommending a particular credit contract, they proceed to arrange the credit with the credit provider;
  - aggregators, in acting as a conduit between an individual broker and a credit provider;
  - mortgage managers, where they are involved in arranging the credit (in addition to managing the credit once it has been provided); and
  - persons who refer the consumer to another person, where this is done for the purpose of securing credit (including where the referrer does not need to be contemplating a particular credit contract with a particular credit provider or a particular lease with a particular lessor).

***Division 4 — Other definitions***

1.32 In most instances a person will only engage in a credit activity if they do so in the course of, as part of, or incidentally to, a business ‘carried on in this jurisdiction’ by the person.

1.33 A business is taken to be ‘carried on in this jurisdiction’ where a person engages in conduct that is intended to induce people in Australia to use the goods or services the person provides, or is likely to have that effect. *[Part 1-2, Division 4, section 12]*

1.34 The Credit Bill will apply where the person engaging in credit activities is:

- a natural person;
- a body corporate;
- a partnership; or
- a trustee.

*[Part 1-2, Division 4, sections 14 and 15]*

1.35 There is also provision made to allow for additional activities requiring a person to hold a licence to be prescribed by the regulations. No regulations have been made yet, and this is to allow for future contingencies. *[Part 1-2, Division 3, item 6 in the Table in subsection 6(1)]*

## Part 1-3 — Application of this Act

### *Division 1 — Introduction*

1.36 Division 2 is about the constitutional basis and geographical application of the Credit Bill. It also deals with the application of this Credit Bill to the Crown. *[Part 1-3, Division 1, section 17]*

### *Division 2 — Constitutional basis and application of the Credit Bill and the Transitional Bill*

#### *Constitutional basis for this Bill and the Transitional Bill*

#### Application in a referring State

1.37 The Credit Bill provides the constitutional basis for its effective operation; that is, the States will be referring constitutional power of the States to the Parliament of the Commonwealth.

1.38 The application of the Credit Bill and Transitional Bill (Bills) in the referring States is based on:

- the legislative powers of the Commonwealth Parliament under section 51 of the Constitution, apart from paragraph 51(xxxvii); and
- the legislative powers of the Commonwealth Parliament which it has as a result of matters referred to it by the Parliament of the referring States under paragraph 51(xxxvii) of the Constitution.

#### *[Part 1-3, Division 2, section 18]*

1.39 The State referrals cover matters to the extent to which they are not otherwise included in the legislative powers of the Commonwealth Parliament.

#### Application in a Territory

1.40 In the Northern Territory, the Australian Capital Territory and the Jervis Bay Territory, the application of the Bills is based on the legislative powers of the Commonwealth Parliament under section 122 of the Constitution to make laws for the government of those Territories, and under section 51 of the Constitution. The Credit Bill applies in those Territories as a law of the Commonwealth, therefore overriding subsection 22(3) of the *Acts Interpretation Act 1901*. *[Part 1-3, Division 2, subsection 18(2)]*



Application outside Australia

1.41 Outside Australia, the application of the Bills is based on:

- the legislative power the Commonwealth Parliament has under paragraph 51(xxix) of the Constitution; and
- the other legislative powers that the Commonwealth Parliament has under section 51 of the Constitution; and
- the legislative powers that the Commonwealth Parliament has under section 122 of the Constitution to make laws for the government of those Territories.

*[Part 1-3, Division 2, subsection 18(3)]*

Application in a non-referring State

1.42 Application of the Bills in a State that is not a referring State is based on:

- the legislative powers that the Commonwealth Parliament has under section 51 (other than paragraph 51(xxxvii)) and section 122 of the Constitution; and
- the legislative powers that the Commonwealth Parliament has in relation to matters to which this Act relates because those matters are referred to it by the Parliaments of the referring States under paragraph 51(xxxvii) of the Constitution.

*Meaning of Referring State*

Reference of matters by State Parliament to Commonwealth Parliament

1.43 A State which has referred powers on this basis is a ‘referring State’:

- if and to the extent that the matters are not otherwise included in the legislative powers of the Parliament of the Commonwealth (otherwise than by a reference under paragraph 51(xxxvii) of the Constitution); and
- if and to the extent to which the matters are included in the legislative powers of the Parliament of the State.

*[Part 1-3, Division 2, subsection 19(1)]*

1.44 A State is a referring State even if a law of the State provides that the reference to the Commonwealth Parliament is to terminate in particular circumstances. *[Part 1-3, Division 2, subsection 19(2)]*

1.45 The reference of powers is in two parts, the first enabling the initial enactment of the Bills, and the second enabling subsequent amendment of the Bills by the Commonwealth Parliament. These references of power are explained in more detail as follows.

#### Reference covering initial Bills

1.46 The first part of the reference of powers relate to the extent of the making of laws with respect to those matters by including the referred provisions in the initial Bills. *[Part 1-3, Division 2, subsection 19(3)]*

#### Reference covering amendments of the Bills

1.47 The second part of the reference of powers covers the referred credit matter to the extent of the making of laws with respect to those matters by making express amendments of the Credit Bills. *[Part 1-3, Division 2, subsection 19(4)]*

#### Effect of termination of reference

1.48 A State will cease to be a referring State if its initial reference terminates. *[Part 1-3, Division 2, subsection 19(5)]*

1.49 Moreover, a State ceases to be a referring State if:

- the State's amendment reference terminates; and
- the exception to the amendment reference termination *[Part 1-3, Division 2, subsection 19(7)]* does not apply to the termination *[Part 1-3, Division 2, subsection 19(6)]*.

1.50 A State whose amendment reference has terminated will not cease to be a referring State if the termination is to take effect on a day to be fixed by proclamation; that day is no earlier than six months after the proclamation date; and the State's amendment reference, and the amendment reference of every other State, terminates on that day *[Part 1-3, Division 2, subsection 19(7)]*. The effect of this provision is that a State can remain part of the national scheme for the regulation of credit if it terminates its amendment reference, but only if it gives at least six months notice of the termination and if every other referring State terminates its amendment reference on the same day.

1.51 There are various definitions relevant to explaining the terms used in the operation of Division 2. For example; there is a definition of

the term ‘amendment reference’ of a State which means the reference by the Parliament of the State to the Parliament of the Commonwealth of the referred credit matter. *[Part 1-3, Division 2, subsection 19(8)]*

***Meaning of referred credit matter***

*Referred credit matter*

1.52 ‘Referred credit matter’ is defined in the Credit Bill as follows:

- credit, being credit the provision of which would be covered by the expression ‘provision of credit to which this Code applies’ in the initial National Credit Code; and,
- consumer leases, being consumer leases each of which would be covered by the expression ‘consumer lease to which Part 11 applies’ in the National Credit Code.

*[Part 1-3, Division 2, subsection 20(1)]*

1.53 A referred credit matter does not include the making of laws with respect to the following:

- the creation, holding, transfer, assignment, disposal or forfeiture of a State statutory right;
- limitations, restrictions or prohibitions concerning the kinds of interests that may be created or held in, or the kinds of persons or bodies that may create or hold interests in, a State statutory right;
- any matters involving the forfeiture, or disposal, of property or in connection with the enforcement of the general law or the transfer of property from a person to another person; or
- an excluded State statutory right.

*[Part 1-3, Division 2, subsection 20(2)]*

1.54 Despite the definitions in the new Credit Code, certain terms are given different definitions for the purpose of these provisions. These terms include: credit, credit activity, licence, personal property lease and property. *[Part 1-3, Division 2, subsection 20(3)]*

### ***General application of the Bills***

#### *Application in this jurisdiction*

1.55 Each provision of the Bills applies in this jurisdiction. *[Part 1-3, Division 2, subsection 21(1)]*

#### *Geographical coverage of 'this jurisdiction'*

1.56 Subject to a referral of constitutional power by all of the States, the Bills extend to every jurisdiction covering each geographical area that consists of each 'referring State', the Australian Capital Territory, the Jervis Bay Territory and the Northern Territory. *[Part 1-3, Division 2, subsection 21(2)]*

1.57 Therefore, jurisdiction throughout the Bills consists of either the whole of Australia (if all of the States are referring States); or Australia (other than any State that is not a referring State) if one or more States are not referring States. *[Part 1-3, Division 2, subsection 21(3)]*

#### *Application outside Australia*

1.58 Subject to subsection 21(6), each provision of the Bills applies, according to their tenor, in relation to acts and omissions outside this jurisdiction. *[Part 1-3, Division 2, subsection 21(4)]*

#### *Application in non-referring States*

1.59 The Credit Bill does not apply to an act or omission in a State that is not a referring State to the extent to which that application would be beyond the legislative powers of the Parliament (including powers it has under paragraphs 51(xxxvii) and (xxxix) of the Constitution). *[Part 1-3, Division 2, subsection 21(5)]*

#### *Residence, place of formation etc.*

1.60 Each provision of the Bills applies to natural persons and all bodies corporate and unincorporated. *[Part 1-3, Division 2, subsection 21(5)]*

### ***Bills bind Crown***

1.61 It is expressly provided that the Code binds the Crown in each of its capacities *[Part 1-3, Division 2, 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.

1.62 The Crown is expressly stated not to be otherwise bound by the Credit Bill or the Transitional Bill [*Part 1-3, Division 2, subsection 22(1)*].

1.63 However, there is a specific power to make regulations, so that the Credit Bill or the Transitional Bill, in full or specified provisions, may bind the Crown either in right of the Commonwealth or in all of its other capacities [*Part 1-3, Division 2, subsection 22(2)*]. It is considered preferable to allow for this by regulation, as this gives greater flexibility in adapting the law so that the Crown is bound in appropriate circumstances.

1.64 It is specifically provided 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 [*Part 1-3, Division 2, subsection 22(4)*].

### **Division 3 — Interaction between Commonwealth credit legislation and State and Territory laws**

#### ***Concurrent operation intended***

1.65 A provision provides that the Bills are not intended to exclude or limit the concurrent operation of any law of a State or Territory [*Part 1-3, Division 3, section 23*]. This provision is in terms similar to those of several other Commonwealth legislative provisions, including section 75 of the *Trade Practices Act 1974*, section 250B of the *Water Act 2007* and section 5E of the *Corporations Act 2001* (Corporations Act).

1.66 Where a person commits an act or omission which is an offence against either of the Bills and an offence against the law of a State or Territory; and that person is convicted of either of those offences, the person is not liable to be convicted of the other of those offences. [*Part 1-3, Division 3, section 23*]

1.67 The concurrent operation provision provides that in all circumstances where a Commonwealth law and a State law can operate concurrently, they are intended to do so. This means, for example, that if a State government sets additional conditions or requirements in relation to the registration of a mortgage or charge over real property interests in that State, then those conditions or requirements would not be inconsistent with the Credit Bill.

#### ***When Commonwealth credit legislation does not apply***

1.68 A provision of a State or Territory law may declare a matter to be an excluded matter, in relation to either the whole of the

Commonwealth credit legislation or a specified provision of the legislation. As a result, the Bills (or the provision specified) will not apply in that State or Territory in relation to the declared matter [*Part 1-3, Division 3, subsections 24(1) and (2)*]. A regulation may provide that the provision does not apply to the declaration [*Part 1-3, Division 3, subsection 24(3)*]. This provision is in terms similar to section 5F of the Corporations Act.

***Avoiding direct inconsistency between Commonwealth and State and Territory laws***

1.69 There is a provision which limits or qualifies the operation of the Bills if a valid displacement provision is in effect. The key rule is that this provision of the Credit Bill does not prohibit the doing of an act, or impose a civil or criminal liability for doing an act, if a provision of a State or Territory law (displacement provision) specifically authorises or requires the doing of that act [*Part 1-3, Division 3, section 25*]. This provision is in terms similar to section 5G of the Corporations Act.

***Regulations to deal with interaction between laws***

1.70 A provision provides that regulations can be made modifying the operation of the Credit Bill and Transitional Bill so that it does not apply to a matter dealt with by a State or Territory law, or is not inconsistent with the operation of a State or Territory law specified in the regulations. The regulation-making power allows regulations to be made regarding the interaction between the Credit Bill and Transitional Bill, independently of the displacement provision mechanism discussed above. [*Part 1-3, Division 3, section 26*]

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## **Chapter 2**

# ***Licensing of persons engaging in credit activities***

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### **Outline of chapter**

2.1 Chapter 2 of this explanatory memorandum explains the requirement for persons engaging in credit activities to be holders of an Australian credit licence (ACL) and the obligations that are imposed on such licensees, as set out in Chapter 2 of the National Consumer Credit Protection Bill 2009 (Credit Bill).

2.2 In order to facilitate a smooth transition to licensing, persons currently engaging in credit activities will first need to be registered with the Australian Securities and Investments Commission (ASIC). These arrangements are set out in Schedule 2 to the National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009 (Transitional Bill). A detailed explanation of registration is in Chapter 3 of the explanatory memorandum to that Bill.

2.3 The key elements of the scheme are that:

- it requires persons who engage in credit activities to, initially, be registered with ASIC, and to subsequently hold an ACL;
- it imposes entry standards for registration and licensing, and enables ASIC to refuse an application where the person does not meet those standards;
- it requires registered persons and licensees to meet ongoing standards of conduct while they engage in credit activities; and
- ASIC has the power to suspend or cancel a licence or registration, or to ban an individual from engaging in credit activities.

## **Context of amendments**

2.4 Currently there is no consistency in the way in which the States and Territories regulate providers of credit and related services. Western Australia has a licensing system for both lenders and brokers. Victoria and the Australian Capital Territory have registration systems covering credit providers and brokers. The remaining States and Territories do not impose any entry requirements on credit providers. As a result, a finance broker who operates nationally is required to hold three different licences or registrations.

2.5 The proposed national licensing scheme therefore has benefits for industry in removing the need for lenders and brokers who operate nationally to meet different requirements.

2.6 At the same time the development of a greater and more complex range of credit products in the market has made it much less straightforward for consumers to determine whether a product is suitable for their needs and increased their dependence on intermediaries. As a result there are considerable information asymmetries that justify regulatory intervention. These issues have been evident for some time in the relationship between consumers and finance brokers or other intermediaries.

2.7 ASIC considered the scope for consumers to suffer financial loss as a result of incompetent, conflicted or misleading conduct by intermediaries in a 2003 report<sup>1</sup>. For example, if, as a result of unsuitable advice about a loan, the borrower is placed in a loan with an interest rate 0.5 per cent higher, then as a result the borrower would pay an additional \$15,500 in interest on a loan of \$175,000 over 25 years. It considered that the lack of uniform regulation contributed to these outcomes.

2.8 In recognition of the need for national regulation of brokers the Ministerial Council on Consumer Affairs (MCCA) released the draft Finance Brokers Bill (NSW) in November 2007.

2.9 The regulation impact statement developed in the preparation of the draft Finance Brokers Bill (NSW) documented in detail a number of undesirable market practices, including:

- brokers recommending products that earned them higher commissions but which are inappropriate, higher cost or unaffordable for their clients;

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1 *A Report to ASIC on the finance and mortgage broker industry*, Consumer Credit Legal Centre (NSW) Inc., March 2003.



- brokers misrepresenting the applicants' financial details so that the loan is approved, and the broker receives commissions, when, if the lender was aware of the borrower's actual financial position, they would reject the application;
- brokers 'upselling' loans to higher amounts to increase commissions; and
- brokers and lenders engaging in 'equity stripping', that is, arranging or providing high-cost loans for borrowers in financial difficulty (particularly those facing foreclosure of the family home), in the expectation that the borrower will default with subsequent transfer of the consumer's equity in their home to the broker and the lender through fees, charges and default interest.

2.10 Before the draft Finance Brokers Bill (NSW) was finalised the States agreed to the transfer of responsibility for credit to the Commonwealth allowing for the introduction of a national approach to licensing that extends to all persons engaging in credit activities.

2.11 Concerns such as those discussed above were considered in 2008 when both the Australian Government and the Council of Australian Governments decided that providers of credit and related services should be subject to a national licensing system administered by ASIC.

2.12 Developments in the delivery of credit mean that the distinctions between lenders, brokers and intermediaries are no longer straightforward, and that a comprehensive approach to licensing all market participants is therefore preferable.

2.13 This approach is consistent with the 2008 findings of the Productivity Commission, which recommended a licensing scheme for finance brokers and a licensing or registration scheme for lenders.<sup>2</sup>

2.14 The objectives in introducing the licensing system are to improve the conduct of the industry over time, and to address concerns such as those identified above, by having a market environment for credit in which:

- lenders and intermediaries act honestly and have adequate resources and competency to carry on their businesses;

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2 *Review of Australia's Consumer Policy Framework*, Productivity Commission Inquiry Report No. 45 of 30 April 2008.

- borrowers who suffer losses because of a breach of their obligations by lenders or intermediaries are able to obtain compensation; and
- dishonest or incompetent lenders and intermediaries are prevented from continuing to operate.

2.15 It was decided to provide a stand-alone national licensing scheme that is to be distinguished from the regulation of financial services under the *Corporations Act 2001* (Corporations Act). This is because credit involves consumers receiving money that they must repay, rather than the purchase of, or investment in, a financial product that generally includes the expectation of a benefit or return from the payment. From the outset the ACL is tailored to meet the issues arising in the credit context, thereby avoiding the need to extensively modify or vary elements of the Corporations Act.

## **Summary of new law**

2.16 The Credit Bill implements a national licensing scheme for persons engaging in credit activities. It is complemented by the Transitional Bill which establishes transitional arrangements that require persons who currently engage in credit activities to be registered by 30 June 2010, before becoming holders of an ACL.

2.17 The key elements of the scheme are that:

- it requires persons who engage in credit activities to, initially, be registered with ASIC, and to subsequently hold an ACL;
- it imposes entry standards for registration and licensing, and enables ASIC to refuse an application where the person does not meet those standards;
- it requires registered persons and licensees to meet ongoing standards of conduct while they engage in credit activities; and
- ASIC has the power to suspend or cancel a licence or registration, or to ban an individual from engaging in credit activities.

2.18 Participants will need to be registered or hold a licence if they engage in any of the following credit activities:

- entering into credit contracts or consumer leases;

- collecting money due under a credit contract (including where the lender has ceased providing credit, and where an assignee has purchased the debts from the original credit provider);
- acting as an intermediary between the borrower and the lender (principally as finance brokers, but not exclusively so, with the definition also covering bodies such as introducers, mortgage managers and aggregators); or
- suggesting or providing assistance in respect of a specific credit product with a particular credit provider.

2.19 Section 5 of the National Credit Code (Code) sets out the circumstances in which the Code will apply to the provision of credit. Generally it regulates the provision of credit where it is provided:

- for personal domestic or household use;
- to purchase, renovate or improve a residential investment property; or
- to refinance such credit.

2.20 The definition of ‘credit’ otherwise expressly excludes credit provided for business or investment use.

2.21 There are only limited and specific circumstances in which ASIC can refuse to register a person. Generally ASIC must register a person except where they meet any of the criteria resulting in automatic rejection of the application. The criteria relate to matters where there is an unacceptable risk, established by a public finding or outcome, to consumers; for example, members of organised criminal groups who are subject to court orders as prescribed in the Bill would be unable to be registered.

2.22 Once registered a person must meet set standards of conduct; for example, they will be required to act efficiently, honestly and fairly, to comply with the law, and to remain a member of an External Dispute Resolution Scheme (EDR Scheme) (as approved by ASIC). This will give consumers an avenue for the expeditious resolution of complaints through a no-cost forum, outside of the court system.

2.23 After becoming registered a person will then have to apply for a licence in the period from 1 July 2010 to 31 December 2010. A person engaging in credit activities for the first time after 1 July 2010 can no longer be registered and will need to apply for an ACL.

2.24 The entry requirements for licensing are more rigorous and will require ASIC to consider two key elements in respect of the application.

2.25 First, ASIC must assess whether the applicant has adequate organisational capacity, systems and competence to be able to comply with their obligations under the Credit Bill when engaging in credit activities. For example, ASIC will need to consider whether the applicant has systems in place both to meet responsible lending obligations, and to deal with conflicts of interest so that their clients are not disadvantaged where any such conflict exists.

2.26 Secondly, ASIC must assess whether there is any reason to doubt the applicant is a fit and proper person to be involved in the provision of credit services. In considering this question ASIC is able to take into account a broad range of relevant matters, such as their past conduct and compliance with credit laws of States and Territories (including prior to the enactment of the Credit Bill).

2.27 A special process (called streamlining) has been designed for authorised deposit-taking institutions (ADIs). It is considered that ADIs are subject to levels of government supervision that are sufficiently rigorous so that they do not need to demonstrate, in order to obtain a licence, their competencies and qualifications. Once licensed they will be subject to the same obligations as all other holders of an ACL.

2.28 The regulations may describe other categories of participants who may also be streamlined to an ACL.

2.29 These will be the only categories of person who will be streamlined, given the lack of uniformity in relation to registration and licensing of other credit providers and brokers or intermediaries at a State and Territory level.

2.30 A registered person or a licensee can authorise third parties to engage in credit activities on their behalf, without these persons having to hold a licence in their own right. These persons are known as 'credit representatives'. The registered person or licensee is generally responsible for their conduct, and must specify in writing the credit activities they can engage in.

2.31 ASIC has the power to suspend or cancel a licence or registration, or to ban individuals from engaging in credit activities. ASIC can take action as it considers appropriate in a broad range of circumstances to protect consumers from the risk of financial harm and to maintain the integrity of the scheme.

2.32 The national scheme means that a person who is banned or loses their licence or is deregistered by ASIC will be unable to legally engage in credit activities throughout Australia. At present there is nothing to prevent a person who has been banned in one State or Territory from continuing to operate as a broker or lender simply by moving to a different jurisdiction.

### Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Introduces nationally consistent licensing regime for lenders or intermediaries, irrespective of the jurisdiction they operate in.	In the Northern Territory, Queensland, South Australia and Tasmania there is no registration or licensing scheme for either lenders or intermediaries.
Introduces enhanced entry requirements and ongoing conduct obligations for lenders and intermediaries.	In the Australian Capital Territory and Victoria there is a registration scheme for both intermediaries, and lenders, and in New South Wales there is a negative registration scheme for both intermediaries and lenders.
<p>The main differences with the law operating in Western Australia are:</p> <ul style="list-style-type: none"> <li>• applicants are subject to a number of additional obligations, including a requirement to be a member of an EDR Scheme approved by ASIC;</li> <li>• significant ongoing requirements while licensed (including that the licensee must properly train and supervise people who act on their behalf); and</li> <li>• the capacity to remove the licence if the licensee no longer meets the entry requirements.</li> </ul>	<p>In Western Australia there is a licensing scheme for both lenders and intermediaries.</p> <p>The main features of the licensing scheme are:</p> <ul style="list-style-type: none"> <li>• entry requirements, including that the applicant is a fit and proper person;</li> <li>• some ongoing requirements while licensed; and</li> <li>• the capacity to remove the licence if the licensee no longer meets the entry requirements.</li> </ul>

### Detailed explanation of new law

#### When does a person engage in a credit activity?

2.33 The Dictionary to the Credit Bill contains detailed definitions of when a person will engage in credit activities, and therefore when the

requirements to be registered and licensed arise. Paragraphs 2.34 to 2.43 contain a summary of these provisions; a more detailed explanation is in Chapter 1 of this explanatory memorandum.

2.34 There are two broad categories of persons who are engaging in a credit activity:

- The first category primarily covers lenders and providers of consumer leases, but also embraces activities in relation to mortgages and guarantees where they are taken to secure or guarantee obligations under a credit contract or lease [*Part 1-2, Division 3, items 1, 3, 4 and 5 in the table in subsection 6(1)*].
- The second category is defined as persons who provide credit services, and primarily, but not exclusively, covers finance brokers and other intermediaries where they have a role in relation to securing credit for a consumer [*Part 1-2, Division 3, item 2 in the table in subsection 6(1)*].

2.35 In respect of the first category a person will engage in credit activities where:

- they are credit providers who provide credit, or lessors who provide consumer leases, as defined in the Code. They will engage in credit activities as long as they are a party to a contract. Credit providers and lessors will therefore need to remain licensed where they are still collecting money due under credit contracts or leases, notwithstanding that they no longer enter into new credit contracts or leases [*Part 1-2, Division 3, items 1(a) and 3(a) in the table in subsection 6(1)*];
- they carry on a business of providing credit or leases, and will therefore need to hold a licence where they engage in pre-contractual conduct before entering into credit contracts or leases [*Part 1-2, Division 3, items 1(b) and 3(b) in the table in subsection 6(1)*];
- they perform obligations or exercise rights in relation to a credit contract or lease, or a proposed credit contract or lease [*Part 1-2, Division 3, items 1(c) and 3(c) in the table in subsection 6(1)*].  
Examples of persons who fall within this definition include:
  - persons performing statutory obligations arising before a credit contract or lease has been entered into; and
  - mortgage managers where they are managing the credit contract on behalf of the credit provider;

- they are either *[Part 1-2, Division 3, item 4 in the table in subsection 6(1)]*:
  - a mortgagee under a mortgage that secures the obligations of a borrower under a credit contract; or
  - they perform obligations or exercise rights in relation to a mortgage;
- they are either *[Part 1-2, Division 3, item 5 in the table in subsection 6(1)]*:
  - the beneficiary of a guarantee that guarantees the obligations of a borrower under a credit contract; or
  - they perform obligations or exercise rights in relation to a guarantee; and
- they are a person who receives, by assignment in law, the rights of a credit provider or a lessor, and exercises those rights. This requirement arises irrespective of whether they receive the rights directly from the credit provider or lessor, or from a person who was themselves an assignee *[Part 1-2, Division 3, section 10]*. The definition does not extend to equitable assignees.

2.36 A person will be in the second category of persons who engage in credit activities by ‘providing credit services’ where they either:

- provide credit assistance; or
- act as an intermediary.

*[Part 1-2, Division 3, section 7]*

2.37 A person provides ‘credit assistance’ to a consumer where they:

- suggest that the consumer:
  - apply for a provision of credit in respect of a particular credit contract or lease;
  - apply for an increase to the credit limit of a particular credit contract; or
  - remain in a particular credit contract or lease; or

- assist the consumer, in respect of a particular credit contract or lease, to:
  - apply for a provision of credit in respect of a particular credit contract or lease; or
  - apply for an increase to the credit limit of a particular credit contract.

*[Part 1-2, Division 3, section 8]*

2.38 A person will provide credit assistance regardless of whether they deal directly with the consumer or with the consumer's agent. This will cover the situation where, for example, the person is assisting an elderly parent to apply for a credit contract, but is dealing with their children.

2.39 The definition is intended to apply to situations such as:

- finance brokers where they recommend a particular credit contract or lease; and
- a person who suggests a person apply for a particular credit contract or lease, but does not proceed to arrange the credit contract for the consumer.

2.40 A person will 'act as an intermediary' where they act as an intermediary between a credit provider and a consumer for the purposes of securing a provision of credit, or between a lessor and a consumer for the purposes of securing a lease. *[Part 1-2, Division 3, section 9]*

2.41 The definition is intended to regulate every person who may be an intermediary between the consumer and the credit provider. Innovations in credit product design and delivery now mean that a consumer may pass through a number of hands between the first person they deal with and the lender, and may be uncertain as to the roles or functions of all these different parties. It is intended that the licensing requirements will apply to all these persons.

2.42 A person can act as an intermediary either directly or indirectly. The intention is to require a person to hold a licence even where they may have no direct or face-to-face contact with the consumer, but, nevertheless act as an intermediary by preparing or passing on information, as the result of a request by a consumer or by another intermediary, and their role is wholly or partially to secure credit or a lease.

2.43 The definition is intended to apply to situations such as:



- finance brokers where, after recommending a particular credit contract, they proceed to arrange the credit with the credit provider;
- aggregators, in acting as a conduit between an individual broker and a credit provider;
- mortgage managers, where they are involved in arranging the credit (in addition to managing the credit once it has been provided); and
- persons who refer the consumer to another person, where this is done for the purpose of securing credit.

### **Registration and licensing of persons who engage in credit activities**

2.44 Paragraphs 2.45 to 2.56 summarise the transitional arrangements for registered persons. These paragraphs discuss the timetable for the transition from registration to licensing, enabling the changing requirements to be followed in sequence.

2.45 Initially, a person who engages in credit activities will have to register with ASIC between 1 April 2010 and 30 June 2010.

*[Transitional Bill, Schedule 2, Part 3, item 11]*

2.46 From 1 July 2010 persons engaging in credit activities for the first time, or those who failed to register, must first obtain for a licence.

*[Transitional Bill, Schedule 2, Part 2, item 4]*

2.47 A registered person will then need to apply for a licence between 1 July 2010 and 31 December 2010. The effect is that:

- a person who is registered as at 1 July 2010 has until 31 December 2010 to apply for a licence; and
- they can continue to engage in credit activities as a registered person until their licence application is determined by ASIC.

2.48 Table 2.1 summarises the changes in requirements over time.

**Table 2.1**

1 April 2010 to 30 June 2010	All persons engaging in credit activities will need to apply to be registered.  They need to demonstrate membership of an EDR Scheme in order to be registered.
1 July 2010 to 31 December 2010	All persons engaging in credit activities will commit an offence unless: <ul style="list-style-type: none"> <li>• they are registered; or</li> <li>• they are licenced.</li> </ul>
1 July 2010 and onwards	All persons engaging in credit activities for the first time on or after 1 July 2010 cannot be registered and must apply for and receive a licence before commencing business.
1 January 2011 to 30 June 2011	All persons engaging in credit activities will commit an offence unless: <ul style="list-style-type: none"> <li>• they are registered and have applied for a licence (and not had their application rejected); or</li> <li>• they are licenced.</li> </ul> <p>A person who was registered and has applied for a licence can continue engaging in credit activities until they get notice of the decision and then either:</p> <ul style="list-style-type: none"> <li>• where the application is granted — continue to engage in credit activities as authorised by the licence; or</li> <li>• where the application is rejected — cease engaging in credit activities or they will commit an offence.</li> </ul>
1 July 2011 and onwards	From this date at the latest, all persons engaging in credit activities must be holders of an ACL.  All registrations are cancelled.

2.49 A person must apply to ASIC to be registered by lodging an application in the approved form. They cannot be registered if:

- they are not a member of an EDR Scheme that has been approved by ASIC; and
- any of the criteria resulting in automatic exclusion apply (such as insolvency or convictions for serious fraud). The criteria relate to matters where there is an unacceptable risk, established by a public finding or outcome, to consumers were the applicant to be allowed to engage in credit activities. *[Transitional Bill, Schedule 2, Part 3, item 12]*

2.50 A registered person is required to conduct their business in accordance with a number of specific obligations, such as that they will engage in credit activities efficiently, honestly and fairly, and they will comply with the credit legislation and with any conditions imposed by ASIC on the registration. *[Transitional Bill, Schedule 2, Part 3, item 16]*

2.51 Given that applicants engaging in credit activities will not previously have been registered under the Commonwealth law the obligations applying to registered persons are limited to those that can be met immediately. Licensing will build on these requirements by requiring the registered person to demonstrate, for example, the necessary operational capacity and an appropriate commitment of resources to meet the required conduct standards.

2.52 The Transitional Bill also imposes specific obligations on registered persons to assist ASIC in gathering intelligence and information about registered persons, in order to assist it in its functions in regulating those engaging in credit activities. *[Transitional Bill, Schedule 2, Part 3, items 17 to 19]*

2.53 ASIC is given power to:

- impose a condition on a registration, or vary or revoke a condition *[Transitional Bill, Schedule 2, Part 3, items 14 and 15]*; and
- suspend or cancel a registration *[Transitional Bill, Schedule 2, Part 3, items 21 to 26]*.

2.54 All registered persons are required to apply for a licence by 31 December 2010. The entry requirements for licensing are more onerous and it may be that not all registered persons will be able to meet the requirements for holding a licence. Where a person's licence application is rejected by ASIC then their registration is automatically cancelled *[Transitional Bill, Schedule 2, Part 3, item 20]*. They can no longer legally engage in credit activities unless they make a fresh licence application which is approved by ASIC. *[Transitional Bill, Schedule 2, Part 3, item 6]*

2.55 If the person is granted a licence by ASIC then the registration no longer has any effect, as it has been superseded by the licence. For the purposes of certainty, it is expressly provided that all registrations cease to operate on 30 June 2011. *[Transitional Bill, Schedule 2, Part 3, item 21]*

2.56 The Transitional Bill allows for the dates by which a person must be registered or have applied for a licence to be varied by regulation. *[Transitional Bill, Schedule 2, Part 3, items 3 and 5]*

## National Consumer Credit Protection Bill

### *Part 2-1 — Requirement to be licensed to engage in credit activities*

#### *Division 2 — Engaging in credit activities without a licence*

2.57 A person who engages in credit activities after 1 July 2011 will need to hold a licence or they will commit an offence. It is expected that by this date, at the very latest, there will no longer be any need for transitional arrangements. *[Part 2-1, Division 2, subsection 29(1)]*

2.58 However a person who engages in a credit activity without holding a licence has a defence where:

- that person engages in the credit activity on behalf of a licensee;
- the licensee is authorised to engage in credit activities of that type;
- the person's conduct is within the authority of the licensee; and
- the person themselves is either:
  - an employee or a director of the licensee, or of a related body corporate of the licensee; or
  - a credit representative of the licensee.

*[Part 2-1, Division 2, subsection 29(3)]*

2.59 A 'credit representative' is a person formally appointed to act on behalf of the licensee, in accordance with section 64 or section 65.

2.60 A person will also have a defence where they are a representative of a person who is exempt from requiring a licence, and they are acting within the authority of their principal. *[Part 2-1, Division 2, subsection 29(4)]*

2.61 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).

2.62 A person's conduct is *within the authority* of another person as follows:

- where they are an employee of the person or of a related body corporate of the person — the conduct is within the scope of the employee's employment;
- where they are a director of the person or of a related body corporate of the person — the conduct is within the scope of the director's duties as director; or
- where they are a credit representative — the conduct is within the scope of the authorisation in writing specifically granted to the credit representative under subsection 64(1) or 65(1).

*[Part 1-2, Division 2, section 5]*

2.63 These provisions place the onus of proof on any defendant where the defence is that they have been engaging in credit activities on behalf of the licensee, and that their conduct was authorised by or conducted on behalf of that person.

2.64 The reason for the reversal of the onus of proof is that a defence of this type may raise complex factual matters that cannot be readily established by ASIC, but that will be squarely within the knowledge of the employee, director or credit representative. That person will be in the best position to both know and establish that their conduct has been authorised by their principal.

2.65 This offence has a criminal penalty of 200 penalty units, or imprisonment for 2 years or both, and a civil penalty of 2,000 penalty units (so that ASIC may appropriately penalise any contravention of the provision).

2.66 Consumers have specific remedies against persons where they engage in credit activities while unlicensed, as there is a clear need to deter this type of behaviour, and it is intended that consumers should only deal with those who have demonstrated they meet the entry requirements.

*Division 3 — Other prohibitions relating to the requirement to be licensed and to credit activities*

2.67 A person will commit an offence where:

- they hold out that they are authorised to engage in a credit activity when this is not the case (for example, that they hold an ACL when this is not the case) [*Part 2-1, Division 3, subsection 30(1)*];
- they hold out or advertise that they can engage in credit activities when they would commit an offence if they actually engaged in those credit activities [*Part 2-1, Division 3, subsection 30(2)*];
- where although licensed themselves, they conduct business with another person who is not licensed themselves but is still engaging in a credit activity [*Part 2-1, Division 3, section 31*]; and
- they demand or receive a fee from a consumer in relation to a credit activity, when they are unable to engage in the credit activity because they are not licensed [*Part 2-1, Division 3, section 32*].

2.68 A person must not, in the course of engaging in a credit activity, give information or a document to another person if they know, or are reckless, as to whether the information or document is false or misleading. The main purpose of this provision is to make it an offence for a person to forward an application for a credit contract or a lease that is false or misleading. [*Part 2-1, Division 3, section 33*]

2.69 These offences all have a criminal penalty, and a civil penalty of 2,000 penalty units (so that ASIC may appropriately penalise any contravention of the provision).

***Part 2-2 — Australian credit licences***

*Division 2 — Australian credit licences*

2.70 The holder of an ACL is only authorised to engage in the credit activities which are expressly specified by ASIC in a condition of the licence. [*Part 2-2, Division 2, section 35*]

*Division 3 — How to get an Australian credit licence*

2.71 A person applies for a licence by lodging their application with ASIC. The latest date at which a registered person can lodge their

application is 31 December 2010. However, from 1 July 2010 a person who is not registered must obtain a licence before engaging in credit activities. *[Part 2-2, Division 3, section 36]*

2.72 ASIC must grant the licence if the following requirements are satisfied:

- the application was made properly, that is, in the approved form and with all supporting information;
- ASIC has no reason to believe that the applicant is likely to breach the obligations that are imposed on a licensee under section 47; and
- ASIC has no reason to believe that the applicant is not a fit and proper person to engage in credit activities.

*[Part 2-2, Division 3, subsection 37(1)]*

2.73 Notwithstanding these requirements it is specifically provided that ASIC must not grant a licence where:

- the person is subject to a banning or disqualification order under Part 2-4 of the Credit Bill; or
- a prescribed State or Territory order is in effect:
  - where the applicant is a natural person — against that person;
  - where the applicant is a body corporate — against a director, secretary or senior manager who would perform duties in relation to the credit activities to be authorised by the licence; and
  - where the applicant is a partnership or trustee — against a partner or trustee who would perform duties in relation to the credit activities to be authorised by the licence.

*[Part 2-2, Division 3, section 40]*

2.74 In considering the latter two substantive grounds the onus of proof is on ASIC to establish reasons why the licence should be refused. ASIC is specifically directed to consider the following matters:

- whether a registration, licence or Australian financial services licence of the person has ever been suspended or cancelled;

- whether a banning order or disqualification order under Part 2-4 has ever been made against the person;
- whether a banning order or disqualification order under Division 8 of Part 7.6 of the Corporations Act has ever been made against the person;
- whether the person has ever been banned from engaging in a credit activity under a law of a State or Territory;
- whether the person has ever been insolvent (if they are not the trustees of a trust);
- whether the person has ever been disqualified from managing corporations under Part 2D.6 of the Corporations Act;
- any criminal conviction of the person, within 10 years before the application was made;
- any other matters that ASIC considers relevant; and
- any other matter prescribed by the regulations.

*[Part 2-2, Division 3, subsection 37(2)]*

2.75 ASIC is specifically directed to consider these matters in relation to:

- where the applicant is a natural person — that person;
- where the applicant is a body corporate — every director, secretary or senior manager who would perform duties in relation to the credit activities to be authorised by the licence; and
- where the applicant is a partnership or trustee — every partner or trustee who performs duties in relation to the credit activities to be authorised by the licence.

*[Part 2-2, Division 3, paragraphs 37(2)(g) and (h) and subsection 37(3)]*

2.76 The extent to which the conduct or characteristics of any of these persons will mean that the applicant may not meet the fit and proper requirement will depend on factors such as the background of the individual and the level of day-to-day control and power they exert over the credit activities engaged in by the applicant.



2.77 In the case of bodies corporate, the persons to be considered has been extended beyond directors or secretaries to include senior managers. A *senior manager* is defined as a person who:

- makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
- has the capacity to affect significantly the corporation's financial standing.

*[Part 1-2, Division 2, section 5]*

2.78 The skills and character of senior managers is relevant to ASIC's consideration of whether an application should be granted, as it is expected that they would be involved in setting the policies and procedures to be followed by those having direct contact with clients, including employees or credit representatives. They are also, in practice, usually responsible for ensuring that their representatives comply with the law. Their credentials and suitability are therefore critical to ASIC's assessment of the applicant.

2.79 The matters identified in subsection 37(2) are relevant to determining both whether or not the applicant is likely to contravene the obligations in section 47 and whether the fit and proper person requirement is met. Where present they will not necessarily be grounds for refusing a licence but they will be matters that always need to be considered by ASIC. For example, where a person has been convicted of serious fraud, the circumstances of the offence may show such a disregard for the interests of other persons or so great an abuse of their confidence or trust that ASIC can conclude the person is not a fit and proper person.

*[Part 2-2, Division 3, subsection 37(2)]*

2.80 Apart from the specific matters listed in subsection 37(2) ASIC may also take into account any other matters it considers relevant, in deciding whether or not to grant the applicant an ACL. The scope of the information is only limited by the extent to which it is relevant to this question. It would generally include the past business practices of the applicant, as this can be seen as an indicator of future behaviour. For example, a history of having provided credit or financial services without holding a licence when this would be required in law, would usually be relevant, and may be more relevant than a breach of the law that can be characterised as technical.

2.81 The first ground on which ASIC can refuse a licence is if it believes that the applicant is likely to contravene the obligations that are imposed on a licensee under section 47.

2.82 The statutory test is whether the person is likely to contravene the obligations, rather than whether they will contravene the obligations. On a restricted view of the latter phrase ASIC would be required to believe, as a matter of certainty, that the applicant will contravene the obligations in the future. Such a standard would be so onerous that it could result, in practice, in ASIC never being able to refuse a licence.

2.83 The test is whether they are likely to contravene the obligations under section 47. ASIC may take into account any information relevant to this question, such as:

- the extent of compliance by the applicant with analogous obligations while a registered person (where applicable);
- a history of the applicant that exhibits a reluctance to comply with State or Territory credit legislation prior to applying for the licence or while it is being considered;
- conduct of the applicant that shows deliberation and planning in wilfully disregarding the law; or
- any other conduct of the applicant that may lead ASIC to conclude, on reasonable grounds, that the applicant is not likely to comply (for example, where information from a State or Territory as to the activities of the applicant as a member of an organised criminal group warrants this conclusion).

2.84 Secondly, ASIC must have no reason to believe that the applicant is not a fit and proper person to engage in credit activities [Part 2-2, Division 3, paragraph 37(1)(c)]. This may cover situations such as where the person:

- lacks appropriate knowledge, skills, judgment or character;
- has been subject to adverse findings in relevant criminal or civil proceedings, reflecting on their character; or
- breached fiduciary obligations in a way that demonstrates they are not a fit and proper person.

2.85 ASIC may also require the applicant to produce further information before making a final decision (including a report by a suitably qualified person). This might cover, for example, a report on a serious or systematic breach of credit legislation by the applicant, and the way in which it has addressed that conduct. Providing for an independent expert view to be obtained in such circumstances will allow ASIC to make

a decision whether or not to approve a licence using the best possible information. *[Part 2-2, Division 3, subsection 37(4)]*

2.86 ASIC can also take into account information from other sources where it is relevant to its consideration of the licence application. This might include, for example:

- allegations of previous misconduct that ASIC or a State or Territory regulator is aware of, including those received through complaints by consumers;
- information received by ASIC or a State or Territory regulator in the course of the exercise of their statutory powers and functions;
- actions taken against the person by a relevant industry body or association; or
- intelligence received by ASIC from other market participants.

2.87 The transfer of information or documents to ASIC from State and Territory regulators is authorised in Schedule 1 of the Transitional Bill.

2.88 ASIC must provide the applicant with written notice of its decision on the licence application. Where ASIC has decided to refuse the licence this can only be done after giving the applicant an opportunity to be heard. The reasons for refusing the decision must be set out in the written notice. *[Part 2-2, Division 3, sections 41 and 42]*

2.89 Where ASIC rejects a licence application the applicant has a right to appeal that decision directly to the Administrative Appeals Tribunal, rather than a review by ASIC. *[Part 7-1, Division 3, section 327]*

2.90 On being licensed, ASIC must notify each licensee of their ACL number. Where the licensee is also the holder of an Australian financial services licence they are to be allocated the same number. *[Part 2-2, Division 3, section 43]*

2.91 Licensees will be required to cite their licence number on certain documents (as specified in the regulations) after a two-year transitional period. *[Part 2-2, Division 5, section 52]*

2.92 It will be an offence of strict liability if a licensee fails to include their licence number in documents as required *[Part 2-2, Division 5, subsections 52(3) and (4)]*. It is a strict liability offence as it is considered important that

consumers are made aware, in a straightforward and consistent fashion, that they are dealing with the holder of an ACL, and that they are also able to accurately check the licensee's details on the register maintained by ASIC.

2.93 This offence also has a civil penalty of 2,000 penalty units, so that ASIC may appropriately penalise any contravention of the provision.

*Persons who can be streamlined to an Australian credit licence*

2.94 A streamlined procedure for applying for an ACL is established for ADIs. Given the level of existing government oversight, it is considered that:

- there is no reason to believe that these lenders are likely to contravene the obligations that are imposed on a licensee under section 47; and
- there is no reason to believe that these lenders are not fit and proper persons to engage in credit activities.

2.95 ADIs therefore will not need to independently satisfy ASIC as to these requirements, and, as a result, they will only need to provide a statement, in an approved form, that they will comply with the obligations of a licensee. *[Part 2-2, Division 3, section 38]*

2.96 There is also provision for other classes of applicants to be streamlined through the regulations *[Part 2-2, Division 3, section 39]*. It is expected that this power will be used to streamline holders of 'A' or 'B' class licences under the *Finance Brokers Control Act 1975 (WA)*, as they have also been subject to robust oversight.

2.97 It is explicitly provided that a licence can be subject to conditions that, in turn, may be varied or revoked, or subject to cancellation or suspension, and that no compensation is payable in relation to any such action in respect of a licence. *[Part 2-2, Division 3, section 44]*

*Division 4 — Conditions on an Australian credit licence*

2.98 ASIC must specify, as a licence condition, the types of credit activities that the licensee is authorised to engage in, as an applicant may only meet the criteria to engage in some, but not all, credit activities. For example, a finance broker may not be able to demonstrate the necessary competence or expertise to be authorised to lend. *[Part 2-2, Division 4, subsection 45(6)]*

2.99 Once a person is licensed, ASIC may at any time impose, vary or revoke conditions on a licence. ASIC must however first give the licensee an opportunity to make submissions and give evidence at a private hearing. *[Part 2-2, Division 4, subsection 45(5)]*

2.100 ASIC can use this power flexibly to, for example, address systemic issues by imposing additional conditions on the way in which representatives are trained or supervised.

2.101 ASIC's power to vary or revoke conditions does not extend to any standard conditions prescribed by the regulations. *[Part 2-2, Division 4, subsection 45(7)]*

2.102 Where the licensee is regulated by Australian Prudential Regulation Authority (APRA), special procedures apply. If the licensee is an ADI and the proposed condition would have the result of significantly limiting or restricting the ADI's ability to carry on all or any of its banking business, then the power to impose, vary or revoke such a condition can only be exercised by the Minister, and not ASIC. *[Part 2-2, Division 4, subsection 46(2)]*

2.103 The Minister refers to the Minister responsible for administering the Transitional Bill, determined in accordance with section 19A of the *Acts Interpretation Act 1901*.

2.104 If the licensee is not an ADI but still regulated by APRA, then ASIC must consult with APRA in relation to any new conditions, or varying existing conditions, where they would prevent the licensee from carrying on all or any of its usual activities. This is intended to allow for a consistency in approach by the two regulators. *[Part 2-2, Division 4, subsection 46(1)]*

#### *Division 5 — Obligations of licensees*

##### General conduct obligations

2.105 Once licensed, the licensee must conduct their business in accordance with a number of specific obligations. The obligations build on and are more rigorous than those for registered persons and, in particular, require the applicant to have in place systems and procedures to meet these obligations. *[Part 2-2, Division 5, section 47]*

2.106 The obligations are to:

- do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly *[Part 2-2, Division 5, paragraph 47(1)(a)]*;

- have in place adequate arrangements to ensure that clients of the licensee are not disadvantaged by any conflict of interest that may arise wholly or partly in relation to credit activities engaged in by the licensee or by its representatives [*Part 2-2, Division 5, paragraph 47(1)(b)*];
- comply with any conditions imposed by ASIC on their licence [*Part 2-2, Division 5, paragraph 47(1)(c)*];
- comply with the credit legislation [*Part 2-2, Division 5, paragraph 47(1)(d)*];
- take reasonable steps to ensure that its representatives comply with this legislation [*Part 2-2, Division 5, paragraph 47(1)(e)*];
- maintain the competence to engage in the credit activities authorised by the licence [*Part 2-2, Division 5, paragraph 47(1)(f)*];
- ensure that its representatives are adequately trained and are competent to engage in the credit activities authorised by the licence [*Part 2-2, Division 5, paragraph 47(1)(g)*];
- have an internal dispute resolution procedure that complies with standards or requirements made or approved by ASIC and covers disputes in relation to the credit activities engaged in by the licensee or by its representatives [*Part 2-2, Division 5, paragraph 47(1)(h)*];
- be a member of an approved EDR Scheme [*Part 2-2, Division 5, paragraph 47(1)(i)*];
- have compensation arrangements, for loss or damage, as a result of breaches of their obligations, in accordance with the regulations or as otherwise approved in writing by ASIC [*Part 2-2, Division 5, paragraph 47(1)(j) and section 48*];
- have adequate arrangements and systems to ensure compliance with its obligations under this section, and a written plan which documents those arrangements and systems [*Part 2-2, Division 5, paragraph 47(1)(k)*];
- except where the licensee is a body regulated by APRA, have adequate resources to engage in the credit activities and have adequate risk management systems [*Part 2-2, Division 5, paragraph 47(1)(l)*]; and

- comply with any additional obligations imposed by regulation [*Part 2-2, Division 5, paragraph 47(1)(m)*].

2.107 These obligations are principle-based and it is intended that licensees can be flexible in adopting practices that suit their organisation. For example, if a licensee distributes credit contracts where there is a significant risk of consumer detriment where they are missold this will need to be reflected in the way in which it meets these obligations (for example, by training or monitoring of its representatives that is consistent with the level of risk).

2.108 These obligations are intended to ensure that licensees demonstrate a necessary commitment to meeting the expected standards of conduct of a licensee, and that persons who cannot do so, irrespective of the reason, are excluded.

2.109 It is expressly provided that compliance with the obligations in paragraphs 47(1), (b), (g), (k) and (l) is to be determined according to the nature, scale and complexity of the credit activities engaged in by the licensee.

2.110 The reference to ‘nature, scale and complexity’ enables a licensee to tailor the way in which they comply with the obligations, taking into account factors such as:

- the types of credit activities the licensee engages in;
- the diversity and structure of the licensee’s operations (including the geographical spread of the operations and the extent to which the licensee outsources any of its functions);
- the volume and size of the transactions the licensee is responsible for; and
- the number of people in the licensee’s organisation.

2.111 The obligations in section 47 continue as long as a person is licensed. It is unlikely that a licensee can meet all the obligations in the same way over time, and there is therefore a need for licensees to monitor and review the way in which they address these requirements, and to alter their practices in the light of experience and changes in the operating environment.

2.112 The first requirement is that a licensee must do all things necessary to ensure that the credit activities authorised by the registration are engaged in efficiently, honestly and fairly [*Part 2-2, Division 5, paragraph 47(1)(a)*]. This requires the licensee to conduct itself in a way that

is consistent with, and reflects an appreciation of, the need to meet community standards of efficiency, honesty and fairness.

2.113 The efficiency criterion cannot be used to justify conduct that is unfair or dishonest. For example, if a person consistently arranges for consumers to sign contract documents without any explanation that may be efficient but in all likelihood it would not meet the required standard of honesty or fairness, both as to the procedures adopted and the outcomes for consumers.

2.114 The licensee must also do all things necessary to meet this requirement. This is a higher requirement than in relation to other obligations, where the licensee must 'take reasonable steps to ensure' it is meeting the obligation.

2.115 It is unlikely that the licensee will be complying with the 'efficiently, honestly and fairly' obligation if it is failing to comply with the other obligations. However, the 'efficiently, honestly and fairly' obligation is also a stand-alone obligation that operates separately from the other obligations.

2.116 A licensee must have in place adequate arrangements to ensure that their clients are not disadvantaged by any conflict of interest that arises wholly or partly in relation to credit activities engaged in by the licensee or by its representatives. *[Part 2-2, Division 5, paragraph 47(1)(b)]*

2.117 This obligation only applies to conflicts of interests where an interest of the licensee conflicts with a legal obligation or duty that person owes to their client, including where that obligation arises under statute, at common law or under a contract between the licensee and the client. It does not otherwise require a licensee to take action in respect of different interests of parties where they do not constitute a conflict of interest at law.

2.118 The following examples illustrate the intended application of this requirement. These examples do not provide guidance on the other general obligations, including, for example, the obligation to act efficiently, honestly and fairly.

### **Example 2.1**

A lender is selling the borrower's property pursuant to a power of sale under a mortgage. The lender sells the property to a company controlled by a director of the lender. The property is sold for less than its market value, but for an amount sufficient to extinguish the liability of the borrowers to the lender. There is a conflict of interest between the interests of the lender and the borrower, and the borrower has been



disadvantaged (*Australia and New Zealand Banking Group Ltd v Bangadilly Pastoral Company Pty Ltd* [1978] HCA 21; 139 CLR 195).

### **Example 2.2**

A finance broker has appointed credit representatives and has entered into agreements under which the level of remuneration increases if the credit representative arranges 30 loans in a month. A credit representative needs to arrange two more loans to achieve this target, and does so by placing borrowers in credit contracts that are unsuitable. By being placed in an unsuitable credit contract, these clients have been disadvantaged by the credit representative's conflict of interest in receiving the higher remuneration.

### **Example 2.3**

A finance broker was aware of the risk of its credit representatives acting in the way described in Example 2.2, and had in place reasonable procedures and levels of supervision to address it. The licensee has adequate arrangements to ensure its clients are not disadvantaged by this possible conflict.

### **Example 2.4**

The lender sets the price of its credit significantly above market rates, but is not under any obligation or duty to its borrowers in respect of the price. As there is no conflict between the interests of the lender and the borrower, the lender does not need to have arrangements to address this practice.

### **Example 2.5**

The lender in Example 2.4 also operates as a finance broker, and in this capacity regularly arranges credit for its clients at above market interest rates. Some of these clients would be eligible for a loan with interest at a market rate. There is a conflict between the interests of the finance broker and its clients and some clients are being disadvantaged as a result.

### **Example 2.6**

A finance broker also sells investment properties on behalf of a third party. The finance broker has a discretion to set the price for the property above a set minimum, and earns higher commissions for larger loans. The broker must ensure they have adequate arrangements to prevent any disadvantage to clients from the incentive they have to set higher property prices so as to maximise loan values and receive higher commissions.

2.119 A licensee must comply with any conditions imposed by ASIC on their licence, including any standard conditions included in the regulations applying to all licensees. *[Part 2-2, Division 5, paragraph 47(1)(c)]*

2.120 A licensee must comply with the credit legislation *[Part 2-2, Division 5, paragraph 47(1)(d)]*. This requires the licensee to conduct their business with an appreciation of the credit legislation, and the need to conduct their business with respect for the law. They need to consider their application to all aspects of their operation, but especially in their dealings with consumers as the regulation of this relationship is one of the main areas addressed in the legislation.

2.121 Where the licensee may breach the credit legislation because of the conduct of its representatives, rather than its own conduct, then it will need to adopt procedures which reflect this. For example, where the licensee has a number of credit representatives in a range of different locations it will need to adopt different procedures to ensure it is complying than a licensee with a single retail outlet.

2.122 Where a breach of the legislation has occurred, whether as a result of the conduct of a representative or otherwise, then the licensee would need to consider whether the circumstances of the breach are such that it is likely to reoccur, and, if so, to take action to address this to ensure it complies in the future.

2.123 A licensee must take reasonable steps to ensure that its representatives comply with the credit legislation *[Part 2-2, Division 5, paragraph 47(1)(e)]*. Representatives refers to the following classes of persons (but only to the extent their activities or duties place them in a position where the licensee must comply with the credit legislation as a consequence of their conduct) *[Part 1-2, Division 2, section 5]*:

- any employees and directors of the licensee, or of a related body corporate of the licensee; and
- any other person acting on behalf of the licensee, including credit representatives.

2.124 A licensee must have and maintain the competence to engage in the credit activities authorised by the licence *[Part 2-2, Division 5, paragraph 47(1)(f)]*. This primarily requires the applicant to demonstrate that they possess, through appropriate personnel, the skills and experience relevant to all the credit activities authorised by the licence. Where the applicant only engages in a narrow range of credit activities then the requisite competence will be correspondingly limited.

2.125 A licensee must ensure that its representatives are adequately trained and are competent to engage in the credit activities authorised by the licence [*Part 2-2, Division 5, paragraph 47(1)(g)*]. The licensee must ensure representatives understand and adhere to compliance arrangements and that where they do not display the knowledge or skills to meet this obligation an appropriate response is provided, whether it be further training or disciplinary action. It is expected that ASIC will provide guidance on what it considers are the relevant competency standards. Nevertheless, the obligation must still be met prior to any guidance from ASIC.

2.126 The licensee must have an internal dispute resolution procedure that complies with standards or requirements made or approved by ASIC and covers disputes in relation to the credit activities engaged in by the licensee [*Part 2-2, Division 5, paragraph 47(1)(h)*]. It is expected that these standards would cover matters such as transparency, that is, the internal dispute resolution procedures are in writing and known to its representatives where it is relevant to their functions or duties. The standards will be particularly relevant to small businesses and to those who do not have previous experience of internal dispute resolution procedures.

2.127 The licensee must be a member of an approved EDR Scheme [*Part 2-2, Division 5, paragraph 47(1)(i)*]. It is expected that a licensee would use complaints, whether resolved internally or externally, as part of its compliance program and that the licensee would therefore address any structural weaknesses or actual or potential non-compliance with the law identified through the complaints handling process.

2.128 It is also important that, where a complaint cannot be resolved internally, a licensee deals appropriately with the transfer of the complaint to the EDR Scheme. The licensee is required to disclose their membership of the EDR Scheme to consumers if the complaint cannot be resolved internally (as well as in some of the documents to be provided to the consumer by the licensee).

2.129 The licensee must have compensation arrangements, for loss or damage, as a result of breaches of its obligations in accordance with the regulations or as otherwise approved in writing by ASIC [*Part 2-2, Division 5, paragraph 47(1)(j) and section 48*]. This obligation only arises when compensation arrangements are specified, either in the regulations or formally by ASIC.

2.130 The licensee must have adequate arrangements and systems to ensure compliance with its obligations under this section, and a written plan which documents those arrangements and systems. [*Part 2-2, Division 5, paragraph 47(1)(k)*]

2.131 This requirement assists licensees to determine the scope of their obligations, and to ensure they are complying with the other general conduct obligations.

2.132 Except where the licensee is a body regulated by APRA, the licensee must have adequate resources to engage in the credit activities and have adequate risk management systems [*Part 2-2, Division 5, subparagraph 47(1)(i)*]. This will require applicants to demonstrate they have sufficient resources to be able to meet their obligations; it is not sufficient for a person to have a commitment to complying with the law if they fail, for example, to commit sufficient resources to monitor changes to the law, and then fail to implement modifications to their procedures as a result.

2.133 Except where the licensee is a body regulated by APRA, the licensee must have adequate risk management systems [*Part 2-2, Division 5, subparagraph 47(1)(ii)*]. This will require licensees to be able to identify risks faced by its business, and develop appropriate responses to effectively manage those risks.

#### Obligations to assist ASIC

2.134 The Credit Bill imposes specific obligations on licensees to assist ASIC in gathering intelligence and information about licensees, in order to assist it in its functions in regulating those engaging in credit activities. [*Part 2-2, Division 5, sections 49 to 51*]

2.135 First, a licensee must provide ASIC with information about their credit activities, whether in response to a written notice from ASIC or where this is required by the regulations. [*Part 2-2, Division 5, sections 49 and 50*]

2.136 ASIC may require the licensee to provide a report, prepared by a suitably qualified person, covering matters specified by ASIC in the written notice. [*Part 2-2, Division 5, subsection 49(3)*]

2.137 It will be an offence of strict liability if a licensee:

- fails to comply with a notice to provide information to ASIC within the time specified in the notice [*Part 2-2, Division 5, subsections 49(7) and (8)*]; or
- fails to provide information as prescribed by the regulations [*Part 2-2, Division 5, subsections 49(4) and (5)*].

2.138 These are strict liability offences as it crucial that ASIC is able to obtain information about the conduct of a licensee in a timely way, that allows it to effectively perform its regulatory role.

2.139 These offences also all have a criminal penalty, and a civil penalty of 2,000 penalty units, so that ASIC may appropriately penalise any contravention of these provisions.

2.140 A licensee must also give reasonable assistance to ASIC as requested, in relation to whether the licensee and their representatives are complying with credit legislation. *[Part 2-2, Division 5, section 51]*

2.141 Reasonable assistance is not defined in the Credit Bill, but means conduct such as making and keeping appointments with ASIC staff, and cooperating in a reasonable way with requests by ASIC for assistance.

2.142 If the request for reasonable assistance is in writing it is expressly stated that it is not a legislative instrument. This statement is declaratory of the existing position, consistent with section 5 of the *Legislative Instruments Act 2003*. *[Part 2-2, Division 5, subsection 50(2)]*

2.143 The assistance may include the licensee showing ASIC books of the licensee. This requirement is not to be read as requiring the licensee to show books where it would not otherwise be required to do so as a result of the proper exercise of ASIC's powers. *[Part 2-2, Division 5, subsection 50(4)]*

2.144 A licensee is required to lodge with ASIC, on an annual basis, a compliance certificate. The certificate must:

- be in the form approved by ASIC — it is anticipated that the form will require a licensee to certify that they are complying with their obligations under the Credit Bill;
- be signed:
  - by the licensee, where they are a natural person, or by a partner or trustee (if the licensee is a partnership or trust); or
  - where the licensee is a body corporate, by a person of a kind to be defined in the regulations; and
- be lodged within 45 days of the licensee's licensing anniversary (that is, the anniversary of the day on which the licence took effect).

*[Part 2-2, Division 5, subsections 53(2), (3) and (7)]*

2.145 It will be an offence of strict liability if a licensee fails to lodge the compliance certificate with ASIC *[Part 2-2, Division 5, subsections 53(5)]*

*and (6)*. It is a strict liability offence as if there is a reason why the licensee cannot make the necessary certification it is crucial that ASIC is informed of this in accordance with the law.

2.146 The licensee may be required to pay a fee on the lodgment of this certificate in accordance with the requirements of the National Consumer Credit Protection (Fees) Bill 2009.

*Division 6 — When a licence can be suspended, cancelled or varied*

Subdivision A — Suspensions and cancellations

2.147 ASIC may suspend or cancel a licence without a hearing in limited circumstances only. First, it can do so where it receives a request from the licensee in the approved form, or where the licensee has ceased engaging in credit activities, or have never commenced engaging in credit activities. *[Part 2-2, Division 5, paragraphs 54(1)(a) and (b) and subsection 54(3)]*

2.148 Secondly, in a limited number of situations, ASIC can suspend or cancel a licence without a hearing where there may be an urgent need to do so. These circumstances are where a specified person is:

- insolvent (where they are not the trustees of a trust);
- convicted of serious fraud;
- they are incapable of managing their affairs because of physical or mental incapacity; or
- becomes subject to a prescribed State or Territory order.

*[Part 2-2, Division 5, subsection 54(2)]*

2.149 The persons specified for the purpose of deciding whether ASIC can take action without a hearing are:

- where the applicant is a natural person — that person;
- where the applicant is a body corporate — every director, secretary or senior manager who performs duties in relation to the licence; and
- where the applicant is a partnership or trustee — every partner or trustee who performs duties in relation to the licence.

*[Part 2-2, Division 5, paragraph 54(1)(c)]*

2.150 ASIC can also suspend or cancel a licence after a hearing, on the following grounds:

- the licensee has contravened its obligations in section 47, or ASIC has reason to believe that they are likely to do so;
- the application for the licence contained information that was false or materially misleading (including where it was false or misleading because it failed to include relevant information); or
- ASIC has reason to believe that the fit and proper person requirement is no longer satisfied, taking into account the same considerations as those relevant to the question of whether an application for a licence should be granted.

*[Part 2-2, Division 5, subsections 55(1) and (2)]*

2.151 The requirement that the licensee is a fit and proper person is therefore continuing in nature. Where the licensee engages in conduct or otherwise demonstrates that they are no longer a fit and proper person, then ASIC can take action.

2.152 Special procedures apply in relation to possible suspensions or cancellations of a licence held by an APRA regulated body. ASIC is required to consult with APRA as follows:

- where the licensee is an ADI or a related body corporate of an ADI — where the proposed cancellation or suspension would prevent the ADI from being able to carry on all or any of its banking business, then:
  - the power to cancel or suspend the licence can only be exercised by the Minister;
  - the Minister must not exercise the power until they have considered advice from ASIC; and
  - ASIC cannot give advice given until it has consulted APRA about the proposed action; and
- in all other cases where the licensee is regulated by APRA — ASIC must consult with APRA where the proposed cancellation or suspension would prevent the body from being able to carry on all or any of its usual activities.

*[Part 2-2, Division 5, section 56]*

Subdivision B — Variations

2.153 ASIC can vary a person's licence as a result of a change in the name of the licensee. This is to ensure that where a licensee has changed their name, consumers are able to search the register using the new name. *[Part 2-2, Division 5, section 57]*

Subdivision C — Miscellaneous rules about suspensions, cancellations and variations

2.154 Where ASIC suspends a licence, then the licence has no effect. The person can therefore no longer engage in credit activities except where ASIC specifically provides for this in the suspension.

2.155 Notwithstanding that ASIC has suspended or cancelled a licence, it may specify that the licence continues for the purpose of specified provisions of the Credit Bill in relation to either a specified matter or for a specified period, or both these matters. *[Part 2-2, Division 5, sections 58 and 62]*

2.156 This allows ASIC to deal flexibly with suspensions or cancellations by requiring the person to comply with some of the obligations that attach to licensees, rather than all these obligations ceasing with the suspension. For example, ASIC could stipulate that obligations in relation to representatives continue for a specified period.

2.157 ASIC can revoke any suspension of a licence at any time. *[Part 2-2, Division 5, section 59]*

2.158 The date on which any change by ASIC takes effect is the date on which the notice is given to the licensee. *[Part 2-2, Division 5, subsection 60(2)]*

2.159 ASIC is required to give written notice of any suspension, or its revocation, or the cancellation or variation of a licence to the licensee. Where ASIC suspends or cancels a licence it is required to specify the reasons for taking this action. *[Part 2-2, Division 5, sections 60 and 61]*

2.160 As soon as practicable after the notice is given to the licensee, ASIC must publish a notice of the cancellation or suspension on its website, specifying when it came into effect. *[Part 2-2, Division 5, subsection 60(3)]*



***Part 2-3 —Credit representatives and other representatives of licensees***

*Division 2 — Authorisation of credit representatives*

2.161 In order to allow flexibility in the market a registered person or licensee may authorise third parties to engage in credit activities on its behalf. These persons are described as credit representatives in the legislation. *[Part 2-3, Division 2, section 64]*

2.162 In paragraphs 2.165 to 2.193, the registered person or licensee who appoints a credit representative is referred to as the principal.

2.163 This Division of the Credit Bill sets out:

- the circumstances and restrictions on the appointment of credit representatives;
- the consequences of an appointment in breach of these requirements; and
- the rules for determining the liability of the principal for a credit representative.

2.164 For the avoidance of doubt it is expressly stated in this explanatory memorandum that the Credit Bill does not seek to set out prescriptive rules to, for example, the following effect:

- a broker is always only the agent of the consumer;
- a broker can be the agent of the lender or the agent of a lenders mortgage insurer;
- a person cannot be an agent for more than one party involved in a transaction; and
- a person who holds an ACL can be appointed as an authorised representative by the holder of an Australian financial services licence, and similarly a person who holds an Australian financial services licence can be appointed as a credit representative by the holder of an ACL.

2.165 The principal must formally authorise a credit representative in writing. The principal may authorise the credit representative to either engage in the same activities as the principal, or to only engage in some of those activities. *[Part 2-3, Division 2, subsections 64(1) and (3)]*

2.166 An authorisation will be of no effect where it purports to authorise:

- a credit representative to engage in a credit activity beyond that allowed by the registration or licence;
- a person to engage in a credit activity where the person is currently prevented from engaging in that credit activity by a banning or disqualification order (whether under this Commonwealth law or under a State or Territory law);
- a person who is not a member of an EDR Scheme in their own right; or
- a natural person who has been convicted, within the last 10 years, of serious fraud; or
- a person where a prescribed State or Territory order is in effect against:
  - against the proposed credit representative where they are a natural person;
  - any director, secretary or senior manager who would perform duties in relation to the credit activities specified in the authorisation, where the proposed credit representative is a body corporate; or
  - a partner or trustee who would perform duties in relation to the credit activities specified in the authorisation, where the proposed credit representative is a partnership or the trustees of a trust.

*[Part 2-3, Division 2, subsections 64(4) and (5)]*

2.167 The intention is to require the principal, as part of their obligations in relation to credit representatives, to make relevant inquiries into their background, both before appointing a person as a credit representative, and while they continue to so act. This is consistent with the general principal that licensees are responsible for their representatives.

2.168 Generally credit representatives cannot in turn authorise other persons to act as either their own credit representatives or as a credit representative of the principal. This is because the principal is responsible for the conduct of its credit representatives and should therefore be able to determine who can act when cloaked in its authority.

2.169 The exception to this principle is where a body corporate is appointed as a credit representative. In this case the credit representative may, but with the consent of the licensee, appoint a natural person or persons to engage in credit activities on behalf of the principal. *[Part 2-3, Division 2, section 65]*

2.170 A sub-authorisation of a credit representative by a body corporate will be of no effect where that authorisation purports to authorise:

- an individual to engage in a credit activity where any of the same matters set out in paragraph 2.163 apply to that individual; or
- an individual to engage in a credit activity where the principal has not given their written consent.

*[Part 2-3, Division 2, subsections 64(5) and (6)]*

2.171 In order to give effect to these restrictions on credit agents a principal will commit an offence where they either:

- give an authorisation to a credit agent that is of no effect under either section 64 or 65 *[Part 2-3, Division 2, section 69]*; or
- fail to revoke or vary, as soon as practicable, an authorisation that is of no effect under either Section 64 or 65 *[Part 2-3, Division 2, section 70]*.

2.172 Both of these offences have a criminal penalty, and a civil penalty of 2,000 penalty units (so that ASIC may appropriately penalise any contravention of the provision).

2.173 A credit representative may be authorised to act for more than one principal. However, each principal must consent to the person also being the credit representative of each of the other licensees (except where the person is acting as the credit representative of a number of related bodies corporate). *[Part 2-3, Division 2, section 66]*

2.174 A licensee is prohibited from acting as the credit representative of another licensee where the second licensee has a licence which authorises it to engage in the same activities as the first licensee. *[Part 2-3, Division 2, section 67]*

2.175 A principal may vary or revoke an authorisation at any time, by written notice to the credit representative *[Part 2-3, Division 2, section 68]*. The credit representative must then:

- in the case of a variation — act in accordance with the written authority as varied; and
- in the case of a revocation — cease engaging in credit activities.

2.176 A person who has authorised a credit representative, or has purported to do so, is required to:

- where any such authorisation is or would be, either in part or totally, of no effect — not authorise them *[Part 2-3, Division 2, section 69]*; and
- where they become aware of a matter which means the authorisation, either in part or totally, is of no effect — either revoke the authorisation or vary it if possible so that it continues to have effect *[Part 2-3, Division 2, section 70]*.

2.177 Once a licensee or a corporate credit representative has appointed a person as a credit representative they are required to notify ASIC within 15 business days of their appointment. The notice provided to ASIC must include:

- the name and business address of the credit representative;
- details of the authorisation, including the date on which it was made and what the credit representative is authorised to do on behalf of the principal;
- details of any other principal for whom the credit representative is authorised to act; and
- details of the EDR Scheme the credit representative has joined.

*[Part 2-3, Division 2, subsections 71(1) to (3)]*

2.178 A licensee or a corporate credit representative must advise ASIC within 10 business days of the following matters:

- any changes to the information previously provided to ASIC in respect of the credit representative; or
- the revocation of the authorisation.

*[Part 2-3, Division 2, subsection 71(4)]*

2.179 A person will commit an offence (and be liable to a criminal penalty, and a civil penalty of 2,000 penalty units, so that ASIC may appropriately penalise any contravention of the provision) where they are subject to a requirement to give a notice to ASIC and they fail to do so.

*[Part 2-3, Division 2, subsections 71(5) and (6)]*

2.180 This is also an offence of strict liability as it is important that ASIC be advised of this information within a relatively short period so that it can update its register, and maintain the integrity of this database. The register will be used regularly by both:

- consumers, to verify the status of the person they are dealing with; and
- by other persons engaging in credit activities, to ensure, for example, that they are not dealing with someone who is not authorised, in breach of the law.

2.181 ASIC must allocate a unique credit representative number to each authorised credit representative, and must give written notice of this number to both the credit representative and the person who authorised them. *[Part 2-3, Division 2, section 72]*

### *Division 3 — Information about representatives*

2.182 ASIC is specifically authorised to give a licensee information about its representatives, where this is relevant to their conduct or continuing appointment. *[Part 2-3, Division 3, section 73]*

2.183 This enables ASIC, in specified circumstances, to provide a licensee with information it has obtained about a current or potential representative so that the licensee can decide whether to employ them, or to terminate or vary their existing terms of appointment.

2.184 The information provided by ASIC can only be used by the licensee, or to any person who the licensee provides it to (such as its lawyers), for the following purposes:

- making a decision about whether to take action against the person; and
- taking any action as a result of that decision.

*[Part 2-3, Division 3, subsection 73(2)]*

2.185 In relation to information provided by ASIC a person:

- will commit an offence where they use it for a purpose other than those specified in paragraph 2.181 *[Part 2-3, Division 3, subsections 73(4) and (5)]*; and
- will have qualified privilege where they use it for those purposes *[Part 2-3, Division 3, subsection 73(7)]*.

2.186 This offence has a criminal penalty of 50 penalty units, or imprisonment for one year or both, and a civil penalty of 2,000 penalty units (so that ASIC may appropriately penalise any contravention of the provision).

2.187 The Credit Bill provides that where a person has qualified privilege then the person:

- has qualified privilege in proceedings for defamation; or
- is not liable, in the absence of malice on the person's part, to an action for defamation at the suit of a person.

*[Part 1-2, Division 4, section 16]*

*Division 4 — Liability of licensees for representatives*

2.188 This Division deals with the liability of principals for the conduct of their credit representatives, including where the credit representative acts for more than one principal.

2.189 The Division applies to conduct on which a client could reasonably be expected to rely and on which the client did rely in good faith. Where there is reliance it would be unusual for it not to be in good faith. *[Part 2-3, Division 4, section 74]*

2.190 Where a representative acts for only one principal, that principal is responsible for the conduct of its credit representative, whether or not

the conduct is within the authority of the licensee. *[Part 2-3, Division 4, section 75]*

2.191 Where a credit representative acts for several principals, then the liability of these principals is to be determined in accordance with the following principles:

- where the conduct relates to a particular class of credit activity and the person is a credit representative of only one of those principals in respect of that type of activity — that principal is solely responsible;
- if the representative is the representative of more than one of the principals in relation to a class of credit activity then:
  - where the conduct has only been authorised by one of the principals — that principal is solely responsible; and
  - where the conduct has been authorised by two or more of the principals — those principals are jointly and severally responsible to the client; and
- in all other cases — all of the principals are jointly and severally responsible for the conduct, whether or not the credit representative's conduct is within authority in relation to any of them.

*[Part 2-3, Division 4, section 76]*

2.192 Where, as a result of the operation of these provisions, a licensee is responsible for the conduct of a representative, the licensee will be liable to a client for any loss or damage they suffered as a result of the conduct of the representative. *[Part 2-3, Division 4, section 77]*

2.193 While this Division determines the liability of principals for the conduct of representatives it does not:

- make a principal either civilly or criminally liable as a result of the conduct of a representative, when they would otherwise be liable *[Part 2-3, Division 4, subsection 78(3)]*; or
- relieve a representative of liability they have to a client or the licensee *[Part 2-3, Division 4, subsection 78(4)]*.

2.194 The Credit Bill provides that any agreement is void to the extent it attempts to avoid the outcomes in paragraphs 2.190 to 2.191, or change the liability of persons inconsistently with the Credit Bill. However a principal can obtain an indemnity from the credit representative or from

another principal for any potential liability arising under this Division. A principal may also indemnify another principal in respect of the conduct of the credit representative. This is to allow these parties to be flexible in determining how to apportion liability amongst themselves. [Part 2-3, Division 4, subsections 78(5) and (6)]

**Part 2-4 — Banning or disqualification of persons from engaging in credit activities**

*Division 2 — Banning orders*

2.195 ASIC has the power to make an order banning any person from engaging in credit activities. The power can be exercised against:

- any natural person, including a licensee, an employee, a representative (including a credit representative), or a registered person; or
- a corporate credit representative or other person within the meaning of the Credit Bill.

*[Part 2-4, Division 2, section 80]*

2.196 The intention of a banning order is to protect the public, rather than being an order to punish or impose a penalty (although this will usually be a necessary consequence). However, even where the individual is unlikely to commit an offence again, ASIC may decide to ban them where it is necessary to protect the public, including by deterring others who might otherwise be emboldened where misconduct is perceived to not result in any sanction.

2.197 A person can be banned if:

- any credit registration or ACL held by the person is suspended or cancelled;
- the person becomes insolvent (except for the trustees of a trust);
- the person is convicted of fraud (if they are a natural person);
- they have breached any credit legislation or are likely to do so;
- they are involved in a contravention of any credit legislation or are likely to be involved in a contravention of any credit legislation;



- a prescribed State or Territory order is made against the person; or
- ASIC has reason to believe that they are not a fit and proper person to engage in credit activities.

*[Part 2-4, Division 2, subsection 80(1)]*

2.198 A person is ‘involved in’ a contravention of credit legislation if the person:

- has aided, abetted, counselled or procured the contravention;
- has induced the contravention, whether by threats or promises or otherwise;
- has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
- has conspired with others to effect the contravention.

*[Part 1-2, Division 2, section 5]*

2.199 The extension of grounds to where the person is involved in a contravention of credit legislation enables ASIC to take into account conduct where the person is not under a legal responsibility to comply with the legislation themselves but they contributed to or caused another person to breach the legislation. The Credit Bill primarily places obligations to comply with the law on the holder of an ACL. Where the ACL is, for example, a body corporate then any contravention of the law will necessarily be the result of an act or omission by a natural person, such as a director or employee. The Credit Bill specifically allows ASIC to take into account the conduct of these persons where they have been involved in a contravention of the credit legislation, in deciding whether or not these individuals should be banned.

2.200 While fraud is not defined in the Credit Bill, it should, given the context, be interpreted consistently with the definition of serious fraud.

2.201 ASIC can ban a person where their conduct, while not falling into any of the specific categories, gives ASIC reason to believe that they are not a fit and proper person to engage in credit activities.

2.202 In determining whether a person is not a fit and proper person to engage in credit activities ASIC is authorised to take into account:

- the matters listed in subsection 37(2) (as set out in paragraph 2.74);
- any criminal convictions of the person, within 10 years before the cancellation or suspension of the licence; and
- any other matters ASIC considers relevant.

*[Part 2-4, Division 2, subsection 80(2)]*

2.203 Given that it can be expected that ASIC will principally use this power to ban individuals, this would enable ASIC to take into account conduct such as where:

- ASIC believes the individual has committed a fraud, but the individual has not been prosecuted for this or there is a delay or uncertainty in any prosecution;
- the individual has engaged in conduct causing serious detriment or financial loss to consumers, so that there is a need to protect the public; or
- the individual has demonstrated a consistent failure to comply with the law, or with directions from any licensee or employer.

2.204 ASIC can ban a person without a hearing where:

- their licence was cancelled or suspended without a hearing; or
- the person has been convicted of serious fraud.

*[Part 2-4, Division 2, subsections 80(5) and (6)]*

2.205 It is considered that an awareness by those engaging in credit activities that misconduct can result in a banning, and potential loss of livelihood, will act as an effective restraint or deterrent.

2.206 A **banning order** is defined as a written order made by ASIC that prohibits a person from engaging in credit activities. ASIC is given flexibility in making orders so that a person can either be banned from engaging in all activities permanently, or banned in more limited ways (for example, for a specified period only, or in relation to specified credit activities). *[Part 2-4, Division 2, section 81]*

2.207 ASIC must give a copy of the banning order to the person against whom it was made. *[Part 2-4, Division 2, subsection 80(8)]*

2.208 If a person engages in conduct in breach of a banning order they will commit an offence. This offence has a criminal penalty of 100 penalty units, or imprisonment for 2 years, or both, and a civil penalty of 2,000 penalty units (so that ASIC may appropriately penalise any contravention of the provision). *[Part 2-4, Division 2, section 82]*

2.209 ASIC can vary or cancel a banning order, including a permanent banning order, either on its own initiative or at the request of the banned person, where the request is made in the approved form. *[Part 2-4, Division 2, subsections 83(2) and (3)]*

2.210 Where the request is made by the banned person ASIC must consider whether there has been a change in the circumstances on which the banning order was based that makes it appropriate to vary or cancel the banning order. *[Part 2-4, Division 2, section 83]*

2.211 Where ASIC proposes not to vary or cancel the banning order it must give the banned person an opportunity to present their case, at a private hearing and through written submissions. *[Part 2-4, Division 2, subsection 83(4)]*

2.212 It is expressly stated that a banning order, or any variation or cancellation of the order, is not a legislative instrument. This statement is declaratory of the existing position, consistent with section 5 of the *Legislative Instruments Act 2003*. *[Part 2-4, Division 2, subsection 81(4)]*

2.213 ASIC must give written notice of any banning order, and any subsequent variation or cancellation, to the person. *[Part 2-4, Division 2, subsection 83(5)]*

2.214 A banning order, or any variation or cancellation of the order, takes effect from the date on which the notice is given to the person *[Part 2-4, Division 2, subsections 84(1) and (2)]*. ASIC must also publish a notice of the banning order, or any variation or cancellation, on its website *[Part 2-4, Division 2, subsection 84(3)]*.

2.215 ASIC is required to specify in writing the reasons for any banning and any subsequent variation. *[Part 2-4, Division 2, section 85]*

*Division 3 — Disqualification by the Court*

2.216 Where ASIC has cancelled a licence or has made a permanent banning order against a person, it can apply to the Court for further orders:

- an order disqualifying the person from engaging in credit activities (in total or subject to conditions, or in specified circumstances); or
- any other order the Court thinks appropriate.

*[Part 2-4, Division 3, section 86]*

***Part 2-5 — Financial records, trust accounts and auditors***

2.217 This part of the Credit Bill imposes obligations on licensees:

- to keep financial records that correctly record and explain the credit activities the licensee engages in; and
- to keep a trust account, where they receive and hold money on behalf of another person.

*Division 2 — Financial records of licensees*

2.218 Each licensee will be required to keep financial records that correctly record and explain the transactions they enter into and their financial position. A failure to keep records as required by this Division will be an offence with a criminal penalty of 200 penalty units, or imprisonment for 5 years or both, and a civil penalty of 2,000 penalty units (so that ASIC may appropriately penalise any contravention of the provision). *[Part 2-5, Division 2, section 88]*

2.219 The definition of ***financial records*** includes the following types of records:

- invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes and vouchers;
- documents of prime entry; and
- where the licensee provides credit services, any trust account statements or reports that the licensee is required to keep under Division 3.

*[Part 2-5, Division 2, subsection 88(2)]*

2.220 The licensee must also comply with the following requirements in relation to their financial records:

- the records must correctly record and explain the credit activities in which the licensee engages [*Part 2-5, Division 2, paragraph 88(1)(a)*];
- the records must be kept in a way that:
  - enables accurate profit and loss statements and balance sheets to be prepared; and
  - allows this information to be properly audited [*Part 2-5, Division 2, section 89*];
- the records must either be kept in English, or in a manner that enables them to be easily translated into English [*Part 2-5, Division 2, section 90*];
- the records must be accessible within this jurisdiction [*Part 2-5, Division 2, section 91*]; and
- the records must be sufficiently detailed to show the following information:
  - particulars of money received or paid by the licensee (which will include moneys paid into and out of any trust accounts required to be maintained pursuant to Division 2);
  - the amount and date of all payments made by debtors, lessees or guarantors, and the outstanding balance owing under each credit contract or consumer lease;
  - income received and expenses paid by the licensee; and
  - the assets and liabilities of the licensee [*Part 2-5, Division 2, section 92*].

2.221 The Credit Bill provides for regulations to be made to impose additional requirements in relation to the financial records of financial services licensees. [*Part 2-5, Division 2, paragraph 88(g) and Part 2-5, Division 2, section 93*]

2.222 Licensees are required to retain financial records for a period of seven years after the transactions covered by the record have been completed. The requirement applies even where the person has stopped carrying on a business of engaging in credit activities to which the records

relate. This offence has a criminal penalty of 25 penalty units, or imprisonment for 6 months year or both, and a civil penalty of 2,000 penalty units (so that ASIC may appropriately penalise any contravention of the provision). *[Part 2-5, Division 2, section 95]*

2.223 It is expressly provided that:

- a financial record is admissible in Court as prima facie evidence of a matter stated in the record; and
- a document purporting to be a financial record kept by a licensee is presumed to be such a record, unless the contrary is proved.

*[Part 2-5, Division 2, subsections 96(1) and (2)]*

*Division 3 — Trust accounts of credit service licensees*

2.224 This Division imposes requirements on licensees where they are required to keep trust accounts. The obligation only applies to licensees who:

- provide credit services (that is, they either provide credit assistance or act as an intermediary); and
- in that capacity they receive money on behalf of another person.

*[Part 2-5, Division 3, section 97]*

2.225 The statutory obligations in respect of trust accounts only apply once a person is licensed. While a person is registered they are subject to common law obligations where these arise in law.

2.226 The requirements in respect of trust accounts are:

- to keep trust accounts with an Australian ADI *[Part 2-5, Division 3, subsection 98(2)]*;
- to designate its title as the licensee's trust account *[Part 2-5, Division 3, subsection 98(3)]*;
- to pay into the trust account any money received by the licensee on behalf of another person in their capacity as a licensee *[Part 2-5, Division 3, subsection 99(1)]*; and
- to only withdraw money from the account to pay a person who is lawfully entitled to that money *[Part 2-5, Division 3,*

*subsections 99(2) and (3)*. It is specifically provided that the money cannot be used to pay debts of other creditors of the licensee [*Part 2-5, Division 3, subsection 99(5)*].

2.227 A failure to comply with either section 98 or section 99 will be an offence with a criminal penalty of 25 penalty units, or imprisonment for 6 months year or both, and a civil penalty of 2,000 penalty units (so that ASIC may appropriately penalise any contravention of the provision).

2.228 The licensee is required to lodge a trust account statement; and an auditor's report with ASIC annually [*Part 2-5, Division 3, subsections 100(1) and (2)*]:

2.229 A breach of this requirement will be an offence with a criminal penalty of 25 penalty units, or imprisonment for 6 months year or both, and a civil penalty of 2,000 penalty units (so that ASIC may appropriately penalise any contravention of the provision).

2.230 The annual statement and the auditor's report must be in the form approved by ASIC and contain information and materials as specified in the regulations [*Part 2-5, Division 3, subsection 100(3)*].

2.231 The licensee must lodge the report with ASIC [*Part 2-5, Division 3, section 101*]:

- where the licensee is a body corporate — within two months of the end of the financial year;
- where the licensee is not a body corporate in any other case — within three months of the end of the financial year; and
- where the licensee is granted an extension — within the period of the extension.

2.232 A **financial year** is defined as meaning [*Part 2-5, Division 3, subsection 100(6)*]:

- where the licensee is a body corporate — a financial year of the body corporate within the meaning of section 323D of the Corporations Act; and
- in any other case — a year ending on 30 June.

2.233 ASIC may grant an extension to the usual time limits where the request is made by the licensee and the auditor before the end of the period they would otherwise be required to provide the report in [*Part 2-5, Division 3, subsection 101(3)*]. ASIC may impose any conditions as it

considers appropriate on the extension, and the licensee must comply with those conditions [*Part 2-5, Division 3, subsections 101(4) and (5)*].

*Division 4 — Matters relating to audit reports*

2.234 This Division regulates the relationship between auditors, licensees and ASIC, in relation to the following audit reports:

- an audit report under subsection 49(3), in response to a notice served by ASIC on an applicant for a licence, or a licensee; and
- an audit report under subsection 100(2) of a licensee's trust account.

2.235 In relation to these reports, the licensee or, if it is a body corporate, a director, secretary or senior manager of the licensee, is required to:

- provide the auditor with reasonable access to its records;
- assist the audit, or explain to them matters relevant to the preparation of the report; and
- not fail to give assistance or otherwise hinder or delay the auditor in the exercise of their duties.

*[Part 2-5, Division 3, subsections 102(1) to (3)]*

2.236 The licensee is liable to meet the reasonable fees and expenses of the auditor, and, if necessary, the auditor can recover this amount as a debt owing by the licensee. [*Part 2-5, Division 3, section 103*]

2.237 An auditor is required to advise ASIC where it becomes aware of any of the following matters:

- a matter that adversely affects the ability of the licensee to meet their obligations;
- a matters that contravenes or may contravene Divisions 2 and 3 (that is, the provisions in respect of financial records and trust accounts); or
- an attempt to unduly influence, coerce, manipulate or mislead the auditor in the preparation of their report.

*[Part 2-5, Division 3, subsection 104(2)]*



2.238 The auditor is only required to advise ASIC if it forms an opinion that one of these matters has occurred. If it considers the conduct does not satisfy the requirement in the law it is not required to report it to ASIC. *[Part 2-5, Division 3, subsection 104(2)]*

2.239 An auditor is required, within seven days of becoming aware of such a matter, to provide a written report to both ASIC and the licensee. *[Part 2-5, Division 3, subsection 104(1)]*

2.240 The Credit Bill provides that qualified privilege will apply to the following conduct by auditors (including a registered company auditor on behalf of an audit company):

- statements, whether oral or in writing, made by the auditor in the course of their duties relating to an audit report; and
- giving a report as required under subsection 104(1), either to ASIC or to the potential licensee.

*[Part 2-5, Division 3, subsections 105(1) and (2)]*

2.241 A person has qualified privilege where they publish:

- a document prepared by an auditor in the course of their duties in relation to an audit report; and
- a statement, whether oral or in writing, made by an auditor or a registered company auditor on behalf of an audit company in the course of their duties relating to an audit report.

*[Part 2-5, Division 3, subsections 105(3) and (4)]*

2.242 The Credit Bill provides that where a person has qualified privilege then the person:

- has qualified privilege in proceedings for defamation; or
- is not liable, in the absence of malice on the person's part, to an action for defamation at the suit of a person.

*[Part 1-2, Division 4, section 16]*

2.243 The Credit Bill includes a power to make regulations in respect of:

- audit reports required either under subsection 37(4) in response to a notice served by ASIC on an applicant for a licence, or a licensee, or under subsection 100(2) (in respect of a licensee's trust account);

- auditors that prepare the reports; and
- the auditing standards that must be complied with in the preparation of the reports.

*[Part 2-5, Division 3, section 106]*

**Part 2-6 — Exemptions and modifications in relation to this Chapter**

*Division 2 — Exemptions and modifications in relation to this Chapter*

2.244 Exemptions and modifications can be effected both by ASIC and through the regulations to the following provisions of the legislation:

- Chapter 2 of the Credit Bill — dealing with licensing of persons who engage in credit activities;
- the definitions in the Credit Bill, as they apply in Chapter 2 of the Credit Bill; and
- instruments made for the purposes of Chapter 2 of the Credit Bill.

*[Part 2-6, Division 2, section 108]*

2.245 There are three different ways in which the application of these provisions can be modified or changed:

- by ASIC exempting or modifying their application to:
  - a particular person or that person and all their credit representatives; or
  - a credit activity that is engaged in, in relation to a specified credit contract, mortgage, guarantee or consumer lease *[Part 2-6, Division 2, subsection 108(1)]*;
- by ASIC exempting or modifying their application to:
  - a class of persons; or
  - a class of credit activities *[Part 2-6, Division 2, subsections 108(3) and (4)]*; or
- by an exemption or modification of their application in the regulations to:
  - a class of persons; or

- a class of credit activities [*Part 2-6, Division 2, section 110*].

2.246 An exemption by ASIC of a particular person (or that person and all their credit representatives) or a credit activity that is engaged in relation to a specified credit contract, mortgage, guarantee or consumer lease is stated not to be a legislative instrument. This statement is declaratory of the law, consistent with section 5 of the *Legislative Instruments Act 2003*. [*Part 2-6, Division 2, subsection 109(2)*]

2.247 An exemption by ASIC of a particular person or a credit activity that is engaged in, in relation to a specified credit contract, mortgage, guarantee or consumer lease, must be in writing and must be published by ASIC on its website. [*Part 2-6, Division 2, subsection 109(5)*]

2.248 A person will not commit an offence where their conduct:

- is only an offence because of the nature of the exemption by ASIC (for example, where the exemption is conditional and the condition is not met); and
- at the time of the conduct the person had not been given notice of the exemption (either because they had not been given written notice of it by ASIC or because it had not been published by ASIC on its website).

[*Part 2-6, Division 2, subsection 109(6)*]



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# **Chapter 3**

## ***Responsible lending conduct***

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### **Outline of chapter**

3.1 Chapter 3 of this explanatory memorandum discusses the imposition of responsible lending conduct obligations on all holders of Australian credit licences. These obligations are contained in Chapter 3 of the National Consumer Credit Protection Bill 2009 (Credit Bill).

3.2 The obligations arise in respect of certain conduct in relation to contracts as defined in sections 4 and 5 of the National Credit Code (Code) and consumer leases to which Part 11 of the Code applies. Where the term ‘credit contract’ or ‘contract’ is used in this Chapter, it includes both credit contract and consumer lease (unless the contrary intention appears).

3.3 In addition to general conduct obligations for licensees to operate efficiently, fairly and honestly, licensees who provide credit or credit assistance will be required to meet specific conduct obligations in relation to lending and leasing responsibly.

3.4 The responsible lending conduct obligations set in place expected standards of conduct of licensees when they enter into a consumer credit contract, where they suggest a credit contract to a consumer or where they assist a consumer to apply for a credit contract.

3.5 The key obligation for licensees is to ensure they do not provide, suggest, or assist with a credit contract that is unsuitable for the consumer. This obligation requires licensees to reasonably inquire and verify a customer’s financial circumstances to make an assessment that the credit contract will meet the consumer’s requirements and that the consumer has the capacity to repay the contract.

3.6 Further, licensees must disclose key details about themselves that will assist the consumer to understand who they are dealing with, the dispute resolution services available to the consumer, an indication of any costs the consumer may incur, and other matters.

3.7 The Australian Securities and Investments Commission (ASIC) and consumers will be able to take action against a licensee for non-performance of the responsible lending conduct obligations.

## **Context of new law**

3.8 The May 2008 final Productivity Commission's report on the *Review of Australia's Consumer Policy Framework* (the PC Report) noted an increased use of credit in Australia over the last 20 years. Increased use of credit has led to higher levels of household indebtedness which impacts on household financial capacity and ability to respond to changing circumstances such as interest rate increases, a slowdown in economic conditions or rising unemployment. Evidence suggests that these increases have come about mostly as a result of the growth in the size of home loans over the years.

3.9 In addition, the distribution channels for credit to consumers (such as the use of various intermediaries) and the development of products such as no and low documentation loans have often placed the borrower at arm's length from the lender and have limited the documentation and inquiries regarding a consumer's financial position that lenders have before them, when deciding whether or not to approve an application. The consumer is in a position where they are dependent on the intermediary's skill and expertise. The level of regulation of market participants providing such services varies significantly from State to State.

3.10 In recognition of the need for national regulation of brokers the Ministerial Council on Consumer Affairs (MCCA) released the draft Finance Brokers Bill (NSW) in November 2007.

3.11 The regulation impact statement developed in the preparation of the Finance Brokers Bill (NSW) documented in detail a number of undesirable market practices, including:

- brokers recommending products that earned them higher commissions but which are inappropriate, higher cost or unaffordable for their clients;
- brokers misrepresenting the applicants' financial details so that the loan is approved, and the broker receives commissions, when, if the lender was aware of the borrower's actual financial position, they would reject the application;
- brokers 'upselling' loans to higher amounts to increase commissions; and
- brokers and lenders engaging in 'equity stripping', that is, arranging or providing high-cost loans for borrowers in financial difficulty (particularly those facing foreclosure of

the family home), in the expectation that the borrower will default with subsequent transfer of the consumer's equity in their home to the broker and the lender through fees, charges and default interest.

3.12 Before the draft Finance Brokers Bill (NSW) was finalised the States agreed to the transfer of responsibility for credit to the Commonwealth allowing for the introduction of a national approach to licensing that extends to all persons engaging in credit activities.

3.13 The Productivity Commission in its review of consumer protection noted that poor lending practices have contributed to a growing number of borrowers experiencing financial stress, and recommended consideration, in the context of a national credit regime, of what, if any, initiatives are required to promote 'responsible lending'.

3.14 The Productivity Commission commented that the purchase of financial services can entail significant monetary commitments, sometimes over long periods of time. Where imprudent lending decisions are made, the consequences for consumers can be particularly costly. Moreover, purchasing decisions will often involve complex product comparisons, with consumers frequently relying on intermediaries to make these comparisons on their behalf. However, assessing the quality of such advice, even after the event, can be problematic. Accordingly, effective consumer protection measures are particularly important for these services.

3.15 Current regulation of credit for consumers, under the Uniform Consumer Credit Code (UCCC), primarily regulates credit providers (rather than credit assistants or intermediaries) in relation to matters such as the disclosure requirements to be met in order to provide consumers with credit contracts, or how to vary those contracts in the event of hardship or default. It does not comprehensively address the appropriateness of the initial provision of the credit to the consumer. That is to say, it does not regulate whether or not it was responsible to lend to the consumer in the first place. However, most lending institutions apply lending criteria to determine who they will lend to, which in large part consider the borrower's circumstances and the risk the loan poses to the lending institution.

3.16 Responsible lending conduct regulation encourages prudent lending and leasing to continue and imposes sanctions in relation to irresponsible lending and leasing.

3.17 The Code contains a provision that imposes 'up front' obligations on any party to a credit transaction. These obligations set out that 'a person must not make a false or misleading representation in

relation to a matter that is material to entry into a credit contract or a related transaction or in attempting to induce another person to enter into a credit contract or related transaction'. This places accountability on all parties to a credit transaction, borrower, credit assistant and lender alike to conduct themselves honestly and transparently.

3.18 Several Australian lending institutions have established responsible lending charters and processes. The United Kingdom introduced responsible lending laws in 2006.

## **Summary of new law**

3.19 Chapter 3 of the Credit Bill includes the requirements and obligations in relation to lending and leasing responsibly to consumers.

3.20 These obligations are placed on licensees who:

- enter into credit contracts or consumer leases;
- suggest a consumer enter into a particular credit contract or consumer lease with a particular credit provider or lessor; or
- assist a consumer to apply for a particular credit contract or consumer lease with a particular credit provider or lessor.

3.21 Persons who lend or lease solely proprietary contracts are not caught by the obligations applying to the provision of credit assistance. In contrast, a credit provider or lessor who deals in contracts from other providers, in addition to their proprietary contracts, is required to meet the credit assistance requirements.

3.22 The obligations also apply when a relevant licensee increases an existing credit limit, suggests a consumer increase the limit of a credit contract or assists a consumer to apply for an increase in a credit limit.

3.23 When a licensee suggests to a consumer that they remain in an existing credit contract or consumer lease the obligations also apply. This results in an equivalent regulatory treatment of a suggestion to refinance to an alternative credit contract or remain in an existing credit contract.

3.24 A particular credit contract with a particular credit provider or lessor is key to when the responsible lending conduct obligations are triggered. The obligations with regard to the suggestion of credit are not triggered when, for example, a home loan generally, or a credit card generally are suggested to a consumer.



3.25 The primary obligations in relation to the provision of credit (for example, lending); or the provision of credit assistance (for example, suggesting a particular credit contract or assisting with a particular credit contract) are: to make an assessment that the loan is not unsuitable for the consumer; and to assess that the consumer has the capacity to meet the financial obligations under the contract without substantial hardship.

3.26 The consumer will have the right to request a copy of an assessment. However, there is no obligation to provide the consumer with a copy of the assessment if the credit assistance or contract is not provided to the consumer.

3.27 The assessment obligations are supplemented by disclosure obligations. A licensee who triggers the responsible lending obligations must disclose key details about themselves to:

- assist the consumer to understand who they are dealing with;
- advise the consumer of their access to dispute resolution services; and
- provide an indication of any costs the consumer may incur.

3.28 Licensees will also be obliged to ensure actual fees to be incurred are known to the consumer before the credit or assistance is provided. Many fee and commission disclosure obligations already exist for credit providers in the Code (see section 17 of the Code). The proposed legislation requires credit assistants to make fee and commission disclosures.

3.29 Breaches of the responsible lending obligations can result in a range of sanctions including:

- criminal penalties of up to two years imprisonment and/or 200 penalty units; and
- civil penalties up to 2,000 penalty units.

3.30 Details of the sanctions regime are in Chapter 4 (Remedies) of the Credit Bill. Some civil penalties will attract the infringement notice regime. The infringement notice regime is set out in section 331 of Chapter 7 (Miscellaneous) of the Credit Bill.

## Detailed explanation of new law

### Part 3-1 — Licensees that provide credit assistance in relation to credit contracts

3.31 This Part of the Credit Bill does not apply to licensees who deal only with their proprietary credit contracts or proprietary consumer leases. The responsible lending conduct obligations applying to these licensees are different in some significant respects, and are set out in Part 3-2.

3.32 Credit assistance is defined in section 8 of the Dictionary in Chapter 1. In summary, a person provides *credit assistance* to a consumer where they suggest that the consumer:

- apply for a provision of credit in respect of a particular credit contract or lease;
- apply for an increase to the credit limit of a particular credit contract or lease; or
- remain in a particular credit contract or lease. [*Part 1-2, Division 3, paragraphs 8(a), (b), (c), (f) and (g)*]

3.33 A person also provides credit assistance where they assist the consumer:

- in respect of a particular credit contract or lease, to apply for a provision of credit in respect of a particular credit contract or lease; or
- to apply for an increase to the credit limit of a particular credit contract or lease. [*Part 1-2, Division 3, paragraphs 8(d), (e) and (h)*]

3.34 A person provides credit assistance whether they deal directly with the consumer or with the consumer's agent. This is intended to apply in situations where, for example, the person is assisting an elderly parent to apply for a credit contract, but is dealing with one or more of their children.

#### *Division 2 — Credit guide of credit assistance providers*

3.35 When a licensee, who is a credit assistance provider (credit assistant), considers it likely they will be providing credit assistance, they will be required to provide the consumer with a credit guide. The credit guide must be provided to the consumer as soon as practicable after it becomes apparent to the credit assistant that they are likely to provide

credit assistance to the consumer. Failure to comply with this requirement attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units are in line with the civil penalties regime in the Corporations Act. *[Part 3-1, Division 2, subsection 113(1)]*

3.36 The purpose of the credit guide is to provide the consumer with key information early in the credit transaction so that they are informed and aware of necessary matters before deciding to use the services of the credit assistant.

3.37 The credit guide gives the consumer some preliminary information about the credit assistant and disclosure of key conduct obligations of the credit assistant and key rights of the consumer (such as the requirement not to suggest or assist with unsuitable credit contracts, the consumer's right to request a copy of the preliminary assessment and access to information about procedures for resolving disputes).

3.38 The guide must also include information about the possible nature and size of fees and charges that the consumer may incur if they use the credit assistant's services. This is likely to include the basis on which the consumer would pay the credit assistant, for example, the fees information might set out the hourly rate that the credit assistant charges or the percentage of the amount of credit secured (if that is the basis on which the fee is charged to the consumer). *[Part 3-1, Division 2, paragraph 113(2)(e)]*

3.39 The guide also includes information about the six credit providers with whom the credit assistant conducts the most business. *[Part 3-1, Division 2, paragraph 113(2)(f)]*

3.40 The guide must also set out an overview of the commission arrangements between the credit assistant and the credit providers with whom they deal for providing credit assistance.

- For example, this disclosure may set out that the credit assistant receives upfront commission of a certain rate or a range of rates and trailing commission of a certain rate or range of rates upon the successful securing of the credit contract.
- The reasonable estimate of the amounts may, for example, be set out in percentage or dollars (for example, per \$1,000 of credit secured).
- The information about the method for working out these amounts may, for example, state that it is a flat rate or relates to a volume of sales.

*[Part 3-1, Division 2, paragraph 113(2)(g)]*

3.41 A regulation-making power is included in order to allow for the content of the credit guide to be revised as necessary [*Part 3-1, Division 2, paragraph 113(2)(b)*]. A further regulation-making power is included to prescribe any information that need not be included in the credit guide. The power also allows for further specificity to be prescribed in relation to providing information regarding commissions as required in subsection 113(2)(g) [*Part 3-1, Division 2, subsection 113(3)*].

3.42 It is envisaged that the credit assistant could meet the requirements of a credit guide through the provision of a standardised document as the information is not generally tailored to a specific contract.

3.43 The credit guide may be provided in the most suitable manner for the circumstance, for example either in person, in writing, (for example, by post or an email) or as a notice appearing on the Internet website which is accepted by the consumer.

3.44 A regulation-making power is included in order to prescribe the manner for giving the credit guide if prescription becomes necessary. For example, regulations could be made that set out how a credit guide may be given where the conduct takes place over the telephone. [*Part 3-1, Division 2, subsection 113(4)*]

3.45 A breach of section 113 is also an offence of strict liability, subject to a maximum penalty of 50 penalty units. The imposition of a strict liability offence is considered appropriate in order to encourage the relevant parties to put in place systems and policies that minimise the risk of contraventions of the relevant provisions. [*Part 3-1, Division, subsections 113(5) and (6)*]

***Division 3 — Quote for providing credit assistance etc. in relation to credit contracts***

3.46 Before providing credit assistance to a consumer, a licensee must provide a quote for the credit assistance that is to be provided and any other services the quote covers. The quote advises the consumer of the maximum cost to them in relation to using the services of the credit assistant. It includes all costs that the consumer will be likely to incur either out of their own pocket or disbursed from the credit for the credit assistant's services. It is possible that the final cost to the consumer may be less than the quoted amount.

3.47 The quote must advise the consumer of whether or not the costs will be incurred by the consumer irrespective of whether the credit is successfully secured. It is envisaged that under the business arrangements of some credit assistants, the consumer could possibly still be required to

pay the credit assistant for their services and pay for services such as a property valuation (via the credit assistant) despite the credit application not being successful.

3.48 The quote must be signed (or otherwise accepted) and dated by the consumer and then a copy of the accepted quote must be provided to the consumer before the credit assistance is provided. Failure to comply with the requirement attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units are in line with the civil penalties regime in the *Corporations Act 2001* (Corporations Act).  
*[Part 3-1, Division 3, subsection 114(1)]*

3.49 The quote, in writing, must set out:

- information about the credit assistance and other services that the quote covers, for example, this might include the scope of the credit assistance to be provided such as the consumer's requirements or the type of loan the consumer is looking for and any other services that will incur a cost to be paid to the credit assistant (either for their services or for payment to another service provider, such as a valuer);
- the maximum amount payable in relation to the credit assistance set out in paragraph 114(2)(c), detailing:
  - in dollars, the maximum fee payable by the consumer for using the credit assistance;
  - in dollars, the maximum of any other charges the licensee will incur for providing the credit assistance that they will pass on to the consumer (for example postage or photocopying); and
  - in dollars, the maximum of any other fees and charges payable to the credit assistant that the consumer may incur as a result of the licensee making payments to another person on their behalf (such as valuation fees or legal fees).
- whether the amount is payable if the credit contract is not secured or the credit limit is not increased. *[Part 3-1, Division 3, subsection 114(2)]*

3.50 A regulation-making power is included in order to allow for any other requirements to be prescribed in relation to the quote. *[Part 3-1, Division 3, paragraph 114(2)(f)]*

3.51 The quote may be given in the most appropriate manner for the circumstances, for example, either in person, in writing (by post or electronically, for example, as an attachment to an email).

3.52 A regulation-making power is included in order to prescribe the manner for giving the quote if prescription becomes necessary. [*Part 3-1, Division 3, subsection 114(3)*]

3.53 The credit assistant must neither request nor demand payment of the quoted amount prior to providing the credit assistance nor demand payment of an amount that exceeds the maximum amount set out in the quote. Failure to comply with these requirements attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units is in line with the civil penalties regime in the Corporations Act. [*Part 3-1, Division 3, subsections 114(4) and (5)*]

3.54 The credit assistant must not claim an estate or interest in any land by lodging or threatening to lodge a caveat in order to induce the consumer to pay any amounts the consumer may owe the credit assistant. Failure to comply with the requirement attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units is in line with the civil penalties regime in the Corporations Act. [*Part 3-1, Division 3, subsection 114(6)*]

***Division 4 — Obligations of credit assistance providers before providing credit assistance for credit contracts***

3.55 Before providing credit assistance, the credit assistant must make a preliminary assessment as to whether the proposed contract will be unsuitable for the consumer or the increased credit limit will be unsuitable for the consumer.

3.56 The preliminary assessment must be made no more than 90 days before the suggestion or assistance is given and must be an assessment that relates to the period in which the consumer proposes to enter the contract or increase the credit limit. Failure to comply with the requirement attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units are in line with the civil penalties regime in the Corporations Act. [*Part 3-1, Division 4, subsection 115(1)*]

3.57 For different types of credit it may be appropriate to provide for a longer or shorter length of time in which the preliminary assessment is to be made before the assistance day. This period may be prescribed by the regulations.

3.58 The credit assistant must also have made the inquiries and verification as set out in detail in section 117. Failure to make an assessment as required incurs a civil penalty.

### Example 3.1

A consumer visits a finance broker in January saying she would like to buy a house later that year, probably around June, as she is going to get a payrise and could the broker suggest a loan that meets the consumer's requirements (not discussed in this example). The broker makes the relevant inquiries and a month later the consumer provides the broker with the relevant documents in order to verify the consumer's financial situation. With these matters complete, the broker suggests a loan to the consumer on 15 February. This is the assistance day.

The preliminary assessment was completed earlier in February, prior to the assistance day, and is therefore compliant with the requirement to be no more than 90 days old from the assistance day.

The assessment establishes that the proposed loan will be suitable for the consumer in June, the period in which the consumer is looking to enter the contract, and therefore complies with the requirement to cover the period in which the contract is proposed to be entered into.

If the consumer found a house earlier than June and seeks to apply for the loan earlier, then the preliminary assessment would not necessarily establish that the contract was not unsuitable, as it was based on the contract being entered into in June, to take into account a contemplated financial circumstance (the payrise) that would only apply at that time.

#### *Suggestions to remain in a credit contract*

3.59 A preliminary assessment must also be made by a credit assistant no more than 90 days before providing credit assistance which suggests that the consumer *remain* in a particular credit contract with a particular credit provider and which assesses the time at which the suggestion to remain is made (there is no period in which the consumer could propose to enter the contract as there is not one being suggested). Failure to comply with the requirement attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units is in line with the civil penalties regime in the Corporations Act. [*Part 3-1, Division 4, subsection 115(2)*]

3.60 For different types of credit it may be appropriate to provide for a longer or shorter length of time in which the preliminary assessment is to be made before the assistance day. This period may be prescribed by the regulations.

3.61 The credit assistant must also have made the inquiries and verification as set out in detail in section 117. Failure to make an assessment as required incurs a civil penalty.

***Preliminary assessment of unsuitability of the credit contract***

3.62 In order to have made a compliant preliminary assessment for the purposes of subsection 115(1), the credit assistant must specify the period that the assessment covers (which is to be the period that it is proposed that the contract be entered or the credit limit to be increased). *[Part 3-1, Division 4, paragraph 116(1)(a)]*

3.63 In order to have made a compliant preliminary assessment for the purposes of subsection 115(2), the credit assistant must specify the period that the assessment covers (which is to be a period which includes the assistance day). *[Part 3-1, Division 4, paragraph 116(2)(a)]*

3.64 A compliant preliminary assessment must also assess whether the credit contract will be unsuitable for the consumer if the contract is entered or the credit limit is increased in that specified period. *[Part 3-1, Division 4, paragraphs 116(1)(b) and 116(2)(b)]*

***Reasonable inquiries etc. about the consumer***

3.65 In order to appropriately meet the requirement to make an assessment about the unsuitability of a suggested contract for the consumer or of a contract application in relation to which they are providing assistance, the credit assistant must:

- make reasonable inquiries about the consumer's requirements and objectives for the credit contract;
- make reasonable inquiries about the consumer's financial situation;
- take reasonable steps to verify the consumer's financial situation; and
- make any inquiries or take any verification steps as prescribed by the regulations.

Failure to comply with the requirement attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units is in line with the civil penalties regime in the Corporations Act. *[Part 3-1, Division 4, subsection 117(1)]*

3.66 The purpose of the credit assistant's preliminary assessment of unsuitability is to ensure that credit assistants do not suggest to consumers (or assist consumers to apply for) credit contracts that they do not reasonably believe meet the consumer's requirements and objectives and reasonably believe that the consumer has the capacity to repay the contract without substantial hardship.



3.67 In contrast to an unsuitability assessment made by a credit provider for the purposes of entering a consumer into a credit contract, an unsuitability assessment made by a credit assistant is considered to be a 'preliminary' assessment based on the information available to a credit assistant. This does not diminish the credit assistant's responsibilities with regard to making reasonable inquiries and undertaking reasonable verification of the information they can access. However, it recognises that the credit assistant does not have access to some information that is available to a credit provider (such as credit bureau data and data arising from a banking relationship) and that a credit assistant is not making an assessment that takes into consideration the commercial risk of being the lender.

3.68 The minimum requirement for satisfying reasonable inquiries about the consumer's requirements and objectives will be to understand the purpose for which the credit is sought and determine if the type, length, rate, terms, special conditions, charges and other aspects of the proposed contract meet this purpose or put forward credit contracts that do match the consumer's purpose.

3.69 The purpose for undertaking reasonable inquiries about the consumer's financial situation is to ascertain a reasonable understanding of the consumer's ability to meet *all* the repayments, fees, charges and transaction costs of complying with the proposed credit contract. The general position is that consumers should be able to meet the contract's obligations from income rather than equity in an asset. However, it is noted that there may be circumstances where this may not be a reasonable position.

### **Example 3.2**

Where interest is prepaid and capitalised into the loan principal, consideration needs to be given to the consumer's ability to meet the credit contract payments and any associated transaction fee that will be incurred after the 'repayment free' period ends in determining whether the proposed credit contract is not unsuitable for the consumer. For example, if it is reasonably foreseeable the consumer will be required to refinance the loan after the interest-free period because they cannot meet the ongoing payments, it is unlikely the loan would be not unsuitable.

3.70 Reasonable inquiries about the consumer's financial situation could include: determining the amount and source of the consumer's income; determining the extent of fixed expenses (such as rent or contracted expenses such as insurance, other credit contracts and associated information); and other variable expenses of the consumer (and drivers of variable expenses such as number of dependents and number of vehicles to run, and any particular or unusual circumstances).

3.71 The significance of these inquiries will be dependent on circumstances. For example, the credit assistant's knowledge of expenses such as the monthly mobile phone expense may be a proportionately significant expense for a low income earner, therefore reasonable inquiries would seek to ensure, to the extent possible, that such matters have been included in the consumer's expenses. In contrast, the mobile phone expense may not be significant to a high net worth individual and may require little inquiry.

3.72 The possible range of factors that may need to be established in relation to a consumer's capacity to repay credit could include:

- the consumer's current income and expenditure;
- the maximum amount the consumer is likely to have to pay under the credit contract for the credit;
- the extent to which any existing credit contracts are to be repaid, in full or in part, from the credit advanced;
- the consumer's credit history, including any existing or previous defaults by the consumer in making payments under a credit contract;
- the consumer's future prospects, including any significant change in the consumer's financial circumstances that is reasonably foreseeable (such as a change in the amount the consumer has to pay under the credit contract for the credit or under any other credit contract to which the consumer is party).

3.73 The level of inquiries necessary to meet the level of 'reasonable inquiries' is likely to be greater where the consumer is refinancing, particularly where they are having difficulties meeting the repayments, or are even in arrears, on their existing credit contract. In this situation it will be possible to determine that the consumer cannot meet the repayments of the amount being charged under that contract, and a contract will prima facie be unsuitable where the repayments are at the same or a similar level. Where the current contract is no longer not unsuitable and no alternative contract is considered to be not unsuitable, there is a defence provided that allows the credit assistant to suggest the consumer remain in the existing contract without contravention of the responsible lending obligations (see explanation at subsection 124(7)).

3.74 There are usually transaction costs associated with refinancing, including any fees for using a credit assistant's services. All costs of changing credit contracts are expected to be taken into consideration when

assessing the consumer's ability to meet the obligations of the new credit contract over its entire term.

3.75 A regulation-making power is included in order to prescribe particular inquiries or steps that must be made or taken, or do not need to be made or taken in order to have made reasonable inquiries or reasonable verification [*Part 3-1, Division 4, subsection 117(2)*]. ASIC also expects to provide guidance where appropriate to set out further detail about reasonable inquiries and verification in particular circumstances.

3.76 It is noted that there will be matters that will not be able to be known to the credit assistant. This may arise where the consumer may not disclose the matter, despite the credit assistant's inquiry, and where there was no reasonable way of verifying the information provided.

3.77 The Code contains a provision that imposes up front obligations on any party to a credit transaction. Subsection 154(1) of the Code says 'a person must not make a false or misleading representation in relation to a matter that is material to entry into a credit contract or a related transaction or in attempting to induce another person to enter into a credit contract or related transaction'.

3.78 It is noted that this imposes an obligation on credit providers, debtors, guarantors as well as any third party (such as a credit assistant). A debtor who makes a false or misleading representation to a credit provider or guarantor to induce them to provide or guarantee the credit may be liable for any loss suffered.

3.79 Any compensation to a consumer or an order in relation to loss or damage can be mitigated (including limiting any compensation) if the consumer has made a false or misleading representation in order to obtain the credit. This is to take into account what is practically just in the circumstances.

***When a credit contract must be assessed as unsuitable — entering contract or increasing the credit limit***

3.80 There is an obligation on a credit assistant to assess that the credit contract will be unsuitable for the consumer if the contract will be unsuitable (as defined below). However, this does not limit the credit assistant from assessing that the contract will be unsuitable for other reasons. Failure to comply with the requirement attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units is in line with the civil penalties regime in the Corporations Act. [*Part 3-1, Division 4, subsection 118(1)*]

3.81 A credit contract must be assessed as unsuitable for the consumer if at the time of making the preliminary assessment it is likely that:

- the consumer will be unable to comply with the financial obligations under the contract, or could only comply with substantial hardship;
- the contract will not meet the consumer's requirements and objectives; or
- prescribed circumstances that set out when the contract must be assessed as unsuitable are present,

if the contract were entered in the period proposed or the credit limit increased in the period proposed. *[Part 3-1, Division 4, subsection 118(2)]*

3.82 For it to be *likely* that the consumer will be able to comply with the financial obligations under the contract, the credit assistant must take a future view of the reasonable foreseeability of that compliance, given the financial obligations will arise into the future.

3.83 It is presumed that if a consumer will only be able to comply with their financial obligations under the contract by selling their principal place of residence, then the consumer could only comply with those obligations with substantial hardship, unless the contrary is established. *[Part 3-1, Division 4, subsection 118(3)]*

3.84 The effect of this is that where a consumer establishes that they could only meet the repayments by selling their home, then the onus is on the credit assistant to establish that the contract was not unsuitable.

3.85 The only information that must be taken into account by a credit assistant when making the preliminary unsuitability assessment has two elements.

3.86 The first is information that the credit assistant had reason to believe to be true. That would include, for example, information that has been provided by the consumer about their financial circumstances that has been verified by the credit assistant or is otherwise reasonably believed to be true.

3.87 The second is information that the credit assistant would have had reason to believe if the reasonable steps to verify required had in fact occurred, the intent of this part of the proposed provision is to ensure that credit assistants, in making their assessments regarding unsuitability, are required to take into consideration information that they should have

become aware of if the reasonable steps to verify had been taken. Information that does not satisfy these requirements (that is, information that is not reasonably believed to be true) must not be taken into account. [Part 3-1, Division 4, subsection 118(4)]

***When the credit contract must be assessed as unsuitable — remaining in credit contract***

3.88 Similarly to the requirements in section 118, credit assistance that suggests the consumer *remain* in a credit contract that they are currently in, also needs to meet the requirement to not be an unsuitable suggestion for the consumer based on the outcome of a preliminary assessment. Failure to comply with the requirement attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units is in line with the civil penalties regime in the Corporations Act. [Part 3-1, Division 4, subsections 119(1) and (2)]

3.89 Further, it is presumed to be unsuitable to suggest a consumer remain in a credit contract that could only be complied with by selling the consumer's principal place of residence, unless the contrary is established. [Part 3-1, Division 4, subsection 119(3)]

3.90 Finally, the credit assistant must only use information that it has reason to believe was true or would have reason to believe was true if it had undertaken the inquiries or verification required. Information that does not satisfy these requirements must not be taken into account. [Part 3-1, Division 4, subsection 119(4)]

***Providing the consumer with the assessment***

3.91 For the purposes of considering proceeding with a particular credit contract or in the event of a dispute in relation to a suggested credit contract or assisted credit application, a consumer may request a copy of the preliminary assessment that sets out the determination that the proposed or existing credit contract is not unsuitable for them, and the grounds for that assessment.

3.92 A copy of the preliminary assessment may be requested by the consumer within seven years of the date of the credit assistance quote. It must be provided by the credit assistant within:

- seven business days of the credit assistant receiving the request, if the request is made within two years of the quote; or
- twenty-one business days thereafter.

There is no obligation on a credit assistant to provide a copy of the assessment if the credit assistance is not provided to the consumer. Failure to comply with the requirement attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units is in line with the civil penalties regime in the Corporations Act. *[Part 3-1, Division 4, subsection 120(1)]*

3.93 Regulations may prescribe the manner in which the licensee must give the consumer the copy of the assessment if considered necessary. *[Part 3-1, Division 4, subsection 120(2)]*

3.94 The consumer cannot be charged any costs for being provided a copy of the assessment. Failure to comply with the requirement attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units is in line with the civil penalties regime in the Corporations Act. *[Part 3-1, Division 4, subsection 120(3)]*

3.95 A breach of either subsection 120(1) or (3) is also an offence of strict liability, subject to a maximum penalty of 50 penalty units. The imposition of a strict liability offence is considered appropriate in order to:

- enhance the effectiveness of the regulatory regime dealing with ASIC's enforcement powers; and
- encourage the relevant parties to put in place systems and policies that minimise the risk of contraventions of the relevant provisions. *[Part 3-1, Division 4, subsections 120(4) and (5)]*

#### ***Division 5 — Fees, commission etc. relating to credit contracts***

3.96 The credit assistant must provide, at the same time as providing credit assistance, a credit proposal disclosure in writing, to the consumer. Failure to comply with the requirement attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units is in line with the civil penalties regime in the Corporations Act. *[Part 3-1, Division 5, subsection 121(1)]*

3.97 The credit proposal disclosure must contain the following:

- ***Commissions***
- A reasonable estimate of the total amount of any commission that the credit assistant, their employee, director or credit representative is likely to receive in relation to the particular credit contract being suggested or for which assistance to

apply for the particular credit contract is being provided  
*[Part 3-1, Division 5, paragraph 121(2)(b)].*

- Fees and charges
- Any fees or charges the consumer is liable to pay to the credit assistant, in relation to applying for the credit contract being suggested by the credit assistant (this figure was foreshadowed in the quote) *[Part 3-1, Division 5, paragraph 121(2)(a)].*
- A reasonable estimate of any fees or charges the consumer is liable to pay to the credit provider, in relation to applying for the credit contract being suggested by the credit assistant *[Part 3-1, Division 5, paragraph 121(2)(c)].*
- A reasonable estimate of any fees or charges the consumer is liable to pay to any another person in relation to applying for the credit contract (this figure was foreshadowed in the quote) *[Part 3-1, Division 5, paragraph 121(2)(d)].*
  - Where any of these fees or charges are being disbursed from the credit being applied for, the credit assistant is to provide an estimate of the net amount of credit that will be available to the consumer after those payments are made *[Part 3-1, Division 5, paragraph 121(2)(e)].*

### **Example 3.3**

Jesse Consumer is applying for a loan of \$150,000 for a housing mortgage with the assistance of a credit assistant. The credit assistant previously quoted that his fees to suggest and apply for a loan that met the consumer's requirements (not discussed here) would be \$225 plus an estimated \$500 for a property valuation and \$800 for legal fees.

The loan application fee to be charged by the credit provider for the suggested loan is \$100.

The credit assistant receives 2 per cent commission for every \$100,000 of credit secured from the suggested credit provider.

The credit proposal disclosure document set out the required information as follows:

<i><b>Credit proposal disclosure for Jesse Consumer, 27 May 2009</b></i>	
<i><b>Provided by Rhys' Credit Assistance Services</b></i>	
<i><b>In relation to application for XYZ Mortgage Product</b></i>	
<i>Description</i>	<i>Amount</i>
Amount of credit applied for	\$150,000
<i>Costs to be disbursed from credit</i>	
Credit assistant fees	\$225
Legal fees	\$800
Valuation fees	\$500
Credit provider charges	\$100
<i>Total estimate of costs</i>	\$1,625
Net credit available to consumer	\$148,375
<i>Estimated total commissions receivable by the credit assistant from the credit provider</i>	\$3,000
<i>(This is estimated by a percentage of the credit secured)</i>	

3.98 A regulation-making power is included to allow for further specificity to be prescribed in relation to providing information regarding commissions as required in paragraph 121(2)(b). *[Part 3-1, Division 5, subsection 121(3)]*

3.99 The credit proposal disclosure document may be given in the most suitable manner for the circumstance, for example either in person, in writing, (for example, by post or an attachment to an email).

3.100 A regulation-making power is included in order to prescribe the manner for giving the quote if prescription becomes necessary. *[Part 3-1, Division 5, subsection 121(4)]*



3.101 A credit assistant must not profit from payments made to another person (third party) by the credit assistant on behalf of the consumer made in the course of providing credit assistance. Failure to comply with the requirement attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units is in line with the civil penalties regime in the Corporations Act. *[Part 3-1, Division 5, subsection 122(1)]*

***Division 6 — Prohibition on suggesting, or assisting with, unsuitable credit contracts***

3.102 There is a prohibition on credit assistants from suggesting to consumers or assisting consumers to apply for the provision of credit under a particular credit contract with a particular credit provider, if the contract will be unsuitable for the consumer. Failure to comply with the requirement attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units is in line with the civil penalties regime in the Corporations Act. *[Part 3-1, Division 6, subsection 123(1)]*

3.103 Similarly, there is a prohibition on credit assistants from suggesting that the consumer remain in a particular credit contract with a particular credit provider if the contract is unsuitable for the consumer at that time. Failure to comply with the requirement attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units is in line with the civil penalties regime in the Corporations Act. *[Part 3-1, Division 6, subsection 124(1)]*

3.104 A credit contract is unsuitable for a consumer if at the time the credit assistant suggests it or assists the consumer to apply for it, it is likely that the consumer will be unable to comply with the consumer's financial obligations under the contract or could only comply with substantial hardship at that time, or the contract does not meet the consumer's requirements and objectives at the time that the contract is proposed to be entered or the credit limit is proposed to be increased. *[Part 3-1, Division 6, subsections 123(2) and 124(2)]*

3.105 It is presumed that if a consumer will only be able to comply with their financial obligations under the contract by selling their principal place of residence, then the consumer could only comply with those obligations with substantial hardship, unless the contrary is established.

3.106 The effect of this is that there will be an onus on the credit assistant to demonstrate that it was not unsuitable to suggest or assist with a credit contract with a consumer that could only be complied with as a result of the sale of the consumer's primary place of residence. *[Part 3-1, Division 6, subsections 123(3) and 124(3)]*

3.107 The information that must be taken into account by a credit assistant when determining if the contract will be unsuitable includes two elements.

3.108 The first is information that the credit assistant had reason to believe to be true. That would include, for example, information that has been provided by the consumer about their financial circumstances that has been verified by the credit assistant or is otherwise reasonably believed to be true.

3.109 The second is information that the licensee would have had reason to believe if the reasonable steps to verify required had in fact occurred, the intent of this part of the proposed provision is to ensure that credit assistants, in making their assessments regarding unsuitability, are required to take into consideration information that they should have become aware of if the reasonable steps to verify had been taken. Information that does not satisfy these requirements (that is, information that is not reasonably believed to be true) must not be taken into account. *[Part 3-1, Division 6, subsections 123(4) and 124(4)]*

3.110 Regulations may allow for specific situations in which a credit contract is taken to be unsuitable or not unsuitable. *[Part 3-1, Division 6, subsections 123(5) and 124(5)]*

3.111 Breach of the requirement in subsections 123(1) and 124(1) is an offence, punishable by a maximum penalty of 100 penalty units, or 2 years imprisonment, or both. This reflects the importance of the need to deter the most serious ‘moral’, economic and social harm in relation to consumer credit, that is suggesting a consumer enter into an unsuitable credit contract or assisting a consumer to enter an unsuitable credit contract. ASIC and the courts will be able to target the sanction in accordance with the seriousness of the breach. *[Part 3-1, Division 6, subsections 123(6) and 124(6)]*

3.112 Where a credit assistant suggests that a consumer remain in an unsuitable contract because there is no other credit contract that is not unsuitable for the consumer, the credit assistant will have a defence to this suggestion if the credit assistant informs the consumer of the procedure for seeking a variation of their contract with their credit provider or a stay of enforcement from their credit provider. The credit assistant bears the burden to evidence that there was no alternative contract that was not unsuitable and that they informed the consumer of the procedures. *[Part 3-1, Division 6, subsection 124(7)]*

3.113 Regulations may be made that prescribe the particular inquiries that must be made, or do not need to be made, for determining that no other credit contract was not unsuitable for the consumer. *[Part 3-1, Division 6, subsection 124(8)]*

## Part 3-2 — Licensees that are credit providers under credit contracts

### *Division 2 — Credit guide of credit providers*

3.114 A licensee who considers it likely they will be entering into a credit contract with a consumer will be required to provide the consumer with the licensee's credit guide. The guide is required be provided to the consumer as soon as practicable after it becomes apparent to the credit provider that the consumer is likely to enter into a credit contract with them. Failure to comply with the requirement attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units is in line with the civil penalties regime in the Corporations Act. *[Part 3-2, Division 2, subsection 126(1)]*

3.115 The credit guide includes the following information about the credit provider:

- key identification information;
- procedures for resolving disputes with a consumer; and
- a description of key obligations of the credit provider (which relate to the requirement not to provide consumers with an unsuitable loan and the consumer's right to request a copy of the credit provider's assessment that the loan is not unsuitable for the consumer).

*[Part 3-2, Division 2, subsection 126(2)]*

3.116 The purpose of the credit guide is to provide the consumer with key information early in the credit transaction, so that they are informed of relevant matters before deciding to enter a credit contract with the particular credit provider.

3.117 It is envisaged that the credit provider could meet the requirements of a credit guide through the provision of a standardised document as the information is not generally tailored to a specific contract.

3.118 When a credit application is received by a credit provider from a credit assistant, it is anticipated that the credit guide information will be provided to the consumer in the provider's first communication with them, often this will be at the time the pre-contractual disclosure is provided, as required by the Code as it is likely at this time that the credit provider will be entering into a credit contract with the consumer. If the provider's credit guide has already been provided by the credit assistant

(and met the requirements of subsection 126(2)), there is no expectation to provide it again.

3.119 A regulation-making power is included in order to allow for the content of the credit guide to be revised and modified as necessary. *[Part 3-2, Division 2, subsection 126(3)]*

3.120 The credit guide may be provided in the most suitable manner for the circumstance, for example either in person, in writing, (for example, by post or an email) or as an Internet notice accepted by the consumer.

3.121 A regulation-making power is included that will permit prescription regarding the manner for giving the credit guide. *[Part 3-2, Division 2, subsection 126(4)]*

3.122 A breach of section 126 is also an offence of strict liability, subject to a maximum penalty of 50 penalty units. The imposition of a strict liability offence is considered appropriate in order to encourage the relevant parties to put in place systems and policies that minimise the risk of contraventions of the relevant provisions. *[Part 3-2, Division 2, subsections 126(5) and (6)]*

*Credit guide of credit providers who are assignees*

3.123 When the rights or obligations of a consumer credit contract are assigned to another licensee, the new credit provider will be required to provide all debtors with their credit guide as soon as practicable. The provision of this credit guide notifies the debtor of the change in legal ownership of the credit contract, and key information about the assignee's membership of external dispute resolution and compensation arrangements. Failure to comply with the requirement attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units is in line with the civil penalties regime in the Corporations Act. *[Part 3-2, Division 2, subsection 127(1)]*

3.124 The credit guide includes some basic information about the assignee, and the procedures for dealing with a dispute with the consumer. *[Part 3-2, Division 2, subsection 127(2)]*

3.125 A regulation-making power is included in order to allow for the required content of the credit guide to be revised or modified. *[Part 3-2, Division 2, subsection 127(3)]*

3.126 The assignee's credit guide may be provided in the most suitable manner for the circumstance, for example either in person, in writing, (for example, by post or an email) or as an Internet notice accepted by the consumer.

3.127 A regulation-making power is included that will permit prescription regarding the manner for giving the credit guide. *[Part 3-2, Division 2, subsection 127(4)]*

3.128 1.121 A breach of section 127 is also an offence of strict liability, subject to a maximum penalty of 50 penalty units. The imposition of a strict liability offence is considered appropriate in order to encourage the relevant parties to put in place systems and policies that minimise the risk of contraventions of the relevant provisions. *[Part 3-2, Division 2, subsections 127(5) and (6)]*

***Division 3 — Obligations of credit providers before entering credit contracts or increasing credit limits***

3.129 Before entering into a credit contract with a consumer, the credit provider must make an assessment as to whether the contract will be unsuitable for the consumer. Similarly, when a credit provider is increasing the limit of an existing credit contract, the credit provider must assess whether the new limit for the credit contract will be unsuitable for the consumer before increasing the limit. Failure to comply with the requirement attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units is in line with the civil penalties regime in the Corporations Act. *[Part 3-2, Division 3, section 128]*

3.130 The assessment must be made no more than 90 days before the credit contract is entered (the critical day) and must be an assessment that covers the day the contract is to be entered or the credit limit increased.

3.131 For different types of credit contracts, it may be appropriate to provide for a longer or shorter length of time in which the assessment is to be made before the critical day. This period may be prescribed by the regulations.

3.132 The credit provider must also have made the inquiries and verification as set out in detail in section 130. Failure to make an assessment as required incurs a civil penalty.

*Assessment of unsuitability of the credit contract*

3.133 In order to make a compliant assessment for the purposes of section 128, the credit provider must specify the period that the assessment covers (which is to be a period which includes the critical day). *[Part 3-2, Division 3, section 129]*

3.134 A compliant assessment must also assess whether the credit contract will be unsuitable for the consumer if the contract is entered or the credit limit is increased in that specified period. *[Part 3-2, Division 3, section 129]*

*Reasonable inquiries etc. about the consumer*

3.135 In order to appropriately meet the requirement to make an assessment about the unsuitability of the contract for the consumer, the credit provider must:

- make reasonable inquiries about the consumer's requirements and objectives for the credit contract;
- make reasonable inquiries about the consumer's financial situation; and
- take reasonable steps to verify the consumer's financial situation.

Failure to comply with the requirement attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units is in line with the civil penalties regime in the Corporations Act. *[Part 3-2, Division 3, subsection 130(1)]*

3.136 Regulation-making power allows for specific matters or steps to be undertaken that are considered mandatory to meet the assessment requirement. Regulations may also prescribe steps or particular inquiries that do not need to be taken to meet the assessment requirement. *[Part 3-2, Division 3, subsection 130(2)]*

3.137 ASIC also expects to provide guidance where appropriate to set out further detail about reasonable inquiries and verification process in particular circumstances.

3.138 Consideration of what is reasonable will depend on the circumstances. Generally, the minimum requirement for satisfying reasonable inquiries about the consumer's requirements and objectives will be to understand the purpose for which the credit is sought and determine if the type, length, rate, terms, special conditions, charges and other aspects of the proposed contract meet this purpose or put forward credit contracts that do match the consumer's purpose.

**Example 3.4**

It could be unlikely that a small amount loan for the purpose of meeting a living expense (such as fixing the car) that had a high interest rate and a term of several years would meet the consumer's requirements and not be unsuitable.

### Example 3.5

A consumer may apply directly to the credit provider for a credit card. Often a credit card has no particular purpose and therefore there would be limited requirement to understand the consumer's requirements and objectives in this case. However, there would remain the requirement to assess the consumer's capacity to repay the contract and not to offer the consumer more credit than they requested. Where the credit provider knew the initial use of the credit card (for example, a major purchase such as a car) it would need to take that into account in considering whether or not the credit contract was not unsuitable.

### Example 3.6

A consumer applies for a short term, small amount loan to meet an urgent expense. It is assumed that the consumer in this situation does not have savings and therefore that the ability to meet the repayments is entirely from future income. The purpose of the loan (for example, to meet rent or utilities bills) and the inquiries into the borrower's financial circumstances indicate that there is very little discretionary expenditure that could be reduced in order to free-up income or meet high interest payments or fees. Reasonable inquiries to make an assessment of the consumer's capacity to repay the loan would include recent payslips and bank statements confirming details of pay dates and amounts, number of dependents, time employed, period at home address and other factors that influence the consumer's capacity to repay.

3.139 The purpose for undertaking reasonable inquiries about the consumer's financial situation is to ascertain a reasonable understanding of the consumer's ability to meet *all* the repayments, fees, charges and transaction costs of complying with the proposed credit contract. The general position is that consumers should be able to meet the contract's obligations from income rather than equity in an asset.

3.140 Reasonable inquiries about the consumer's financial situation could ordinarily include inquiries about the amount and source of the consumer's income, determining the extent of fixed expenses (such as rent or contracted expenses such as insurance, other credit contracts and associated information) and other variable expenses of the consumer (and drivers of variable expenses such as the number of dependents and the number of vehicles to run, particular or unusual circumstances). The extent of inquiries will however depend on the circumstances.

3.141 The possible range of factors that may need to be established in relation to a consumer's capacity to repay credit could include:

- the consumer's current income and expenditure;

- the maximum amount the consumer is likely to have to pay under the credit contract for the credit;
- the extent to which any existing credit contracts are to be repaid, in full or in part, from the credit advanced;
- the consumer's credit history, including any existing or previous defaults by the consumer in making payments under a credit contract; and
- the consumer's future prospects, including any significant change in the consumer's financial circumstances that is reasonably foreseeable (such as a change in repayments for an existing home loan, due to the ending of a honeymoon interest rate period).

3.142 It is noted that there will be matters that will not be able to be known to the credit provider. This may arise where the consumer may not disclose the matter, despite the credit provider's inquiry, and where there was no reasonable way of verifying the information provided.

3.143 The Code contains a provision that imposes up front obligations on any party to a credit transaction. Subsection 154(1) says 'a person must not make a false or misleading representation in relation to a matter that is material to entry into a credit contract or a related transaction or in attempting to induce another person to enter into a credit contract or related transaction'.

3.144 It is noted that this imposes an obligation on credit providers, debtors, guarantors as well as any third party. A debtor who makes a false or misleading representation to a credit provider or guarantor to induce them to provide or guarantee the credit may be liable for any loss suffered.

3.145 Any compensation to a consumer or an order in relation to loss or damage can be mitigated (including limiting any compensation) if the consumer has made a false or misleading representation in order to obtain the credit. This is to take into account what is practically just in the circumstances.

*Reasonable steps to verify*

3.146 In undertaking the assessment, credit providers are required to take into account information about the client's financial situation and other matters required by the regulations that they either already possess, or which would be known to them if they made reasonable inquiries and took reasonable steps to verify it. This provision means that credit providers must ask the client about their financial situation and the other



matters prescribed in the regulations, and must make such efforts to verify the information provided by the client as would normally be undertaken by a reasonable and prudent lender in those circumstances. Conducting a credit reference check is, for instance, likely to be an action that would be reasonable to undertake in most transactions. Credit providers are not expected to take action going beyond prudent business practice in verifying the information they receive.

3.147 ASIC may also provide guidance, where appropriate, to set out further detail about reasonable inquiries and verification in particular circumstances.

#### *Refinancing*

3.148 The level of inquiries necessary to meet the level of ‘reasonable inquiries’ is likely to be greater where the consumer is refinancing, particularly where they are having difficulties meeting the repayments, or even in arrears, on their existing credit contract. In this situation it will usually be possible to determine that the consumer cannot meet the repayments of the amount being charged under that contract, and a contract will prima facie be unsuitable where the repayments are at the same or a similar level.

3.149 There are usually transaction costs associated with refinancing, including any fees for using a credit assistant’s services. All costs of changing credit contracts are expected to be taken into consideration when assessing the consumer’s ability to meet the obligations of the new credit contract over its entire term.

#### *When a credit contract must be assessed as unsuitable*

3.150 A credit provider must assess that the credit contract will be unsuitable for the consumer if the contract will be unsuitable for the consumer. *[Part 3-2, Division 3, subsection 131(1)]*

3.151 A credit contract must be assessed as unsuitable for the consumer if it is likely that at the time of entering the contract it is reasonably foreseeable that:

- the consumer will be unable to comply with the consumer’s financial obligations under the contract, including by not being able to make payments, or could only comply with substantial hardship;
- the contract will not meet the consumer’s requirements and objectives; or

- prescribed circumstances set out that the contract must be assessed as unsuitable.

Failure to comply with the requirement attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units is in line with the civil penalties regime in the Corporations Act. *[Part 3-2, Division 3, subsection 131(2)]*

3.152 Even if the contract will not be unsuitable for the consumer as assessed, the credit provider may still assess that the contract will be unsuitable for other reasons.

3.153 The standard for the consumer being likely to meet the financial obligations in the contract is an objective one. It is not directly linked to the credit provider's own internal standards and guidelines regarding assessing a capacity to repay. Such internal standards and guidelines would be expected to factor in the credit provider's own policies on risk exposures and may vary from time to time, in line with changes to the risk appetite of the credit provider, and the commercial and economic environment. Accordingly, the fact that an application for credit satisfied a credit provider's own policies for affordability does not necessarily mean that it met the standard in the legislation. However, it is expected that the types of inquiries made and assessments conducted for the purposes of the credit provider's internal standards and guidelines on affordability would, in most cases, be very similar to those that are required in order to assess the likelihood that a consumer can meet the financial obligations under the proposed contract.

3.154 The concept of substantial hardship is used in paragraph 76(2)(1) of the Code and is applied similarly for responsible lending.

3.155 It is presumed that if a consumer will only be able to comply with their financial obligations under the contract by selling their principal place of residence, the consumer could only comply with those obligations with substantial hardship, unless the contrary is established.

3.156 The effect of this that there will be an onus on the credit provider to demonstrate that it was not unsuitable to enter into a credit contract with a consumer that could only be complied with as a result of the sale of the consumer's primary place of residence. *[Part 3-2, Division 3, subsection 131(3)]*

3.157 The information that must be taken into account by a credit provider for determining if the credit contract is unsuitable includes two elements.

3.158 The first is information that the credit provider had reason to believe to be true. That would include, for example, information that has been provided by the consumer about their financial circumstances that has been verified by the credit provider or is otherwise reasonably believed to be true.

3.159 The second is information that the licensee would have had reason to believe if the required reasonable steps to verify had in fact occurred, the intent of this part of the proposed provision is to ensure that credit providers, in making their assessments regarding unsuitability, are required to take into consideration information that they should have become aware of if the reasonable steps to verify had been taken. Information that does not satisfy these requirements (that is, information that is not reasonably believed to be true) must not be taken into account. *[Part 3-2, Division 3, subsection 131(4)]*

*Giving the consumer the assessment*

3.160 For the purposes of considering entering a particular credit contract or in the event of a dispute in relation to an existing credit contract, a consumer may request a copy of the assessment that sets out determination that the proposed or existing credit contract is not unsuitable for them and the grounds for that assessment. Failure to comply with the requirement attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units are in line with the civil penalties regime in the Corporations Act. *[Part 3-2, Division 3, subsection 132(1)]*

3.161 The consumer has the right to request this assessment up to seven years after the critical day (ordinarily, the day the credit contract is entered or increased). A copy of the assessment must be provided to the consumer within seven business days of the credit provider receiving a request made within two years of the critical day and within 21 business days of the credit provider receiving a request made thereafter. There is no obligation on a credit provider to provide a copy of the assessment if the credit contract is not entered into or the credit limit is not increased. Failure to comply with the requirement attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units are in line with the civil penalties regime in the Corporations Act. *[Part 3-2, Division 3, subsection 132(2)]*

3.162 The consumer cannot be charged any costs for being provided a copy of the assessment. *[Part 3-2, Division 3, subsection 132(4)]*

3.163 Regulations may prescribe the manner in which the licensee must give the consumer the copy of the assessment if considered necessary. *[Part 3-2, Division 3, subsection 132(3)]*

3.164 A breach of either subsection 132(1), (2) or (4) is also an offence of strict liability, subject to a maximum penalty of 50 penalty units. The imposition of a strict liability offence is considered appropriate in order to:

- enhance the effectiveness of the regulatory regime dealing with ASIC's enforcement powers; and
- encourage the relevant parties to put in place systems and policies that minimise the risk of contraventions of the relevant provisions.

*[Part 3-2, Division 2, subsections 126(5) and (6)]*

***Division 4 — Prohibition on entering , or increasing the credit limit of, unsuitable credit contracts***

3.165 There is a prohibition on credit providers from entering into a consumer credit contract or increasing the limit of an existing credit contract if the contract is unsuitable for the consumer at the time the contract is entered into or the limit is increased.

3.166 A credit contract is unsuitable for a consumer if at the time it is entered or the credit limit is increased it is likely that the consumer will be unable to comply with the consumer's financial obligations under the contract, or could only comply with substantial hardship at that time or the contract does not meet the consumer's requirements and objectives at that time. Failure to comply with the requirement attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units is in line with the civil penalties regime in the Corporations Act. *[Part 3-2, Division 4, subsections 133(1) and (2)]*

3.167 For it to be *likely* that the consumer will be able to comply with the financial obligations under the contract, the credit provider must take a future view of the reasonable foreseeability of that compliance, given the financial obligations will arise into the future.

3.168 It is presumed that if a consumer will only be able to comply with their financial obligations under the contract by selling their principal place of residence, then the consumer could only comply with those obligations with substantial hardship, unless the contrary is established.

3.169 The effect of this that there will be an onus on the credit provider to demonstrate that it was not unsuitable to enter into a credit contract with a consumer that could only be complied with as a result of the sale of the consumer's primary place of residence. *[Part 3-2, Division 4, subsection 133(3)]*

3.170 The information that must be taken into account by a credit provider when determining the contract is unsuitable includes two elements.

3.171 The first is information that the credit provider had reason to believe to be true. That would include, for example, information that has been provided by the consumer about their financial circumstances that has been verified by the credit provider or is otherwise reasonably believed to be true.

3.172 The second is information that the credit provider would have had reason to believe if the required reasonable steps to verify had in fact occurred, the intent of this part of the proposed provision is to ensure that credit providers, in making their assessments regarding unsuitability, are required to take into consideration information that they should have become aware of if the reasonable steps to verify had been taken. Information that does not satisfy these requirements (that is, information that is reasonably believed to be true) must not be taken into account. *[Part 3-2, Division 4, subsection 133(4)]*

3.173 Regulations may allow for specific situations in which a credit contract is taken to be unsuitable or not unsuitable. *[Part 3-2, Division 4, subsection 133(5)]*

3.174 Breach of the requirement in subsection 133(1) is an offence, punishable by a maximum penalty of 100 penalty units, or 2 years imprisonment, or both. This reflects the importance of the need to deter the most serious ‘moral’, economic and social harm in relation to consumer credit; that is entering into an unsuitable credit contract with a consumer. ASIC and the courts will be able to target the enforcement action and sanction in accordance with the seriousness of the breach. *[Part 3-2, Division 4, subsection 133(6)]*

### **Part 3-3 — Licensees that provide credit assistance in relation to consumer leases**

3.175 Divisions 2 to 6 largely replicate the same requirements on licensees where they are providing credit assistance in respect of a consumer lease, as those applying in respect of a credit contract. *[Part 3-3, sections 136 to 147]*

### **Part 3-4 — Licensees that are lessors under consumer leases**

3.176 Divisions 2 to 4 largely replicate the same requirements on licensees where they enter into consumer leases as lessors, as those applying where they enter into credit contracts. *[Part 3-4, sections 149 to 156]*

## Part 3-5 — Credit representatives

### *Division 2 — Credit guide of credit representatives*

3.177 A registered person or a licensee can authorise third parties to engage in credit activities on its behalf, without these persons having to hold a licence in their own right. These persons are known as ‘credit representatives’. The registered person or licensee has responsibility for supervising these persons, and must specify in writing the credit activities they can engage in. A credit representative may be authorised to act for more than one principal.

3.178 As a result of this arrangement, that allows for the representative to be authorised to act for more than one principal, a credit representative is required to provide in its credit guide information that sets out the credit representative’s separate identity and information about the parties for which they act, and other relevant information.

3.179 The credit representative must provide this information in their own credit guide, which they must give to a consumer at the same time they provide a consumer a licensee’s credit guide. Failure to comply with the requirement attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units is in line with the civil penalties regime in the Corporations Act. *[Part 3-5, Division 2, subsection 158(1)]*

3.180 The credit representative’s guide gives the consumer some basic information about the credit representative, the six licensees with whom they conduct the most business, commissions the credit representative is likely to receive from those licensees, disclosure of the authorised services of the credit assistant and information that flags the possible nature and size of fees and charges that the consumer may incur if they use the credit representative’s services. *[Part 3-5, Division 2, subsection 158(2)]*

3.181 A regulation-making power is included in order to allow for the content of the credit guide to be revised as necessary. *[Part 3-5, Division 2, subsection 158(3)]*

3.182 The credit guide may be provided in the most suitable manner for the circumstance, for example either in person, in writing, (for example, by post or an email) or as an Internet notice accepted by the consumer.

3.183 A regulation-making power is included in order to prescribe the manner for giving the credit guide if prescription becomes necessary. *[Part 3-5, Division 2, subsection 158(4)]*

3.184 A breach of section 158 is also an offence of strict liability, subject to a maximum penalty of 50 penalty units. The imposition of a strict liability offence is considered appropriate in order to encourage the relevant parties to put in place systems and policies that minimise the risk of contraventions of the relevant provisions. *[Part 3-5, Division 2, subsections 158(5) and (6)]*

## **Part 3-6 — Debt collectors**

### *Division 2 — Credit guide of debt collectors*

3.185 When a debt collector is authorised to collect, on the credit provider's behalf, repayments made by a debtor under a credit contract, the person authorised to do so will be required to provide the debtor with their credit guide as soon as practicable. Failure to comply with the requirement attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units are in line with the civil penalties regime in the Corporations Act. *[Part 3-6, Division 2, subsection 160(1)]*

3.186 When a debt collector is authorised to collect, on the lessor's behalf, payments made by a lessee under a lease, the person authorised to do so will be required to provide the debtor with their credit guide as soon as practicable. Failure to comply with the requirement attracts a civil penalty, of a maximum of 2,000 penalty units. The maximum civil penalty units is in line with the civil penalties regime in the Corporations Act. *[Part 3-6, Division 2, subsection 160(2)]*

3.187 The provision of this credit guide notifies the debtor of the identity of the person collecting the debt and key information about the collector's membership of external dispute resolution and compensation arrangements. *[Part 3-6, Division 2, subsection 160(3)]*

3.188 A regulation-making power is included in order to allow for the content of the credit guide to be revised as necessary. *[Part 3-6, Division 2, subsection 160(4)]*

3.189 The credit guide may be provided in the most suitable manner for the circumstance, for example either in person, in writing, (for example, by post or an email) or as an Internet notice accepted by the consumer.

3.190 A regulation-making power is included in order to prescribe the manner for giving the credit guide if prescription becomes necessary. *[Part 3-6, Division 2, subsection 160(5)]*

3.191 The requirement will only apply to debt collectors who are not exempt from this obligation.

3.192 A breach of section 160 is also an offence of strict liability, subject to a maximum penalty of 50 penalty units. The imposition of a strict liability offence is considered appropriate in order to encourage the relevant parties to put in place systems and policies that minimise the risk of contraventions of the relevant provisions. *[Part 3-6, Division 2, subsections 161(6) and (7)]*

## **Part 3-7 — Exemptions and modifications relating to this Chapter**

### *Division 2 — Exemptions and modifications relating to this chapter*

3.193 Exemptions and modifications can be effected both by ASIC and through the regulations to the following provisions:

- this chapter;
- the definitions in the Credit Bill, as they apply to references in this chapter; and
- instruments made for the purposes of this chapter.

*[Part 3-7, Division 2, section 162]*

3.194 There are three different ways in which the application of these provisions can be modified or changed:

- by ASIC exempting or modifying their application to a particular person (or that person and all their credit representatives), credit contract or consumer lease *[Part 3-7, Division 2, subsection 163(1)]*;
- by ASIC exempting or modifying their application to a class of persons, credit contracts or consumer leases *[Part 3-7, Division 2, subsection 163(3)]*; or
- by an exemption or modification of their application in the regulations to *[Part 3-7, Division 2, section 164]*:
  - a person or class of persons;
  - a credit contract or class of credit contracts; or
  - a consumer lease or class of consumer leases.

3.195 An exemption or modification by ASIC in respect of a particular person, credit contract or consumer lease is stated not to be a legislative instrument. This statement is declaratory of the position, consistent with



section 5 of the *Legislative Instruments Act 2003*. [*Part 3-7, Division 2, subsection 163(2)*]

3.196 An exemption by ASIC of a particular person or a credit activity that is engaged in relation to a specified credit contract, mortgage, guarantee or consumer lease must be in writing and must be published by ASIC on its website. [*Part 3-7, Division 2, subsection 163(5)*]

3.197 A person will not commit an offence where their conduct:

- is only an offence because of the nature of the exemption by ASIC (for example, where the exemption is conditional and the condition is not met); and
- at the time of the conduct the person had not been given notice of the exemption (either because they had not been given written notice of it by ASIC or because it had not been published by ASIC on its website).

[*Part 3-7, Division 2, subsections 163(6) and (7)*]



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# **Chapter 4**

## **Remedies**

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### **Outline of chapter**

4.1 Chapter 4 of this explanatory memorandum outlines the remedies and sanctions regime, the dispute resolution and court framework administered by the Australian Securities and Investments Commission (ASIC) to support the National Consumer Credit Protection Bill 2009 (Credit Bill), established in Chapter 4 of the Credit Bill.

4.2 It also sets out the remedies available to consumers, including remedies in relation to unlicensed conduct.

4.3 It sets out the jurisdiction and procedure of the courts, and the dispute resolution mechanisms available to consumers.

### **Context of new law**

#### **Background**

4.4 In transferring the regulation of consumer credit from the States and Territories to the Commonwealth, some of the bodies providing dispute resolution services and exercising jurisdiction under the new legislation will change.

4.5 Currently:

- Some providers of credit and credit services have voluntarily joined an external dispute resolution (EDR) scheme in relation to credit matters. Membership of an EDR Scheme is often a key component of being a signatory to an industry code, for example the Banking Code of Conduct, or to achieve membership of an industry body.
- As part of being a member of an EDR Scheme or signatory to an industry code of conduct, some credit and credit service providers are also expected to provide appropriate internal dispute resolution schemes.

- Relevant State and Territory Fair Trading or Consumer Affairs bodies provide dispute resolution and conciliation functions between lenders and consumers.
- Consumers may raise a dispute or seek court intervention under the Uniform Consumer Credit Code (UCCC) in the relevant State or Territory tribunal, specialist court or local court.

4.6 As part of the transfer of consumer credit regulation, the Commonwealth cannot confer federal jurisdiction upon State and Territory tribunals which are not courts within the meaning of Chapter III of the Constitution. In addition, the relevant State and Territory Fair Trading and Consumer Affairs bodies will no longer provide official dispute resolution services for credit matters.

4.7 Some concerns have been raised about the potential gaps between what matters can be heard by federal courts and, State courts and tribunals. Concerns have also been raised about the relative accessibility of the federal courts compared to the relevant State courts and tribunals, particularly in relation to costs and ease of access.

4.8 The dispute resolution framework seeks to address these concerns.

4.9 Consequently, wherever possible, parties will be encouraged to resolve disputes without resorting to litigation. It is expected that courts would generally only be utilised where internal dispute resolution (IDR) and EDR processes have not resolved the matter, or where EDR is considered inappropriate.

4.10 This arrangement is in line with trends to provide accessible, timely and cost effective dispute resolution processes. For example, as reported in its *2007-08 Annual Report*, the Victorian Civil and Administrative Tribunal (VCAT) resolved 48 per cent of credit disputes via VCAT's Mediation Services or through settlement agreements reached at or before a hearing. This figure does not include mediations which resulted in debtors and lenders trying new repayment arrangements before finally settling, or matters that were settled during a hearing.

4.11 This also recognises that in cases of hardship or other consumer credit issues, a facilitated or negotiated outcome can be more favourable to a debtor than if it had been formally heard and determined under law.

4.12 The key policy objective of the amendments is to maintain accessibility to dispute resolution in terms of location, procedural simplicity and costs, taking into account the different jurisdictional

context when transferring the regulation of credit from the States and Territories to the Commonwealth.

## **Summary of new law**

4.13 The key provisions establish a civil penalty and consumer remedy framework that promotes strong consumer protections, including a civil enforcement regime and broad civil remedies.

4.14 The key provisions:

- enable ASIC to seek a court declaration of contravention for a civil penalty and seek a pecuniary penalty;
- set out the administrative provisions in relation to a civil penalty;
- enable the court to grant remedies to consumers and other relevant parties for loss and damage suffered as a result of a contravention of the Credit Bill, including through varying the contract as well as monetary redress;
- enable the court to grant relief to consumers and other relevant parties for unlicensed conduct; and
- permit infringement notices to be issued by ASIC for strict liability offences and civil penalties as provided by regulations.

4.15 In addition, they facilitate the transfer of consumer credit to the Commonwealth and promote accessibility in terms of location, procedural simplicity and costs of dispute resolution. This includes:

- access to all relevant Commonwealth, State and Territory courts;
- delineation of civil and criminal jurisdiction, including transfer and appeal arrangements;
- ‘opt in’ streamlined court procedures for certain consumer remedies; and
- a presumption that a court may not impose an adverse cost order in certain circumstances.

## **Sanctions and remedies regime**

4.16 As part of the implementation of a national consumer credit regulation framework, it was agreed that ASIC would have enhanced enforcement powers. These enhanced powers have been partly achieved by extending the range of penalties and sanctions available to ASIC that can be responsive to the tenor and magnitude of a contravention.

4.17 The overall structure includes a tiered approach to sanctions in the Credit Bill, which reflect considerations of the *Review of Sanctions in Corporate Law* (Treasury, 2007), the *Commonwealth Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (Attorney-General's Department, 2007). It also seeks to maintain consistency with the *Corporations Act 2001* (Corporations Act) and other Commonwealth consumer protection law, where there are offences in respect of similar conduct.

4.18 The tiered approach to the sanctions regime includes:

- criminal offences, including strict liability offences;
- civil penalties;
- infringement notices; and
- administrative sanctions to be exercised by ASIC as the consumer credit regulator, including banning orders against individuals, and the power to cancel or suspend an Australian credit licence (ACL), further explained in Chapter 2 of this explanatory memorandum.

4.19 Further, ASIC's current regulatory powers under the *Australian Securities and Investments Commission Act 2001* will be largely replicated for credit matters, further explained in Chapter 6 of this explanatory memorandum.

4.20 Consumer remedies are an important element of the enforcement package as it enables consumers to take direct action against a licensee who breaches the law and causes them loss or damage. Private suits are considered a useful way of influencing and curbing market behaviour, particularly in relation to the National Credit Code (Code).

### *Criminal sanctions*

4.21 Criminal sanctions will apply to breaches of law where:

- the objectives of the offence suggest that such an outcome would be warranted; or
- the offence is analogous to similar provisions in the Corporations Act, to ensure consistency of application of 'like' offences.

4.22 Where the credit licensing regime is similar to the existing financial services licensing regime in the Corporations Act, creating offences in respect of the same type of conduct, the offences and penalties in the Credit Bill have generally been made consistent with those in the Corporations Act.

4.23 Some breaches that are procedural in nature (record-keeping, lodgment of documents or disclosing information) have criminal sanctions, including indictable offences, attached. This is necessary because:

- criminal sanctions play an important role in deterring inappropriate corporate behaviour and ensuring that ASIC can prevent or minimise losses to investors, consumers and the Government;
- a failure of a licensee to comply with provisions, such as maintaining records, audit, and lodgment of documents can seriously jeopardise ASIC's ability to investigate questionable behaviour and mitigate any losses or potential losses; and
- the disclosure of information in documents to consumers is a significant policy component of financial services regulation to address the particular economic 'harm' of information asymmetry in the market.

4.24 Generally the activities that attract the strongest criminal sanctions are those that address what is considered to be the most serious 'moral' culpability in relation to the credit contract; acting unlicensed and entering, or suggesting or assisting a person to enter, an 'unsuitable' credit contract. For example, the jail terms available for putting someone into an 'unsuitable' contract is intended to target 'equity stripping' and predatory lending.

4.25 The criminal procedures in relation to criminal offences are consistent with the provisions in Part 9.6A, Division 2 of the Corporations Act.

***Civil penalties***

4.26 Civil penalty sanctions apply in the Credit Bill where the misconduct affects or potentially affects the integrity of the credit market and where there may be an absence of malicious or reckless intention. Civil sanctions have a lower burden of proof than criminal sanctions and are an alternative source of imposing legal obligations and deterring conduct.

4.27 It is also recognised that civil penalties play a useful role for regulating corporate wrongdoing as the amount of the penalty is a disincentive for corporate misbehaviour. They are also used as alternatives to criminal penalties.

4.28 For example, civil penalties are utilised instead of criminal sanctions in some responsible lending requirements, noting that the main 'harm' (entering or suggesting an unsuitable credit contract) is being rectified as both an indictable offence and civil penalty. Often breaches of these laws adversely affect the consumer where they have been placed in an 'unsuitable' credit product.

4.29 The maximum civil penalty for all relevant offences is 2,000 penalty units. This equates to \$1,100,000 for corporations and \$220,000 for individuals.

4.30 The administration and procedural provisions for civil penalties are consistent with Part 9.4B of the Corporations Act. This includes the application of civil pecuniary orders in section 1317G of the Corporations Act.

***Infringement notices***

4.31 Infringement notices are employed for breaches, where a higher volume of contraventions are expected, or where a penalty is more effective where it is imposed immediately, and the person committing the breach still has a fresh memory of their conduct, and may be more inclined to remedy it in the future. They will apply automatically to all strict liability offences, but will also apply to civil penalties where specified in the regulations.

4.32 The issuing of infringement notices is at the discretion of ASIC.



4.33 The legislation and regulations allow for infringement notices to be issued to persons alleged to have committed certain strict liability or civil offences. This allows ASIC to deal with suspected minor offenders without the need to summons a person to appear in court.

4.34 In addition, systemic breaches may be grounds for administrative action in relation to a licence and/or a relevant civil and criminal penalty.

### ***Tiered approach***

4.35 The tiered approach enables ASIC to target the penalty to the nature and type of contravention. For example, in addition to a ‘fault’ based criminal offence, a strict liability penalty may also be included, with an associated infringement notice attached.

4.36 A tiered approach also recognises that when regulating a broad range of credit providers and credit service providers, different types of sanctions may be appropriate.

4.37 For example, an infringement notice may not be a significant deterrent for a large financial institution, but it is likely to be a deterrent for a small broker. Alternatively, it recognises that imprisonment may not be appropriate for an administrative oversight, but would be useful against a person involved in a contravention where the licensee has deliberately not complied with the law (for example, predatory lending and equity stripping).

4.38 It is recognised that most credit providers and credit service providers are ordinarily inclined to comply with the law. However the tiered approach enables a targeting of the most appropriate sanctions.

### **Example 4.1: Licensing**

Section 49 requires a licensee to comply with a written direction by ASIC to provide a written statement about the credit activities they have engaged in, within the time they have specified. Failure to comply can result in an indictable offence, a strict liability offence, a civil penalty and/or an infringement notice.

- For a failure to submit a *suitable* statement on time (some defects), ASIC may issue a licensee with a \$220 infringement notice.
- If this statement is grossly late, ASIC may consider a strict liability offence more appropriate (maximum penalty of \$1,100).
- If the statement is significantly defective and does not meet ASIC’s direction, ASIC may consider pursuing a civil penalty. The civil

penalty amount sought would reflect the level of defect. A civil penalty may also be pursued against a larger financial institution against which a strict liability offence or an infringement notice may not be a sufficient future deterrent (the maximum penalty will be \$220,000 for an individual and \$1,100,000 for a corporation).

- If ASIC's requests are deliberately avoided or purposefully not complied with (particularly where it is suspected that compliance with the direction to provide information may reveal unlawful or inappropriate behaviour), ASIC may choose to pursue an indictable offence against the licensee (maximum 25 penalty units and/or a jail term of six months).

### ***Consumer remedies***

4.39 Consumer remedies are an important element of the enforcement package as it enables consumers to take direct action against a provider who breaches the law and causes them loss or damage. These actions can provide sufficient deterrent against breaches of the law. Private actions are considered an important way of influencing and curbing market behaviour.

4.40 Consumer remedies also enable consumers to obtain redress from illegal behaviour or misconduct, such as predatory lending or equity stripping, and the opportunity to receive just and equitable outcomes, particularly where they have experienced loss and damage from the unlawful conduct.

4.41 Consumers will have a range of remedies available to them where they experience loss or damage from the misconduct of a credit provider or credit service provider.

4.42 Consumers will also have remedies available to them where the credit provider or credit service provider is acting unlicensed. The consumer can, among other things, prevent an unlicensed provider from obtaining profit or gain from them for their credit activity.

### **Dispute resolution framework**

4.43 The sanctions and penalties regime is supported by a dispute resolution framework that facilitates the enforcement of the Credit Bill and assists consumers to obtain redress.

4.44 The Credit Bill provides for a three-tier dispute resolution system for consumer credit issues:

- First, consumers are able to access the licensee's internal dispute resolution (IDR) process.

- Secondly, if they are dissatisfied with the outcome of the IDR process, consumers may access the licensee's EDR Scheme. Membership of an ASIC-approved EDR Scheme is a compulsory requirement for registration and licensing.
- Thirdly, consumers retain access to the courts to seek redress. Neither IDR nor EDR processes will remove a consumer's right to seek redress directly from a court.

4.45 The purpose of these provisions is to establish a dispute resolution framework that enables a commensurate level of rights to be retained and address key transitional issues relating to consumer credit dispute resolution.

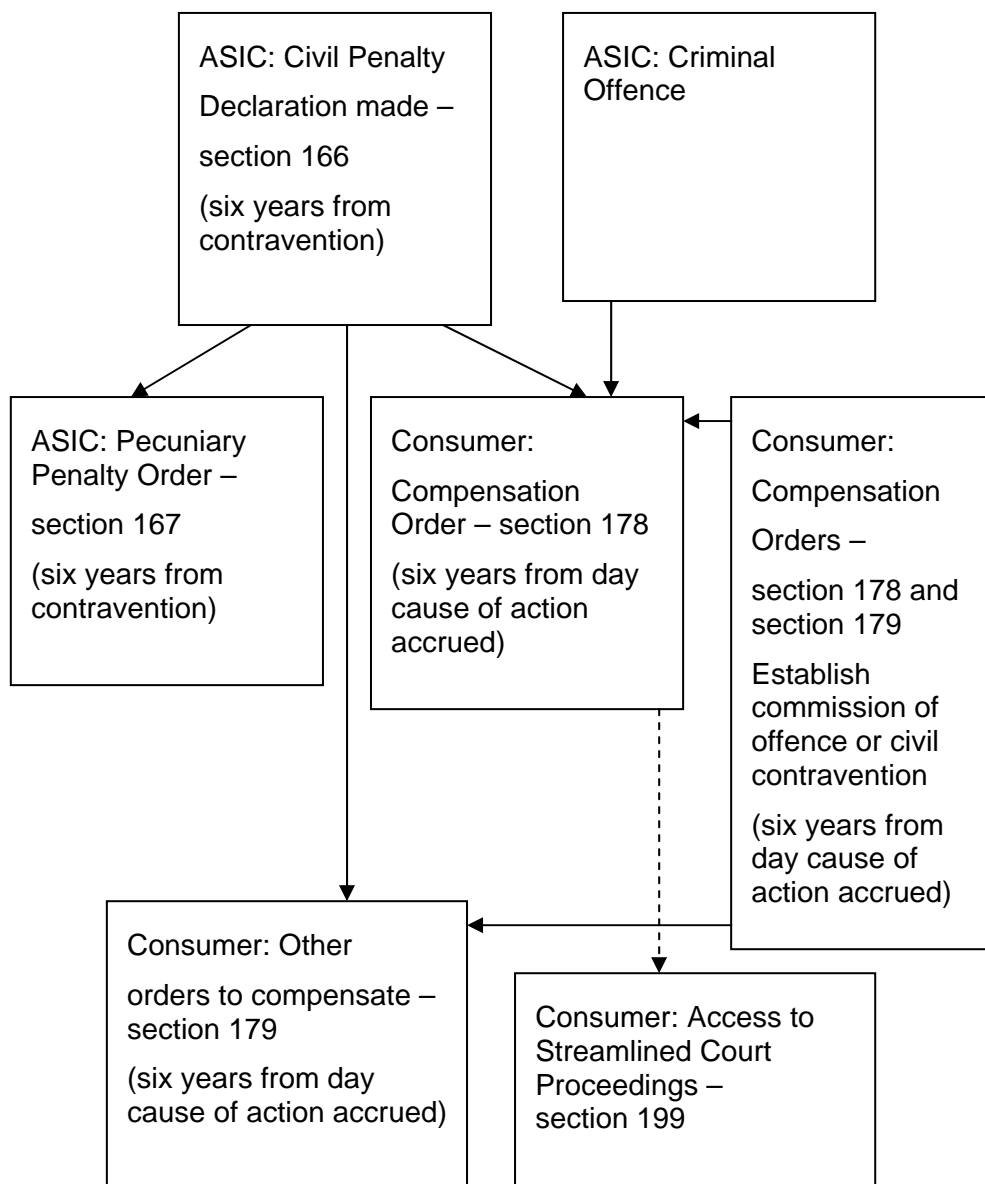
### ***EDR Schemes***

4.46 EDR Schemes provide consumers with an independent, informal and no-cost alternative to going to court. EDR Scheme members (licensees) are bound by a decision of an EDR Scheme. Consumers retain their right to access the courts following a decision or outcome by an EDR Scheme.

4.47 EDR Schemes are required to take measures to deal with the privacy of personal information in accordance with the *Privacy Act 1988* (where it is applicable) and this may include making contractual arrangements with members about dealing with privacy matters.

4.48 The application of section 131 of the *Evidence Act 1995* would apply so that evidence of a communication made or a document prepared in connection with settlement negotiations undertaken through EDR proceedings is not admissible in subsequent court proceedings. That is, materials prepared in connection with a negotiation are generally inadmissible in court unless, for example, both parties' consent is given, where communication between parties includes a statement it was not to be confidential, or the proceedings are to enforce the agreement made through EDR.

**Diagram 4.1: Overview of interaction between the Civil Penalty, Criminal Offence and Consumer Remedy Framework**



## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Streamlined court proceedings can be adopted for credit disputes for claims under \$40,000 or for hardship to ensure that consumers have access to simpler forms of dispute resolution.	Consumers in Victoria, New South Wales, Australian Capital Territory and Western Australia currently have access to tribunals with streamlined, low cost options for redress.
There will be a presumption against adverse cost orders for small claims proceedings, hardship and postponement matters.	Generally State and Territory tribunals do not issue adverse cost orders.
Jurisdiction for civil matters will be extended to the Federal Court, the Federal Magistrate Court and all State and Territory Courts.	Some States and Territories permit credit matters to only be heard in Tribunals.
Jurisdiction for criminal matters will remain in State and Territory Courts.	Criminal matters were heard in State and Territory Courts.
Additional consumer remedies are available for loss and damages for breaches of the Credit Bill (other than the Code).	No consumer remedies exist in relation to the licensing of credit providers and credit service providers or responsible lending.

## Detailed explanation of new law

### Part 4.1 — Civil penalty provisions

4.49 The administration and procedural provisions of civil penalties are consistent with the provisions of the Corporations Act (see Part 9.4B — Civil consequences of contravening civil penalty provisions). This includes the application of civil pecuniary orders (see section 1317G of the Corporations Act).

#### *Division 1 — Declarations and pecuniary penalty orders for contraventions of civil penalty provisions*

4.50 ASIC may seek a declaration of contravention of a civil penalty provision against a person that contravened that provision. [*Part 4-1, Division 2, section 166*]

4.51 The declaration of a contravention is conclusive evidence of the civil penalty breach [*Part 4-1, Division 2, subsection 166(4)*]. This enables ASIC to seek a pecuniary penalty against a person for contravening the civil penalty [*Part 4-1, Division 2, section 167*]. It also enables a consumer to

rely on the declaration of contravention when seeking compensation for loss or damage. *[Part 4-2, Division 2, section 178, Part 4-2, Division 2, section 179]*

4.52 ASIC may also apply for an order that a person pay a pecuniary penalty once a declaration has been made. *[Part 4-1, Division 2, section 167]*

4.53 ASIC can only seek a declaration and pecuniary penalty order within six years of a person contravening the provision. This is consistent with section 1317K of the Corporations Act, and section 77 of the *Trade Practices Act 1974*.

4.54 Civil penalties attract a maximum penalty of 2,000 penalty units on all civil penalties. This amounts to a maximum of \$220,000 for individuals and \$1,100,000 for corporations, partnerships or multiple trustees *[Part 4-1, Division 2, paragraph 167(3)(b)]*. A 'penalty unit' has the meaning given by section 4AA of the *Crimes Act 1914*.

4.55 The civil penalty limit was adopted to maintain general consistency with the Corporations Act (a maximum of \$200,000 for individuals and \$1,000,000 for corporations). However, it is expressed as a penalty unit and not in dollar terms. These amounts are broadly familiar to the financial services industry. It is recognised that these amounts need to be substantial to sufficiently deter inappropriate corporate or business behaviour.

4.56 The pecuniary penalty may be recoverable as a debt due to the Commonwealth, and therefore goes to the consolidated revenue fund as required by section 81 of the Constitution.

#### ***General provisions relating to civil penalty provisions***

4.57 A contravention of a civil penalty is not a criminal offence. *[Part 4-1, Division 3, section 168]*

4.58 A person who is involved in the contravention of a civil penalty provision is taken to have contravened that provision *[Part 4-1, Division 3, section 169]*. This would include, among other things, where the person has:

- aided, abetted, counselled or procured the contravention;
  - induced the contravention, whether by threats or promises or otherwise;
  - been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to effect the contravention;
- or

- conspired with others to effect the contravention.

4.59 The court must apply the rules of evidence and procedures for civil matters when hearing proceedings for a declaration of contravention. This replicates section 1317L of the Corporations Act to ensure that the court applies the rules of evidence and procedures for civil matters when hearing proceedings for a declaration of contravention. As discussed in the *Australian Law Reform Commission Principled Regulation Report: Federal Civil and Administrative Penalties in Australia, December 2002*, the court should retain the flexibility to ensure that there is procedural fairness in each case. *[Part 4-1, Division 3, section 170]*

4.60 The court is not allowed to make a declaration or contravention where the civil proceeding occurs after a criminal proceeding for substantially the same conduct. *[Part 4-1, Division 3, section 171]*

4.61 This provision ensures that an order is not made against a person where the person has been convicted of an offence that is substantially the same as the conduct that constituted the contravention. This is analogous to the ‘double jeopardy’ rule applicable to criminal offences.

4.62 Proceedings for a civil penalty are to be stayed where criminal proceedings are commenced against the person for an offence constituted by substantially similar conduct to the conduct constituting the contravention. *[Part 4-1, Division 3, subsection 172(1)]*

4.63 The civil proceeding may be resumed if the person is not convicted of the offence. Otherwise, proceedings for the declaration or order are dismissed. *[Part 4-1, Division 3, subsection 172(2)]*

4.64 ASIC may still reserve the right to commence criminal proceedings notwithstanding the imposition of a civil penalty order. *[Part 4-1, Division 3, section 173]*

4.65 The admissibility of evidence given in proceedings for a civil penalty order is not admissible in a criminal proceeding. *[Part 4-1, Division 3, section 174]*

4.66 There is also a provision to protect a person from civil double jeopardy, where a person is not liable to pay a penalty under another provision of the law for the same conduct. *[Part 4-1, Division 3, section 175]*

4.67 A person in contravention of a civil penalty provision can get relief from liability where it appears to the court that:

- the person acted honestly; and

- having regard to all the circumstances of the case the person ought fairly to be excused from the contravention.

*[Part 4-2, Division 2, section 183]*

4.68 This acts as a defence to a contravention of the civil penalty. The court may relieve the person either wholly or partly from liability.

4.69 Section 183 is modelled on section 1317S of the Corporations Act.

### **Consumer remedies — Overview**

4.70 A consumer and other affected parties have a number of remedies available to them under the Credit Bill.

4.71 For example, a consumer may have suffered loss or damage as a result of being entered into or suggested an unsuitable credit contract in breach of the responsible lending conduct requirements (see Chapter 3 of this explanatory memorandum). If a consumer is put into or suggested an unsuitable credit contract by a licensed credit provider, they can:

- seek an injunction against the provider from collecting more interest payments *[Part 4-2, Division 2, section 177]*;
- seek compensation for the loss or damage, with the maximum amount payable determined according to the limits in quantum of the selected court *[Part 4-2, Division 2, section 178]*; and
- seek an order to compensate, prevent or reduce the loss or damage suffered by, among other things, varying the contract, enforcing some, or part of the contract, or declaring the contract void *[Part 4-2, Division 2, section 179]*.

4.72 A consumer also has remedies against an unlicensed provider. If a consumer was put into or suggested an unsuitable credit contract by an unlicensed credit provider they will be able to obtain an order from the court to, among other things:

- prevent the non-licensed credit provider from profiting from a credit contract;
- seek compensation for loss or damage suffered as a result of the person having engaged in the credit activity; and



- prevent or reduce any loss or damage suffered or likely to be suffered.

*[Part 4-2, Division 2, section 180]*

## Part 4.2 — Power of the courts to grant remedies

### *Injunctions*

4.73 To maximise remedies available to consumers and the enforcement powers of ASIC, the court may grant injunctive relief where there is a contravention, or is a proposed contravention of the Credit Bill. *[Part 4-2, Division 2, section 177]*

4.74 On application by ASIC or a person, a court can issue an injunction on such terms as it considers appropriate, if it is satisfied that a person is engaged or is proposing to engage in conduct that would contravene or attempt to contravene the Credit Bill (including an offence or a civil penalty). *[Part 4-2, Division 2, subsection 177(1)]*

4.75 The court may grant an injunction with the consent of all relevant parties to the proceeding, whether or not the court is satisfied that the person has engaged or is engaging in the relevant contravening conduct. *[Part 4-2, Division 2, subsection 177(2)]*

4.76 The court may also:

- grant an interim injunction *[Part 4-2, Division 2, subsection 177(3)]*;
- revoke or vary an injunction or interim injunction *[Part 4-2, Division 2, subsection 177(4)]*;
- grant an injunction restraining a person from engaging in conduct, as necessary *[Part 4-2, Division 2, subsection 177(5)]*; or
- grant an injunction to require a person to do an act or thing, as necessary *[Part 4-2, Division 2, subsection 177(6)]*.

4.77 Where ASIC applies for an injunction, the court cannot make an undertaking as to damages a condition of obtaining an interim injunction *[Part 4-2, Division 2, subsection 177(7)]*. This is to ensure ASIC is not financially constrained from acting when seeking an interim injunction.

4.78 However, the court has the power to award damages in addition to, or in substitution for, the granting of an injunction *[Part 4-2, Division 2, subsection 177(8)]*. For example, where a guarantor seeks an injunction against a lender for a property being re-possessed and sold, the court may

grant damages to the debtor who might otherwise have benefited from the sale of the property, if not for the injunction.

***Compensation orders for loss or damage***

4.79 Where a licensee has contravened a civil penalty or committed an offence, and a consumer has suffered loss or damage from that contravention, the consumer can seek compensation in two ways:

- through a specific order for a compensation amount for loss and damage [*Part 4-2, Division 2, section 178*]; or
- through a general order to compensate loss or damage or prevent or reduce the loss or damage suffered or is likely to suffer, through a broader range of remedies [*Part 4-2, Division 2, section 179*].

4.80 ASIC may make an application on behalf of the consumer with their consent for both types of orders.

4.81 The primary reason for the two separate orders is to enable access to streamlined court procedures in section 199 for straightforward compensation matters. It is recognised that more complex claims warrant a more formal assessment under the law. However, straightforward and small claims could be addressed in simpler court proceedings. Consequently, a separate remedy for only monetary compensation is provided in section 178.

4.82 If the amount of compensation sought under section 178 is less than \$40,000, a consumer can 'opt-in' to a streamlined court procedure at their local court, Magistrate's Court, or the Federal Magistrates Court. This procedure permits more streamlined and informal proceedings, including not having to regard legal forms and technicalities and a presumption against legal representation (see below).

4.83 An order can be made under this provision; whether or not a declaration of contravention under section 166 has been made.

4.84 Both types of compensation orders are limited to offences or contraventions of the Credit Bill other than the Code. This is because the Code contains self-contained civil remedies that are currently known to industry and consumers. These provisions would likely be in conflict with provisions in the Code.

4.85 The compensation orders may only be made within six years of the day the cause of action (that is, the loss or damage to the consumer) that relates to the contravention or offence accrued. This is to capture the

situation where the contravention (for example, putting a consumer into an unsuitable contract) does not result in loss or damage to the consumer until a later time.

4.86 Section 179 is modelled on section 1325 of the Corporations Act.

4.87 A court may make an order as it thinks appropriate to compensate a consumer or any other affected party (*the plaintiff*), or prevent or reduce that loss or damage suffered where the loss or damage is the result of a contravention of a civil penalty provision or a commission of an offence under the Credit Bill [*Part 4-2, Division 2, subsection 179(1)*]. The *defendant* is the person who committed the contravention or offence [*Part 4-2, Division 2, paragraph 179(1)(b)*].

4.88 The type of orders the court can make include:

- voiding or partially voiding the contract, deed or arrangement;
- varying the contract, deed or arrangement;
- refusing to enforce some or all of the terms of such a contract, deed or arrangement; and/or
- directing the contravener to pay an amount of compensation.

4.89 This remedy is particularly important where precise restitution or compensation is not possible. It enables the court to do what is practically or equitably just between the parties.

4.90 The flexibility given to the courts to rewrite the credit contract is due to the way in which credit contracts operate. The consumer may have utilised the credit in a way that does not allow the court to void the contract (for example, due to the purchase of a home or where the principal is used to purchase goods or services that cannot be sold, such as travel).

4.91 An award of money may not be the most effective way of providing compensation, compared with varying the terms of the contract. Cancelling the contract (rescission) may also give a consumer an unfair benefit in the use of the principal of the loan.

#### **Example 4.2: Responsible lending**

Samuel was an electrician who earned \$1,200 a week. He spent \$600 a week on expenses. He went to a lender to get a home loan of \$200,000. Samuel needed a loan with an average interest rate that he could pay off over the medium term. Instead, he was offered a loan for

\$500,000 with a high fixed interest rate and therefore repayments that he could not readily afford.

As he was experiencing hardship, Samuel sought an injunction against the lender collecting his mortgage repayments. Samuel then sought compensation for the loss and damage he had suffered for being put into an unsuitable loan. The court, under section 179, ordered the lender to reduce the overall debt Samuel owed to the lender commensurate with what he would have owed if he had been provided with a loan that was *not unsuitable* minus:

- the amount he had already paid to the lender; and
- the amount in compensation for any loss and damages he suffered as a result of getting the *unsuitable* product.

This recognised that Samuel received a benefit from the initial credit provided, but that he experienced loss and damage from being put into the unsuitable loan.

4.92 Any compensation to a consumer or an order in relation to loss or damage can be mitigated (including limiting the amount of compensation) if the consumer has made a false or misleading representations in order to obtain the credit. This is to take into account what is practically just in the circumstances.

#### **Example 4.3 Consumer False and Misleading Representation**

In order to obtain a credit card with a \$3,000 limit, Flower claimed that she had an income of \$50,000 and had one personal loan valued at \$5,000. In fact, Flower only had an income of \$18,000 and also had another personal loan of \$3,000 plus a credit card with a credit limit of \$4,000 from other credit providers.

The credit provider offered her the credit card.

The credit provider relied on the information provided by Flower and made some reasonable steps to verify her financial circumstances in order to provide the loan. However, the credit provider did not suitably verify her income. If the credit provider had known of her true financial circumstances, they would not have offered her the credit.

When Flower could no longer meet the repayments, she sought compensation for being placed into an *unsuitable* credit contract.

In this instance, the court considered that Flower was entitled to a lower amount compensation for loss and damage, even if the credit provider did not suitably verify her income. This is because she made

false and misleading representations to the credit provider about her financial circumstances.

### **Preference for compensation**

4.93 A person who contravenes the Credit Bill may be required to both pay a fine and compensate those who have suffered loss or damage as a result of the contravention. Where the person who has contravened the Credit Bill has insufficient financial resources for both, section 181 will require the court to give preference to making a compensation order to compensate those who have suffered loss or damage. *[Part 4-2, Division 2, section 181]*

4.94 This is not directed at allowing the court to waive or reduce the fine where it considers that the defendant does not have sufficient financial resources, thereby allowing the defendant to avoid punishment. The court may still impose a fine. The provision allows the court to order that a person who has suffered loss or damage will be compensated first, that is, before the fine is paid into consolidated revenue. Where a fine is not paid, proceedings for enforcement and recovery may be commenced.

### **Orders in relation to unlicensed conduct**

4.95 A consumer also has remedies against an unlicensed provider. *[Part 4-2, Division 2, section 180]*

4.96 An unlicensed provider is someone who acts in contravention of section 29; that is, acts without holding a licence.

4.97 For example, if a consumer was put into or suggested an unsuitable credit contract by an unlicensed credit provider, the consumer will be able to obtain an order from the court to:

- prevent the non-licensed person from profiting from the credit contract;
- seek compensation for loss or damage suffered as a result of the person having engaged in the credit activity; and/or
- reduce or prevent any loss or damage suffered or likely to be suffered.

*[Part 4-2, Division 2, section 180(1)]*

4.98 ASIC can make an application on behalf of the consumer, only if it has obtained written consent from them. *[Part 4-2, Division 2, subsections 180(3) and (4)]*

4.99 The provision suggests that dealing with an unlicensed credit provider is equivalent to a criminal offender profiting from their crime. As a result, they should not be able to profit or gain from their unlawful credit activity.

4.100 The person engaging in unlawful credit activity should not be able to retain fees, charges, interest, commissions, interest payments and other monetary benefits or profits from the contract while acting unlicensed (including where their licence has been suspended).

4.101 In addition, the consumer should be able to recover or prevent any loss and damage they have suffered.

4.102 Therefore, the court should be able to vary a contract to take into account any benefits the lender may have received from the contract created when acting unlicensed, taking into account any benefit the consumer had from the use of the principal amount.

4.103 The Credit Bill provides that these orders can be made against a credit provider or credit service provider irrespective of whether they notified the customer that they were not licensed.

4.104 It is considered that the need to deter persons who engage in credit activities when unlicensed means that they should not be able to avoid the civil consequences of that conduct through a simple form of disclosure. It is also considered that disclosure of the person's unlicensed status will not result in consumers reconsidering their decision to enter into the loan where they are particularly vulnerable (for example, because they have an urgent need for money to purchase medication).

#### ***Other remedies***

4.105 ASIC may seek an adverse publicity order against a person who has contravened or committed an offence against the Credit Bill. Under a publicity order, a court may require a person to disclose certain information in a specified way and to publish the information at their own expense. *[Part 4-2, Division 2, section 182]*

4.106 They would be required to publicise the fact that they have breached the Credit Bill, along with details of any remedial action they have been required to undertake. For example, a corporation may be ordered to publicise the fact that it has breached the Credit Bill and details of what it has been ordered to do to rectify the breach.

4.107 Similar provisions exist in section 12GLB in the *Australian Securities and Investments Commission Act 2001*.

4.108 Section 184 enables the court to make multiple orders, that is, one or more remedies in relation to the same breach.

### **Infringement notices**

4.109 Section 331 allows regulations to be made for infringement notices to be issued to persons alleged to have committed:

- strict liability; or
- civil penalty contraventions as provided in the regulations.

4.110 This allows ASIC to deal with suspected minor offenders without the need to summons a person to appear in court.

4.111 In relation to strict liability offences, the maximum fine must not exceed one-fifth of the maximum penalty that a court could impose on the person for that offence.

4.112 In relation to civil penalties, the maximum fine must not exceed one-twentieth of the maximum penalty.

4.113 The infringement notice power will be supported by regulations that establish the form and manner in which they are issued.

4.114 This provision is modelled on section 799 of the *Fair Work Act 2009*.

4.115 The following provisions which attract a civil penalty may have an infringement notice attached in regulations at a later stage: sections 113, 114, 115, 117, 118, 120, 121, 128, 130, 131, 132. (This list is indicative only.)

### **Part 4.3 — Jurisdiction and procedure of courts**

4.116 Generally under the Credit Bill:

- Civil jurisdiction is conferred upon all Federal and State Courts (except Family Courts) subject to their general jurisdictional limits.
- Criminal jurisdiction is conferred upon all State Courts, subject to their general jurisdictional limits.

4.117 More broadly, the jurisdiction, appeal, transfer and procedural arrangements are intended to be consistent with the Corporations Act,

where appropriate, to ensure that ASIC can administer and enforce its obligations consistently.

4.118 The law establishes the rules that restrict cross-jurisdictional appeals and manage the transfer of proceedings under the Credit Bill between those courts. These rules are intended to produce many of the same outcomes as Division 1 of Part 9.66A of the Corporations Act.

4.119 These arrangements also apply to the Code.

4.120 A number of measures have been introduced to maintain current rights and obligations in relation to dispute resolution and to transition jurisdiction into the Commonwealth sphere.

## **Civil Proceedings — Division 2**

4.121 Division 2 of Part 4-3 deals with civil proceedings. It also contains rules about the transfer of civil proceedings between courts and other matters, such as when proceedings may be dealt with as small claims proceedings and when a cost order can be made.

4.122 The Division applies to the exclusion of the *Jurisdiction of Courts (Cross-vesting) Act 1987* and section 39B of the *Judiciary Act 1903*. This does not limit the application of the other provisions in the *Judiciary Act 1903*. [Part 4-3, Division 2, section 186]

4.123 This approach is consistent with the operation of the Corporations Act and reflects the agreed court structure as part of the National Credit Law Agreement 2009.

### ***Conferral of civil jurisdiction***

4.124 Under the new law, credit jurisdiction for civil proceedings will be conferred to the:

- Federal Court;
- Federal Magistrates Court, but the court does not have jurisdiction to award an amount for loss or damage that exceeds \$750,000 or another amount prescribed by regulation; and
- courts of the States and Territories (including the magistrates or local courts), subject to their general jurisdictional limits, including (but not limited to) limits as to locality and subject matter.



*[Part 4-3, Division 2, section 187]*

4.125 This will ensure continuity with current arrangements under the Uniform Consumer Credit Code (UCCC), and allows matters which are currently being handled by State courts to continue to be heard. Courts in Queensland, South Australia, Tasmania and the Northern Territory can continue to deal with consumer credit matters.

4.126 It also ensures that lower cost and accessible court options (such as the local and magistrate's courts) remain available. This facilitates access to the court process for parties wishing to enforce their rights in a court regardless of the value of the credit contract or lease in dispute. This reflects that such matters will range in value and should be heard in different courts for cost and expediency.

4.127 The Family Courts will continue to exercise their general and accrued jurisdiction in relation to credit matters where appropriate. As the arrangements being regulated under the Credit Bill relate to the provision of credit in the course of business activities, it was not considered necessary to confer direct jurisdiction on the Family Courts.

***Other civil proceedings relating to criminal prosecution***

4.128 The civil jurisdiction of the Federal Court and Federal Magistrates Court is restricted in certain circumstances.

4.129 The Federal Court and the Federal Magistrates Court is prevented from exercising jurisdiction in relation to particular types of civil proceedings (proceedings where a person is seeking a writ of mandamus or prohibition or an injunction) that relate to a prosecution of an offence under the Credit Bill *[Part 4-3, Division 2, section 188]*. This limitation reflects that the Federal Courts do not have criminal jurisdiction under the Credit Bill.

4.130 The Federal Court or the Federal Magistrates Court cannot exercise jurisdiction where a person seeks these types of civil proceedings against an officer or officers of the Commonwealth in relation to:

- a decision to prosecute a person for an offence under the Credit Bill, where the prosecution is proposed to be conducted in a State or Territory court *[Part 4-3, Division 2, subsection 188(1)]*; and
- for a 'related criminal justice process decision' where a prosecution for an offence of the Credit Bill or an appeal arising out of such a prosecution, is before a State or Territory court *[Part 4-3, Division 2, subsection 188(2)]*.

4.131 This does not apply if the ‘related criminal justice process decision’ occurred after the relevant civil proceeding [*Part 4-3, Division 2, subsection 188(4)*]. However, in such a situation a prosecutor may apply for a permanent stay of proceedings, if such a matter is better dealt with in the criminal justice process or will not substantially prejudice the person [*Part 4-3, Division 2, subsection 188(5)*].

4.132 A *related criminal justice process decision* is a decision made in the criminal justice process in relation to an offence (other than a decision to prosecute). [*Part 4-3, Division 2, subsection 188(3)*]

4.133 In this section, *appeal* includes an application for a new trial and a proceeding to review or call in question the proceedings, decision or jurisdiction of a court or judge. [*Part 1-2, Division 2, section 5*]

4.134 This provision has effect, despite anything else in the Credit Bill or any other law. [*Part 4-3, Division 2, subsection 188(6)*]

4.135 This provision is consistent with section 1337D of the Corporations Act.

#### *Cross-jurisdictional appeals*

4.136 The process of cross-jurisdictional appeals is set out to take into account the cross-jurisdictional application of the Credit Bill in a referral context.

4.137 Despite the national nature of the credit reforms, cross-jurisdictional appeals will not be permitted. This is consistent with section 1337F of the Corporations Act. That is:

- the Federal Court cannot appeal to a court of a State, a court of a Territory, or the Federal Magistrates Court [*Part 4-3, Division 2, item 1 in the table in section 189*];
- the Federal Magistrates Court cannot appeal to a court of a State or Territory [*Part 4-3, Division 2, item 2 in the table in section 189*];
- a court of a State cannot appeal to the Federal Court, Federal Magistrates Court, or a court of a Territory or another State [*Part 4-3, Division 2, item 3 in the table in section 189*]; and
- a court of the Australian Capital Territory or Northern Territory cannot appeal to the Federal Court, the Federal Magistrates Court, or a court of a State or another Territory [*Part 4-3, Division 2, items 3 and 4 in the table in section 189*].

4.138 However, all courts are expected to act to support and be in aid of one another in relation to civil matters arising under the Credit Bill. [Part 4-3, Division 2, section 190]

***Transfers between courts — Jurisdiction of proceedings***

4.139 Part 4-3, Division 2, Subdivision C of sets out the transfer arrangements between the courts that have jurisdiction for civil matters under the Credit Bill.

4.140 The transfer and cross-vesting procedures are consistent with the model in Part 9.6A, Subdivision C of the Corporations Act. It was considered important to maintain consistency with the Corporations Act where possible, to ensure that ASIC can address credit activities and matters arising from the Corporations Act together where appropriate.

4.141 This arrangement operates to the exclusion of the *Jurisdiction of Courts (Cross-vesting) Act 1987*. [Part 4-3, Division 2, section 186]

4.142 Among other things, the *Jurisdiction of Courts (Cross-vesting) Act 1987* does not achieve the objectives of the Credit Bill because it only addresses the transfer of proceedings between the State Supreme Courts and the Federal and Family Courts. It does not address the transfer of proceedings in relation to State lower courts, as is necessary under the Credit Bill.

4.143 In addition, the transfer arrangements assist in ensuring that legal proceedings for credit occur in the most appropriate jurisdiction.

4.144 The UCCC requires that debtors must be a natural person ordinarily resident in the UCCC's jurisdiction (the relevant State or Territory). By operation of this, a legal proceeding against a debtor was brought in the State or Territory the debtor was ordinarily resident in at the time the contract was made.

4.145 In adopting the UCCC in the Commonwealth context as the National Credit Code (Code), the Code's jurisdiction is no longer limited to the State and Territory where the contract was made. This could make it difficult for consumers in another jurisdiction to respond to or engage with those proceedings. This may cause particular vulnerabilities for debtors who could not afford or have the capacity to challenge a proceeding in another jurisdiction.

4.146 The court transfer arrangements work in conjunction with section 330 to address these specific issues that arise from regulating credit matters in the Commonwealth context.

***When a transfer can occur***

4.147 A court (the *transferring court*) can transfer a proceeding (*transfer matter*) to another court (the *receiving court*) that:

- exercises jurisdiction under the Credit Bill; and
- has the power to grant the remedies being sought.

*[Part 4-3, Division 2, section 191]*

4.148 A transfer can only occur at the instigation of a party to the proceedings or the court itself if it appears to the *transferring court* that the *transfer matter*:

- arises or relates to another proceeding that has come or is about to come before a receiving court; or
- is otherwise in the interests of justice for proceedings to be brought in another court.

*[Part 4-3, Division 2, section 194]*

4.149 Generally, it would not be in the interests of justice for a party to commence legal proceedings that did not comply with the requirements set out under section 330 regarding where legal proceedings must be brought. *[Part 4-3, Division 2, paragraph 193(1)(b)]*

4.150 The *transferring court* must take into account a number of criteria, including the principal location or business of the parties, where the event took place and if it involves real property, and the jurisdiction where the real property is located *[Part 4-3, Division 2, subsection 193(2)]*.

**Example 4.4: Criteria for transfer in the credit context**

In examining whether a transfer was appropriate in the credit context the transferring court could take into account, among other things:

- the debtor's current location or place of residence *[Part 4-3, Division 2, paragraph 193(2)(a)]*;
- the jurisdiction in which the credit contract was entered into *[Part 4-3, Division 2, paragraph 193(2)(b)]*;
- the location of the mortgaged real estate *[Part 4-3, Division 2, paragraph 193(2)(c)]*;

- whether an enforcement proceeding against a credit contract should be heard in the same jurisdiction as where an application of hardship is made [*Part 4-3, Division 2, paragraph 193(2)(d)*];
- when bringing an enforcement proceeding against a debtor for a credit contract, the credit provider was acting in good faith and was not bringing proceedings against a debtor in a different jurisdiction to which they reside in order to frustrate or limit the debtors ability to challenge the proceedings [*Part 4-3, Division 2, paragraph 193(1)(b)*]; and
- if a matter was referred by a lower court to another court in a different jurisdiction [*Part 4-3, Division 2, paragraph 193(1)(e)*].

4.151 These transfer arrangements do not apply to Federal Court or the Federal Magistrates Court which are subject to the transfer arrangements set out in section 32AB of the *Federal Court of Australia Act 1976* and section 39 of the *Federal Magistrates Act 1999*. [*Part 4-3, Division 2, subsection 191(2)*]

4.152 There are separate transfer procedures in relation to the **lower courts**, that is, the Federal Magistrates Court, or a District court, County court, Magistrates Court or Local court of a State or Territory. A **superior court** is the Federal Court or the Supreme Court of a State or Territory. [*Part 1-2, Division 2, section 5*]

4.153 A ‘lower court’ may transfer matters to the Supreme Court in their jurisdiction, with a recommendation that the matter be transferred to another superior court in another jurisdiction. [*Part 4-3, Division 2, subsection 192(2)*]

4.154 The transfer arrangements also set out the documents and procedure, the conduct requirements and the rights of legal practitioners, where such a transfer occurs. [*Part 4-3, Division 2, sections 195 to 197*]

4.155 A decision by a ‘transferring court’ to transfer the matter to another court is not subject to appeal. [*Part 4-3, Division 2, section 198*]

### ***Small claims proceedings***

4.156 Section 199 enables ‘opt-in’ streamlined court proceedings to be adopted for consumer actions for:

- matters arising for compensation for loss or damage up to \$40,000 under the Credit Bill, including the Code [*Part 4-3, Division 2, items 1, 10, 11, and 13 in subsection 199(2)*];
- some court orders available under the Code, where the value of credit contract, mortgage, guarantee or consumer lease is

no more than \$40,000 [*Part 4-3, Division 2, items 2, 3, 6, 7, 9, and 12 in the table in subsection 199(2)*]; and

- requests in relation to a hardship variation (under Schedule 1, Part 4, Division 3, sections 72 and 73 of the Code) and postponements of enforcement proceedings (under section 96 of the Code) [*Part 4-3, Division 2, items 4, 5 and 8 in the table in subsection 199(2)*].

4.157 The procedure is designed to expedite proceedings for small claims matters and replicate some of the advantages that State tribunals offered. It addresses some of the concerns arising from the inability to continue to access State tribunals, where they were available. It also improves consumer access to dispute resolution in jurisdictions where tribunals are not utilised.

4.158 Once a small claims procedure is triggered, the court can make ancillary or consequential orders in relation to the proceedings, even if those orders are not listed in section 199. [*Part 4-3, Division 2, subsection 199(4)*]

#### **Example 4.5: Ancillary or consequential orders**

Premjit, a mortgagor had his \$3,000 fridge repossessed by the credit provider.

Premjit applied to the court under section 108 of the Code to have his mortgaged fridge returned and uses the streamlined court proceedings. The court duly orders the return of the fridge to Premjit, but also:

- makes an order under section 109 of the Code for the fridge be delivered to the mortgagor's home on Thursday at 8 am; and
- a separate order under section 110 of the Code for \$2,000 to compensate the mortgagor for the food that was spoiled and lost when the credit provider repossessed his fridge.

#### *Compensation for loss or damage up to \$40,000*

4.159 A person may 'opt-in' to a small claims procedure where they are seeking compensation under sections 178 and 106, subsection 107(3) and section 118 of the Code.

4.160 The monetary limit on amounts that may be awarded under the small claims procedure is \$40,000 with the regulations allowing a higher amount to be set, if considered appropriate. This amount is greater than

the limit of \$20,000 under the *Fair Work Act 2009*, but is consistent with its arrangements for small claims proceedings.

4.161 The monetary limit recognises that matters over \$40,000 are likely to be more complex and should attract more formal consideration of the Court. This procedure should cover most claims under the Code. For example, the Victorian Civil and Administration Tribunal noted in its *2007-08 Annual Report* that claims under \$10,000 comprised 87 per cent of all its general civil applications, including credit matters.

4.162 The monetary limit is also consistent with the current jurisdictional limits for the award of damages in State and Territory magistrate and local courts.

4.163 An applicant may opt for the small claims procedures in relation to a credit contract that exceeds the monetary amount or where they may be entitled to amounts greater than \$40,000. However, the maximum amount a court could award under this procedure is \$40,000.

#### **Example 4.6 Small Claims Compensation Limit**

Regina believes she is entitled to \$50,000 in compensation for loss and damage from her credit provider. She decides to use the opt-in small claims procedures since she believes this will be easier, reduce any upfront costs of obtaining legal representation, and will allow her to settle her claim faster.

However, in deciding to use the opt in small claims procedure, the court may only be able to award her compensation of up to \$40,000. Regina considers it is worth forfeiting this extra \$10,000 of her claim, for the benefit of having her claim considered under the small claims procedure.

#### ***Other orders***

4.164 A number of orders that are available under the Code have been included where they would benefit from a streamlined court procedure. Access to this procedure is restricted to matters where the value of the credit contract, mortgage guarantee or consumer lease is less than \$40,000.

4.165 The value of the credit contract, mortgage or guarantee is determined by the amount of credit that has been or may be provided under a credit contract to which it relates [*Part 4-3, Division 2, subsection 199(3)*]. An eligible credit contract would include, for example, a credit card with a maximum credit limit of \$30,000, where the credit limit had been reached and paid out a number of times.

4.166 In relation to consumer leases, the value is based on the amount payable under the consumer lease, including fees and charges. [*Part 4-3, Division 2, subparagraph 199(3)(b)(iv)*]

4.167 Orders in relation to unjust transactions (section 76 of the Code) and unconscionable fees and charges (section 78 of the Code) were included to facilitate such complaints. However, it is considered that more complex and serious cases may benefit from more formal consideration by the court. These include matters that relate to a person's residential property.

4.168 Some court orders in relation to the Code have been included to facilitate cases involving the repossession of goods (section 108). These orders are considered to be commonly used by consumers.

4.169 In such a situation, the borrower may be able to apply for hardship variation, stay or postponement of enforcement and also have access to the provisions in relation to getting their goods returned, or payment of compensation for repossession in breach of the Code. These cases are considered to involve relatively small amounts of money.

4.170 In addition, orders in relation to statement of accounts and dispute accounts (sections 37 and 38 of the Code) were included as a straightforward matter that would benefit from streamlined procedures.

#### ***Hardship variations and postponements of enforcement***

4.171 Requests for hardship variations (section 74) and postponements (section 96) under the Code are also eligible for streamlined court proceedings, in recognition that consumers seeking these requests may already be suffering hardship and are likely to be in need of an expedited and lower cost avenue for redress.

4.172 There is no monetary threshold to accessing the small claims procedure in relation to a hardship variation or postponement of enforcement proceeding.

#### ***Court procedures for small claims***

4.173 This procedure is consistent with procedures already available in State magistrates and local courts for workplace relations matters. Under the *Workplace Relations Act 1996*, the small claims procedure currently applies to proceedings in a State magistrates or local court. The *Fair Work Act 2009* extends the small claims procedure to the Federal Magistrates Court.



4.174 When dealing with a matter under the small claims procedure, the Federal Magistrates Court (or a State or Territory magistrates or local court) may act in an informal manner. It will not be bound by formal rules of evidence and it may act without regard to legal forms and technicalities. This is intended to ensure that claims for a relatively small amount of money, or that need to be heard quickly, such as hardship, are dealt with efficiently and expeditiously by the courts. *[Part 4-3, Division 2, subsection 199(5)]*

4.175 At any stage of the small claims procedure, the court may amend the papers commencing the proceeding so long as sufficient notice is given to any party adversely affected by the amendment. This is intended to ensure that small claims procedures are not subject to onerous procedural requirements and to clarify the nature of the legal issues in dispute. *[Part 4-3, Division 2, subsection 199(6)]*

4.176 There is also a presumption against legal representation. A person may only be represented by a 'lawyer' with the leave of a court. The term *lawyer* is defined in the Credit Bill as a person admitted to the legal profession by the High Court, Federal Court or Supreme Court of a State or Territory. The definition of 'lawyer' is intended to have the same or a similar meaning to the legislation regulating the legal profession in most States and Territories. It extends to all admitted lawyers. *[Part 4-3, Division 2, subsection 199(7)]*

4.177 That person is not taken to be represented by a lawyer if the lawyer is an employee or officer of the person. *[Part 4-3, Division 2, subsection 199(9)]*

4.178 Where a court has given permission for a person to be represented by a lawyer, it may do so subject to conditions designed to ensure that no other party is unfairly disadvantaged. *[Part 4-3, Division 2, subsection 199(8)]*

4.179 For example, if one party is a company and represented by an employee who is legally qualified (as permitted, under the exemption in subsection 199(9)), the court may consider it appropriate for the other party to be represented by a person who is a lawyer.

#### ***Costs — adverse cost orders***

4.180 Costs in relation to court proceedings may include fees, disbursements, and other expenses. The standard position is that costs follow the event; that is, an award of costs will generally flow with the result of litigation with the successful party being entitled to an order for costs against the unsuccessful party.

4.181 Adverse cost orders are seen as a disincentive for a consumer to raise a dispute in court. In particular, they are seen as a disincentive for debtors seeking a hardship variation under the Code, due to the potential of experiencing large costs.

4.182 The removal of adverse cost orders in tribunal proceedings were seen as an advantage of a tribunal compared to the courts.

4.183 A presumption against issuing adverse cost orders apply to applications:

- that occur under the small claims proceeding in section 199; or
- section 72 (hardship variation) or section 94 (postponement of enforcement proceedings) of the Code (regardless of whether the matter is heard in a small claims proceeding).

4.184 This presumption can be rebutted if the proceedings were vexatious or without reasonable cause or where a party's unreasonable act or omission caused the other party to incur costs. [*Part 4-3, Division 2, section 200*]

### **Criminal proceedings — Division 3**

4.185 Division 3 deals with criminal proceedings and sets out the laws that are to be applied in relation to criminal proceedings.

4.186 This Division is intended to be consistent with Part 9.6A, Division 2 of the Corporations Act.

4.187 It does not limit the operation of the *Judiciary Act 1903*, except in relation to sections 68, 70 and 70A. [*Part 4-3, Division 3, section 203*]

#### ***Criminal jurisdiction***

4.188 Jurisdiction for criminal matters, including summary and indictable convictions, is conferred to the courts of each State and Territory where they have jurisdiction to deal with such matters [*Part 4-3, Division 3, section 204*]. This also extends to, among other things:

- the examination and commitment for trial on indictment;
- an offender's sentencing punishment and release; and
- any appeals arising from proceedings connected with such matters.

*[Part 4-3, Division 3, section 204(2)]*

4.189 Section 204 has the same legal effect as section 1338B of the Corporations Act. This provision has been amended to improve its readability.

4.190 In addition, the jurisdiction conferred onto the courts of the Northern Territory and Australian Capital Territory is restricted by its constitutional limits. *[Part 4-3, Division 3, subsection 203(3)]*

4.191 The Federal Courts do not exercise criminal jurisdiction under the Credit Bill. This is because the Federal Courts *generally* do not exercise criminal jurisdiction, particularly in relation to indictable offences. This is consistent with the operation of the Corporations Act.

*Summary Offences*

4.192 The jurisdiction in relation to summary offences is unlimited, despite any limits as to locality of the jurisdiction of that court under the law of the State or Territory. *[Part 4-3, Division 3, subsection 204(7)]*

4.193 Only a magistrate can exercise criminal jurisdiction for a summary conviction, or examination or commitment for trial. *[Part 4-3, Division 3, subsection 204(3)]*

4.194 Further, a court may decline to exercise their jurisdiction in relation to a summary offence if, having regard to all the circumstances (including the public interest), the court is satisfied that it is appropriate. *[Part 4-3, Division 3, subsection 204(9)]*

*Indictable offences*

4.195 However, indictable offences can only be heard in a court if:

- the offence was committed (begun or completed) in its jurisdiction, that is, it was committed in the jurisdiction of the relevant State or Territory; or
- if the offence was committed outside of Australia.

*[Part 4-3, Division 3, subsection 204(10)]*

4.196 A person who pleads guilty to an indictable offence may be sentenced or otherwise dealt with without trial. *[Part 4-3, Division 3, subsection 204(4)]*

4.197 Reference to ‘any such trial or conviction’ in the criminal jurisdiction conferred to the courts includes jurisdiction in relation to the

**relevant criminal law** of a State or Territory. [Part 4-3, Division 3, subsections 204(4) and (5)]

4.198 'Relevant criminal law' includes criminal law relating to the conviction or sentencing of an indictable offence. [Part 4-3, Division 3, subsection 204(7)]

4.199 A person may be dealt with in accordance with the relevant criminal law even if, apart from the operation of this section, the offence is required to be prosecuted by indictment or either summarily or on indictment. [Part 4-3, Division 3, subsection 204(6)]

### **Criminal proceedings**

4.200 The laws of a State or Territory apply to a person who is charged under the Credit Bill in relation to the arrest, custody, **criminal procedure** and the rules of evidence applied to criminal procedure. [Part 4-3, Division 3, subsection 205(1)]

4.201 'Criminal procedure' relates to the procedure in relation to examining and obtaining a conviction, including the hearing and determination of appeals or any related proceedings. [Part 4-3, Division 3, subsection 205(2)]

4.202 ASIC, or a delegate of ASIC, or a representative authorised by the Minister may lay or make a charge in relation to an offence against the Credit Bill. This does not affect the operation of the *Director of Public Prosecutions Act 1983*. [Part 4-3, Division 3, section 206]

4.203 When ASIC is undertaking a prosecution, ASIC may seek assistance from certain persons in relation to the defendant, to give all assistance in connection with the prosecution that they are reasonably able to give. [Part 4-3, Division 3, section 207]

4.204 These persons are:

- if the defendant is a natural person, a person who is or was a partner, employee or agent of the defendant; or
- if the defendant is a body corporate, a person who is or was an officer, employee or agent of the defendant.

4.205 Failure to comply with a reasonable request for assistance from ASIC gives rise to an offence of strict liability [Part 4-3, Division 3, subsection 207(3)]. This is consistent with the equivalent requirements in section 1317 of the Corporations Act and will enable ASIC to properly discharge its investigative and prosecution functions.

4.206 Any person who is or is likely to be a defendant to the proceeding in relation to which ASIC is seeking assistance, or such a person's lawyer, is not required to assist and has a defence to any action taken against them under subsection 207(2) [*Part 4-3, Division 3, subsection 207(4)*]. This is similar to the equivalent provisions in section 49 of the ASIC Act.

4.207 This provision operates in conjunction with the rules of evidence or common law that applies in the relevant jurisdiction. The privilege against self-incrimination and legal client privilege only apply as permitted by the rules of evidence or the common law of the relevant jurisdictions. [*Part 4-3, Division 3, subsection 205(1)*]

4.208 These procedures work in conjunction with ASIC's powers to bringing criminal proceedings for an offence against the Credit Bill when relying on evidence gathered from a formal investigation under section 247. [*Part 6-4, Division 2, section 274*]

4.209 ASIC may seek a court order to obtain compliance with such a request. [*Part 4-3, Division 3, subsection 207(5)*]

4.210 A body corporate does not have a privilege against self-incrimination. This reflects current common law principles [*Part 4-3, Division 3, section 208*]. This is consistent with section 1316 of the Corporations Act.

#### **Proceedings generally — Division 4**

4.211 Division 4 contains rules about proceedings generally, such as ASIC's power to intervene in proceedings and the standard of proof to be applied.

4.212 ASIC has the power to intervene in proceedings relating to a matter arising under the Credit Bill. This power is based on section 1330 of the Corporations Act. It enables ASIC to make submissions to a Court for any purpose (not just to secure a civil penalty), for example, to make submissions on the way legislation should be interpreted. [*Part 4-3, Division 4, section 20*]

4.213 A Registrar, or another proper officer of an Australian Court, may make a certificate that states that a person was convicted by that court of an offence, including that a person was found to have committed that offence, but that court did not proceed to convict that person of an offence, for the purposes of the Credit Bill. [*Part 4-3, Division 3, section 210*]

4.214 This certificate is considered conclusive evidence, unless it is proven that offence was quashed or set aside, or that the finding was set aside or reversed.

4.215 This has the effect, among other things, of assisting a person or a corporation to rely on earlier proceedings when making an application for compensation without having to 'reprove' all the matters that were decided in the earlier proceedings. This has a similar effect to obtaining a declaration that a person has contravened a civil penalty provision, for obtaining a civil penalty order or compensation.

4.216 This replicates section 1333 of the Corporations Act.

4.217 Nothing in the Credit Bill restricts or affects the court from punishing contempt of court when a person contravenes an order of the court and commits an offence. *[Part 4-3, Division 3, section 211]*

## **Application and transitional provisions**

4.218 Federal jurisdiction commences for claims that arise under the new legislation from the commencement of the Credit Bill.

4.219 The Federal Court, Federal Magistrates Court and State and Territory courts would all be able to exercise federal jurisdiction in relation to claims that arise under the new legislation from commencement.

4.220 The Credit Bill will provide a provision about the preservation of rights to enable persons to pursue a remedy or court action in the Federal Court, Federal Magistrates Court and State and Territory courts for matters that arose before the commencement of the Credit Bill, in relation to laws referred to the Commonwealth, such as the Code.

4.221 The State courts retain jurisdiction over credit laws not referred to the Commonwealth. These arrangements more specifically are set out in the National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009.

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# **Chapter 5**

## **Administration**

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### **Outline of chapter**

5.1 Chapter 5 of this explanatory memorandum outlines the administrative measures established in the National Consumer Credit Protection Bill 2009 (Credit Bill). These measures provide the Australian Securities and Investments Commission (ASIC) with the ability to perform elements of its role as the national regulator of consumer credit. Chapter 5 also outlines the effects of the imposition of certain fees under the National Consumer Credit Protection (Fees) Bill 2009 (Fees Bill).

5.2 The key elements of ASIC's role as detailed in this chapter are:

- the requirement to create and maintain registers relating to credit activities and documents lodged with it under the Credit Bill, and the inspection and public availability of those registers;
- ASIC's ability to deal with documents submitted for lodgment with it under the Credit Bill;
- requirements relating to the concealment or falsification of credit books; and
- the effect of payment of fees under the Fees Bill.

5.3 These provisions are designed to allow ASIC to have sufficient administrative powers for the efficient operation of the legislative scheme.

### **Summary of new law**

5.4 The content of the administrative provisions in Chapter 5 of the Credit Bill include (but are not limited to) the following:

- ASIC's creation and maintenance of registers relating to credit activities and documents lodged with it under the Credit Bill;

- documents lodged with ASIC, approved forms and details relating to how these documents may need to be lodged with ASIC, or when ASIC may refuse to receive them;
- matters relating to documents lodged with ASIC;
- offences relating to:
  - the concealing or falsification of credit books; and
  - obstructing or hindering ASIC;
- details regarding the effect of fees payable to the Commonwealth under the Fees Bill; and
- administrative matters relating to functions of ASIC.

## Detailed explanation of new law

### Part 5-1 — Registers relating to credit activities

#### *Division 1 — Introduction*

5.5 Part 5-1 deals with registers relating to credit activities that must be established and maintained by ASIC. [Part 5-1, Division 1, section 212]

#### *Division 2 — Registers relating to credit activities*

5.6 Division 2 requires ASIC to establish and maintain one or more registers relating to credit activities. It also deals with how those registers are to be maintained, and the inspection and public availability of those registers.

5.7 As part of ASIC's role as the national regulator of the Australian credit regime, ASIC must establish and maintain one or more registers relating to credit activities. [Part 5-1, Division 2, subsection 213(1)]

5.8 Regulations may prescribe the way in which ASIC's credit register can be established and maintained. These may include details that ASIC must enter in the credit registers in relation to:

- persons, including licensees and their credit representatives;
- those persons registered to engage in credit activities and their credit representatives;



- persons banned or disqualified from engaging in a credit activity under State or Territory law or under an order made under Part 2-4 (Part 2-4 is about the banning or disqualification of persons from engaging in credit activities); and
- any other persons prescribed by the regulations.

*[Part 5-1, Division 2, subsection 213(2)]*

5.9 ASIC's credit register may be maintained in electronic form and may be maintained as part of, or together with any register in relation to financial services maintained under section 922A of the *Corporations Act 2001* (Corporations Act). *[Part 5-1, Division 2, subsection 213(3)]*

5.10 ASIC registers are not a legislative instrument. This statement is merely declaratory of the law, consistent with section 5 of the *Legislative Instruments Act 2003*. *[Part 5-1, Division 2, subsection 213(4)]*

5.11 A person may inspect, make copies of or take extracts from the credit registers that ASIC may make available to the public on its own website or by other means. *[Part 5-1, Division 2, section 214]*

## **Part 5-2 — Documents lodged with ASIC or required by the Credit Bill**

### ***Division 1 — Introduction***

5.12 Part 5-2 deals with the lodging of documents with ASIC. It also has offences related to making false statements in documents. *[Part 5-2, Division 1, section 215]*

### ***Division 2 — Lodgment of documents with ASIC***

5.13 Division 2 deals with how documents should be lodged with ASIC, approved forms, and ASIC's power to refuse to receive documents submitted for lodgment.

5.14 In order to maintain its registers and perform its functions under the Credit Bill, ASIC can require information be provided to it. This may be done through the lodgment of certain documents.

5.15 A document required to be lodged with ASIC under the Credit Bill is considered to be lodged if it is transmitted to ASIC by an electronic format approved by ASIC. ASIC is also able to approve another (non-electronic) manner for lodgment of a document if, for example, a person has no access to a computer. If ASIC refuses to receive

a document submitted for lodgment, that document is considered as having not been lodged with ASIC. *[Part 5-2, Division 2, section 216]*

5.16 If a document is lodged with ASIC, then any other material that is lodged with the document as required by the Credit Bill or an approved form is taken to be included in that document. *[Part 5-2, Division 2, subsection 216(3)]*

5.17 If ASIC has approved a form for a particular document (for example, the Australian credit licence application form), the document must be submitted to ASIC in the approved form; include the information statements or any other matters required by that form; and be accompanied by any other material required by the form. *[Part 5-2, Division 2, section 217]*

5.18 ASIC may refuse to receive a document submitted to it for lodgment if ASIC considers the document contains a matter contrary to law, is false or misleading, incomplete or contains an error, alteration or erasure. *[Part 5-2, Division 2, subsection 218(1)]*

5.19 ASIC may request that a refused document be amended or completed and resubmitted, or that a fresh document be submitted in its place, or that an incomplete document have a supplementary document lodged. *[Part 5-2, Division 2, subsection 218(2)]*

5.20 ASIC may give written notice to a person who submits a document for lodgment to give ASIC any other document or information ASIC considers necessary to form an opinion whether it should refuse the person's lodged document. *[Part 5-2, Division 2, subsection 218(3)]*

5.21 ASIC's written notice must specify the day the person must comply with the notice. The time ASIC gives for the person to comply must be a reasonable time after the notice is given. ASIC may also extend the day by giving a written notice to the person. *[Part 5-2, Division 2, subsection 218(4)]*

5.22 A person must comply with a written notice from ASIC. The civil penalty for non-compliance is a maximum of 2,000 penalty units *[Part 5-2, Division 2, subsection 218(5)]*. The criminal penalty for non-compliance is a maximum of 50 penalty units or 1 year imprisonment, or both and is consistent with section 1274 of the Corporations Act. *[Part 5-2, Division 2, subsections 218(5) and (6)]*

5.23 The offence is strict liability. Strict liability will significantly enhance the role of ASIC in administering the enforcement regime. *[Part 5-2, Division 2, subsections 218(5), (6) and (7)]*

***Division 3 — ASIC's register of documents***

5.24 Division 3 deals with ASIC's register of documents that have been lodged with it.

5.25 To facilitate ASIC's role as the regulator of the Australian credit regime, ASIC may establish and maintain one or more document registers in any form ASIC considers appropriate. *[Part 5-2, Division 3, subsections 219(1) and (2)]*

5.26 ASIC document registers may be maintained in an electronic form. *[Part 5-2, Division 3, subsection 219(3)]*

5.27 ASIC is not required to make any part of a document register public, nor is it required to permit any person to inspect or make copies of, or take extracts from a document register. *[Part 5-2, Division 3, subsection 219(4)]*

5.28 An ASIC document register is not a legislative instrument. This statement is merely declaratory of the law, consistent with section 5 of the *Legislative Instruments Act 2003*. *[Part 5-2, Division 3, subsection 219(5)]*

5.29 Where information about a person is included in a document register, ASIC may give that person a written notice requiring them to give ASIC information about themselves, being information of the kind included on the document register. For example, where the information included in the register is a business address, the person can be given a written notice requiring them to give ASIC information about their current business address. The notice must specify the day that the person must comply with the notice. This must be a reasonable period after the notice is given by ASIC. *[Part 5-2, Division 3, subsections 220(1) and (2)]*

5.30 A person must comply with a written notice from ASIC. The civil penalty for non-compliance is a maximum of 2,000 penalty units *[Part 5-2, Division 3, subsection 220(3)]*. The criminal penalty for non-compliance is a maximum of 50 penalty units or 1 year imprisonment, or both and is consistent with section 1274 of the *Corporations Act*. *[Part 5-2, Division 3, subsection 220(4)]*

5.31 The offence is strict liability. Strict liability will significantly enhance the role of ASIC in administering the enforcement regime. *[Part 5-2, Division 3, subsection 220(5)]*

5.32 ASIC may prepare a written document that sets out information obtained from its document register *[Part 5-2, Division 3, subsection 221(1)]*. The document is admissible as prima facie evidence of the matters in the document (meaning that in a court proceeding, the court will take the written document as factually representing the matters in the document,

unless the contrary is established) [Part 5-2, Division 3, subsection 221(2)]. The document need not be certified by ASIC, or signed, in order to purport to have been prepared by ASIC [Part 5-2, Division 3, subsection 221(3)].

**Division 4 — Other provisions relating to documents lodged with ASIC or required under the Credit Bill**

5.33 Division 4 deals with further provisions relating to the lodging of documents with ASIC.

5.34 In court proceedings, a copy or extract of any document lodged with and certified by ASIC is admissible in evidence as of equal validity with the original document [Part 5-2, Division 4, section 222]. This allows ASIC to convert original documents into electronic format and provide to the court copies or extracts with equal status as the originals.

5.35 ASIC may destroy or dispose of a document if it considers that it is no longer necessary or desirable to retain the document and the document has been in ASIC's possession for a period prescribed by the regulations or a copy of the document has been included in the document register. This allows ASIC to destroy the original documents lodged with it where they have been included in the document register. [Part 5-2, Division 4, section 223]

5.36 ASIC may give a person written notice requiring them to comply with any provision of the Credit Bill that requires that they lodge a document with ASIC or comply with any request of ASIC to resubmit a document under Part 5-2, Division 2, subsection 218(2) (a lodgment notice). The notice may require the person to comply within 14 days. [Part 5-2, Division 4, subsection 224(1)]

5.37 If a person fails to comply with a lodgment notice within 14 days, ASIC may apply to a court for an order directing the person to comply with the requirement or request. [Part 5-2, Division 4, subsection 224(2)]

5.38 The court may order that costs incidental to ASIC's application be borne by certain persons. For example, the cost may be borne by the person, or if the person is a body corporate, by the director, secretary or senior manager, or if the person is a partnership or trustee, by a partner or trustee who is responsible for the failure to comply. [Part 5-2, Division 4, subsection 224(3)]

5.39 There are various offences relating to documents required to be lodged or already lodged with ASIC under the Credit Bill. [Part 5-2, Division 4, section 225]

- 5.40 A person must not either:
- make, or authorise the making of, a statement or an omission in a document; or
  - omit, or authorise the omission of a matter from a document if:
    - the person knows that the statement is false or misleading, or based on information that is false or misleading, or omits matters that makes the documents misleading; or
    - the person knows that without the matter that has been omitted the document is misleading; or
    - is reckless as to whether this is the case.

5.41 The civil penalty for this offence is a maximum of 2,000 penalty units. The criminal penalty for the offence is a maximum of 200 penalty units, or 5 years imprisonment, or both and is consistent with subsection 1308(2) of the Corporations Act. *[Part 5-2, Division 4, subsections 225(2) to (4)]*

### **Example 5.1**

Brigitte's Home Loans Pty Ltd's application for a licence to engage in credit activities recklessly fails to disclose details of a director who will perform duties in relation to those credit activities if the registration is granted.

Without inclusion of this information, the application is false in a material particular or materially misleading. ASIC may therefore seek a civil penalty from the court against Brigitte's Home Loans Pty Ltd of up to \$1.1 million.

In addition, ASIC may reject the application for a licence.

5.42 A person must take reasonable steps to ensure that they do not make, or authorise the making of, a statement, or an omission in a document under certain circumstances *[Part 5-2, Division 4, subsection 225(5)]*. These circumstances are:

- that the person knows or is reckless as to whether the statement is false or misleading; or
- has omitted something that makes it misleading or is based on information that is false or misleading.

5.43 The civil penalty for this offence is a maximum of 2,000 penalty units.

5.44 The criminal penalty for the offence is a maximum of 5 penalty units and is consistent with subsection 1308(4) of the Corporations Act. *[Part 5-2, Division 4, subsections 225(5) and (6)]*

5.45 This offence also carries strict liability *[Part 5-2, Division 4, subsection 225(7)]*. This strict liability will significantly enhance the role of ASIC in administering the enforcement regime.

5.46 A person is taken to have authorised the making of a statement or omission relevant to a document if they vote in favour of a resolution approving the document or otherwise approves the document. *[Part 5-2, Division 4, subsection 225(8)]*

### **Part 5-3 — Concealment or falsification of credit books**

#### *Division 1 — Introduction*

5.47 Part 5-3 deals with the concealment or falsification of credit books. *[Part 5-3, Division 1, section 226]*

#### *Division 2 — Prohibitions relating to the concealment or falsification of credit books*

5.48 Division 2 deals with requirements not to conceal or falsify credit books, and a requirement to take precautions against the falsification of credit books. A definition for the term credit book is provided. *[Part 5-3, Division 2, subsection 227(4)]*

5.49 It is an offence for a person to conceal, destroy, mutilate, alter or send a credit book out of the jurisdiction of the Credit Bill *[Part 5-3, Division 2, subsection 227(1)]*. The civil penalty for this offence is a maximum of 2,000 penalty units. The criminal penalty for the offence is a maximum of 50 penalty units, or 6 months imprisonment, or both and is consistent with section 1101E of the Corporations Act *[Part 5-3, Division 2, subsections 227(1) and (2)]*.

5.50 A defence to this offence is that the person did not intend to defraud or prevent, delay or obstruct the carrying out an examination, investigation or audit, or the exercise of a power under the Credit Bill *[Part 5-3, Division 2, subsection 227(3)]*. The defendant bears the evidentiary burden in relation to this defence since these are matters which will be peculiarly within the knowledge of the defendant, and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

### Example 5.2

Jane is taken to court for concealing a credit book from ASIC that was pertinent to an investigation ASIC was conducting in performing a function under the Credit Bill. She wants to make the defence that she did not conceal the credit book because she did not intend to obstruct ASIC's investigation.

Because she bears the evidentiary burden in relation to the defence, she will need to establish to the satisfaction of the court that she did not have the intention to obstruct ASIC's investigation for the defence to apply.

5.51 It is an offence for a person to engage in conduct that results in the falsification of a credit book [*Part 5-3, Division 2, section 228*]. The civil penalty for this offence is a maximum of 2,000 penalty units. The criminal penalty for the offence is a maximum of 50 penalty units, or six months imprisonment, or both and is consistent with section 1101F of the Corporations Act [*Part 5-3, Division 2, subsections 228(1) and (2)*].

5.52 A defence to this offence is that the person acted honestly and in all the circumstances, the act or omission constituting the offence should be excused. [*Part 5-3, Division 2, subsection 228(3)*]

5.53 The defendant bears the evidentiary burden in relation to this defence since these are matters which will be peculiarly within the knowledge of the defendant, and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

5.54 It is an offence for a person required by the Credit Bill to keep a credit book not to take reasonable steps to guard against the falsification of the credit book and facilitate the discovery of any falsification of the credit book [*Part 5-3, Division 2, section 229*]. The civil penalty for this offence is a maximum of 2,000 penalty units. The criminal penalty for the offence is a maximum of 50 penalty units, or 6 months imprisonment, or both and is consistent with section 1101G of the Corporations Act [*Part 5-3, Division 2, subsections 229(1) and (2)*].

## **Part 5-4 — Fees imposed by the National Consumer Credit Protection (Fees) Bill 2009**

### *Division 1 — Introduction*

5.55 Part 5-4 deals with fees imposed by the Fees Bill. [*Part 5-4, Division 1, section 230*]

**Division 2 — Fees imposed by the Fees Bill**

5.56 Division 2 deals with fees, including the payment of fees, the lodging of documents or doing of acts without the payment of fees, and the waiver or refund of fees.

5.57 Fees imposed under the Fees Bill are payable to the Commonwealth. *[Part 5-4, Division 2, section 231]*

5.58 Generally, if a fee for the lodgment of a document is payable under the Fees Bill and the document is submitted without the payment, the document is still taken to have been lodged despite the non-payment of the fee. *[Part 5-4, Division 2, section 232]*

5.59 However, a compliance certificate required to be lodged under Part 2-2, Division 5, section 53 is not taken to have been lodged until the fee is paid. This has effect despite any other Part of the Credit Bill. *[Part 5-4, Division 2, section 232]*

5.60 If a fee is payable under the Fees Bill for a matter involving the doing of an act by the Minister or ASIC, they may refuse to do the act until the fee is paid *[Part 5-4, Division 2, section 233]*. This has effect despite any other Part of the Credit Bill *[Part 5-4, Division 2, section 234]*. This means, for example, that an application for a licence or registration may be accepted for lodgment by ASIC but that ASIC may refuse to grant the licence or registration if the fee is not paid.

5.61 Nothing in Division 2 or in the Fees Bill prevents the Commonwealth from waiving or reducing fees that would otherwise be payable, or refunding in whole or in part fees paid under the Credit Bill. The Commonwealth may do this either in a particular case or in a particular class of cases. *[Part 5-4, Division 2, section 235]*

5.62 ASIC may recover a debt due under Division 2 on behalf of the Commonwealth. *[Part 5-4, Division 2, section 236]*

5.63 Nothing in, or done under Division 2 imposes on ASIC a duty to:

- allow the inspection or search of a register or document;
- make available information; or
- confer a right to inspect or search a register or document or to have information made available except so far as such a duty or right would, but for the effect of Part 5-4, Division 2, section 233, exist under a provision of another Part of the Credit Bill or under some other law.

*[Part 5-4, Division 2, section 237]*



## Part 5-5 — Other administrative matters

### *Division 1*

5.64 Part 5-5 deals with miscellaneous provisions relating to administrative matters. [*Part 5-5, Division 1, section 238*]

### *Division 2 — Other administrative matters*

5.65 Division 2 deals with miscellaneous provisions relating to administrative matters.

5.66 Subject to the *Australian Securities and Investments Commission Act 2001* (ASIC Act), ASIC has the general administration of the Credit Bill. [*Part 5-5, Division 2, section 239*]

5.67 It is an offence for a person to engage in conduct that results in the obstruction or hindering of ASIC, or any other person, in the performance of a function or power under the Credit Bill [*Part 5-5, Division 2, section 240*]. The civil penalty for this offence is a maximum of 2,000 penalty units. The criminal penalty for the offence is a maximum of 100 penalty units, or 2 years imprisonment, or both and is consistent with section 65 of the ASIC Act [*Part 5-5, Division 2, subsections 240(1) and (2)*]. Sections 292 and 293 of the Credit Bill also contain other offences relating to the obstruction or hindrance of ASIC.

5.68 A defence to this offence is that the person has a reasonable excuse [*Part 5-5, Division 2, subsection 240(3)*]. The defendant bears the evidentiary burden in relation to this defence since these are matters which will be peculiarly within the knowledge of the defendant, and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

5.69 ASIC may, on application, approve in writing codes of conduct, or variations to codes of conducts for the activities of licensees, or credit representatives; or activities in relation to which ASIC has a regulatory responsibility. Such an approval must be in writing. [*Part 5-5, Division 2, subsections 241(1) and (2)*]

5.70 ASIC must not approve a code of conduct, or a variation, unless it is satisfied that the code is not inconsistent with the Credit Bill or any other law of the Commonwealth under which ASIC has regulatory responsibilities. [*Part 5-5, Division 2, paragraph 241(3)(a)*]

5.71 Further, it must be appropriate to approve the code of conduct or variation, having regard to the following:

- the ability of the applicant to ensure that persons who hold out that they comply with the code of conduct will comply with that code as in force from time to time;
- the desirability of codes being harmonised to the greatest possible extent; or
- any other matter ASIC considers relevant.

*[Part 5-5, Division 2, paragraph 241(3)(b)]*

5.72 ASIC may revoke an approval of a code of conduct on application by the person who applied for the approval, or if ASIC is no longer satisfied as mentioned in subsection 241(3). Such a revocation must be in writing. *[Part 5-5, Division 2, subsection 241(4)]*

5.73 A code of conduct approved under subsection 241(1), or an approval of such a code of conduct, an approval of a variation of a code of conduct under subsection 241(2), or a revocation of a code of conduct under subsection 241(4) are all legislative instruments. *[Part 5-5, Division 2, subsection 241(5)]*

5.74 ASIC may arrange for the use of computer programs which are under their control for any purposes relating to making decisions under the Credit Bill *[Part 5-5, Division 2, subsection 242(1)]*. A decision made by such a computer program is taken to be a decision of ASIC. *[Part 5-5, Division 2, subsection 242(2)]*

5.75 A person has qualified privilege in relation to giving any information to ASIC under certain circumstances *[Part 5-5, Division 2, section 243]*. These circumstances are matters that:

- a person is required or expressly permitted to give under the Credit Bill *[Part 5-5, Division 2, paragraph 243(1)(a)]*;
- relates to a contravention, or possible contravention, of the credit legislation *[Part 5-5, Division 2, paragraph 243(1)(b)]*; or
- relates to a matter that is relevant to a decision made by ASIC under:
  - section 37 (when ASIC may grant a licence); or
  - sections 54 and 55 (ASIC's powers to suspend or cancel licences); or
  - subsection 80(1) (ASIC's power to make banning orders).

*[Part 5-5, Division 2, subparagraphs 243(c)(i), (ii) and (iii)]*

5.76 This type of intelligence from third parties is a significant source of detailed and time-sensitive information which assists ASIC in the performance of its oversight of the industry and can be used to take action against persons involved in misconduct.

5.77 A person that has qualified privilege under subsection 243(1) or (2) in relation to conduct is also not liable for any action based on breach of confidence in relation to that conduct.

### **Example 5.3**

Bank ABC informs ASIC that they have detected what may be fraudulent statements in an application for credit which they have received from Joker Broker Inc.

On this basis of this, ASIC commences an investigation and determines that the application from Joker Broker Inc is in fact fraudulent.

Joker Broker Inc sues Bank ABC for breach of confidence. However, Bank ABC has qualified privilege under section 243 as the information relates to a contravention, or possible contravention, of the credit legislation.

5.78 ASIC may issue a certificate stating that a requirement of the Credit Bill specified in the certificate :

- had or had not been complied with at a particular date or within a period specified in the certificate [*Part 5-5, Division 2, paragraph 244(1)(a)*]; or
- had been complied with at a date specified in the certificate but not before that date [*Part 5-5, Division 2, paragraph 244(1)(b)*].

5.79 In proceedings in a court, a certificate issued by ASIC under subsection 244(1) is admissible as prima facie evidence of the matters stated in the certificate. [*Part 5-5, Division 2, section 244*]

5.80 The operator of an approved External Dispute Resolution Scheme (EDR Scheme) may give information to ASIC in relation to a person becoming, or ceasing to be, a member of the EDR Scheme [*Part 5-5, Division 2, section 245*]. This information will enable ASIC to monitor the licence condition that all licensees must remain an EDR member at all times [*Part 2-2, Division 5, paragraph 47(1)(i)*].



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# **Chapter 6**

## **Compliance and enforcement**

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### **Outline of chapter**

6.1 Chapter 6 of this explanatory memorandum outlines the powers Australian Securities and Investments Commission (ASIC) may exercise in relation to the investigation and enforcement of credit legislation, including the National Consumer Credit Protection Bill 2009 (Credit Bill) and the National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009 (Transitional Bill).

### **Context of amendments**

6.2 ASIC generally exercises its compliance and enforcement powers under the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

6.3 The ASIC Act is based on a separate referral of State powers. Relevant enforcement provisions have been included in the Credit Bill in order to cover credit matters.

6.4 The provisions in Chapter 6 largely replicate the relevant ASIC Act provisions, subject to changes to ensure they work effectively in the context of regulating credit activities.

6.5 Consistency with the provisions from the ASIC Act ensures that ASIC retains similar levels of enforcement rights, obligations, and capacity to administer and discharge its duties under the ASIC Act, *Corporations Act 2001* (Corporations Act) and the Credit Bill.

6.6 Certain provisions of the ASIC Act have not been replicated in the Credit Bill. This is because either:

- those provisions are not relevant in the context of credit activities and the Credit Bill; or
- the provisions in the ASIC Act will apply appropriately without replication in the Credit Bill. This includes matters relating to the general function and operation of ASIC.

6.7 For example, section 127 of the ASIC Act has not been replicated in the Credit Bill. This section of the ASIC Act will apply appropriately because the Commonwealth credit legislation is ‘protected information’ for the purposes of paragraph 127(1)(b) of the ASIC Act by reason of the inclusion of this legislation in section 12A of the ASIC Act.

6.8 Some provisions in the ASIC Act that are being replicated limit the use of certain immunities from prosecution and impact on the privilege against self-incrimination.

6.9 The inclusion of more limited immunities in relation to ASIC powers was the result of extensive inquiries and empirical research into the difficulties of corporate regulation. The limiting of immunities was recommended by the Joint Standing Committee on Companies and Securities (1992) and by the ‘*Review of the Derivative Use Immunity Reforms*’ by John Kluver (1997). It was accepted that a full ‘use’ and ‘derivative use’ immunity would unacceptably fetter investigation and prosecution of corporate misconduct offences. Comparable issues would arise in relation to credit matters.

6.10 ASIC is given broad powers to obtain information about suspected contraventions of the credit legislation, as the most effective way of regulating credit activities and maintaining public confidence in the integrity of the credit industry.

6.11 The use of ASIC’s powers under the Credit Bill is subject to Parliamentary scrutiny by the Parliamentary Joint Committee on Corporations and Financial Services.

## Summary of new law

6.12 Chapter 6 of the Credit Bill outlines the powers that ASIC may exercise for the purpose of administering and enforcing the Commonwealth credit legislation.

6.13 The phrase *Commonwealth credit legislation* is defined as the Credit Bill (when enacted), any instrument made under the Credit Bill (when enacted), the Transitional Bill (when enacted) and any instrument made under it. [Part 1-2, Division 2, section 5]

6.14 These powers supplement the powers that are already available to ASIC under the ASIC Act, and replicate the powers contained in the ASIC Act as far as is possible and as necessary in the context of the Commonwealth credit legislation.

6.15 ASIC is given power to:

- gather information about credit activities and persons who engage in credit activities, including:
  - the examination or questioning of persons where relevant to an ASIC investigation;
  - inspection of books; and
  - obtaining information about audits;
- undertake investigations for the effective administration of the Commonwealth credit legislation, such as investigating suspected contraventions of the credit legislation;
- use in proceedings information obtained under its information-gathering and investigation powers; and
- conduct administrative hearings as authorised by the Commonwealth credit legislation (for example, to make decisions about whether to cancel or suspend a licence).

6.16 This Chapter also sets out requirements in relation to the following matters:

- reports relating to ASIC investigations;
- procedures for examination of persons;
- procedures in relation to the production or seizure of books; and
- rules and procedures in relation to the conduct of hearings.

6.17 Further, the provisions establish offences for non-compliance with the requirements of this Chapter, the rules relating to self-incrimination and legal professional privilege and the evidentiary use and value of certain materials.

## Detailed explanation of new law

### Part 6-1 — Investigations

6.18 Division 2 of Part 6-1 of the Credit Bill provides that ASIC may make investigations either on its own initiative, or if it is directed to do so by the Minister. The powers to commence an investigation are consistent with the powers of investigation in sections 13 and 14 of the ASIC Act.

6.19 Consistent with existing ASIC powers, ASIC's powers of investigation under the Credit Bill include procedures that enable ASIC to respond effectively to suspected contraventions of credit legislation. As a result, ASIC can require potential defendants to present their positions to it promptly where delay would be contrary to the public interest.

6.20 ASIC's investigation powers assist in maintaining the integrity of the credit industry and promote consumer protection in relation to the provision of credit.

6.21 ASIC has a general power to make such investigation as it thinks expedient for the due administration of the Commonwealth credit legislation if it has reason to suspect that there may have been committed:

- a contravention of the credit legislation;
- a contravention of a law of the Commonwealth, or of a law of a referring State or Territory, that concerns the management, conduct or affairs of a licensee, a credit representative or other person who engages, or has engaged, in credit activities. In relation to a body corporate, *affairs* has the same meaning as in section 232 of the Corporations Act [Part 1-2, Division 2, section 5]. In relation to other persons, a definition has not been included and the natural meaning of the term applies; or
- a contravention of a law of the Commonwealth, or of a law of a referring State or Territory, that involves fraud or dishonesty and relates to a credit activity or a credit contract, mortgage, guarantee or consumer lease.

[Part 6-1, Division 2, section 247]

6.22 The term *credit legislation* is defined as the Credit Bill (when enacted), the Transitional Bill (when enacted), the ASIC Act and any other Commonwealth, State or Territory legislation that covers conduct relating to credit activities (whether or not it also covers other conduct),



but only in so far as it covers conduct relating to credit activities. [Part 1-2, Division 2, section 5]

6.23 This definition is necessarily broader than the definition of **Commonwealth credit legislation**, which is defined as the Credit Bill (when enacted), any instrument made under the Credit Bill, the Transitional Bill (when enacted) and any instrument made under it. [Part 1-2, Division 2, section 5]

6.24 For ASIC to have a reason to suspect a contravention requires more than mere speculation, but less than having reasonable grounds to believe that a contravention has occurred.

6.25 ASIC's decision to commence an investigation is not a reviewable decision under the *Administrative Appeals Tribunal Act 1975* (AAT Act) or the *Administrative Decisions (Judicial Review) Act 1977* (AD(JR) Act).

6.26 ASIC can be directed by the Minister to investigate a particular matter if the Minister is of the opinion that it is in the public interest to do so. [Part 6-1, Division 2, section 248]

6.27 ASIC can also be directed by the Minister to investigate a matter relating to:

- an alleged or suspected contravention of the Commonwealth credit legislation;
- an alleged or suspected contravention of a law of the Commonwealth or of a referring State or Territory that concerns the management, conduct or affairs of a licensee, a credit representative or other person who engages in, or has engaged in, credit activities, or that involves fraud or dishonesty and relates to a credit activity or a credit contract, mortgage, guarantee or consumer lease; or
- a credit activity engaged in by a person.

6.28 The Minister also has power to direct ASIC to investigate a credit activity even if it does not involve an alleged or suspected contravention of a law. [Part 6-1, Division 2, section 248]

### ***Reports of investigations***

6.29 ASIC may prepare a report — either an interim report or a final report — that sets out certain findings and opinions arising out of an investigation. In some cases, ASIC is required to prepare a report and

give a copy to the Minister. The powers to prepare reports are consistent with the powers in sections 16 and 17 of the ASIC Act.

6.30 ASIC must prepare an interim report if, in the course of an investigation under Part 6-1, it forms the opinion that:

- a contravention of a law of the Commonwealth, or of a referring State or Territory, has been committed, and that contravention is serious; or
- the preparation of an interim report would enable or assist the protection, preservation or prompt recovery of property; or
- there is an urgent need for the Commonwealth credit legislation to be amended.

*[Part 6-1, Division 2, subsection 249(1)]*

6.31 An interim report that ASIC is required to prepare must contain, as relevant, ASIC's finding about contraventions and material on which the findings are based, matters that will enable or assist the protection, preservation or prompt recovery of property, or ASIC's opinion and reasons for its opinion about the amendment of the legislation.

6.32 The requirement to prepare an interim report is intended to apply in circumstances where it is in the public interest for findings of facts to be made at an early stage of an investigation to assist a decision to be made about whether to commence civil or criminal proceedings, or to seek law reform, and to also assist in the preparation and conduct of proceedings if such proceedings are commenced. The public interest in preparing an interim report must be balanced against the public interest in maintaining the integrity of the investigation.

6.33 ASIC also has discretion to decide to prepare an interim report.  
*[Part 6-1, Division 2, subsection 249(2)]*

6.34 ASIC may choose to prepare a final report at the end of an investigation that sets out ASIC's findings about matters investigated, material on which those findings are based and any other matters relating to or arising out of the investigation that ASIC thinks fit. *[Part 6-1, Division 2, section 250]*

6.35 If a final report is prepared for an investigation, each record of an examination conducted in the course of that investigation must accompany the report. In addition, if, in ASIC's opinion, a statement made at an examination conducted in the course of another investigation under Part 6-1 is relevant to the investigation and a record has been made

of that statement, a copy of the record must accompany the report.  
[Part 6-1, Division 2, section 251]

6.36 ASIC can be directed by the Minister to prepare either an interim report or a final report. If a report is prepared at the Minister's direction, it must also set out such matters relating to, or arising out of, the investigation that the Minister directs. [Part 6-1, Division 2, subsections 249(2) and (3), 250(2) and (3)]

6.37 Interim reports and final reports prepared are not legislative instruments. Subsections 249(4) and 250(4) are declaratory of the position that the interim or final reports are not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. [Part 6-1, Division 2, subsections 249(4) and 250(4)]

6.38 All reports must be given to the Minister, and the Minister can choose to print and publish the report or part of it. [Part 6-1, Division 2, subsections 251(1) and (4)]

6.39 ASIC may also give a report of an investigation in whole or part to:

- specified agencies — if the report relates to a serious contravention of a law of the Commonwealth, or of a referring State or Territory. This will enable those agencies to use ASIC's findings in the administration of their own legislation and the exercise of their powers; and
- a person — if the report relates to a person's affairs to a material extent.

[Part 6-1, Division 2, subsections 251(2) and (3)]

6.40 The making of a report is a reviewable decision for the purposes of the AD(JR) Act. The rules of natural justice require ASIC to give a person whose rights, interests or legitimate expectations may be adversely affected by findings contained in the draft report an opportunity to be heard or to make submissions on those findings before the report is published: *Kioa v West* (1985) 116 ALR 321 at 582-583. Findings of fact contained in a report are also reviewable under the AD(JR) Act if there is an error of law or on the ground that there is no evidence or other material to justify the decision made: *Australian Broadcasting Tribunal v Bond* (1990) 94 ALR 11 at 38.

6.41 A report prepared by ASIC under Part 6-1 is admissible in proceedings (other than criminal proceedings) as prima facie evidence of any facts or matters that the report states ASIC to have found to exist.  
[Part 6-8, Division 2, section 308]

6.42 The term *proceedings* has the same meaning as in Part 3 of the ASIC Act, that is, a proceeding in a court, or a proceeding or hearing before, or an examination by or before, a tribunal, whether the proceeding, hearing or examination is of a civil, administrative, criminal, disciplinary or other nature. *Tribunal* is broadly defined and would include ASIC. [Part 1-2, Division 2, section 5]

6.43 The court or tribunal must be satisfied that the copy of the report has been given to the other party, and that the other party, and their lawyer, have had a reasonable opportunity to examine it and take the contents into account in preparing their case. [Part 6-8, Division 2, section 309]

6.44 Before a copy of a report is admitted into evidence, the other party can apply to cross-examine persons who were involved in preparing the report or making a finding about a fact or matter that the report states ASIC to have found to exist, or who gave information or produced a book on the basis of which a finding was made. Cross-examination must be allowed unless the court or tribunal considers that, in all the circumstances, it is not appropriate to do so. This gives the other party the opportunity to appropriately test the findings made by ASIC and the information on which those findings were based. [Part 6-8, Division 2, subsections 309(3) and (4)]

6.45 These provisions ensure that the other party has the opportunity to take the contents of the report into account when preparing their case, and appropriately test the findings made by ASIC and the information on which those findings were based.

6.46 Under section 246 of the ASIC Act, the Minister, ASIC, Commission members, delegates and staff are protected from liability for acts done, or omissions made, in good faith relating to the functions and powers of ASIC. This includes the preparation and distribution of a report under Part 6-1. It is intended to make regulations so that the credit legislation is a prescribed law for the purposes of section 246 of the ASIC Act.

## Part 6-2 — Examination of persons

6.47 ASIC may, by written notice, require a person to:

- give to ASIC all reasonable assistance with an investigation under Part 6-1 of the Bill; and
- appear before an ASIC staff member for an examination on oath and to answer questions.

[Part 6-2, Division 2, section 253]

6.48 ASIC can exercise this power if it, on reasonable grounds, suspects or believes that the person can give information relevant to a matter that it is investigating, or is to investigate, under Part 6-1. *[Part 6-2, Division 2, subsection 253(1)]*

6.49 Intentional or reckless failure to comply with a requirement is an offence, unless the person has a reasonable excuse. The defendant has the burden of establishing that they had a reasonable excuse for non-compliance, as this matter is peculiarly within the knowledge of the defendant. The penalty is 100 penalty units or two years imprisonment or both. *[Part 6-6, Division 2, subsections 290(1) and (4)]*

6.50 Failure to comply with requirements made by ASIC in relation to an examination can seriously jeopardise ASIC's ability to exercise its powers and functions to properly inquire into questionable behaviour. In the absence of any reasonable excuse, criminal sanctions are appropriate to deter non-compliance.

6.51 This power and the corresponding offence are consistent with section 19 of the ASIC Act.

6.52 A person can give information relevant to a matter if the person can:

- explain or state a matter;
- identify a person, matter or thing;
- disclose information; or
- answer a question.

*[Part 1-2, Division 2, section 5]*

6.53 The terms 'give' and 'information' when used in Chapter 6 have the same meaning as in Part 3 of the ASIC Act. *[Part 1-2, Division 2, section 5]*

6.54 ASIC can exercise this power if it suspects or believes that the person can give relevant information. A suspicion for the purposes of this provision must be more than mere conjecture, surmise or speculation, but it can be based on matters not admissible in evidence, such as hearsay. A 'suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to a 'slight opinion, but without sufficient evidence': *Qld Bacon Pty Ltd v Rees* (1966) 115 CLR 266 at 303. The test for a belief is a higher threshold than suspicion.

6.55 A person is required to give all reasonable assistance in connection with the investigation. This may extend to actions as well as providing information.

**Example 6.1: Examples of Reasonable Assistance**

Examples of 'reasonable assistance' include:

- signing a power of attorney (*ASC v Kutzner* (1998) 16 ACLC 182);
- signing documents to authorise the release of information to ASIC (*Smith v Papamihail* (1998) 158 ALR 451);
- identifying where documents may exist by drawing a chart, map or diagram;
- providing passwords for access to computer files; and
- providing a key for a locked safe.

6.56 The overriding requirement is that the assistance sought must be 'reasonable'.

6.57 The notice given by ASIC must state the general nature of the matter that ASIC is investigating, or is to investigate. The notice must also set out the effect of subsection 257(1) (right of the examinee's lawyer to be present, address the inspector and examine the examinee) and section 295 (abrogation of the privilege against self-incrimination). *[Part 6-2, Division 2, subsection 253(3)]*

***Procedure of an examination***

6.58 The remaining provisions of Part 6-2 apply only where a person (the examinee) appears before another person (the inspector) for examination. These provisions do not apply to the power to require a person to give reasonable assistance. *[Part 6-2, Division 2, section 254]*

6.59 The provisions authorise the inspector to control the procedure of the examination. The inspector has power to:

- require the examinee to either take an oath or make an affirmation that the statements the examinee will make are true *[Part 6-2, Division 2, subsection 255(1)]*;
- administer an oath or affirmation *[Part 6-2, Division 2, subsection 255(1)]*;
- require the examinee to answer a question that is put at the examination and that is relevant to a matter that ASIC is

investigating, or is to investigate, under Part 6-1 [*Part 6-2, Division 2, subsection 255(4)*];

- make directions about who can be present at the examination [*Part 6-2, Division 2, section 256*];
- curtail obstruction of the examination [*Part 6-2, Division 2, section 257*];
- give directions about the conduct of an examinee's lawyer [*Part 6-2, Division 2, section 257*];
- cause a record to be made of the examination [*Part 6-2, Division 2, subsection 258(1)*]; and
- impose conditions when providing the examination transcript to the examinee [*Part 6-2, Division 2, subsection 258(2)*].

6.60 These provisions are consistent with sections 20 to 24 of the ASIC Act.

6.61 Failure of an examinee to comply with a requirement to either take an oath or make an affirmation that the statements the examinee will make are true is an offence of strict liability, except to the extent that the person has a reasonable excuse [*Part 6-6, Division 2, subsections 290(1) and (4)*]. The defendant has the burden of establishing that they had a reasonable excuse for non-compliance, as this matter is peculiarly within the knowledge of the defendant. The penalty is 10 penalty units, or three months imprisonment or both [*Part 6-6, Division 2, subsection 290(2)*].

6.62 The inspector may require the examinee to answer a question that is put to the examinee and that is relevant to a matter that is being investigated. [*Part 6-2, Division 2, subsection 255(4)*]

6.63 The concept of 'relevance' is wide in the context of investigative powers. ASIC is not obliged to explain to the examinee why questions are relevant to the investigation.

6.64 Intentional or reckless failure to comply with a requirement under subsection 255(4) is an offence, unless the person has a reasonable excuse. The defendant has the burden of establishing that they had a reasonable excuse for non-compliance, as this matter is peculiarly within the knowledge of the defendant. The penalty is 100 penalty units or two years imprisonment or both. The offence and penalty is consistent with those for non-compliance with subsection 21(3) of the ASIC Act. [*Part 6-6, Division 2, subsections 290(1) and (4)*]

6.65 Failure to comply with requirements made by ASIC in relation to an examination can seriously jeopardise ASIC's ability to exercise its powers and functions to properly inquire into questionable behaviour. Criminal sanctions are appropriate to deter non-compliance where there is no reasonable excuse for non-compliance.

6.66 The requirement to answer a question overrides any duty of confidentiality and the privilege against self-incrimination. It is expressly provided that it is not a reasonable excuse for a person to refuse or fail to give information because the information might tend to incriminate the person or make the person liable to a penalty. However, if before making an oral statement, the examinee claims that the statement might tend to incriminate them or make them liable to a penalty, then the statement is not admissible in evidence against the person in criminal proceedings or proceedings for the imposition of a penalty (other than proceedings in respect of the falsity of the statement). *[Part 6-6, Division 2, section 295]*

6.67 A lawyer is entitled to refuse to answer a question if the giving of information would involve disclosing a privileged communication made by or on behalf of the lawyer in his or her capacity. The lawyer may not refuse to comply if the person on behalf of whom the communication was made consents to the lawyer complying with the requirement, or, if this person is a body corporate that is being wound up, the liquidator of the body gives their consent. *[Part 6-6, Division 2, section 296]*

6.68 If an examinee refuses to answer a question, the inspector may certify the refusal in writing (for example, by swearing an affidavit setting out details of the failure to comply) and apply to the court for an order that the person comply. The court may inquire into the matter to determine whether the refusal was based on a reasonable excuse. *[Part 6-6, Division 2, section 297]*

6.69 The examination must take place in private *[Part 6-2, Division 2, subsection 256(1)]*. This promotes the public interest in protecting the integrity of the investigation and the private interest of the examinee by ensuring that any prejudicial disclosures injurious to reputation or disclosures relating to personal or business confidences are not made public.

6.70 The following persons are entitled to be present:

- the inspector, the examinee and a member of ASIC;
- a staff member approved by ASIC — which is defined in Part 1-2 (Dictionary) by reference to section 5 of the ASIC Act to mean a person referred to in subsection 120(1)



of the ASIC Act (staff engaged under the *Public Service Act 1999*) or employed under subsection 120(3) of the ASIC Act (additional persons employed under written agreements), a person engaged under section 121(1) of the ASIC Act (persons engaged under written agreements as consultants or to perform services) and any officers, employees or persons who under section 122 of the ASIC Act are to assist ASIC (staff seconded to ASIC); and

- the examinee's lawyer.

*[Part 6-2, Division 2, subsection 256(2)]*

6.71 The inspector may also give directions about who may be present during the examination, or part of the examination. *[Part 6-2, Division 2, subsection 256(1)]*

6.72 The power to allow any other person to attend an examination must only be exercised where it is reasonable to do so, and without the private character of the examination being lost. It would not normally be reasonable to have persons with no connection with ASIC or the matter present.

### **Example 6.2**

It may be reasonable to allow another person to attend:

- where the examinee is elderly, ill or otherwise in need of support; or
- to allow an accredited translator to be present to assist where a person speaks a language other than English.

6.73 The individual circumstances should be considered by the inspector. This power also allows the presence of persons recording the examination for transcription.

6.74 The power to give directions under subsection 256(1) may also be used to exclude a particular person from an examination. The inspector may use this power to overrule the examinee's choice of lawyer and exclude that particular lawyer from the examination if the inspector had a belief, in good faith and on reasonable grounds, that the presence of the particular lawyer would prejudice the investigation.

### **Example 6.3**

ASIC may need to make this direction where a particular lawyer or firm of lawyers represents a number of examinees in the same investigation. This may increase the risk that persons to be examined

have prior knowledge of questions and answers of previous examinees, which could affect the veracity of the examinee's answers and prejudice the investigation; *Gangemi v ASIC* (2003) 45 ACSR 383.

6.75 It is an offence for any other person to be present at an examination. This is an offence of strict liability. The penalty is 10 penalty units or imprisonment for three months or both. This offence and penalty is consistent with the offence and penalty in subsection 22(2) of the ASIC Act. *[Part 6-2, Division 2, subsections 257(2) and (3)]*

6.76 This offence provision recognises the importance of maintaining privacy of examinations for both the public interest in the integrity of the investigation and the private interests of the examinee. Criminal sanctions are appropriate to deter unauthorised attendance at examinations.

6.77 An examinee's lawyer may address the inspector and examine the examinee about matters about which the examinee has been questioned. The lawyer is subject to directions from the inspector about the timing of these activities; for example, the inspector might determine that any examination by the lawyer should take place after the inspector has finished questioning the examinee. *[Part 6-2, Division 2, subsection 257(1)]*

6.78 The inspector also has power to prevent the lawyer from exercising those rights in a manner that obstructs the inspector's own examination. Examples of obstruction by a lawyer may include prompting of answers or repeatedly interrupting the examination. A failure by the examinee's lawyer to comply with a requirement to stop addressing the inspector, or examining the examinee, is an offence of strict liability, attracting a penalty of 5 penalty units. This is because of the need to preserve the integrity of the examination, in order for it to be effective. *[Part 6-2, Division 2, subsections 257(2) and (3)]*

#### *Record of examination*

6.79 The inspector may, or must if the examinee requests, cause a record to be made of statements made at the examination. The making of a record of examination ensures the effectiveness of the examination because it records for future use the questions asked and answers given at the examination. If a record is made in, or reduced to, writing, the inspector may require the examinee to read and sign it. *[Part 6-2, Division 2, subsection 258(1) and paragraph 258(2)(a)]*

6.80 Signing the record of examination affects its evidentiary use. If the record is signed, it is, in any future proceeding, prima facie evidence of the statements that it records. *[Part 6-8, Division 3, section 303]*

6.81 Failure to read or sign a record in accordance with a requirement is an offence of strict liability, unless the person has a reasonable excuse. The defendant has the burden of establishing that they had a reasonable excuse for non-compliance, as this matter is peculiarly within the

knowledge of the defendant. The penalty is 10 penalty units or three months imprisonment or both. This offence and penalty is consistent with the offence and penalty in section 63 of the ASIC Act. *[Part 6-2, Division 2, paragraph 258(2)(a) and Part 6-6, Division 2, subsection 290(2)]*

6.82 This offence provision recognises the importance of the signed record of examination as evidence in proceedings. Criminal sanctions are appropriate to deter non-compliance with a requirement to sign a record of examination, except where there is a reasonable excuse for the non-compliance.

6.83 It is expressly provided that it is not a reasonable excuse for a person to refuse or fail to sign a record in accordance with a requirement that the signing the record might tend to incriminate the person or make the person liable to a penalty. However, if before signing the record the examinee claims that the statement might tend to incriminate the person or make them liable to a penalty, the fact that the person has signed the record is not admissible in evidence against the person in a criminal proceeding or a proceeding for the imposition of a penalty (other than a proceeding in respect of the falsity of a statement contained in the record). *[Part 6-6, Division 2, section 295]*

6.84 This provision is included because it is necessary to expressly state that the privilege against self-incrimination does not apply in order to abrogate that privilege. It enables ASIC to obtain information that is necessary for the purposes of its investigation, but allows the person to maintain protection from the information being used against them in criminal proceedings or proceedings for the imposition of a penalty.

6.85 If an examinee refuses to sign a record, the inspector may certify the refusal in writing (for example, by swearing an affidavit setting out details of the failure to comply) and apply to the court for an order that the person comply. The court may inquire into the matter to determine whether the refusal was based on a reasonable excuse. *[Part 6-6, Division 2, section 297]*

6.86 If requested by the examinee, the inspector must give the examinee a copy of the written record subject to any conditions that the inspector imposes. For example, an inspector might impose conditions that protect the private nature of the examinations, such as limitations on the subsequent use and disclosure of the record. *[Part 6-2, Division 2, paragraph 258(2)(b)]*

6.87 A record of examination, together with a copy of any related book, may be given by ASIC to a person other than the examinee to be used in connection with proceedings. ASIC may give a copy of a record and related books to a person's lawyer if the lawyer satisfies ASIC that the person is carrying on, or contemplating in good faith, proceedings in

relation to a matter to which the examination related. *[Part 6-2, Division 2, subsection 259(1)]*

6.88 The term 'related book' is not defined, but may include documents formally identified and incorporated in the record, and also documents referred to directly or indirectly that would help a reader to understand the record. For example, if an examinee refers to a meeting with a client in which a particular credit contract was suggested, written notes of that meeting may constitute a related book.

6.89 This power recognises the importance of litigants and potential litigants having access to information relevant to their proceedings, and supports the efficient conduct of those proceedings.

6.90 If a copy of a record is given to a person under this power, the person or any other person who has possession, custody or control of the copy or a copy of it must not use it, or publish or communicate to a person any part of its contents, except in connection with preparing, beginning or carrying on, or in the course of, proceedings. *[Part 6-2, Division 2, subsection 259(2)]*

6.91 Contravention of this provision is an offence of strict liability. The penalty is 10 penalty units or three months imprisonment or both. The offence and penalty are consistent with the offence and penalty in subsection 25(3) of the ASIC Act. *[Part 6-2, Division 2, subsections 259(2) and (3)]*

6.92 This provision is necessary because the release of the record may affect the confidentiality of the information contained in the record. This provision limits as far as possible the terms on which the information can be used and distributed to protect the confidential nature of that information. Criminal sanctions are appropriate to deter use of the record for a purpose not contemplated by the section.

6.93 It is also provided that ASIC may, subject to such conditions (if any) as it imposes, give to a person a copy of a written record of the examination together with any related book. *[Part 6-2, Division 2, subsection 259(4)]*

6.94 This is not a discrete power to give a copy of a record of examination to a person. It is a machinery or facilitative provision that enables the provision of records of examination and related books and the imposition of conditions where the giving of those documents is for a purpose authorised in some other way (for example under section 127 of the ASIC Act): see *Johns v ASC* (1993) 178 CLR 408.

6.95 A failure to comply with conditions imposed by ASIC under subsection 258(2) or subsection 259(2) is an offence of strict liability. The penalty is 10 penalty units or three months imprisonment or both.

The offence and penalty are consistent with the offence and penalty in section 26 of the ASIC Act. *[Part 6-2, Division 2, section 260]*

6.96 This offence provision recognises the importance of conditions for protecting the confidentiality of information contained in the record. Criminal sanctions are appropriate to deter use of the record contrary to conditions imposed by ASIC.

6.97 If a final report of the investigation is prepared under section 250, each record of an examination conducted in the course of that investigation must accompany the report. In addition, if, in ASIC's opinion, a statement made at an examination is relevant to any other investigation under Part 6-1 and a record has been made of that statement and a final report has been prepared for that other investigation, a copy of the record must accompany the report. This is to ensure that reports prepared by ASIC include a complete record of information about the basis on which ASIC's findings are made. *[Part 6-2, Division 2, section 261]*

### **Part 6-3 — Inspection of books and audit information-gathering powers**

6.98 For most ASIC inquiries and investigations, records and documents are as important a source of evidence as oral testimony. ASIC has wide powers to compel the inspection and production of records of information, referred to as 'books', that relate to credit activities. These powers are consistent with the information-gathering powers in Part 3 Division 3 of the ASIC Act.

6.99 A *book* includes a register, any other record of information, financial reports or financial records, and documents. This definition is inclusive and therefore also covers any records of information that relate to credit activities engaged in by a person. *[Part 1-2, Division 2, section 5]*

#### ***When powers may be exercised***

6.100 A power conferred by Part 6-3 (other than sections 264, 265, 269 and 270) may only be exercised by ASIC for the following purposes:

- for the performance or exercise of any of ASIC's functions and powers under the Commonwealth credit legislation *[Part 6-3, Division 2, paragraph 263(a)];*
- for the purposes of ensuring compliance with the Commonwealth credit legislation *[Part 6-3, Division 2, paragraph 263(b)];*
- in relation to an alleged or suspected contravention of the credit legislation or a law of the Commonwealth or of a

referring State or Territory [*Part 6-3, Division 2, paragraphs 263(c) and (d)*]; or

- for the purposes of an investigation under Part 6-1 [*Part 6-3, Division 2, paragraph 263(d)*].

6.101 An example of ASIC exercising its powers for the purposes of the performance or exercise of its functions and powers is using them to obtain information to assist it to make a decision on whether to make a banning order under section 80.

6.102 ASIC's power to obtain information to enable it to assess whether a person is complying with an obligation or requirement under the Commonwealth credit legislation can be used, for example, in the course of a surveillance of a person engaging in credit activities.

6.103 ASIC's power to obtain information can be used for making inquiries in relation to:

- an alleged or suspected contravention of the credit legislation; or
- a contravention of a law of the Commonwealth or of a referring State or Territory that:
  - concerns the management, conduct or affairs of a licensee or credit representative or another person who engages, or has engaged, in credit activities; or
  - involves fraud or dishonesty and that relates to credit activities or to a credit contract, mortgage, guarantee or consumer lease.

6.104 For ASIC to have a reason to suspect a contravention requires more than mere speculation, but less than having reasonable grounds to believe that a contravention has occurred.

6.105 The requirement that a contravention concern the management, conduct or affairs of a person would generally mean that the contravention must arise out of the internal management of the person or out of their conduct or business to the extent that it involves credit activities. It is generally not sufficient that the contravention merely relates to the management, conduct or affairs of the person: *ASC v Lord* (1991) 33 FCR 144 at 149.

6.106 The requirement that a contravention involves fraud or dishonesty does not require fraud or dishonesty to be an element of an offence: *ASC v Lord* (1991) 33 FCR 144 at 149.

***Power to inspect books***

6.107 A person who has been authorised in writing by ASIC is entitled to inspect (without charge) a 'book' that the Commonwealth credit legislation requires a person to keep. For example, staff members of ASIC would generally be authorised for the purpose of this provision. The authorisation can be of general application or limited to specified books. [*Part 6-3, Division 2, subsection 264(1)*]

6.108 The authorised person may require a person in whose possession, custody or control the book is to make the book available for inspection. [*Part 6-3, Division 2, subsection 264(2)*]

6.109 A book will be in a person's **possession** if the book is in their custody or under their control. [*Part 1-2, Division 2, section 5*]

6.110 Books that a person can obtain by exercising an enforceable legal right are therefore in the person's possession, notwithstanding that they do not have legal ownership of the books. More than one person can have custody or control of a book. For example, if an agent holds books on a person's behalf, those books are in the possession, custody or control of both the agent and the person, and may be inspected under a notice given to either the agent or the person.

6.111 The power of inspection only enables physical inspection of the books where they are located.

6.112 Failure to comply with a requirement to make books available for inspection is a strict liability offence unless the person has a reasonable excuse. The defendant has the burden of establishing that they had a reasonable excuse for non-compliance, as this matter is peculiarly within the knowledge of the defendant. The penalty is 10 penalty units or 3 months imprisonment or both. This offence and penalty is consistent with the offence and penalty in section 63 of the ASIC Act. [*Part 6-3, Division 2, subsections 264(2) and (3) and Part 6-6, Division 2, subsections 290(2) and (4)*]

6.113 Failure to comply with requirements made by ASIC in relation to inspection of books can seriously jeopardise ASIC's ability to exercise its powers and functions to ensure compliance with the law and properly inquire into questionable behaviour. Criminal sanctions and strict liability are appropriate to deter non-compliance where there is no reasonable excuse for non compliance.

***Power to require an auditor to give information or produce books***

6.114 ASIC may give a written notice to an auditor who prepares an audit report required by the Credit Bill requiring that auditor to give specified information or produce specified books to ASIC, at a specified place and time. *[Part 6-3, Division 2, subsection 265(1)]*

6.115 The place and time for production of books must be reasonable in all the circumstances. There could be a reasonable excuse for non-compliance with a notice to produce books where there is a capricious or unreasonable fixing of a time for production of books: *Hopfner v Flavel (1990) 2 ACSR 295. [Part 6-9, Division 2, section 315]*

6.116 This power may only be exercised:

- for the purposes of ascertaining compliance with audit requirements under the Commonwealth credit legislation; or
- in relation to an alleged or suspected contravention of:
  - audit requirements under the Commonwealth credit legislation; or
  - a law of the Commonwealth or of a referring State or Territory that either concerns the management, conduct or affairs of a licensee of credit representative or other person who engages in, or has engaged in, credit activities or involves fraud or dishonesty and relates to a credit activity engaged in by a person, or a credit contract, mortgage, guarantee or consumer lease; or
- for the purposes of an investigation under Part 6-1 relating to such a contravention.

*[Part 6-3, Division 2, subsection 265(2)]*

6.117 This provision broadly sets out the proper purposes for ASIC to require production of books — that is, where ASIC needs to be able to consider a book to assess whether there has been compliance with an audit requirement, make preliminary inquiries about a possible contravention that relates to an audit matter (outside the formal investigation process), or investigate a matter.

6.118 If the notice requires the giving of information, that information can be given orally or in writing or both.

6.119 An intentional or reckless failure to comply with a requirement made under section 265 is an offence, unless the person has a reasonable



excuse. The penalty is 100 penalty units or two years imprisonment or both. This offence and penalty is consistent with the offence and penalty in section 63 of the ASIC Act. *[Part 6-6, Division 2, subsections 290(1) and (4)]*

6.120 Failure to comply with requirements made by ASIC in relation to production of books can seriously jeopardise ASIC's ability to exercise its powers and functions to ensure compliance with the law and properly inquire into questionable behaviour. Criminal sanctions are appropriate to deter non-compliance where there is no reasonable excuse for non-compliance.

6.121 It is not a reasonable excuse for a person to refuse or fail to give information or produce a book because that might tend to incriminate the person or make them liable to a penalty. However, if before making an oral statement the person claims that the statement might tend to incriminate the person or make them liable to a penalty, the statement is not admissible in evidence against the person in criminal proceedings or proceedings for the imposition of a penalty (other than proceedings in respect of the falsity of a statement). *[Part 6-6, Division 2, section 295]*

6.122 This provision is included to expressly confirm that the privilege against self-incrimination does not apply, in order to abrogate that privilege. It enables ASIC to obtain information that is necessary for the purposes of its assessment or inquiries, but allows the person to maintain protection from the information being used against them in criminal proceedings or proceedings for the imposition of a penalty.

6.123 The notice can require the giving of information or production of books even if doing so would involve a breach of confidentiality owed to an audited body. *[Part 6-3, Division 2, subsection 265(4)]*

6.124 A person who responds to the notice is not liable to a proceeding or subject to a liability merely because of compliance with a requirement under Chapter 6. *[Part 6-9, Division 2, section 320]*

6.125 An auditor has qualified privilege in relation to the response. This is necessary to protect the auditor from legal proceedings for breach of confidence as a result of complying with a requirement made by ASIC. An auditor is also given qualified privilege in relation to information provided to ASIC where they are complying with their other statutory obligations as auditors. *[Part 2-5, Division 4, section 105]*

6.126 ASIC may, by written notice, extend the time within which the auditor must give the information or produce the books to which the notice relates. *[Part 6-3, Division 2, subsection 265(5)]*

6.127 ASIC can authorise an ASIC member or ASIC staff member to make a requirement under section 265. This authorisation can be of general application or limited by reference to the persons of whom requirements may be made, the books that may be required to be produced or the information that is required to be given. If the authorisation is given, the person may make a requirement as if references in section 265 to ASIC were a reference to the person. *[Part 6-3, Division 2, section 268]*

***Powers to require production of books***

6.128 ASIC may, by written notice, require the following persons to produce to ASIC specified books, at a specified place and time:

- a person who engages in credit activity (either alone or together with any other person);
- a person who, in ASIC's opinion, has been a party to engaging in a credit activity; or
- a representative, banker, lawyer or auditor of a person referred to above.

*[Part 6-3, Division 2, paragraphs 266(a) to (c)]*

6.129 The notice may require the production of specified books relating to:

- a credit activity engaged in by a person; or
- the character of financial situation of, or a business carried on by, a person who engages in a credit activity.

*[Part 6-3, Division 2, paragraphs 266(d) and (e)]*

6.130 The power conferred in this provision is consistent with the powers conferred on ASIC by sections 30 and 31 of the ASIC Act, (with changes to limit unnecessary duplication and make those powers relevant to the context of the credit legislation).

6.131 The intention is to enable ASIC to require the production of all books that relate to a credit activity, a credit contract, mortgage, guarantee or consumer lease, or a person who engages in a credit activity (whether under an authorisation in accordance with the credit legislation or not).

6.132 ASIC is given broad powers so that it can:

- obtain all information necessary to enable it to exercise its powers and functions;

- ascertain whether persons involved in engaging in credit activities have done so in compliance with the Commonwealth credit legislation; and
- make all appropriate inquiries and investigation where there is a possible contravention of the Commonwealth credit legislation and other relevant laws.

6.133 The person to whom a notice is given does not need to be the subject of ASIC's investigation or inquiry. If the person has custody or control of relevant books, they may be required to produce those books to ASIC for a proper purpose.

6.134 ASIC also has the power to obtain books by giving a person a written notice requiring production to a specified member or staff member of ASIC at a specified place and time of specified books that are in the person's possession, custody or control and relate to:

- a credit activity engaged in by a person; or
- the character or financial situation of, or business carried on by, a person who engages in a credit activity.

*[Part 6-3, Division 2, subsection 267(1)]*

6.135 ASIC also has the power to obtain books by giving a person a written notice requiring production to a specified member or staff member of ASIC at a specified place and time of specified books that are in the person's possession, custody or control and relate to the question of whether an auditor has complied with audit requirements under the Commonwealth credit legislation. *[Part 6-3, Division 2, subsection 267(2)]*

6.136 Books that a person can obtain by exercising an enforceable legal right are in the person's possession, custody or control notwithstanding the person does not have legal ownership of the books. More than one person can have possession, custody or control of a book. For example, if an agent holds books on a person's behalf, those books are in the possession, custody or control of both the agent and the person, and production may be required under a notice given to either the agent or the person. If the person who receives the notice does not have physical possession of a book, but the book is within their custody and control, compliance with the notice will involve the person exercising their legal right to obtain the return to them of the book so that it can be produced to ASIC.

6.137 The powers to require the production of books at a specified place and time are taken to require the person giving the notice to specify a place and time for production of books that is reasonable in all the circumstances. There could be a reasonable excuse for non-compliance

with a notice to produce books where there is a capricious or unreasonable fixing of a time for production of books: *Hopfner v Flavel (1990) 2 ACSR 295*. [Part 6-9, Division 2, paragraph 315(a)]

6.138 If it is reasonable in the circumstances, ASIC may require production of books immediately. [Part 6-9, Division 2, paragraph 315(b)]

#### **Example 6.4: Production of books**

Circumstances relevant to whether immediate production of books is reasonable may include:

- the urgency of the inquiry or investigation — for example, whether assets are likely to be disposed of; or
- volume, type and location of the documents sought — for example, with large organisations such as banks a reasonable time may be needed to locate documents covered by the notice; or
- whether the person to whom the notice is given wishes to exercise their right to obtain legal advice: *Swan v Scanlan (1982) 61 FLR 468*.

6.139 The books specified in the notice need to be specified in enough detail for the person who is given the notice to understand what they are required to produce. The notice can only specify existing books; ASIC cannot use these powers to require a person to create a book.

6.140 ASIC can authorise a member or staff member to make a requirement under sections 266 and 267. This authorisation can be of general application or limited by reference to the persons of whom requirements may be made, the books that may be required to be produced or the information that is required to be given. [Part 6-3, Division 2, section 268]

6.141 If an authorisation is given, the person may make a requirement as if references in sections 266 and 267 to:

- ASIC were a reference to the authorised person [Part 6-3, Division 2, paragraph 268(3)(a)];
- to specified books or information were a reference to books or information that the authorised person specifies, whether in the requirement or not and whether orally or in writing, to the person of whom the requirement is made. This power supplements, and is not a substitute for, a written notice. It allows the authorised person to adjust a requirement to produce books to meet an immediate demand [Part 6-3, Division 2, paragraphs 268(3)(b) and (3)(c)]; or

- to giving or producing to a specified person were a reference to giving or producing to the authorised person [*Part 6-3, Division 2, paragraph 268(3)(d)*].

6.142 An intentional or reckless failure to comply with a requirement to produce books under sections 31, 33 and 34 is an offence, unless the person has a reasonable excuse. The penalty is 100 penalty units or two years imprisonment or both. This offence and penalty is consistent with the offence and penalty in section 63 of the ASIC Act. [*Part 6-6, Division 2, subsections 290(1) and (4)*]

6.143 Failure to comply with requirements made by ASIC in relation to production of books can seriously jeopardise ASIC's ability to exercise its powers and functions to ensure compliance with the law and properly inquire into questionable behaviour. Criminal sanctions are appropriate to deter non-compliance where there is no reasonable excuse for non-compliance.

6.144 It is expressly provided that it is not a reasonable excuse for a person to refuse or fail to produce a book in accordance with a requirement that the production of the book might tend to incriminate the person or make the person liable to a penalty. [*Part 6-6, Division 2, section 295*]

6.145 This provision is included because it is necessary to expressly state that the privilege against self-incrimination does not apply in order to abrogate that privilege. It enables ASIC to obtain information that is necessary for the purposes of its investigation.

6.146 If the requirement to produce books is made to a person who is a lawyer, and the book contains a privileged communication made by or on behalf of the lawyer in his or her capacity as a lawyer, the lawyer is entitled to refuse to comply. The lawyer may not refuse to comply if the person, on behalf of whom the communication was made, or, if this person is a body corporate that is being wound up, the liquidator of the body, consents to the lawyer complying with the requirement. [*Part 6-6, Division 2, section 296*]

#### ***Powers if books are not produced in accordance with a requirement***

6.147 ASIC is given power to enforce compliance with a requirement to produce books, by:

- seeking the issue of a warrant to search premises and seize books [*Part 6-3, Division 2 sections 269 and 270*];

- requiring the person to state where those books may be found [Part 6-3, Division 2 section 272];
- certifying the failure to comply to the court with a view to the court, in its discretion, inquiring into the case and ordering compliance [Part 6-6, Division 2, section 297]; and
- making freezing orders [Part 6-7, Division 2, sections 299 to 301].

6.148 The powers in Part 6-3 (Inspection of books), Part 6-6 (Offences) and Part 6-7 (ASIC's powers in relation to non compliance with Chapter 6) are explained in more detail below.

6.149 If a staff member of ASIC has reasonable grounds to suspect that there are, or may be within the next three days, on particular premises in Australia books whose production has been required under this Part and that have not been produced, they can apply to a magistrate for the issue of a warrant to search premises for those books. [Part 6-3, Division 2, section 269]

6.150 A search warrant authorises the holder to search and enter private property, and seize books. It authorises what would otherwise be a trespass upon the privacy and property of another.

6.151 ASIC also has existing powers under other legislation to obtain a search warrant. For example, a warrant may be obtained under section 3E of the *Crimes Act 1914* (Crimes Act), which applies generally to all offences against Commonwealth law.

6.152 A search warrant can only be obtained if ASIC has required a person to produce books and there has been non-compliance with that requirement. The power is intended primarily to enforce compliance with the notice that was given by ASIC, by authorising entry on property and seizure of books, rather than being an alternate means of obtaining books.

6.153 A warrant is issued to a member of the Australian Federal Police, who does not have to be named in the warrant. The warrant will enable that Australian Federal Police member to enter and search the premises and take possession of or secure against interference, books that appear to be the books whose production was required. [Part 6-3, Division 2, subsections 270(1) and (2)]

6.154 If a warrant is issued, the magistrate must set out on the information laid before him or her by ASIC the grounds that have been relied on to justify the issue of the warrant. This ensures transparency of the reasons for issuing the warrant and determining whether the warrant may be challenged. [Part 6-3, Division 2, subsection 270(3)]

6.155 The warrant must specify the premises that may be entered, and books that may be searched for, state whether entry is authorised during specified hours or any time, and state that the warrant ceases to have effect on a specified day not more than seven days after the date of issue. *[Part 6-3, Division 2, subsection 270(4)]*

6.156 ASIC may also require a person who has failed or refused to produce particular books in compliance with a requirement under Part 6-3 to state where the books may be found, and who last had possession, custody or control of the books and where that person may be found. *[Part 6-3, Division 2, section 272]*

6.157 This power enables ASIC to obtain information from a person about the location of books that will assist it to obtain those books from a third party.

6.158 An intentional or reckless failure to comply with section 272 is an offence, except to the extent that the person has stated the matter to the best of his or her knowledge or belief, or unless the person has a reasonable excuse. The defendant has the burden of proving that they had a reasonable excuse or that they stated the matter to the best of his or her knowledge, as this matter is peculiarly within the knowledge of the defendant. The penalty is 100 penalty units or two years imprisonment or both. This offence and penalty is consistent with the offence and penalty in section 63 of the ASIC Act. *[Part 6-6, Division 2, subsections 290(1), (4) and (6)]*

6.159 Failure to comply with requirements made by ASIC in relation to inspection of books can seriously jeopardise ASIC's ability to identify sources of books, and therefore its ability to exercise its powers and functions to ensure compliance with the law and properly inquire into questionable behaviour. Criminal sanctions are appropriate to deter non-compliance.

6.160 It is not a reasonable excuse for a person to refuse or fail to make a statement in accordance with a requirement under section 272 that the statement might tend to incriminate the person or make the person liable to a penalty. However, if before making an oral statement the person claims that the statement might tend to incriminate the person or make them liable to a penalty, the statement is not admissible in evidence against the person in criminal proceedings or proceedings for the imposition of a penalty (other than proceedings in respect of the falsity of a statement). This 'use immunity' does not apply if the statement is given in writing. *[Part 6-6, Division 2, section 295]*

6.161 This provision is included because it is necessary to expressly state that the privilege against self-incrimination does not apply in order to abrogate that privilege. It enables ASIC to obtain information that is necessary for the purposes of its assessment or inquiries, but allows the person to maintain protection from the information being used against them in criminal proceedings or proceedings for the imposition of a penalty.

6.162 If the requirement is made to a person who is a lawyer, and the giving of information would involve disclosing a privileged communication made by or on behalf of the lawyer in his or her capacity as a lawyer, the lawyer is entitled to refuse to comply. The lawyer may not refuse to comply if the person on behalf of whom the communication was made, or, if this person is a body corporate that is being wound up, the liquidator of the body, consents to the lawyer complying with the requirement. *[Part 6-6, Division 2, section 296]*

***Powers if books are produced or seized***

6.163 The member or staff member of ASIC specified in a notice or warrant under this Part has powers to:

- take possession of books;
- inspect, make copies of, or take extract from, the books; and
- use, or permit use of, the books for the purposes of a proceeding.

*[Part 6-3, Division 2, subsections 271(1) to (4)]*

6.164 The books can be retained for as long as necessary for the following purposes:

- exercising a power under this provision;
- performing a function or power under the Commonwealth credit legislation, ensuring compliance with the Commonwealth credit legislation or carrying on an investigation;
- making a decision about whether or not proceedings to which the books would be relevant should be begun; and
- carrying on such proceedings.

*[Part 6-3, Division 2, subsection 271(5)]*



6.165 This ensures that ASIC is entitled to retain the books until such time as the purpose for obtaining the books, and any proper purpose that has subsequently arisen has been completed.

6.166 No-one is entitled to claim a lien on the books as against the person to whom they have been produced. *[Part 6-3, Division 2, subsection 271(6)]*

6.167 If a person would be entitled to inspect any of the books if they were not in the possession of ASIC, that person must be permitted to inspect the books. The person to whom books are produced may also permit another person to inspect any of the books. The exercise of the discretion to allow inspection is constrained by section 127 of the ASIC Act, which protects confidential information from unauthorised use or disclosure. *[Part 6-3, Division 2, subsection 271(7)]*

6.168 The person to whom books are produced may deliver them into the possession of ASIC or a person authorised by it to receive them. If this is done, the person who then has possession can exercise each of the powers in this provision. *[Part 6-3, Division 2, subsection 271(8) and paragraph 271(1)(b)]*

6.169 The person to whom books are produced, or to whom they are subsequently delivered, may require the person who produced the books or a person who was a party to the compilation of any of the books, to explain any matter about the compilation of the books. A corporation can be required to supply this information through its officers. *[Part 6-3, Division 2, subsection 271(9)]*

6.170 This provision enables ASIC to clarify matters that are not clear on the face of books that are produced (such as the meaning of codes and terms used in the books, or the identity of persons whose signatures appear in the books) and an explanation of systems used for compiling the books (such as methods used for identifying books required to be produced and IT systems used). This information can assist ASIC to understand and use the books produced, determine the importance of particular books in the context of other books that have been produced and also determine whether any other books ought to have been produced.

6.171 A requirement under subsection 271(9) can be answered in writing or orally.

6.172 A failure to comply with a requirement under subsection 271(9) is an offence, except to the extent that the person has stated the matter to the best of his or her knowledge or belief or unless the person has a reasonable excuse. The defendant has the burden of proving that they had a reasonable excuse or that they stated the matter to the best of his or her knowledge, as

this matter is peculiarly within the knowledge of the defendant. The penalty is 100 penalty units or two years imprisonment or both. This offence and penalty is consistent with the offence and penalty in section 63 of the ASIC Act. *[Part 6-6, Division 2, subsections 290(1), (4) and (5)]*

6.173 Failure to comply with a requirement to explain matters about books that have been produced can jeopardise ASIC's ability to understand and use those books, and therefore its ability to exercise its powers and functions to ensure compliance with the law and properly inquire into questionable behaviour. Criminal sanctions are appropriate to deter non-compliance.

6.174 It is not a reasonable excuse for a person to refuse or fail to give information in accordance with a requirement that the information might tend to incriminate the person or make the person liable to a penalty. However, if before making an oral statement the person claims that the statement might tend to incriminate the person or make them liable to a penalty, the statement is not admissible in evidence against the person in criminal proceedings or proceedings for the imposition of a penalty (other than proceedings in respect of the falsity of a statement). This 'use immunity' does not apply if the explanation is given in writing. *[Part 6-6, Division 2, section 295]*

6.175 This provision is included because it is necessary to expressly state that the privilege against self-incrimination does not apply in order to abrogate that privilege. It enables ASIC to obtain information that is necessary for the purposes of its assessment or inquiries, but allows the person to maintain protection from the information being used against them in criminal proceedings or proceedings for the imposition of a penalty.

6.176 If the requirement is made to a person who is a lawyer, and the giving of information would involve disclosing a privileged communication made by or on behalf of the lawyer in his or her capacity as a lawyer, the lawyer is entitled to refuse to comply. The lawyer may not refuse to comply if the person on behalf of whom the communication was made, or, if this person is a body corporate that is being wound up, the liquidator of the body, consents to the lawyer complying with the requirement. *[Part 6-6, Division 2, sections 295 and 296]*

#### **Part 6-4 — Proceedings after an investigation**

6.177 This Part defines ASIC's power to commence criminal and civil proceedings, following an investigation. These powers are consistent with the powers in sections 49 and 50 of the ASIC Act.

***ASIC may cause prosecution to be begun***

6.178 Section 274 applies where it appears to ASIC, as a result of an investigation or from a record of examination conducted under Chapter 6, that a person may have committed an offence against the Commonwealth credit legislation and ought to be prosecuted for an offence. [Part 6-4, Division 2, subsection 274(1)]

6.179 ASIC may cause a prosecution of the person for the offence to be begun and carried on. [Part 6-4, Division 2, subsection 274(2)]

6.180 This power does not cover the commencement of prosecutions for offences against Part 2 of Division 2 of the ASIC Act, as this power is already contained in section 49 of the ASIC Act.

6.181 Criminal proceedings can also be brought against third parties who assisted in the contravention, as the application of the Commonwealth credit legislation is extended by both section 11 of the *Criminal Code Act 1995* to aiders and abettors, and section 6 of the *Crimes Act 1914* to accessories.

6.182 ASIC has a power to require a person to give all reasonable assistance in connection with a prosecution. This power may be exercised where ASIC, on reasonable grounds, suspects or believes that a person can give information relevant to a prosecution for the offence or the offence relates to matters being, or connected with, affairs of a licensee, credit representative or other person that engages, or has engaged, in credit activities. [Part 6-4, Division 2, subsections 274(3) and (4)]

6.183 The requirement can be made of a person who ASIC suspects or believes, on reasonable grounds, can give information relevant to the prosecution, or, if the offence relates to matters being, or connected with, affairs of a licensee, credit representative or other person that engages, or has engaged, in credit activities, any representative, banker, lawyer or auditor of the licensee, credit representative or other person that engages, or has engaged, in credit activities.

6.184 This power does not apply in relation to the person that is the subject of the prosecution or a person who is or has been that person's lawyer. [Part 6-4, Division 2, subsection 274(6)]

6.185 This power is independent of the power to require a person to give reasonable assistance in connection with an investigation. It is an additional power available to ASIC to further the prosecution of a matter. It only operates from the time at which ASIC commences a prosecution and does not apply at the earlier investigation stage.

6.186 This power is supplemented by ASIC's ability in relation to section 207, which allows ASIC to require certain assistance relating to prosecutions.

6.187 This power is subject to the rules applying to contempt of court.

6.188 A failure to comply with a requirement to give reasonable assistance with a prosecution is an offence, unless the person has a reasonable excuse. The defendant has the burden of proving that they had a reasonable excuse, as this matter is peculiarly within the knowledge of the defendant. The offence is one of strict liability. The penalty is 10 penalty units or imprisonment for three months or both. The offence and penalty are consistent with the offence and penalty in subsection 49(3) of the ASIC Act. *[Part 6-4, Division 2, subsection 274(5) and Part 6-6, Division 2, subsection 290(2)]*

6.189 The requirement to answer a question overrides any duty of confidentiality and the privilege against self-incrimination. It is expressly provided that it is not a reasonable excuse for a person to refuse or fail to give information in accordance with a requirement that the information might tend to incriminate the person or make the person liable to a penalty. However, if before making an oral statement the person claims that the statement might tend to incriminate the person or make them liable to a penalty, the statement is not admissible in evidence against the person in criminal proceeding or proceedings for the imposition of a penalty (other than proceedings in respect of the falsity of the statement). *[Part 6-6, Division 2, section 295]*

6.190 It is considered that ASIC's ability to seek this assistance will maintain the integrity of the financial system and credit regulation framework and outweighs, in these circumstances, the privilege against self incrimination.

6.191 If the requirement under subsection 274(4) is made to a person who is a lawyer, and the giving of information would involve disclosing a privileged communication made by or on behalf of the lawyer in his or her capacity as a lawyer, the lawyer is entitled to refuse to comply. However, the lawyer may not refuse to comply if the person, on behalf of whom the communication was made, or, if this person is a body corporate that is being wound up, the liquidator of the body, consents to the lawyer complying with the requirement. *[Part 6-6, Division 2, section 296]*

6.192 If a person refuses to comply with the requirement, the person making the requirement may certify the refusal in writing (for example, by swearing an affidavit setting out details of the failure to comply) and apply to the court for an order that the person comply. The court may inquire into the matter to determine whether the refusal was based on a reasonable excuse. *[Part 6-6, Division 2, section 297]*

6.193 Nothing in section 274 affects the operation of the *Director of Public Prosecutions Act 1983*. [Part 6-4, Division 2, subsection 274(7)]

***ASIC may cause civil proceedings to be begun***

6.194 ASIC has the power to cause certain civil proceedings to be begun and carried on in another person's name if, as a result of an investigation or from a record of an examination conducted under Chapter 6, it appears to ASIC to be in the public interest for the person to being and carry on such proceedings (other than proceedings under Commonwealth credit legislation). [Part 6-4, Division 2, section 275]

6.195 Proceedings that ASIC may begin and carry on are proceedings for the recovery of damages for fraud, negligence, default, breach of duty or other misconduct, committed in connection with a matter to which the investigation or examination related, or proceedings for recovery of property of a person.

6.196 ASIC may cause proceedings to be begun and carried on in a person's name (not in the name of ASIC), but must only do so with the person's written consent.

6.197 This provision reflects the important role of ASIC in the areas of public policy and law enforcement. It enables ASIC to cause proceedings to be taken where persons have suffered loss or damage, but do not have the resources to maintain expensive and complicated litigation. The purpose of the provision is to commence litigation where there is otherwise insufficient private funding, or the value of individual claims is too small to make litigation worthwhile, but there are good prospects of recovery.

6.198 This power is necessary to ASIC for the proper and efficient exercise of its functions and powers. This is because it enables ASIC to take action in response to offending conduct in a timely way. In some instances, this may be a more appropriate or effective response to misconduct than lengthy and costly investigations that may or may not result in a successful criminal prosecution. In some instances, this may better serve the public interest in protecting consumers.

6.199 Before this power can be exercised, ASIC must consider that it is in the public interest to for a person to begin and carry on civil proceedings. There must be a causative link between the investigation or examination under Chapter 6 and ASIC's view that it is in the public interest to begin and carry on proceedings. Public interest has a broad meaning.

6.200 If the person in whose name proceedings will be begun is a natural person, that person must consent to ASIC beginning and carrying on the proceedings in the person's name. This requirement allows the private interests of the person to override the public interest in causing the proceedings to be begun and carried on. The consent of the person must be present at all stages of the litigation. For example, settlement negotiations can not be conducted or concluded by ASIC without the consent of the persons in whose name proceedings are brought.

6.201 If the person in whose name proceedings will be begun is a company, there is no consent requirement. The public interest in the proceeding prevails over private interests of the company.

### **Part 6-5 — Hearings**

6.202 Division 2 gives ASIC the power to hold hearings for the purpose of the performance or exercise of any of its functions or powers under the Commonwealth credit legislation, other than a function or power conferred by Part 6-1 (which deals with investigations). [*Part 6-5, Division 2, section 277*]

6.203 The power to hold hearings is consistent with the provisions dealing with hearings in Part 3 Division 6 of the ASIC Act.

6.204 There are two general types of hearing that may be conducted by ASIC:

- discretionary hearings; and
- hearings that ASIC is required to hold, in accordance with the Commonwealth credit legislation.

6.205 A discretionary hearing can be held by ASIC for the purposes of the performance or exercise of any of its functions or powers, including the functions or powers set out in section 12A of the ASIC Act.

6.206 The power to hold a hearing may, for example, be used to determine whether particular conduct is acceptable, and not against public interest, to restore confidence in the honesty, efficiency and fairness of the provision of credit activities, or to determine whether particular conduct complies with the law, whether it is against the public interest and if, as a consequence, there should be a change in the law: *Broken Hill Pty Co Ltd v National Companies and Securities Commission* (1986) 160 CLR 492.

6.207 The requirement to hold a hearing is subject to exceptions, where there is a need for ASIC to be able to act quickly. Otherwise, ASIC is required to offer a hearing to the affected person and provide that

person with the opportunity to make submissions on how ASIC should exercise its discretion on a particular matter, in order to ensure natural justice in the process.

6.208 Unless an exception applies, ASIC is required under the Credit Bill and Transitional Bill to give a person an opportunity to attend a hearing and make submissions before ASIC decides to

- impose conditions, or vary or revoke conditions, on registration [*Transitional Bill, Schedule 2, Part 3, subitems 14(1) and (2)*];
- suspend or cancel a person's registration [*Transitional Bill, Schedule 2, Part 3, subitem 22(2)*];
- refuse to grant a credit licence [*Part 2-2, Division 3, section 41*];
- impose conditions, or vary or revoke conditions, on a credit licence [*Part 2-2, Division 4, section 45*];
- suspend or cancel a credit licence [*Part 2-2, Division 6, section 55*];
- make a banning order [*Part 2-4, Division 2, section 80*]; or
- not vary or cancel a banning order in accordance with an application [*Part 2-4, Division 2, section 83*].

6.209 Exceptions to the general rule that ASIC is required to hold a hearing are specified in the law, and generally relate to situations where there may be a need to act quickly to protect the public (for example, where a licensee is insolvent).

6.210 The advantages of enabling ASIC to conduct administrative hearings and make administrative decisions and orders are that they are procedurally less complex than court proceedings, and they generally allow ASIC to respond in a more timely and cost-effective manner to contraventions of the Commonwealth credit legislation. This is particularly important from the perspective of the public interest and protecting and promoting the confidence of participants in the credit industry (including consumers and persons who engage in credit activities).

6.211 The public interest in ASIC having wide powers to make administrative orders is balanced with the need to protect private interests of affected persons who may be the subject of those orders. Private interests of affected persons are protected through:

- clear rights and protections in the administrative process, including:
  - the right to receive a written notice of the hearing [*Part 6-5, Division 2, section 285*];
  - the requirement that certain hearings be held in private [*Part 6-5, Division 2, section 280*];
  - the requirement for ASIC to observe the rules of natural justice [*Part 6-5, Division 2, paragraph 285(2)(c)*];
  - the affected person's right to be represented by a lawyer at the hearing [*Part 6-5, Division 2, subsection 285(8)*]; and
- the affected person's right to administrative or judicial review of ASIC's administrative decisions or orders.

6.212 ASIC has general discretion over how a hearing is conducted. However, the overriding requirement is that hearings must be conducted with as little formality and technicality, and with as much expedition, as the requirements of the credit legislation (other than the excluded provisions) and a proper consideration of the matters before ASIC permit. [*Part 6-5, Division 2, subsection 285(1)*]

#### ***Hearings to be held in public or in private***

6.213 ASIC has the power to direct that a hearing take place in public or in private. [*Part 6-5, Division 2, section 278*]

6.214 In making such a direction, ASIC must have regard to whether matters that will arise during the hearing are of a confidential nature or relate to the commission of an offence, whether any unfair prejudice to a person's reputation would be likely to be caused if the hearing took place in public and whether it is in the public interest that the hearing take place in public. [*Part 6-5, Division 2, subsection 278(2)*]

6.215 For a compulsory hearing, if ASIC has a discretion and the person who has been given the opportunity to appear at the hearing asks that all or part of the hearing be held in public, the hearing or part of the hearing must be held in public unless ASIC is satisfied that it is desirable that the hearing take place in private for one of the reasons referred to in section 278. If a direction under subsection 279(2) is given in writing, it is not a legislative instrument [*Part 6-5, Division 2, subsection 279(3)*]. This provision is declaratory of the position that the direction is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003* [*Part 6-5, Division 2, section 279*].



6.216 However, ASIC does not have any discretion to direct that a hearing be held in public if the Commonwealth credit legislation requires that the hearing take place in private. *[Part 6-5, Division 2, section 280]*

6.217 In each of the provisions of the Credit Bill and Transitional Bill that require a hearing to be held (listed above), the Bills provide that the hearing must take place in private.

6.218 ASIC has power to determine who may be present at a hearing that is to be held in private. If a hearing is to be held in private, the only persons who may be present are:

- a member of ASIC or a staff member approved by ASIC *[Part 6-5, Division 2, paragraphs 282(3)(a) and (3)(b)]*;
- the person to whom the Commonwealth credit legislation required ASIC to give the opportunity of appearing at a hearing *[Part 6-5, Division 2, paragraphs 282(2)(a) and (3)(c)]*;
- a person who represents the person who the Commonwealth credit legislation required ASIC to give the opportunity of appearing at a hearing (which can be an employee of the person if they are a natural person, or an officer or employee if they are a body corporate, or a lawyer *[Part 6-5, Division 2, subsections 285(6) and (8), subparagraph 282(2)(b)(i) and paragraph 282(3)(c)]*; and
- a person for whom ASIC has given a direction that they may be present, and a person who represents that person *[Part 6-5, Division 2, subsection 282(1), subparagraph 282(2)(b)(ii), paragraph 282(3)(c)]*.

6.219 ASIC's power to make directions about who may be present includes a power to make directions that a person may not be present. However, this discretion would not enable ASIC to exclude a person who is entitled to be present at the hearing. *[Part 6-5, Division 2, subsection 282(2)]*

6.220 It is an offence of strict liability for a person to be present at a hearing without an entitlement to be present or an ASIC direction authorising the presence of that person. The penalty is 10 penalty units or three months imprisonment or both. This is necessary to protect the private nature of these types of hearings. *[Part 6-5, Division 2, subsections 282(3) and (4)]*

6.221 In making a direction under subsection 282(1) that a person may be present at a hearing, ASIC may consider whether allowing other persons to attend is fair to the affected person and whether the other person's presence will assist in the conduct of the hearing. For example,

in some circumstance it may be appropriate for a friend or relative to be present to provide the affected person with support, or for the person to have an adviser other than a lawyer to assist them.

6.222 A direction under section 282(1) is not a legislative instrument. The provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act. *[Part 6-5, Division 2, subsection 282(5)]*

***General procedure of the hearing***

6.223 ASIC has general discretion about how a hearing is conducted. However, an overriding requirement is that hearings must be conducted with as little formality and technicality, and with as much expedition, as the requirements of the corporations legislation (other than the excluded provisions) and a proper consideration of the matters before ASIC permit. *[Part 6-5, Division 2, subsection 285(1)]*

6.224 A hearing conducted by ASIC is inquisitorial in nature, to find out the true position about whether, for example, a person should be granted a licence or whether a person should be prevented from engaging in credit activities for the protection of the public. The provisions allow for the proceeding of a hearing to be flexible and enable the person who is given the opportunity of appearing at the hearing the opportunity to make submissions to ASIC in a way that they consider appropriate.

6.225 If ASIC were required to follow formal procedures in the conduct of hearings, it would lose its ability to respond to contraventions in a timely way, which would be contrary to the public interest.

6.226 At the hearing,

- ASIC is not bound by the rules of evidence. It may take into account any material that is relevant, credible and probative;
- ASIC may permit a person to intervene, on such conditions as it thinks fit; and
- ASIC must observe the rules of natural justice, including the bias rule and the hearings rule.

*[Part 6-5, Division 2, subsection 285(2)]*

6.227 The provision that ASIC is not bound by rules of evidence, such as inadmissibility of hearsay evidence, enables ASIC to have regard to the widest range of information and evidence. This is consistent with the inquisitorial nature of the hearing. The requirement that ASIC observe the

rules of natural justice ensures that the procedures adopted by ASIC in obtaining and considering information and evidence during the hearing are fair.

6.228 The requirement that ASIC observe the rules of natural justice generally include the bias rule and hearings rule.

6.229 The bias rule is that a person must not hear and make a decision on a matter if they have actual or apprehended bias.

6.230 Actual bias exists where the decision-maker has prejudged the case against the person, or acted in a way that shows that the decision-maker had a concluded view and was not open to persuasion in favour of the person. Apprehended bias may exist where there is a reasonable apprehension that the decision-maker might not bring an impartial and unprejudiced mind to the resolution of the legal and factual matters at the hearing, so that those matters will not be decided on their merits.

6.231 The hearings rule is that no person should be condemned unheard. The hearings rule relates to matters such as the giving of notice of the hearing, the degree of formality of the hearing, use of material not disclosed to person who is given the opportunity of the hearing, cross-examination of evidence, and the giving of reasons for a decision. ASIC must not make a decision based on evidence obtained without knowledge of the affected person. ASIC must inform the affected person of the nature of any credible and relevant prejudicial evidence that is significant to the decision to be made, and give the person the opportunity to test that evidence.

6.232 Division 4 of Part 4 of the ASIC Act (Meetings of ASIC) applies as far as practicable to hearings. [Part 6-5, Division 2, subsections 285(3) and (4)]

### ***Specific procedural requirements***

#### *Notice of hearing*

6.233 If a hearing is required, ASIC must give a written notice appointing a place and time for the hearing. The person who is given the opportunity to attend the hearing is not compelled to attend. The hearing is the person's opportunity to make submissions about matters that the person wishes ASIC to take into account. If the person does not wish to attend, they may still lodge with ASIC written submissions before the day of the hearing. [Part 6-5, Division 2, section 283]

6.234 If the person chooses to neither appear nor make written submissions, ASIC may make a decision based on the information that it has before it.

6.235 There is no prescribed form for a notice of hearing. This is consistent with the overriding requirement that hearings be conducted with little formality or technicality [*Part 6-5, Division 2, subsection 285(1)*]. In determining the content of the form, ASIC must have regard to the rules of natural justice [*Part 6-5, Division 2, paragraph 285(2)(c)*]. For example, the rules of natural justice require that affected persons be informed of the substance of ASIC's concerns about a particular matter to enable them to understand the concerns to be addressed and prepare their submissions.

*Power to summons witnesses and take evidence*

6.236 The person who has been given an opportunity to appear at the hearing may choose to call witnesses to provide evidence to support their submissions. ASIC may also choose to call witnesses to enable it to fully inquire into the subject matter of the hearing.

6.237 ASIC has power to give a written summons requiring a person to appear at a hearing to give evidence, produce specified documents or both. [*Part 6-5, Division 2, subsection 284(1)*]

6.238 An example of where the issue of a summons may be appropriate is where a witness is not willing or is unable to give a written statement, such as where a contractual duty of confidentiality prevents them from disclosing the relevant information.

6.239 ASIC may also permit a witness to give evidence by tendering a written statement, and, if required, verifying that statement by oath. Whether a written statement is permitted may depend on matters such as the credibility of the witness and whether the evidence should be tested. [*Part 6-5, Division 2, subsection 284(6)*]

6.240 ASIC may require a witness to either take an oath or affirmation that the evidence the person will give will be true. It is a matter for the discretion of the ASIC member conducting the hearing whether an oath or affirmation is required. This will depend on the circumstances of a particular matter. For example, the taking of an oath or affirmation may be required if the credibility of the witness is an issue. [*Part 6-5, Division 2, subsections 284(2) and (3)*]

6.241 The ASIC member conducting the hearing may also require a witness to answer a question, and, if the witness is attending under a summons, produce a document specified in the summons. ASIC may also use its powers under Part 6-3 powers to require the production of books. [*Part 6-5, Division 2, subsection 284(4)*]

6.242 Failure to comply with a requirement to appear in accordance with a summons, take an oath or affirmation and answer a question or produce a document are offences of strict liability, except to the extent that the person has a reasonable excuse. The penalty is 10 penalty units or 3 months imprisonment or both. This offence and penalty is consistent with the offence and penalty in section 63 of the ASIC Act. *[Part 6-5, Division 2, subsections 284(4) and (5); Part 6-6, Division 2, subsections 290(2) and (4)]*

6.243 This offence provision recognises the public interest in ASIC having power to inquire into matters to the fullest extent possible before making decisions in the exercise of its functions and powers, and also to support the interest of the person who has been given the opportunity of a hearing in being able to secure the attendance all necessary witnesses. Criminal sanctions are appropriate to deter non-compliance unless there is a reasonable excuse for non-compliance.

6.244 It is expressly provided that it is not a reasonable excuse for a person to refuse or fail to give information or produce a book in accordance with a requirement that information or the production of the book might tend to incriminate the person or make the person liable to a penalty. *[Part 6-6, Division 2, section 295]*

6.245 This provision is included because is necessary to expressly state that the privilege against self-incrimination does not apply in order to abrogate that privilege. It enables ASIC to obtain information from a witness that is sought by ASIC or the person who has been given the opportunity of a hearing to fully inquire into the matters that are the subject of the hearing. It is not a reasonable excuse for a person to refuse or fail to give information or produce a book in accordance with a requirement that the information or production of a book might tend to incriminate the person or make the person liable to a penalty.

6.246 However, if before making an oral statement or producing a book the examinee claims that the statement or the production of the book might tend to incriminate the person or make them liable to a penalty, the statement or the production of the book is not admissible in evidence against the person in a criminal proceeding or a proceeding for the imposition of a penalty (other than a proceeding in respect of the falsity of the statement). *[Part 6-6, Division 2, subsections 295(2) and (3)]*

6.247 If the requirement to give information or produce books is made to a person who is a lawyer, and the information would involve disclosing, or the book contains, a privileged communication made by or on behalf of the lawyer in his or her capacity as a lawyer, the lawyer is entitled to refuse to comply. The lawyer may not refuse to comply if the person on behalf of whom the communication was made, or, if this person is a body

corporate that is being wound up, the liquidator of the body, consents to the lawyer complying with the requirement. *[Part 6-6, Division 2, section 296]*

*ASIC may restrict publication of certain material*

6.248 ASIC may make a direction preventing or restricting the publication of evidence given before, or matters contained in documents lodged with, ASIC. In determining whether to make a direction, ASIC must have regard to:

- whether the evidence given, or matter arising during the hearing is a confidential nature and relates to the commission of an offence;
- any unfair prejudice to a person's reputation would be likely to be caused unless ASIC exercises its power;
- it is in the public interest that ASIC exercises its power to prevent or restrict publication of the evidence or matter; and
- any other relevant matter.

*[Part 6-5, Division 2, section 281]*

6.249 The publication of information obtained at a hearing before the conclusion of the hearing could prejudice the effective conduct of that hearing.

6.250 This power is necessary because a person who is given the opportunity to appear at a hearing, or a witness, may have lawful possession of a recording or transcript of a hearing, and are under no duty of confidentiality to ASIC.

6.251 The non-disclosure order should be necessary to preserve the secrecy of the hearing, limited to the persons present at the hearing and the evidence given at, and documents before, the hearing and should only operate during the hearing or for a reasonable time after the hearing.

6.252 Failure to comply with a direction under subsection 281(1) is an offence, unless the person has a reasonable excuse. The defendant has the burden of proving that they had a reasonable excuse, as this matter is peculiarly within the knowledge of the defendant. The penalty is 50 penalty units or imprisonment for one year or both. The offence and penalty are consistent with the offence and penalty in subsection 66(2) of the ASIC Act. *[Part 6-5, Division 2, sections 281; Part 6-6, Division 2, section 293]*

6.253 A direction under subsection 281(1) is not a legislative instrument. The provision is included to assist readers, as the instrument

is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. [Part 6-5, Division 2, subsection 281(3)]

*Representation of persons appearing at hearing*

6.254 A natural person may appear in person or be represented by an employee of the person approved by ASIC. [Part 6-5, Division 2, subsection 285(5)]

6.255 A body corporate may be represented by an officer (within the meaning of Part 3 of the ASIC Act) or employee of the body corporate approved by ASIC. [Part 6-5, Division 2, subsection 285(6)]

6.256 An unincorporated association, or person in their capacity as a member of an unincorporated association, may be represented by a member, officer (within the meaning of Part 3 of the ASIC Act) or employee of that association approved by ASIC. [Part 6-5, Division 2, subsection 285(7)]

6.257 Any person may be represented by a lawyer. [Part 6-5, Division 2, subsection 285(8)]

6.258 The right to representation by a lawyer is a fundamental right to protect private interests. ASIC may overrule the choice of lawyer of an affected person or a witness in appropriate circumstances (such as where the presence of the particular lawyer prejudices the conduct of the hearing) by making a direction that that the particular lawyer may not be present. This does not restrict the right of the person to be represented by another lawyer. [Part 6-5, Division 2, subsection 282(1)]

*ASIC to take into account evidence and submissions*

6.259 ASIC must take into account all evidence given, and submissions made, during the hearing (whether they have been given or made in writing or orally), including written submissions given before the hearing. [Part 6-5, Division 2, section 286]

6.260 ASIC cannot choose to ignore evidence or submissions, though it may accord evidence or submissions different weight depending on all the circumstances of the matter, including the credibility of the witnesses.

*Reference to court of questions of law*

6.261 If a question of law arises during a hearing, ASIC may, of its own motion or at a person's request, refer to the court for a decision on that question. In this case, ASIC must not give a decision to which that question is relevant pending the court's decision or proceed with the hearing in a manner that is inconsistent with the court's opinion. All

documents that are before ASIC in connection with the hearing must be sent to the court, and will be returned after the court has made a decision. [Part 6-5, Division 2, section 287]

*Protection for participants*

6.262 Members of ASIC that perform or exercise functions or powers in relation to a hearing, lawyers and other person's appearing on a person's behalf and witnesses have the same protection and immunity as a Justice, barristers and witnesses in proceedings in the High Court. [Part 6-5, Division 2, section 288]

6.263 ASIC staff members may also be protected by the defence against liability for damages in section 246 of the ASIC Act. It is expected that regulations will be made to prescribe the credit legislation as a prescribed law for the purposes of section 246 of the ASIC Act.

6.264 A person is also not liable to a proceeding merely because they have complied, or propose to comply, with a requirement made or purported to be made under this Chapter. This gives protection from liability (for example, for breach of confidentiality) arising from complying with a requirement to answer a question, or produce documents, during a hearing. [Part 6-9, Division 2, section 320]

## **Part 6-6 — Offences**

### *Non-compliance with requirements made under Chapter 6*

6.265 There are a number of offences for non-compliance with requirements of Chapter 6. [Part 6-6, Division 2, section 290]

6.266 These offences have been referred to in the above discussion of each of those requirements.

6.267 Each of these offences and the penalties that apply to the offences are consistent with those set out in Part 3 Division 7 of the ASIC Act.

6.268 The criminal sanctions applying to refusal or failure to comply with requirements made by ASIC are appropriate because:

- criminal sanctions play an important role in deterring inappropriate conduct; and
- failure to comply with requirements made by ASIC in relation to examinations, production of books and the conduct of hearings can seriously jeopardise ASIC's ability



to exercise its functions and powers to ensure compliance with the Commonwealth credit legislation.

6.269 There are a number of strict liability offences which attach to breaches of Chapter 6. These offences are strict liability offences, as they relate to the punishment of offences lacking ‘fault’ and they:

- enhance the effectiveness of the regulatory regime dealing with ASIC’s enforcement powers; and
- encourage participants to put in place systems and policies that address the risk of contraventions of the relevant provisions.

6.270 Offences under subsections 290(1) and (2) do not apply if the person has a reasonable excuse for their non-compliance. The person has the burden of proving that they had a reasonable excuse, as this matter is peculiarly within the knowledge of the defendant. [*Part 6-6, Division 2, subsection 290(4)*]

6.271 Whether there is a reasonable excuse at law for non-compliance depends on all the relevant circumstances of a particular case. It is not necessarily limited to physical or practical difficulties of compliance and may include any excuse which would be accepted by a reasonable person as justifying non-compliance taking into account the importance of the particular statutory requirement: *ASIC v Albarran* [2008] FCA 147 at [82] and [134].

#### **Example 6.5: Reasonable excuse**

Some examples of where a court has considered that a person has established that they had a reasonable excuse are:

- The time specified for compliance with a notice for production of books, or the specification of what is to be produced, is unreasonable or capricious: *Hopfner v Flavel* (1990) 8 ACLC 706 at 711.
- The recipient of the notice only has possession of books that fall outside the scope of the books specified in the notice. The onus is on the recipient of the notice to determine whether the books in their possession are within the scope of the notice: *General Benefits Pty Ltd & Tomblin v ASIC* [2001] SASC 137 at [45].

Some examples of where a court has found that matters did not constitute a reasonable excuse for non-compliance are:

- a duty of confidentiality. The need to maintain a duty of confidentiality does not fall within the statutory definition of a reasonable excuse: *ASC v Zarro* (1991) 32 FCR 546;
- the fact that the person does not have physical custody of relevant books if the person has custody and control of those books;
- mere inconvenience, such as a prior engagement: *Re Deam Ltd* [1974] ACLC 27,799 at 27,803;
- there is current litigation challenging the validity of the notice: *Macdonald v ASC [No 2]* (1994) 12 ACLC 246 at 252;
- the fact that a person may suffer personal detriment in terms of damage to business reputation or the risk of losing future commercial dealings: *von Doussa v Owens [No 1]* (1982) 30 ACSR 367 at 380-381; and
- the possibility that compliance would expose a person to liability for breach of a foreign law: *Bank of Valetta plc v National Crime Authority* (1999) 164 ALR 45.

### ***False information***

6.272 A person must not:

- give information, or make a statement, that is false or misleading in a material particular during an examination; or
- give evidence that is false or misleading in a material particular at a hearing.

*[Part 6-6, Division 2, subsections 291(1) and (2)]*

6.273 It is a defence if the person believes on reasonable grounds that the information, statement or evidence was true and not misleading. The onus is on the defendant to prove this, as this matter is peculiarly within the knowledge of the defendant. *[Part 6-6, Division 2, subsection 291(3)]*

6.274 The penalties for these offences are 100 penalty units or two years imprisonment or both and 10 penalty units or 3 months imprisonment or both respectively *[Part 6-6, Division 2, subsections 291(1) and (2)]*. These offences and penalties are consistent with section 64 of the ASIC Act.

6.275 Criminal sanctions for the provision of false or misleading information to ASIC are appropriate because it is important for ASIC to be able to rely on information given and statements made in the course of examinations and hearings when making decisions about investigations

and proceedings that may result from an investigation, and decisions about the subject matter of a hearing.

***Obstructing person executing a warrant under this chapter***

6.276 A person must not engage in conduct that results in the obstruction or hindering of a person who is executing a warrant issued under section 270, unless the person has a reasonable excuse. The onus is on the defendant to prove this, as this matter is peculiarly within the knowledge of the defendant. *[Part 6-6, Division 2, subsections 292(1) and (2)]*

6.277 The penalty is 100 penalty units or two years imprisonment or both. This offence and penalty is consistent with the offence and penalty in section 65 of the ASIC Act.

6.278 An occupier or person in charge of premises that are entered under a warrant issued under section 270 must not intentionally or recklessly refuse or fail to provide all reasonable facilities and assistance. The penalty is 25 penalty units or six months imprisonment or both *[Part 6-6, Division 2, subsection 292(3)]*. This offence and penalty is consistent with the offence and penalty in section 65 of the ASIC Act.

***Disrupting hearings***

6.279 A person must not engage in conduct that results in the disruption of a hearing. *[Part 6-6, Division 2, subsection 293(1)]*

6.280 A person must not contravene a direction given under subsection 281(1), which prevents or restricts the publication of certain material before a hearing, unless the person has a reasonable excuse. The onus is on the defendant to prove this, as this matter is peculiarly within the knowledge of the defendant. This is an offence of strict liability. *[Part 6-6, Division 2, subsections 293(2) to (4)]*

6.281 These offences are punishable on a summary conviction. The penalty is 50 penalty units or one year imprisonment or both *[Part 6-6, Division 2, subsections 293(1) and (2)]*. These offences and the penalties are consistent with offences in section 66 of the ASIC Act.

6.282 The criminal sanctions, including strict liability, are appropriate because:

- criminal sanctions play an important role in deterring inappropriate conduct;
- obstructing or hindering a person in exercising its examination and information-gathering powers can seriously jeopardise ASIC's ability to exercise its functions and powers

to ensure compliance with the Commonwealth credit legislation and properly inquire into questionable behaviour;

- obstructing or hindering a person in the conduct of a hearing, can seriously jeopardise ASIC's ability to exercise its functions and powers to make an appropriate decision on a matter arising under the Commonwealth credit legislation in a timely way; and
- publishing material that has been obtained, or that is considered, in the course of a hearing, contrary to a direction by ASIC, may undermine the privacy of the hearing and may prejudice the effective conduct of the hearing.

### ***Concealing books relevant to investigation***

6.283 If ASIC is investigating, or about to investigate, a matter a person must not:

- engage in conduct resulting in concealment, destruction, mutilation or alteration of a book relating to that matter; or
- if the matter is in a particular State or Territory, engage in conduct resulting in the taking or sending of the book out of that State or Territory.

*[Part 6-6, Division 2, subsection 297(1)]*

6.284 The purpose of this provision is to deter conduct being engaged in to defeat the purposes of the Commonwealth credit legislation, or delay or obstruct an investigation by ASIC. A defence is provided where the person establishes that they did not intend to defeat the purposes of the Commonwealth credit legislation, or delay or obstruct an investigation by ASIC. The onus is on the defendant to prove this, as this matter is peculiarly within the knowledge of the defendant. *[Part 6-6, Division 2, subsection 297(2)]*

6.285 The penalty is 200 penalty units or five years imprisonment or both. This offence and the penalty are consistent with the offence in section 67 of the ASIC Act.

### ***Self-incrimination***

6.286 The common law privilege against self-incrimination provides that no-one is bound to answer any question or produce any document or thing if the answer or the document or thing would have a tendency to expose that person to conviction for a crime.

6.287 The doctrine of penalty privilege provides that a person cannot be compelled to disclose evidence that may subject the person to a penalty.

6.288 These privileges can be used by a person not to do some act, except where they are expressly or by implication abrogated by legislation.

6.289 The Credit Bill overrides these privileges as it expressly provides that it is not a reasonable excuse for a person to refuse or fail to give information, sign a record or produce a book in accordance with a requirement that information, signing the record or the production of the book might tend to incriminate the person or make the person liable to a penalty. *[Part 6-6, Division 2, subsection 295(1)]*

6.290 Although it is not expressly stated that the privilege is not a legal excuse for non-compliance, it is judicially accepted that this is the effect of such a provision: *Mortimer v Brown* (1969-1970) 122 CLR 493 at 496.

6.291 A person cannot therefore rely on this privilege to justify or excuse non-compliance with a requirement made by ASIC under Chapter 6. This provision is consistent with section 68 of the ASIC Act.

6.292 The Joint Senate Select Committee on Corporations Legislation indicated that the abrogation of these privileges by statute is necessary to give ASIC maximum effectiveness in achieving its investigatory function, thereby protecting the public interest. The same considerations apply to ASIC's functions and powers under the Commonwealth credit legislation.

6.293 It is provided that if, before making an oral statement giving information or signing a record pursuant to a requirement under this Chapter, a person claims that the statement, or signing the record, might tend to incriminate the person or make the person liable to a penalty, and that it would in fact do so, the statement or the fact that the person has signed the record is not admissible in evidence against the person in criminal proceedings or proceedings for the imposition of a penalty (other than in relation to the falsity of the statement or a statement in the record). *[Part 6-6, Division 2, subsections 295(2) and (3)]*

6.294 These provisions are consistent with subsections 68(2) and (3) of the ASIC Act.

6.295 These provisions afford a natural person the protection of use immunity. There is no provision for derivative use immunity.

6.296 Subsection 295(2) expressly confines the evidential immunity in subsection 295(3) to natural persons. Corporations cannot claim the privilege against self-incrimination, the penalty privilege, use immunity or derivative use immunity.

6.297 The use immunity in subsection 295(3) applies in proceedings for the imposition of a penalty. The term *proceedings* has the same meaning as in Part 3 of the ASIC Act, that is, a proceeding in a court, or a proceeding or hearing before, or an examination by or before, a tribunal, whether the proceeding, hearing or examination is of a civil, administrative, criminal, disciplinary or other nature. ‘Tribunal’ is broadly defined and would include ASIC. [Part 1-2, Division 2, section 5]

6.298 If privilege is claimed, oral statements, and the fact that a record has been signed, cannot be used and is not admissible in evidence against the person in proceedings by ASIC for the suspension or cancellation of registration or a licence and banning orders (which may result in the imposition of non-monetary penalties).

#### ***Legal professional privilege***

6.299 At common law, legal professional privilege protects communications between clients and their lawyers from disclosure. The privilege applies to confidential communications between clients, their lawyers and third parties made for the dominant purpose of use in litigation, whether actual or contemplated (litigation privilege). Legal professional privilege also applies to confidential communications between clients and their lawyers made for the dominant purpose of giving or receiving legal advice (legal advice privilege).

6.300 Legal professional privilege is based on the duty of confidentiality between lawyer and client, and on the public interest in assisting the administration of justice by facilitating the representation of clients by lawyers.

6.301 If a lawyer is required under Chapter 6 to give information or produce a book, and the information would involve disclosing, or the book contains, a privileged communication made by or on behalf of the lawyer in his or her capacity as a lawyer, the lawyer is entitled to refuse to comply. The lawyer may not refuse to comply if the person on behalf of whom the communication was made, or, if this person is a body corporate that is being wound up, the liquidator of the body, consents to the lawyer complying with the requirement. [Part 6-6, Division 2, subsections 296(1) and (2)]

6.302 If the lawyer refuses to comply with a requirement under Chapter 6 on the basis of legal professional privilege, he or she must as soon as practicable give to the person who made the requirement a written notice setting out:

- if the lawyer knows the name and address of the person to whom, — that name and address;
- if the requirement is to give information and the communication was made in writing — sufficient particulars to identify the document containing the communication; and
- if the requirement is to produce a book — sufficient particulars to identify the book, or part of the book, containing the communication.

*[Part 6-6, Division 2, section 296]*

6.303 The lawyer is not entitled to refuse to provide this information, for example on the basis that the release of this information would endanger the privilege.

6.304 This provision therefore allows a lawyer to preserve the confidentiality and privilege that may attach to communications sought by ASIC. However, ASIC can use the information obtained under subsection 296(3) to give a requirement to the person identified by the lawyer to produce the otherwise privilege communications. The decision of whether to comply with a requirement from ASIC is then a matter for that person. Although legal professional privilege is a legal excuse for non-compliance, it is not a ‘reasonable excuse’ for the purposes of the offence provisions in Chapter 6.

6.305 A statement that a person makes at an examination is admissible in evidence against the person in proceedings unless the statement discloses a matter in relation to which the person could claim legal professional privilege, if subsection 303(1) did not apply in relation to the statement, and the person objects to the admission of evidence of the statement. *[Part 6-8, Division 2, paragraph 303(1)(d)]*

6.306 This provision affords the examinee ‘use immunity’ in relation to statements made at an examination. It has no application in relation to production of books. This provision achieves a level of balance between the public interest in ASIC having access to all relevant information and the competing public and private interest in preserving the client’s legal professional privilege.

***Powers of the court in relation to non-compliance with Chapter 6***

6.307 If a person refuses or fails to comply with a requirement made under Chapter 6 (other than Part 6-6), and ASIC is satisfied that the person does not have a reasonable excuse, ASIC may certify the failure in writing (for example, by swearing an affidavit setting out details of the failure to comply) and apply to the court for an order that the person comply with the requirement. *[Part 6-6, Division 2, section 297]*

6.308 The court may inquire into the matter to determine whether the refusal or failure was based on a reasonable excuse. If the court makes an order requiring compliance with the requirement, a refusal or failure to comply would amount to a contempt of court.

**Part 6-7 — ASIC's powers in relation to non-compliance with Chapter 6**

6.309 ASIC can make 'freezing orders' that restrain certain dealings in a credit contract, mortgage, guarantee or consumer lease where:

- ASIC considers that information about a credit contract, mortgage, guarantee or consumer lease needs to be found out for the purposes of the exercise of any of ASIC's powers under Chapter 6; and
- a person has refused or failed to comply with a requirement made under Chapter 6, that would provide ASIC with that information.

*[Part 6-7, Division 2, section 299]*

6.310 The orders that can be made by ASIC are orders:

- restraining a specified person from assigning any interest in a credit contract, mortgage, guarantee or consumer lease;
- restraining a specified person from acquiring any interest in a credit contract, mortgage, guarantee or consumer lease;
- restraining the exercise of a right under a credit contract, mortgage, guarantee or consumer lease; and
- directing a credit provider, mortgagee, beneficiary of a guarantee or lessor in relation to which one of these orders is in force to give written notice of that order to any person whom the credit provider, mortgagee, beneficiary of a guarantee or lessor knows to be entitled to exercise a right in



relation to the credit contract, mortgage, guarantee or consumer lease.

*[Part 6-7, Division 2, section 300]*

6.311 Interest in relation to a credit contract, mortgage, guarantee or consumer lease may include:

- the money that is obtained on credit;
- property obtained using the money obtained on credit; and
- real property and goods that secure a credit contract.

6.312 This power is intended to be used on a short-term basis to preserve the status quo where a person fails to comply with a requirement under Chapter 6 to provide information.

6.313 This power can be exercised unilaterally by ASIC without the need of an application to court, and the delay involved in such an application. This power is consistent with the power in section 73 of the ASIC Act.

6.314 An order under subsection 300(1) is not a legislative instrument. Subsection 300(3) is only declaratory of the position that the order is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. *[Part 6-7, Division 2, subsection 300(3)]*

6.315 ASIC may also make orders varying or revoking an order made under section 300. *[Part 6-7, Division 2, subsection 301(1)]*

6.316 If ASIC makes an order under this Part, it must:

- give a copy of the order, and any subsequent order varying or revoking that order, to the person to whom the order is directed *[Part 6-7, Division 2, subsection 301(3)]*; and
- publish the order in the Gazette *[Part 6-7, Division 2, subsection 301(2)]*.

6.317 Failure to comply with an order made under this Part is an offence. The penalty is 25 penalty units or imprisonment for six months or both. This offence and penalty is consistent with the offence and penalty in section 75 of the ASIC Act.

## Part 6-8 — Evidentiary use of certain materials

6.318 This Part of the Credit Bill provides for the admissibility in evidence of:

- information obtained by ASIC in response to a requirement made under Chapter 6; and
- reports prepared by ASIC under Part 6-1.

6.319 This Part is generally consistent with Part 3 Division 9 of the ASIC Act.

### *Statements made at an examination*

6.320 In general, a statement that a person makes during their examination is admissible in evidence against that person in proceedings, except in specified circumstances. *[Part 6-8, Division 2, subsection 303(1)]*

6.321 A statement will not be admissible if:

- the use immunity in subsection 295(3) applies *[Part 6-8, Division 2, paragraph 303(1)(a)]*;
- if the statement is not relevant to the proceedings and the person objects to the admission of evidence of the statement *[Part 6-8, Division 2, paragraph 303(1)(b)]*;
- the statement is qualified or explained by some other statement made at the examination, evidence of which has not been tendered at the proceedings, and the person objects to the admission of the statement *[Part 6-8, Division 2, paragraph 303(1)(c)]*; or
- the person could claim legal professional privilege in the proceedings in relation to the matter disclosed in the statement, and the person objects to the admission of the statement *[Part 6-8, Division 2, paragraph 303(1)(d)]*.

6.322 The examinee's statements may also be admitted in proceedings against the examinee that is heard together with proceedings against another person. *[Part 6-8, Division 2, subsection 303(2)]*

6.323 Where the record of examination has been signed by the examinee, the record is prima facie evidence of the statements that it records. *[Part 6-8, Division 2, subsection 303(3)]*

6.324 A statement that a person makes at an examination of the person may also be admissible in proceedings where that person is not called as a witness.

6.325 If direct evidence by the person (the absent witness) would be admissible in the proceedings, a statement that the absent witness made at an examination is admissible if:

- the absent witness is dead or unfit, because of physical or mental incapacity, to attend as a witness;
- the absent witness is outside the State or Territory in which the proceedings is heard and it is not reasonably practicable to secure their attendance, or they cannot be found; or
- another party requires the absent witness to be called as a witness and the tendering party does not call the absent witness.

*[Part 6-8, Division 2, section 304]*

6.326 These provisions are not exhaustive as to the circumstances in which statements made at an examination will be admissible in a court. The provisions only supplement other means available to adduce evidence of statements made in examination as original evidence to prove the facts contained in those statements, or to prove another fact in issue in the proceedings. If the tendering party does not satisfy the requirements in the Credit Bill, it may still be able to rely on the general law of evidence or some other statute to make the statement admissible against a person.

*[Part 6-8, Division 2, section 310]*

6.327 If a statement contained in a record of examination is admitted as evidence against a person other than the examinee under section 304, the weight to be given to the statement as evidence of a matter is to be determined having regard to the following matters:

- the amount of time between the matter and the making of the statement;
- any reason the person may have had for concealing or misrepresenting a material matter; and
- any other circumstances from which it is reasonable to draw an inference about the accuracy of the statement.

*[Part 6-8, Division 2, subsection 305(2)]*

6.328 If the person who made the statement is not called as a witness in the proceeding, evidence that would be admissible in relation to the person's credibility and to show that the statement is inconsistent with another statement made by the person is also admissible. *[Part 6-8, Division 2, subsection 305(3)]*

6.329 This provision ensures that an unfair advantage cannot be obtained by tendering a record of an examination in evidence rather than calling the examinee as a witness.

6.330 A party that intends to apply to have statements made at an examination admitted in evidence in proceedings may give written notice to another party of this intention. The written notice must be given not less than 14 days before the first day of the hearing. The statements to that the person will apply to admit in evidence must be specified. *[Part 6-8, Division 2, subsections 306(1) and (2)]*

6.331 This requirement ensures that sufficient and timely notice is given to the defendants of the statements that are to be tendered as evidence so that those defendants are given an opportunity to formulate objections to the admission of those statements.

6.332 Written objections of the other party must be given within 14 days, and the court or tribunal may determine those objections as a preliminary point before the hearing of the proceedings. *[Part 6-8, Division 2, subsections 306(3) to (5)]*

6.333 The notice must specify the statements to be tendered in sufficient detail, so that the defendants have no difficulty in identifying what the statements are for the purpose of considering whether or not to object. The requirement to set out specified statements may include questions, answers and other comments or remarks made in the examination that are necessary to properly understand the examinee's answers.

6.334 If notice has been given by the tendering party in accordance with subsections 306(1) and (2), the other party is not entitled to object to the statement unless they have objected to the statement being admitted in accordance with subsection 306(3), or the court or tribunal gives leave to object. *[Part 6-8, Division 2, subsection 306(7)]*

6.335 If the procedure in section 306 is not followed, statements made at an examination may still be admissible in evidence under the general law of evidence or some other evidential statute. *[Part 6-8, Division 2, section 310]*

***Copies of, or extracts from, certain books***

6.336 Subsection 271(4) allows a person to whom books are produced under Chapter 6 to use, or permit the use of, any of the books for the purposes of a proceeding.

6.337 A copy of, or extract from, a book will be admissible in evidence in proceedings as if it were the original book, where it relates to:

- the affairs of a licensee, credit representative or other person who engages, or has engaged, in a credit activity;
- a credit activity engaged in by a person; or
- the character or financial situation of, or a business carried on by, a person who engages, or has engaged, in a credit activity.

6.338 It must be proved that the book is a true copy of the original, and this may be proved by evidence from a person who has compared the copy or extract with the original. *[Part 6-8, Division 2, subsections 307(2) and (3)]*

6.339 The copy or extract does not need to be made under section 271 for this provision to apply.

***Report under Part 6-1***

6.340 A report prepared by ASIC under Part 6-1 is admissible in proceedings (other than criminal proceedings) as prima facie evidence of any facts or matters that the report states ASIC to have found to exist. *[Part 6-8, Division 2, section 308]*

6.341 The court or tribunal must be satisfied that the copy of the report has been given to the other party, and that the other party, and their lawyer, have had a reasonable opportunity to examine it and take the contents into account in preparing their case. If this does not occur the copy is not admissible under section 81. *[Part 6-8, Division 2, subsection 309(2)]*

6.342 Before a copy of a report is admitted into evidence, the other party can apply to cross-examine persons who were:

- involved in preparing the report or making a finding about a fact or matter that the report states ASIC to have found to exist; or

- who gave information or produced a book on the basis of which a finding was made.

6.343 Cross-examination must be allowed unless the court or tribunal considers that, in all the circumstances, it is not appropriate to do so. This gives the other party the opportunity to appropriately test the findings made by ASIC and the information on which those findings were based. *[Part 6-8, Division 2, subsections 309(3) and (4)]*

6.344 These provisions ensure that the other party has the opportunity to appropriately test the findings made by ASIC and the information on which those findings were based.

### **Part 6-9 — Miscellaneous**

6.345 A requirement that can be made of a body corporate under Chapter 6 may also be made of a person who is or has been an officer (within the meaning of Part 3 of the ASIC Act) or employee of the body. *[Part 6-9, Division 2, section 312]*

6.346 This is because a body corporate can only do acts through its officers and agents. For example, if a body corporate has produced books in accordance with a requirement under section 266, ASIC may require a director or employee of the body to explain matters in relation to the books under subsection 271(9).

6.347 A person who makes a requirement under Chapter 6 (other than Part 6-5) must be able to produce an identity card and evidence of their authorisation to make the requirement. *[Part 6-9, Division 2, section 313]*

6.348 This provision provides protection against inspectors making requirements that are outside the scope of their authorisation.

6.349 Subsection 313(2) states that the identity card is not a legislative instrument. This provision is declaratory of the existing position, that an identity card is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

6.350 For ASIC's powers to be effective, there must be clear procedures for service of notices. A notice setting out requirements must be validly served before the recipient is under an obligation to comply with the notice.

6.351 The provision in section 109X of the Corporations Act for service of documents on bodies corporate is applied to the giving of documents under Chapter 6 to natural persons. *[Part 6-9, Division 2, section 314]*

6.352 The provision also has the effect of applying the service procedures in section 109X of the Corporations Act to the service of a notice under Chapter 6 on a natural person. As a result a notice can be served on a natural person either:

- personally — it is sufficient for the document to be left with the person served. It is not necessary that its nature and purpose be identified, described or brought to the attention of the person served; or
- by posting it to or leaving it at the address of the place of residence or business of the intended recipient last known to the process server. The notice may be left with a person who the process server believes on reasonable grounds to live or work at the address of the intended recipient and who is at least 16 years of age. This ensures that service is effected, establishes proof of service, even when the intended recipient refuses to take the notice from the process server and removes the common law requirement that the nature of the document must be described where the person to be served does not accept the document.

6.353 Where a provision in Chapter 6 gives the power to require the production of books at a specified place and time, the provision is taken to require the person giving the notice to specify a place and time for production of books that is reasonable in all the circumstances [*Part 6-9, Division 2, paragraph 315(a)*]. There could be a reasonable excuse for non-compliance with a notice to produce books where there is an unreasonable fixing of a time for production of books: *Hopfner v Flavel (1990) 2 ACSR 295*.

6.354 If it is reasonable in the circumstances, ASIC may require production of books immediately. [*Part 6-9, Division 2, paragraph 315(b)*]

#### **Example 6.6: Production of books**

Circumstances relevant to whether immediate production of books is reasonable may include:

- the urgency of the inquiry or investigation — for example, whether assets are likely to be disposed of; or
- volume, type and location of the documents sought — for example, with large organisations such as banks a reasonable time may be needed to locate documents covered by the notice; or

- whether the person to whom the notice is given wishes to exercise their right to obtain legal advice: *Swan v Scanlan* (1982) 61 FLR 468.

6.355 An examination or a hearing is a judicial proceeding for the purposes of Part III of the Crimes Act (offences relating to the administration of justice). [*Part 6-9, Division 2, subsection 316(1)*]

6.356 Part III of the Crimes Act provides for a number of offences relating to the administration of justice, which apply in relation to the institution and conduct of judicial proceedings. These include offences such as:

- giving false testimony in, or with the intention of instituting, a judicial proceeding;
- fabricating evidence with intent to mislead any tribunal in a judicial proceeding;
- intimidation of persons in relation to their appearance as a witness in judicial proceedings;
- corruption of a witness in judicial proceedings;
- deceiving a witness in judicial proceedings with intent to affect their testimony;
- destroying any book, document or thing that may be required in evidence in judicial proceedings; and
- preventing a person from attending as a witness pursuant to a subpoena or summons.

6.357 Specified sections of the *Evidence Act 1995* apply to an examination in the same way that they apply to proceedings before a court to which the *Evidence Act 1995* applies. The provisions that are applied to examinations are:

- Part 2.2 in full — documents;
- sections 69, 70 and 71 — exceptions to the hearsay rule for business records, contents of tags, labels and electronic communications;
- section 147 — proof of documents produced by processes, machines and other devices in the course of business; and



- Division 2 of Part 4.6 — proof of certain matters by affidavits or written statements.

*[Part 6-9, Division 2, subsection 316(2)]*

6.358 Examinees and persons who have been required to appear as a witness at a hearing are entitled to allowances and expenses prescribed in the regulations (if any). It is proposed to seek regulations that will prescribe allowances and expenses. ASIC may also, at its discretion, pay an amount it considers reasonable on account of costs and expenses incurred in complying with a requirement under Chapter 6. *[Part 6-9, Division 2, section 317]*

6.359 A decision by ASIC to refuse to exercise its discretion under subsection 317(3) to pay reasonable expenses incurred in complying with a requirement is a reviewable decision under the AD(JR) Act.

6.360 As a general rule, the expenses of an investigation are to be paid by ASIC. *[Part 6-9, Division 2, section 318]*

6.361 ‘Expenses’ bears its ordinary meaning and is confined to moneys expended by a person or obligations incurred by a person. ASIC is not responsible for paying expenses of a third party, unless those expenses are payable under section 317. Other expenses of an investigation may include the costs and expenses of initiating civil proceedings under section 275 and any other outgoings that ASIC may reasonably and necessarily incur for the purposes of the investigation.

6.362 ASIC has the power to make orders for the recovery of expenses of its investigation from a proceeding begun as a result of an investigation under Part 6-1 where:

- a person who is convicted of an offence against a law of the Commonwealth or a law of a referring State or Territory in a prosecution; or
- a person has a judgement against them, or a declaration or other order is made against them.

*[Part 6-9, Division 2, subsection 319(1)]*

6.363 The orders that ASIC may make are:

- An order that the person pay the whole of a specified part of the expense of the investigation *[Part 6-9, Division 2, paragraph 319(1)(c)]* — this order may be made where ASIC has incurred an obligation to pay expenses, but has not discharged that obligation.

- An order that the person reimburse ASIC to the extent of a specified amount of such expenses of the investigation as ASIC has paid [*Part 6-9, Division 2, paragraph 319(1)(d)*] — this order may be made where ASIC has already paid the expenses of the investigation. ASIC may make a single reimbursement order directed to more than one person because section 23 of the *Acts Interpretation Act 1901* provides that words in the singular include the plural. If a reimbursement order is made to more than one person, those persons are jointly and severally liable under the order: *Corporate Affairs Commission v Australian Timber Pty Ltd* (1998) 16 ACLC 1642 at 1647.
- An order to pay, or reimburse ASIC in relation to the whole, or a specified part, of the cost to ASIC of making the investigation [*Part 6-9, Division 2, paragraph 319(1)(e)*] — this order may require a person to pay costs of an investigation that do not fall within the ordinary meaning of ‘expenses’.

6.364 For paragraphs 319(1)(c) and (d), ‘expenses’ bears its ordinary meaning and is confined to moneys expended by a person or obligations incurred by a person, but will include expenses payable under section 317.

6.365 For paragraph 319(1)(e), the costs of an investigation includes remuneration of ASIC members and ASIC staff members. These terms are defined in the Dictionary in section 5 of the Credit Bill by reference to the definitions in section 5 of the ASIC Act, and include persons engaged by ASIC under the *Public Service Act 1999*, additional staff employed under written agreements, persons engaged under written agreements as consultants and persons who are staff members, officers and employees of other agencies under the *Public Service Act 1999* that have been seconded to ASIC.

6.366 The order must be made by ASIC in writing and specify when and how the payment or reimbursement is to be made. [*Part 6-9, Division 2, subsection 319(2)*]

6.367 Failure to comply with an order under this provision is an offence of strict liability. The penalty is 50 penalty units or imprisonment for one year or both. This offence provision and penalty is consistent with the offence and penalty in section 91 of the ASIC Act. [*Part 6-9, Division 2, subsections 319(3) and (4)*]

6.368 Where a person fails to pay an amount payable under an order, ASIC may also recover that amount as a debt due to ASIC. The right to recover money does not, however, entitle ASIC to access or continue to hold funds originally obtained by ASIC under a voluntary undertaking. [*Part 6-9, Division 2, subsection 319(5)*]

6.369 A report of an investigation may make recommendations about the making of orders for payment or reimbursement of expenses and costs of the investigation. *[Part 6-9, Division 2, subsection 319(6)]*

6.370 An order for payment or reimbursement of expenses and costs of the investigation is not a legislative instrument *[Part 6-9, Division 2, subsection 319(7)]*. This provision is declaratory of the existing position, as these types of orders are not a legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003*.

6.371 A person is neither liable to a proceeding, nor subject to a liability, merely because the person has complied, or proposes to comply, with a requirement made or purported to be made under Chapter 6. *[Part 6-9, Division 2, section 320]*

6.372 This provision is necessary to ensure that persons who are required by ASIC to answer questions or provide books or other information are not discouraged from complying with the requirement by the possibility of civil liability for breach of a contractual or equitable duty of confidentiality.

6.373 This provision does not protect voluntary informants, because it is limited to circumstance of compliance with a Chapter 6 requirement.

6.374 The functions and powers conferred by Chapter 6 are additional to, and do not derogate from, any other function or power conferred by a law of the Commonwealth, a State or a Territory. *[Part 6-9, Division 2, section 321]*

6.375 This provision is necessary to ensure that the operation of the Credit Bill does not prejudice, or is interpreted as limiting the effect of other laws that confer functions and powers on ASIC, ASIC members and ASIC staff members.

6.376 ASIC has a power to accept enforceable undertakings from a person in connection with a matter in relation to which ASIC has a function or power under the Commonwealth credit legislation. *[Part 6-9, Division 2, subsection 322(1)]*

6.377 This power enables ASIC to accept an enforceable undertaking from credit licensees, representatives of credit licensees and other persons that engage, or who have engaged, in credit activities in relation to credit activities. This power enhances ASIC's ability to enforce compliance with the law.

6.378 Acceptance of an enforceable undertaking is an enforcement outcome that may be used by ASIC as an alternative to commencing civil or administrative action in relation to a contravention of the Commonwealth credit legislation.

6.379 A person cannot be compelled to offer or enter an enforceable undertaking.

6.380 If an enforceable undertaking is given by a person the person may withdraw from, or vary, the undertaking at any time, but only with ASIC's consent. *[Part 6-9, Division 2, subsection 322(2)]*

6.381 A variation of an undertaking may be necessary, for example, to extend the time allowed to complete a particular act. A variation to an enforceable undertaking modifies the original undertaking but does not replace it.

6.382 If ASIC considers that the person who gave the undertaking has breached any of its terms, ASIC may apply to the court for:

- an order directing the person to comply with the terms of the undertaking;
- an order directing the person to pay to the Commonwealth an amount referable to the financial benefit that the person has obtained that is reasonably attributable to the breach;
- any orders that are appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach; or
- any other orders the court considers appropriate.

*[Part 6-9, Division 2, subsections 322(3) and (4)]*

6.383 The court may make orders that can compel the person providing the enforceable undertaking to comply with their undertaking, and put all persons, including third parties who would benefit from the undertaking, in the position that they would have been in had the enforceable undertaking not been breached.

6.384 A breach of an enforceable undertaking cannot be the subject of contempt proceedings. However, the breach of a court order made in relation to a breach of an enforceable undertaking may constitute contempt of court.

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# **Chapter 7**

## **Miscellaneous**

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### **Outline of chapter**

7.1 Chapter 7 of this explanatory memorandum outlines provisions which deal with regulation-making powers and administration matters established in Chapter 7 of the National Consumer Credit Protection Bill 2009 (Credit Bill).

### **Summary of new law**

7.2 The miscellaneous provisions contain standard administration and machinery type provisions that enable the effective operation of the Credit Bill. The provisions include (but are not limited to) the following matters:

- circumstances in which a person will be liable for the conduct of others;
- review by the Administrative Appeals Tribunal (AAT) of decisions made by the Australian Securities and Investments Commission (ASIC);
- the making of regulations; and
- other miscellaneous provisions such as Ministerial delegations.

### **Detailed explanation of new law**

#### **Part 7-1 — Miscellaneous**

##### ***Division 2 — Liability of bodies corporate and persons for conduct of their agents etc.***

7.3 There are certain circumstances which deal with the liability of bodies corporate under the Credit Bill and the conditions in which liability may be imposed on a body corporate where conduct is engaged in on

behalf of a body corporate. In particular, conduct engaged in, by an officer, employee or agent of the body corporate (or by a person at the direction or with the consent or agreement of the officer, employee or agent) is taken to have been engaged in by the body corporate, provided the conduct is within that person's actual or apparent authority. [Part 7-1, Division 2, section 324]

7.4 Similarly, it is sufficient to show the state of mind of an officer, employee or agent (or of a person acting at the direction or with the consent or agreement of the officer, employee or agent), to establish the state of mind of the body corporate. [Part 7-1, Division 2, subsection 323(3)]

7.5 Part 2.5 of Chapter 2 of the Criminal Code, which deals with corporate criminal responsibility, does not apply to an offence under the Credit Bill [Part 7-1, Division 2, subsection 323(4)]. An equivalent provision, which provides for the liability of bodies corporate under the Credit Bill, is applied to liability for principals which would cover sole traders and partnerships. [Part 7-1, Division 2, section 325]

7.6 Regulations may modify this Division for the purposes prescribed in the regulations. [Part 7-1, Division 2, section 326]

### ***Division 3 — Review of ASIC's decisions***

7.7 Division 3 provides for a review by the AAT of a decision made by ASIC. However it is specifically provided that ASIC's compliance and enforcement decisions (including decisions made in relation to infringement notices) will not be subject to review by the AAT [Part 7-1, Division 3, subsection 327(1)]. This approach is consistent with the ASIC Act which effectively excludes the large majority of ASIC decisions made under that Act from AAT review.

7.8 It also excludes from AAT review all ASIC decisions made by legislative instrument [Part 7-1, Division 3, paragraphs 327(1)(a), (b), (f), (g) and (h)]. These decisions are already subject to Parliamentary review under the *Legislative Instruments Act 2003*.

7.9 The review by the AAT is a de novo review on the merits of the decision of the original decision-maker and empowers the AAT to exercise all the powers and discretions that are conferred on the original decision-maker. [Section 43 of the *Administrative Appeals Tribunal Act 1975*]

7.10 Section 27A of the *Administrative Appeals Tribunal Act 1975*, which requires a notice of decision and review rights to be given to a person affected by the decision, does not apply to decisions made under section 327 of the Credit Bill. [Part 7-1, Division 3, section 327(2)]

7.11 Where an ASIC decision is reviewable, persons whose interests are affected by the decision must be informed of the making of the decision and review rights relating to the decision. All reasonable steps in the circumstances must be taken to inform the person [*Part 7-1, Division 3, subsections 328(1) and (2)*]. However, a failure to do so does not invalidate the decision. [*Part 7-1, Division 3, subsection 328(5)*]

7.12 ASIC is not required to give notice to a person affected by the decision. In deciding not to do so, ASIC may have regard to:

- the cost of giving notice to the person or persons; and
- the way in which the interests of the person or persons are affected by the decision.

[*Part 7-1, Division 3, subsection 328(3)*]

7.13 A determination made by ASIC to not give a notice to a person affected by the decision is not a legislative instrument. This statement is merely declaratory of the law, consistent with section 5 of the *Legislative Instruments Act 2003*. [*Part 7-1, Division 3, subsection 328(4)*]

#### ***Division 4 — Regulations***

7.14 The Governor-General may make regulations prescribing matters that are required or permitted by the Credit Bill or matters that are necessary or convenient to be prescribed for the purpose of carrying out or giving effect to the Credit Bill. [*Part 7-1, Division 4, section 329*]

7.15 Regulations may prescribe the location for where court proceedings in relation to matters relating to credit contracts and consumer leases must be brought. [*Part 7-1, Division 4, section 330*]

7.16 In adopting the old Credit Code on a national basis, the new Credit Code's jurisdiction is no longer limited to the State and Territory where the contract was made. This could make it difficult for consumers in another jurisdiction to respond to, or engage with those proceedings; and may cause particular vulnerabilities for debtors who could not afford or have the capacity to challenge a proceeding in another jurisdiction. Hence, the need to make regulations about the above matters.

7.17 Regulations may provide for a person who is alleged to have contravened a civil penalty provision to pay a penalty to the Commonwealth as an alternative to civil proceedings; and that the penalty must not exceed one-fortieth of the maximum penalty that a court could impose. *[Part 7-1, Division 4, subsections 331(1) and (2)]*

7.18 In the case of alleged contraventions of strict liability offences, infringement notices may be issued as an alternative to prosecution. A detailed explanation of the operation of section 331 is provided in Chapter 4 of this explanatory memorandum. *[Part 7-1, Division 4, subsection 331(3)]*

7.19 The value of the infringement notices is limited to one-fifth of the maximum the court could impose for the offence. *[Part 7-1, Division 4, subsection 331(4)]*

#### ***Division 5 — Other miscellaneous provisions***

7.20 A person is taken to have contravened a civil penalty provision or committed an offence, if that person, does or omits to do, an act outside this jurisdiction; and if that person had done, or omitted to do, that act in this jurisdiction, the person would, by reason of also having done, or omitted to do, an act in this jurisdiction, have contravened a civil penalty provision or committed an offence against the Credit Bill. *[Part 7-1, Division 5, subsection 332]*

7.21 A failure to comply with any requirement of the Credit Bill does not affect the validity or enforceability of any transaction, contract or other arrangement. *[Part 7-1, Division 5, subsection 333(1)]*

7.22 This is subject to any express provision to the contrary in the Credit Bill or proposed regulations including regulations made specifically for this purpose. *[Part 7-1, Division 5, subsection 333(2)]*

7.23 There are certain circumstances under which a provision of a contract or other instrument is void. In particular, provisions which seek to modify the effect of the Credit Bill or to indemnify certain classes of persons from loss or liability arising under the Credit Bill are void. For example, a credit provider, mortgagee, beneficiary of a guarantee or lessor who is a party to such a provision commits an offence. The criminal penalty for the offence is a maximum of 100 penalty units. *[Part 7-1, Division 5, subsections 334(1) to (3)]*

7.24 This offence also carries strict liability *[Part 7-1, Division 5, subsection 334(4)]*. This strict liability will significantly enhance the role of ASIC in administering the enforcement regime *[Part 7-1, Division 5, subsection 334(5)]*.



7.25 Subsection 324(2) does not prevent a credit provider from enforcing a guarantee relating to liabilities under a credit contract that is unenforceable solely because of the debtor's death, insolvency or incapacity. *[Part 7-1, Division 5, subsection 334(5)]*

7.26 Subject to the abovementioned contracting out provision, any indemnity for any liability under the Credit Bill is not void, nor can it be declared void on the grounds of public policy, despite any rule of law to the contrary. However, this does not apply to indemnities from liabilities under the Credit Code. *[Part 7-1, Division 5, section 335]*

7.27 It is not anticipated that the treatment of existing rights under the Credit Bill will result in any acquisition of property other than on just terms for the purposes of paragraph 51(xxxi) of the Constitution. However, for the avoidance of doubt, a provision has been included to ensure that an acquisition for the purposes of paragraph 51(xxxi) cannot take place. To the extent that an acquisition of property other than on just terms would occur by virtue of a provision of the Credit Bill (when enacted), the relevant law or instrument is taken not to apply. *[Part 7-1, Division 5, section 336]*

7.28 The Minister may delegate their functions and powers under the Credit Bill to a member or staff member of ASIC. Any such delegate must comply with any directions of the Minister in performing function or exercising powers under the delegation. *[Part 7-1, Division 5, section 337]*



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# **Chapter 8**

## **National Credit Code**

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### **Outline of chapter**

8.1 Chapter 8 of this explanatory memorandum relates to the National Credit Code (Code), which is Schedule 1 to the National Consumer Credit Protection Bill 2009 (Credit Bill).

8.2 The National Credit Code provides a consumer protection framework for consumer credit and related transactions. It largely replicates the Uniform Consumer Credit Code (UCCC), enacted in the *Consumer Credit (Queensland) Act 1994* (Qld) and applied in States and Territories since 1996. The Code also includes amendments to enable the UCCC to operate effectively in Commonwealth context.

8.3 As the Code largely replicates the UCCC, the objectives of the regime remain the same as those when the UCCC was first enacted. Namely, to ensure strong consumer protection through ‘truth in lending’, while recognising that competition and product innovation must be enhanced and encouraged by the development of non prescriptive flexible laws.

8.4 The Code regulates many aspects of the provision of certain types of credit, including upfront and ongoing disclosure obligations, changes to the credit contract, advertising and marketing requirements, termination of the credit contract and penalties and remedies. The Code also regulates consumer leases.

### **Context of amendments**

8.5 The UCCC previously formed part of a legislative scheme that was based on the Uniform Credit Laws Agreement 1993 of the States and Territories. Under this Agreement, the States and Territories agreed to adopt uniform consumer credit laws throughout Australia based on template legislation to be enacted by the Queensland Parliament. In 1994, Queensland enacted the *Consumer Credit (Queensland) Act 1994* (Qld), with the UCCC set out as an appendix to this legislation. All States and Territories then passed enabling legislation which adopted the template legislation and applied it in the State or Territory as ‘in force from time to time’. Any amendments to the UCCC were only required to be made to

the template legislation and applied automatically in other States without amendment to those States' enabling Acts. Slightly different arrangements existed in Tasmania and Western Australia although the outcomes were the same.

8.6 The approach of the Code is for it to be as similar to the UCCC as is practicable, except where the Commonwealth has specifically decided to amend or extend its operation. To achieve this, the Code is contained in a schedule to the Credit Bill and, where possible, the same interpretative provisions that applied to the UCCC now apply to the Code.

8.7 Amendments to the Code can be generally grouped into three categories:

- amendments reflecting new Commonwealth policy regarding the regulation of consumer credit (for example, increasing the threshold for access to hardship variations and stays of enforcements, extending the Code to credit for the purchase, renovation, improvement or refinancing of residential investment property and changes to the debtor's residency requirement);
- amendments to reform mandatory comparison rates, default notices and address several fringe lending practices previously agreed to, but not legislated, by the States; and
- amendments required to replicate UCCC as Commonwealth legislation (for example, changes to ensure consistency with the Commonwealth drafting style, changes to comply with Commonwealth policy, and removal of State references).

## Summary of new law

8.8 The provisions in the Code broadly cover the following areas:

- **scope and application of the Code** — including credit to which the Code applies and does not apply, deemed credit contracts and when the Code is presumed to apply;
- **entering into a credit contract** — including contractual and pre-contractual form and disclosure requirements as well as restrictions on interest, fees and charges;
- **the life of the credit contract** — including provisions for unilateral and agreed changes to obligations as well as

changes on account of hardship experienced by the debtor or harsh or unconscionable conduct by the credit provider;

- **continuous disclosure** — including obligations for credit providers to give statements of account which includes specific information, copies of documents and other notices, and payout figures;
- **terminating a credit contract** — including when a debtor may end a credit contract, a credit provider's enforcement rights and obligations, and enforcement procedures for mortgaged goods;
- **related mortgages and guarantees** — provisions dealing with security for regulated credit contracts, including requirements to ensure security holders' rights are not all encompassing, and prohibition on certain securities;
- **breaches** — including penalties and offences;
- **related sale contracts** — provisions creating liability for linked credit providers;
- **credit related insurance** — including restrictions on financing insurance premiums, limits on commissions paid by an insurer and provisions automatically terminating an insurance contract where credit contract is terminated;
- **advertising and marketing** — including interest rate and comparison rate disclosure requirements as well as restrictions on false or misleading representations, harassment and credit hawking; and
- **consumer leases** — form and disclosure requirements, application of other provisions of the Code (for example, variation on hardship grounds and where a transaction is unjust) and when consumer leases can be ended.

### **Amendments reflecting new Commonwealth policy**

#### *Increased threshold for access to hardship variations and stays of enforcements*

8.9 In transferring the consumer credit regime to the Commonwealth, the Government has increased the threshold under which a debtor can request a change to certain terms of their credit contract on the grounds of hardship to \$500,000 (or higher as specified in the

regulations). The increase in threshold enables more consumers to apply for changes to the terms of their credit contract when in financial hardship, for example, because of illness or unemployment. This increased threshold also applies to request stays of enforcement.

8.10 A credit provider must provide a response to a debtor's application for a change to terms of their credit contract on the grounds of hardship within 21 days of receiving the application. When a credit provider does not agree to an application for a hardship variation, they must give reasons to the consumer for refusing the request.

***Extension of the Code to credit for residential investment property***

8.11 The Government has also extended the Code to apply to credit provided to individuals and strata corporations to purchase, renovate, improve or refinance residential property for investment purposes.

8.12 This is achieved by amending section 6 of the UCCC, now section 5 of the Code, which relates to the provision of credit to which the Code applies.

8.13 Residential property is defined in section 204 to include:

- land that contains or will contain a dwelling;
- certain Crown leases or licences where the land contains or will contain a dwelling;
- interests in a share company which owns the land (that contains or will contain a dwelling) where the individual has a right to occupy the dwelling;
- aged care homes or dwellings in a retirement village; or
- an equity of redemption in land that contains or will contain a dwelling.

8.14 For the Code to apply, the property must be wholly or predominately used (or intended to be used at some future time) as residential property. This will exclude, for example, farms with a farmhouse or a commercial building with a caretaker's cottage.

***Replacement of debtor's residency requirement***

8.15 In determining whether the Code applies, the UCCC requirement for the debtor to be a resident has not been retained. The residency requirement in the UCCC was primarily used to determine

which State or Territory had jurisdiction, which is not required under Commonwealth jurisdiction.

8.16 For the purposes of applying the Code, the debtor's residency requirement has been replaced with a jurisdictional test that examines whether the credit provider carries on business in Australia.

8.17 A business is taken to be 'carried on in this jurisdiction' where a person engages in conduct that is intended to induce people in Australia to use the goods or services the person provides, or is likely to have that effect. This is intended to capture credit providers who do not have a physical presence in Australia but may use the internet or intermediaries to offer consumer credit products to persons in Australia. [*Credit Bill, Part 1-2, Division 4, section 12*]

## **Amendments previously agreed to by the States**

### *National Competition Policy Review recommendations*

8.18 After the Council of Australian Governments (COAG) agreements, but prior to the transfer of credit to the Commonwealth, legislation to implement key recommendations of the National Competition Policy Review of the UCCC was passed through the Queensland Parliament.

8.19 The *Justice Legislation Amendment Act 2008* (Qld) ensures that consumers of 'terms sale of land contracts', 'conditional sale agreements' and 'tiny terms contracts' have the protections of the UCCC.

- 'Terms sale of land contracts' are contracts for the sale of land where the purchase price is payable to the vendor in instalments and the vendor allows the purchaser to take possession of the land but retains title until payment of the final instalment is made.
- 'Conditional sale agreements' are contracts where the purchase price is payable in instalments and the seller allows the purchaser to take possession of the goods but retains title until payment of the final instalment.
- 'Tiny terms contracts' are contracts where the cost of credit is incorporated into the cash price and the transaction is represented as a sale of goods by instalment (without any credit charges or interest).

8.20 These amendments commenced on 22 May 2009.

***Amendments being progressed by the States***

8.21 Prior to the COAG agreement, the Ministerial Council on Consumer Affairs (MCCA) had consulted on, and agreed to, a range of amendments in relation to fringe lending, default notices and mandatory comparison rates. However, given the proposed timing of the introduction of those amendments would have overlapped with the development of the Commonwealth regime, MCCA requested that the amendments instead be progressed as part of the transfer of regulatory responsibility to the Commonwealth.

8.22 These amendments, as contained in the draft Consumer Credit Code Amendment Bill 2008 (Qld), have been largely incorporated by the Commonwealth. The main changes cover:

- **The provision of credit to which the Code does not apply**
  - Subsections 6(2) and (3) have been inserted to address fee structures aimed at avoiding the fees and charges limit for exempt short-term credit by capturing fees and charges paid to parties other than the credit provider.
  - The exemption for pawnbroking in subsection 6(9) is limited to persons genuinely conducting a pawnbroking business by ensuring that where a debtor is in default the pawnbroker's only recourse is against the pawned goods.
- **The presumption relating to the application of the Code**
  - The presumption in section 11 of the UCCC, now section 13 of the Code, has been amended to address abuses of the declaration that allowed credit providers to avoid the UCCC. Specifically, the amendment addresses the situation where credit is being provided wholly or predominantly for personal, domestic or household use, or in relation to a residential investment property, and the lender fails to enquire as to the purpose of the credit because it does not want to hear an inconvenient answer.
  - The aim of the amendment is to make the business purpose declaration presumptive rather than conclusive. Further changes have been made to those proposed by Queensland to minimise the circumstances in which declarations can be used as an avoidance mechanism. Credit providers will still be able to have the benefit of the presumption in situations where the purpose of the credit is ambiguous.



- **Prohibited securities**
  - Section 50, formerly section 46 of the UCCC, is amended to prohibit the taking of security over essential household goods or certain property used by the mortgagor in earning income by personal exertion.
- **Comparison rate schedules**
  - The operation and application of comparison rates has been amended.
- **Default notice amendments**
  - Section 88 has been amended to impose new default notice requirements before a credit provider can enforce a credit contract or a mortgage against a defaulting debtor or mortgagor. New requirements for default notices include:
    - specifying a period for remedying the default;
    - specifying the date after which enforcement proceedings may begin;
    - specifying any information prescribed by regulations about the credit provider’s approved external dispute resolution scheme or the debtor’s rights under the scheme; and
    - specifying the debtor’s debt may be included in a credit reporting agency’s credit information file if the debt remains overdue for 60 days or more.
- **Mortgagor’s remedies**
  - The Code inserts new provisions (sections 108 to 110) dealing with a mortgagor’s remedies. These amendments give a mortgagor additional rights against a credit provider who is seeking to recover enforcement expenses when in breach of requirements that must be met before a credit contract or mortgage can be enforced.
  - The new sections will enable a mortgagor to apply to the Court to regain possession of the goods; apply to the Court for an order for possession for mortgagor; and

apply to the Court for other ancillary or consequential orders.

### **Amendments to transition the UCCC into Commonwealth legislation**

8.23 In addition to the abovementioned amendments, a number of technical amendments were required to make the UCCC operate in the Commonwealth jurisdiction. These cover two broad categories:

- to be consistent with the Commonwealth style (first type of amendments — see paragraph 8.24);
- to make the Code work, or work more effectively, in the Commonwealth context (second type of amendments — see paragraph 8.25).

#### *Consistency with the Commonwealth legislative style*

8.24 The first type of amendments is to ensure the Code is consistent with the Commonwealth legislative style. For example:

- changing references to ‘maximum penalty’ to ‘penalty’;
- changing references from the higher unit of a provision to the lower unit (for example, changing ‘section 62(3)’ to ‘subsection 62(3)’);
- changing references to ‘is guilty of an offence’ to ‘commits an offence’; and
- changing section references to deal with differences in the Commonwealth and State numbering systems.

#### *Work effectively in the Commonwealth context*

8.25 The second type of amendments are those required to make the UCCC work in the Commonwealth context. Examples of this type are:

- changing references to ‘Government Consumer Agency’ to the ‘Australian Securities and Investments Commission (ASIC)’;
- removal of references to ‘Queensland’, the ‘Legislative Assembly’ or ‘Queensland Acts’;
- replacing transitional provisions relevant to Queensland with Commonwealth transitional provisions;

- the classification of certain offences as strict liability in bringing the UCCC into the Commonwealth jurisdiction, so as to maintain the current operation and policy intention of these offences; and
- changes that result from interaction between the UCCC and other Commonwealth legislation (for example, *Acts Interpretation Act 1901*, the *Crimes Act 1914*, the Criminal Code, the *Electronic Transactions Act 1999*, the *Trade Practices Act 1974* and the *Legislative Instruments Act 2003*).

### Comparison of key features of new law and current law

<i>New law (the Code)</i>	<i>Current law (the UCCC)</i>
<p>The Code largely replicates the UCCC.</p> <p>The Code also applies to credit for the purchase, renovation, improvement or refinancing of residential property for investment purposes.</p>	<p>The UCCC regulates many aspects of the provision of credit for personal, domestic or household use, including upfront and ongoing disclosure obligations, changes to the credit contract, advertising and marketing requirements, termination of the credit contract and penalties and remedies.</p> <p>The UCCC includes amendments made by the <i>Justice Legislation Amendment Act 2008 (Qld)</i>, which implements the key recommendations of the National Competition Policy Review.</p> <p>The UCCC also governs consumer leases.</p>
<p>The threshold has been increased to \$500,000.</p>	<p>Under the UCCC, the threshold for hardship variations and stays of enforcement was 110 per cent of the average loan size for new dwellings in New South Wales (that is, \$342,870 for 10 June 2009 to 7 July 2009).</p>

<i>New law (the Code)</i>	<i>Current law (the UCCC)</i>
In the context of determining whether the Code applies, a jurisdictional test that examines whether the credit provider carries on business in Australia is used.  This replaces the residency test as determining State or Territory jurisdiction is not an issue under Commonwealth jurisdiction.	The debtor was required to be a resident of an Australian state or territory for the UCCC to apply.
The Code includes a range of amendments in relation to fringe lending that were agreed by MCCA to be implemented during the transfer of credit to the Commonwealth.	No equivalent.
A range of other technical changes to translate the UCCC into Commonwealth legislation.	No equivalent.

## Detailed explanation of new law

### Part 1 — Preliminary

8.26 Part 1 sets out the preliminary matters of the Code. Consistent with the policy objectives of the UCCC, the Code applies to all credit provided to individual debtors and strata corporations wholly or predominantly for personal, domestic or household purposes whenever any type of charge is made for the credit. There are no thresholds or ceilings such as an upper monetary limit or a minimum interest rate before the Code applies.

8.27 Unlike the UCCC, Part 1 extends application of the Code to credit provided to individuals or strata corporations for the purchase, renovation, improvement or refinancing of residential property for investment purposes.

### Meaning of key words and expressions

#### *Credit and amount of credit*

8.28 Section 3 defines ‘credit’ and ‘amount of credit’ in the same way as section 4 of the UCCC. For the purposes of the Code, credit is the deferral of the payment of debt or the incurring of deferred debt, and amount of credit is the amount of debt actually deferred. [*Schedule 1, Part 1, section 3*]

### ***Credit contract***

8.29 Credit contract is defined in section 4 as a contract under which credit may be provided to which the Code applies. [*Schedule 1, Part 1, section 4*]

### ***Other key terms***

8.30 Part 13 defines other words and expressions used in the Code. This replicates (with some amendment) Schedule 1 of the UCCC. Other miscellaneous provisions relating to the interpretation of the Code are contained in Part 14. [*Schedule 1, Part 1, section 2*]

## **Credit to which the Code applies**

8.31 Section 5 sets out the circumstances in which the Code will apply to the provision of credit (and to credit contracts and related matters):

- the debtor is a natural person or a strata corporation [*Schedule 1, Part 1, paragraph 5(1)(a)*];
- the credit is provided or intended to be provided wholly or predominantly for:
  - personal, domestic or household purposes [*Schedule 1, Part 1, subparagraph 5(1)(b)(i)*]; or
  - the purchase, renovate, improve or refinance of a residential investment property [*Schedule 1, Part 1, subparagraphs 5(1)(b)(ii) and (iii)*];
- a charge is or may be made for the credit [*Schedule 1, Part 1, paragraph 5(1)(c)*]; and
- the credit provider provides credit as part of a business carried on in Australia of providing credit or as part of or incidentally to any other business of the credit provider. A credit provider need not be a bank or financial institution [*Schedule 1, Part 1, paragraph 5(1)(d)*].

8.32 It is specified that investment by the debtor is not a personal, household or domestic purpose. This means that a purpose that can be characterised as being for both an investment purpose or a personal, household or domestic purpose is excluded from the application of the Code. [*Schedule 1, Part 1, subsection 5(3)*]

8.33 The predominant purpose for which credit is provided is specifically defined as:

- the purpose for which more than half of the credit is intended to be used; or
- if the credit is intended to be used to obtain goods or services, and those goods or services will be used for different purposes, the purpose for which the goods or services are intended to be most used.

*[Schedule 1, Part 1, section 4]*

8.34 The question of whether or not credit is provided or intended to be provided wholly or predominantly for a purpose which will result in the credit being regulated by the Code is to be determined consistently with the objectives of the Code. It would not be expected that it can be resolved simply by considering either the actual use of the credit by the borrower or by the purpose of the credit provider.

8.35 Whether or not the credit provider provides credit as part of or incidentally to any other business of the credit provider is to be determined according to the connection between the 'other business' and the provision of credit. For example, in *Dale v Nichols Constructions Pty Ltd* [2003] QDC 453 the connection was established because the working capital of a construction business, when available, was used as the source of funds for credit.

### **Credit to which the Code does not apply**

8.36 Section 6 sets out the kinds of credit to which some or all of the provisions of the Code do not apply. These include short-term credit, credit without prior agreement, credit provided under bill facilities, credit provided by pawnbrokers and trustees of estates (however, sections 76 to 81 regarding reopening unjust transactions apply) and certain employee loans, as well as certain other specified kinds of credit. *[Schedule 1, Part 1, section 6]*

8.37 The exemptions reflect the fact that these contracts provide benefits to the debtor (that Code credit does not) and their availability is restricted so that they do not affect competition.

8.38 Credit under a continuing credit contract is also exempt under subsection 6(5) if the only charge that is, or may be made, is a periodic or other fixed charge that does not vary according to the amount provided. However, the Code does apply where the charge exceeds the prescribed maximum *[Schedule 1, Part 1, subsection 6(5)]*. It is intended that a regulation

will be made which replicates the following prescribed maximum charges under the UCCC:

- \$200 — for the months after the credit contract is made; and
- \$125 — for any subsequent period of 12 months.

8.39 Margin loans are also excluded from the Code as they are proposed to be regulated as a financial product under Chapter 7 of the *Corporations Act 2001*. [*Schedule 1, Part 1, subsection 6(12)*]

8.40 Subsection 6(13) enables other classes of credit to be excluded by regulation from the Code, in its entirety [*Schedule 1, Part 1, subsection 6(13)*]. (Credit can also be partially excluded by regulation under section 203B.) It is intended that regulations will be made to replicate the exclusions of the following classes of credit under the UCCC:

- credit under the GIO Finance Limited No Interest Loan Scheme;
- certain heritage conservation loans;
- credit by an authorised deposit-taking institution that does not exceed 62 days; and
- credit provided under certain charge contracts.

8.41 ASIC is given power to exclude credit in its entirety from the application to the Code in respect of:

- a provision of credit as specified by ASIC [*Schedule 1, Part 1, subsection 6(14)*]; and
- the provision of a class of credit [*Schedule 1, Part 1, subsection 6(17)*].

8.42 An exemption of a provision of credit as specified by ASIC is stated not to be a legislative instrument. This statement is declaratory of the law, consistent with section 5 of the *Legislative Instruments Act 2003*. [*Schedule 1, Part 1, subsection 6(16)*]

8.43 ASIC also has power, under section 203A, to partially exclude credit, with or without conditions, from the application of the Code.

## Mortgages

8.44 Section 7 applies the Code to mortgages given by natural persons or strata corporations which secure obligations under a credit contract or related guarantee, but only to the extent that they do so [*Schedule 1, Part 1, section 7*]. It is intended that a regulation will be made to replicate the exemptions given to the following mortgages under the UCCC:

- a mortgage relating to perishable goods, livestock, primary produce or food stuffs;
- a banker's right to combine accounts; and
- a lien or charge arising by operation of any Act or law or by custom.

## Guarantees

8.45 Section 8 applies the Code to guarantees given by natural persons or strata corporations which guarantee obligations under a credit contract, but only to the extent that they do so [*Schedule 1, Part 1, section 8*]. A regulation is intended to be made to replicate the UCCC regulation that exempts any guarantee by the supplier under a tied loan contract or tied continuing credit contract.

## Deemed credit contracts

### *Goods leases with option to purchase*

8.46 A contract for the hire of goods would not ordinarily be regarded as involving the provision of credit. However, where such a contract has a right or option to purchase the goods and the hire charge exceeds the cash price of the goods, it is functionally equivalent to a credit contract to finance the price of the goods.

- Part 11 of the Code deals with leases for the hire of goods where the hirer has no right or option to purchase the goods.

8.47 Where the lease is a credit contract because of subsection 5(1), section 9 treats such a goods lease as a sale of goods by instalment with a mortgage over the goods [*Schedule 1, Part 1, section 9*]. A regulation is intended to be made to replicate the UCCC regulation that prescribes the form of the terms and conditions of the mortgage.



***Contracts for the sale of land by instalments***

8.48 Whether or not an executory contract for the sale of land by instalments involves the provision of credit will depend on the form of the transaction. However, where the purchaser becomes entitled to possession before transfer of title and is required to make payments (the amount of which exceeds the cash price of the land), it is functionally equivalent to a credit contract to finance the price of the land. For the purpose of contracts for the sale of land by instalments, payments do not include deposits or rent payments.

8.49 Section 10 applies the Code to sale of land by instalments contracts by treating them as credit contracts. [*Schedule 1, Part 1, section 10*]

8.50 The amendment clarifies the application of the Code to executory contracts for the sale of land by instalments. It was always intended that these transactions would be regulated where they involved the provision of credit (as illustrated by the decision in *Director of Consumer Affairs v Geeveekay Pty Ltd* [2006] VCAT 793). The amendment ensures that irrespective of the legal structure these transactions are regulated by the Code where the purchaser becomes entitled to possession before transfer of title and is required to make payments that exceed in total the cash price of the land. A transaction of this type is functionally equivalent to a credit contract to finance the price of the land, and the amendment ensures that purchasers of land in this way will be treated similarly.

***Contracts for the sale of goods by instalments***

8.51 Whether or not a contract for the sale of goods by instalments involves the provision of credit is not necessarily straightforward, particularly where the purchase price of the goods is payable by instalment and the total amount payable is in excess of the cash price of the goods. A transaction structured in this way is functionally equivalent to a credit contract to finance the price of the goods. This provision is not intended to regulate lay-by contracts, where the requirement to make payments is not a deferred debt within the meaning of section 4.

8.52 Section 11 applies the Code to contracts for the sale of goods by instalments by treating them as credit contracts. [*Schedule 1, Part 1, section 11*]

***Contracts for the sale of goods by instalments under related contracts***

8.53 A contract for the sale of goods by instalments under a related contract would not ordinarily be regarded as involving the provision of credit. However, where the charge exceeds the cash price of the goods

under the contracts, it is functionally equivalent to a credit contract to finance the price of the goods.

8.54 A related contract is one where credit finances the sale of the goods where amounts are payable by instalments and the credit provider is the supplier of the goods (or a related body corporate).

8.55 Section 12 has the effect of applying the Code to contracts for the sale of goods by instalments under related contracts by treating them as credit contracts. [*Schedule 1, Part 1, section 12*]

## **Presumptions**

8.56 Section 13 does not replicate section 11 of the UCCC. It has been amended to address abuses associated with the use of the declaration to create a conclusive presumption the credit was not regulated by the Code, notwithstanding that the credit was applied for a personal use. The avoidance of the Code in this way has often been associated with the practice of 'equity stripping' where borrowers in financial stress are refinanced into loans they can not afford, in order for a broker or intermediary to earn substantial fees.<sup>3</sup>

8.57 Section 13 sets out presumptions relating to the application of the Code to credit contracts, mortgages and guarantees. In any court proceedings it places the onus of proof on a person who seeks to claim that the Code does not apply. [*Schedule 1, Part 1, subsection 13(1)*]

8.58 However, it is to be presumed that the Code will not apply where the debtor, before entering into the contract, signs a declaration that the credit is not to be used for a personal, domestic or household purpose or to purchase, renovate, improve or refinance a residential property for investment purposes (a Code purpose). [*Schedule 1, Part 1, subsection 13(2)*]

8.59 Under the UCCC the presumption was conclusive, except in limited circumstances. The decisive effect of the presumption enabled credit providers to rely on it as an effective means of excluding the application of the UCCC; borrowers were not readily able to set side the effect of the declaration as they needed to argue that the credit was for personal use, and therefore that they had signed a false declaration.

8.60 The result was that the declaration could be largely relied upon by credit providers to prevent borrowers being able to exercise rights under the UCCC, even where the credit was used for personal, domestic

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3 As documented by ASIC in Report 119 of March 2008, 'Protecting Wealth in the Family Home: An Examination of Referencing in Response to Financial Stress.'

or household purposes. It was for this reason that declarations were utilised in 'equity stripping' lending practices, and by other lenders seeking to avoid the Code.

8.61 In *State of Queensland v Ward and Another* [2002] QSC 171. Ambrose J said at paragraphs [25] and [35]:

'... it was the terms of section 11 of the Code which induced Shark [the lender] to adopt a business practice of persuading some potential borrowers to sign a declaration that the money they borrowed from Shark was intended wholly or predominately for business purposes ... some of the loans which have been canvassed were accompanied by a declaration executed by the borrower in the form to which I have referred. In many of them, neither Shark nor the borrower believed that the money lent was advanced for any business or investment purpose. The whole exercise in my view was merely a step taken to avoid impact of the Code upon money lent for non-business/investment purposes with a wink and a nod on the part of both lender and borrower the object of the lender merely being to evade its constraints'.

8.62 In order to address this situation it is now provided that the declaration will be ineffective:

- if the credit provider or a prescribed person:
  - knew or had reason to believe; or
  - if they had made reasonable inquiries, would have known or had reason to believe; and
- the credit was in fact to be applied wholly or predominantly for a Code-regulated purpose.

*[Schedule 1, Part 1, subsection 13(3)]*

8.63 It is proposed therefore to define a prescribed person in the regulations in such a way that a credit provider can protect itself from the risk of the declaration being set aside by obtaining the declaration itself. However, where a third party is involved in arranging or obtaining the declaration their knowledge will be relevant to the question of whether the presumption can be displaced.

8.64 This amendment will provide an effective response to the problems previously associated with the abuse of declarations as:

- where, before the contract was entered into, the credit was to be applied for a Code purpose it would be unlikely that this

would not be known or ascertainable by reasonable inquiry by the credit provider; and

- credit providers who do not make any reasonable inquiries into the use of the credit will find it difficult to rely on a declaration where the credit was in fact applied for a Code purpose.

*[Schedule 1, Part 1, subsection 13(4)]*

8.65 It is specifically provided that if a declaration is ineffective under subsection 13(4), that paragraph 5(1)(b) of the Code is taken to be satisfied in respect of the contract, that is, the borrower does not still need to establish that the credit was provided for a Code purpose. The Code still may not apply to the credit contract, but only where it fails to meet some other criteria.

8.66 An offence for inducing a person to make a false or misleading business purpose declaration has been inserted as there was no penalty in the UCCC which applied in these circumstances. The penalty for this offence is 100 penalty units, two years imprisonment, or both. The strict liability attached to this penalty will significantly enhance the role of ASIC in enforcing the provision. *[Schedule 1, Part 1, subsection 13(7)]*

#### **Example 8.1: Whether the lender made reasonable inquiries**

The borrower obtains a loan of \$250,000 from Lender A, with \$200,000 used to pay out their existing home loan, and with the further \$50,000 to be used for a business purpose.

Lender A makes reasonable inquiries to establish that the \$50,000 is for a business purpose, but makes no inquiries into the purpose of the remainder of the funds. Lender A would not meet the criteria for making reasonable inquiries.

#### **Example 8.2: Whether the lender made reasonable inquiries**

The lender receives an application submitted by a finance broker seeking a loan of \$50,000 for business purposes. The application form is signed by the borrower and states that the borrower has an Australian Business Number (ABN), acquired two days before the loan application. The date an ABN was issued can be easily checked.

The application gives no details of the business. In fact, the borrower uses the money to pay arrears on their home loan. It is unlikely that the lender would meet the criteria for making reasonable inquiries if it failed to verify the existence of any business said to be carried on by the borrower.

## Part 2 — Credit contracts

8.67 In achieving the policy objective of the Code, Part 2 of the Code, which generally mirrors Part 2 of the UCCC, sets out:

- credit providers' disclosure obligations when negotiating and making credit contracts;
- debtors' monetary obligations;
- credit providers' interest charging obligations;
- specific obligations on credit providers regarding fees and charges; and
- credit providers' obligation to account.

### Negotiating and making credit contracts

8.68 Division 1 of Part 2 sets out a number of disclosure measures which are directed at ensuring the debtor understands the terms of the credit contract before it is entered into and that key aspects of the contract are documented.

8.69 A maximum penalty of 100 penalty units applies for contraventions of a requirement of this Division. In bringing the UCCC into the Commonwealth jurisdiction, this offence has been drafted as an offence of strict liability. *[Schedule 1, Part 2, section 22]*

8.70 Penalties also apply for contraventions of certain provisions of this Division known as 'key requirements' (see Part 6).

#### *Credit contract to be in writing*

8.71 A credit contract must be in writing, although the regulations may allow other ways of making a credit contract, which do not involve a written document. *[Schedule 1, Part 2, subsection 14(1) and section 15]*

8.72 The Code requires a credit contract to be in writing and sets out the offer and acceptance process. Specifically, the provision permits a contract to be accepted by the debtor (or an authorised person) by accessing or drawing down credit or by some other act that satisfies the conditions of the offer. Where a contract consists of more than one document, only one needs be signed if the other documents are referred to in the signed document. *[Schedule 1, Part 2, subsections 14(1), (2) and (4)]*

8.73 The credit provider (and any associate) cannot be authorised by a debtor to accept the offer. However, a debtor may authorise the credit provider to debit the debtor's account. For example, this is a common practice where the debtor is entering into a new continuing credit contract and wishes the outstanding balance under an existing contract to be paid out and debited to the debtor's account under the new contract. [*Schedule 1, Part 2, subsection 14(3)*]

#### ***Pre-contractual disclosure***

8.74 Section 16 requires the credit provider to make pre-contractual disclosures to the proposed debtor. The disclosures must include the matters required by section 15 to be included in the contract document [*Schedule 1, Part 2, subsection 16(1)*]. The pre-contractual disclosure must occur before the contract is entered or the debtor offers to enter into the contract, whichever occurs first [*Schedule 1, Part 2, subsection 16(2)*].

8.75 Some of the financial information to be included in the pre-contractual statement must be disclosed in the format prescribed by regulation [*Schedule 1, Part 2, subsection 16(4)*]. It is intended that a regulation will be made to replicate the UCCC regulation that prescribes the content and form requirements for pre-contractual statements. Any changes to the pre-contractual disclosure must be notified, in writing, to the debtor before the contract is entered into or the debtor offers to enter into the contract, whichever occurs first [*Schedule 1, Part 2, subsection 16(7)*].

8.76 If the credit provider discloses the comparison rate in the pre-contractual disclosure, it must calculate the comparison rate on the basis prescribed by the regulations [*Schedule 1, Part 2, subsection 16(3)*]. It is intended that a regulation will be made that replicates the comparison rate formula in the UCCC regulations as well as the accompanying warning.

8.77 A credit provider must provide the debtor with an information statement setting out their rights and obligations [*Schedule 1, Part 2, paragraph 16(1)(b)*]. It is intended that a regulation will be made that replicates the UCCC information statement.

#### ***Contract document***

8.78 Under section 17, the contract document must contain the following matters:

- the credit provider's name;
- the amount of credit, with specific disclosure requirements related to whether the amount of credit is ascertainable. Additional disclosure requirements also apply to credit

provided by suppliers for a sale of land or goods by instalment;

- the annual percentage rate under the contract;
- calculation of interest charges and total interest charges;
- repayment details;
- credit fees and charges;
- changes affecting interest and credit charges;
- statement of accounts;
- default rate;
- enforcement expenses;
- details of any mortgage or guarantee;
- commissions;
- insurance financed by the contract; and
- other information prescribed by the regulations. It is intended that a regulation will be made that replicates the UCCC's prescribed warning about credit contracts.

*[Schedule 1, Part 2, section 17]*

8.79 Section 18 requires a credit provider any requirements in the regulations as to the form and expression of the contract document. It provides that, subject to any contrary requirement in the regulations, it may consist of one or more separate documents.

8.80 Section 19 requires that any alteration to a contract document (except alterations that reduce the debtor's liabilities) by the credit provider after it is formed be signed or initialled by the debtor. *[Schedule 1, Part 2, section 19]*

8.81 Section 20 provides for a copy of the contract document to be given to the debtor unless the debtor has already been given such a copy. *[Schedule 1, Part 2, section 20]*

### ***Termination of contract***

8.82 Section 21 enables a debtor to terminate a credit contract, by written notice, before credit is provided. The provision also clarifies that the debtor may still be charged relevant fees and charges incurred under the credit contract before termination. *[Schedule 1, Part 2, section 21]*

### **Division 2 — Debtor’s monetary obligations**

8.83 Credit providers are prohibited from imposing monetary liabilities on the debtor that are not consistent with the Code. In addition, credit providers are prohibited from imposing charges not authorised by the credit contract. *[Schedule 1, Part 2, subsections 23(1) and (3)]*

8.84 It is an offence of strict liability for a credit provider to impose such a prohibited monetary liability or to accept or demand money in respect of such a prohibited monetary liability. A maximum of 100 penalty units applies. *[Schedule 1, Part 2, section 24].*

8.85 A remedy is also provided (see section 111), which means any amount required to be paid in breach of subsections 23(1) and (3) may be recovered by the debtor. *[Schedule 1, Part 2, subsections 23(2) and (4)]*

8.86 The credit provider must make a loan in full, either in cash or money’s worth, without deducting interest. A maximum penalty of 100 penalty units applies. This offence is one of strict liability. A regulation is intended to be made which, like the regulations under the UCCC, prescribes that section 25 does not apply to the deduction of the first payment of interest charges. *[Schedule 1, Part 2, section 25]*

8.87 Section 26 deals with the acceptance of early payments and the crediting of payments under the contract. The credit provider must credit each early payment made as soon as practicable after receipt of the payment, unless the contract prohibits the early payment and the credit provider takes action to alert the debtor of this when payment is made or refunds the payment to the debtor. A maximum penalty of 100 penalty units applies. *[Schedule 1, Part 2, subsections 26(1), (2) and (4)]*

8.88 The offences in section 26 are offences of strict liability. *[Schedule 1, Part 2, subsection 26(3)]*

8.89 Credit contracts may not prohibit a debtor or guarantor from paying out the contract at any time. *[Schedule 1, Part 2, subsection 26(5) and section 82]*



### **Division 3 — Interest charges**

8.90 The following expressions used in the Code are defined in section 27:

- ‘annual percentage rate’;
- ‘daily percentage rate’;
- ‘default rate’;
- ‘unpaid balance’; and
- ‘unpaid daily balance’.

*[Schedule 1, Part 2, section 27]*

8.91 Section 28 limits the amount of interest charges payable under a contract to the amount derived by applying the daily percentage rate to unpaid daily balances. *[Schedule 1, Part 2, section 28]*

8.92 A credit provider may not, under section 29, require payment of (or debit) interest in advance. A regulation is intended to be made that replicates the UCCC regulation which exempts the first payment of interest charged. Interest can be debited on the last day of the period to which the interest charge applies provided the amount debited is not part of the unpaid daily balance for that day. *[Schedule 1, Part 2, section 29]*

8.93 Section 30 prohibits the credit contract from providing for a higher rate of interest on default except when the debtor is in default, in respect of the amount in default and while the default continues. *[Schedule 1, Part 2, section 30]*

8.94 The requirements in Divisions 2 and 3 will apply where the credit is provided for persons investing in residential properties. It is therefore specifically provided that regulations can be made 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 this class of credit. *[Schedule 1, Part 2, sections 26A and 30A]*

### **Division 4 — Fees and charges**

8.95 Sections 31 and 32 enable the regulations to prohibit particular credit fees or charges and deal with the situation where fees or charges are passed onto other parties. *[Schedule 1, Part 2, sections 31 and 32]*

## **Division 5 — Credit provider's obligation to account**

8.96 Division 5 deals with the credit provider's obligations to provide periodic statements of account to the debtor.

8.97 The credit provider must provide the debtor with statements of account. Failure to do so is an offence of strict liability. The required frequency of these statements depends on the type of credit provided. There are also various circumstances in which a statement of account is not required, such as for a credit contract with a fixed interest rate for the entire term of the contract. *[Schedule 1, Part 2, section 33]*

8.98 The information to be contained in a statement of account is specified by section 34 and is:

- the period which the statement covers;
- opening and closing balances;
- credit provided during the statement period;
- identity of supplier;
- interest charges;
- fees and charges debited during the statement period;
- payments to or from account;
- amounts payable by debtor;
- insurance payments;
- alterations; and
- other prescribed information.

*[Schedule 1, Part 2, section 34]*

8.99 Section 35 provides that the opening balance of a statement of account must not exceed the closing balance of the previous statement.

*[Schedule 1, Part 2, section 35]*

8.100 Section 36 requires on request the credit provider to account to a debtor or guarantor statements of amounts owing and certain other matters within certain timeframes. Failure to do so is an offence of strict liability.

*[Schedule 1, Part 2, section 36]*

8.101 A statement may be provided orally, unless the request was in writing, in which case the statement must be given in writing [*Schedule 1, Part 2, subsection 36(3)*]. In the case of joint debtors or guarantors, the statement only needs to be provided to the requesting party [*Schedule 1, Part 2, subsection 36(4)*].

8.102 If the statement is not provided within specified timeframes, the Court may order the credit provider to provide a statement required under this Division or determine the amounts in relation to which the statement was sought. [*Schedule 1, Part 2, section 37*]

### **Disputed accounts**

8.103 Section 38 makes provision for a debtor to dispute accounts. A credit provider is to give a debtor a written explanation where a debtor disputes a particular liability, generally within 30 days of receiving the statement of account. A credit provider must not commence enforcement action until at least 30 days after the written explanation is provided. Where the Court has been asked to determine liability within 30 days of the credit provider's explanation, the credit provider must not commence enforcement proceedings without leave of the Court. Failure to observe this requirement is a strict liability offence with a maximum penalty of 50 penalty units. [*Schedule 1, Part 2, section 38*]

### **Dating and adjustment of debits and credits in accounts**

8.104 Debits or credits made by a credit provider to a debtor's account are taken to have been made on the date assigned to the debit or credit and not the date on which it is processed. A credit provider may subsequently adjust debits or credits so as to accurately reflect the legal obligations of the debtor and credit provider. However, in certain circumstances a debit or credit cannot be assigned a date other than the date on which it is processed, or on the subsequent adjustment of a debit or a credit, or on the account balance (for example, where the assignment or adjustment is not consistent with the credit contract). [*Schedule 1, Part 2, section 39*]

### **Certain transactions not to be treated as contracts**

8.105 Section 40 provides that the requirements for making new contracts do not apply to the provision of credit by authorised deferrals or waivers of money due under a contract, or by authorised changes to the contract. [*Schedule 1, Part 2, section 40*]

### **Part 3 — Related mortgages and guarantees**

8.106 Part 3, which replicates Part 3 of the UCCC, regulates the rights of the parties to a security transaction, namely mortgages and guarantees. The rationale behind the provisions in Part 3 is to regulate the rights of parties between themselves according to a single set of rules, regardless of the form of the transaction. Part 5 of the Code deals with ending and enforcing mortgages and guarantees.

#### **Division 1 — Mortgages**

##### ***Meaning of mortgage***

8.107 Division 1 applies to a mortgage (under which the mortgagor is a natural person or a strata corporation) that secures obligations under a credit contract or related guarantee (see section 7). Under the Code, ‘mortgage’ has an extended meaning (see Part 13). The definition catches all forms of possessory and non-possessory security. It also catches a seller’s retention of title, terms sale of land and the conditional sale of goods. However, mortgage does not include goods leases which are separately regulated in Part 11. [*Schedule 1, Part 2, section 41*]

8.108 Credit providers commit an offence when contravening this Division, or entering into a mortgage that is, or contains a provision which is, void or unenforceable. The offences in section 53 are strict liability and carry a maximum penalty of 50 penalty units. [*Schedule 1, Part 2, section 53*]

##### ***Requirements***

8.109 Section 42 requires a mortgage document to be in writing and signed by the mortgagor. The mortgage document can be included in the credit contract. If these requirements are not met, the mortgage is unenforceable and the mortgagee commits an offence. These form requirements are in addition to State and Territory laws. [*Schedule 1, Part 2, section 42*]

8.110 The credit provider is required to provide the mortgagor with a copy of the mortgage after it has been made, but need not do so where a copy has previously been provided to the mortgagor. [*Schedule 1, Part 2, section 43*]

##### ***Restrictions on mortgage***

8.111 The Code contains a range of measures to ensure the mortgagor’s obligations are not open-ended or all encompassing. The aim of these restrictions is to ensure that the mortgagee cannot claim, or place

restrictions on, goods or property of greater value than the mortgagee has right to under the credit contract.

- The mortgage document must disclose or identify property secured by it [*Schedule 1, Part 2, subsection 44(1)*].
- The mortgage document cannot charge all the property of the mortgagee [*Schedule 1, Part 2, subsection 44(2)*].
- A mortgage over property acquired after the mortgage is entered into is void except where the property is:
  - acquired with the credit provided;
  - described or identified in the mortgage;
  - goods acquired in replacement for, or as additions or accessories to, other goods subject to the mortgage [*Schedule 1, Part 2, section 45*].
- A mortgage over goods supplied from time to time under a continuing credit contract is void except where the mortgage securing payment is over specified goods [*Schedule 1, Part 2, section 46*].
- A mortgage that secures credit under another future credit contract or future-related guarantee is unenforceable unless the credit provider has provided a copy of the credit contract or proposed contract, and guarantee or proposed guarantee [*Schedule 1, Part 2, section 47*].
- A mortgage must not secure obligations under a credit contract unless each mortgagor is a debtor or a guarantor under a related guarantee [*Schedule 1, Part 2, subsection 46(1)*].
- A mortgage must not secure obligations under a guarantee unless each mortgagor is a guarantor or a debtor [*Schedule 1, Part 2, subsection 48(2)*].

***Maximum amount that can be secured***

8.112 Section 49 specifies the maximum amount that may be secured under a mortgage. A mortgage is void where it secures an amount greater than the amount of the debtor's liabilities under the credit contract, or the guarantor's liability under the guarantee, plus reasonable enforcement expenses. [*Schedule 1, Part 2, section 49*]

***Prohibited securities***

8.113 Unless the regulations provide otherwise, a mortgage must not be taken over employees' remuneration or employment benefits under a superannuation scheme. *[Schedule 1, Part 2, subsection 50(1)]*

8.114 An obligation under a credit contract cannot be secured by a cheque, or bill of exchange or promissory note, endorsed or issued by the debtor or guarantor. This prevents a credit provider taking a post-dated cheque from the debtor as security for future repayments, and using the potentially criminal consequences of having the cheque not be paid on presentation as a threat to induce repayment. *[Schedule 1, Part 2, subsection 50(6)]*

8.115 A mortgage must also not be taken over goods that are essential household goods or certain property used by the mortgagor to earn income by personal exertion. The objective of this provision is to address the situation where a credit provider takes a mortgage over essential household goods and threatens repossession of the essential household goods to obtain repayment from the borrower rather than selling the security, which in practice would have minimal resale value. *[Schedule 1, Part 2, subsections 50(2) to (5)]*

8.116 Essential household property is given the same meaning as in the *Bankruptcy Act 1966* and include property (including recreational and sports equipment) that is reasonably necessary for the domestic use of the bankrupt's household, having regard to current social standards (for example, sufficient beds for the members of the household, the only refrigerator, washing machine or television set in the home). Antiques are excluded from the definition. *[Schedule 1, Part 2, subsection 50(8)]*

***Assignment or disposal of mortgaged property***

8.117 Section 51 prohibits the mortgagor assigning or disposing of mortgaged property without the credit provider's consent or the authority of the Court. Failure to observe this requirement is a strict liability offence with a maximum penalty of 50 penalty units applies. A creditor provider must not unreasonably withhold consent or attach unreasonable conditions to the consent. A condition requiring equivalent security is not unreasonable. *[Schedule 1, Part 2, section 51]*

8.118 A credit provider may impose any condition when consenting to any such assignment or disposal of mortgaged property, including:

- requiring breaches of the credit contract to be remedied *[Schedule 1, Part 2, subsection 52(2)];*

- requiring the mortgagor and the assignee to enter into an agreement that the assignee agrees to pay amounts due under the mortgage and perform all other requirements of the mortgage [*Schedule 1, Part 2, subsection 52(3)*]; and
- requiring the mortgagor and assignee to pay specified reasonable costs incurred by the credit provider [*Schedule 1, Part 2, subsection 52(4)*].

## Division 2 — Guarantees

### *Meaning of guarantees*

8.119 Division 2 applies to a guarantee (under which the guarantor is a natural person or a strata corporation) to the extent it guarantees obligations under a credit contract or related guarantee (see section 8 which sets out guarantees to which the Code applies) [*Schedule 1, Part 2, section 54*]. It is intended that a regulation will be made that replicates the exclusion under the UCCC regulations for guarantees under dealer recourse arrangements.

8.120 Credit providers commit a strict liability offence when contravening this Division, or entering into a guarantee that is, or contains a provisions which is, void or unenforceable. A maximum penalty of 50 penalty units applies. [*Schedule 1, Part 2, section 62*]

## Requirements

8.121 The Code contains a number of measures aimed at enabling guarantors to make an informed decision about guaranteeing a credit contract and making sure that they understand and agree to the nature and extent of their obligations.

8.122 Section 55 provides that a guarantee must be in writing and signed by a guarantor [*Schedule 1, Part 2, section 55*]. It is intended that a regulation be made that replicates the UCCC warning notice. These form requirements are in addition to State and Territory laws such as the Statute of Frauds.

8.123 Before the guarantee is signed, the credit provider must give the prospective guarantor a copy of the credit contract (containing the matters that are required to be included in the contract document by section 17). Failure to do so makes the guarantee unenforceable. The guarantor must also be given a statutory information statement explaining their rights and obligations [*Schedule 1, Part 2, section 56*]. It is intended that a regulation will

be made that prescribes the statutory information statement under the UCCC regulations for the purposes of the Code.

8.124 Credit providers are required to provide the guarantor with a copy of the guarantee and related credit contract within 14 days of the guarantee being signed and provided to the credit provider. This does not apply if copies of the respective documents were previously provided to the guarantor. *[Schedule 1, Part 2, section 57]*

#### ***Guarantor's right to withdraw***

8.125 Section 58 enables the guarantor to withdraw from the guarantee by giving the credit provider written notice before the credit is first provided. The guarantor can also withdraw after credit is first provided if the credit contract differs in some material respect from the one given to them before signing. *[Schedule 1, Part 2, section 58]*

#### ***Extension of guarantee***

8.126 The Code prohibits 'all accounts or blanket guarantees'. Under the Code, a guarantee only covers liabilities under the initial debt and any additional liability that the guarantor agrees will be covered by the guarantee. An 'all accounts' guarantee is made unenforceable by section 59 except to the extent the guarantor is given a copy of the new credit contract, which is provided to be covered by the guarantee, and accepts the extension of the guarantee. *[Schedule 1, Part 2, section 59]*

#### ***Limitation of guarantor's liability***

8.127 Section 60 imposes the following limits on the liability of a guarantor:

- A guarantee is void to the extent that it exceeds the debtor's liability plus reasonable expense of enforcing the guarantee *[Schedule 1, Part 2, subsection 60(1)]*.
- A guarantor's liability is not affected by the debtor's death insolvency or incapacity (provided this is covered in the guarantee) *[Schedule 1, Part 2, subsection 60(2)]*.
- A guarantee for the liability of a debtor under 18 years of age may be unenforceable in certain circumstances *[Schedule 1, Part 2, subsection 60(3)]*.
- A guarantor may limit liabilities under a continuing credit contract *[Schedule 1, Part 2, subsection 60(4)]*.



- A guarantee is void to the extent it limits the guarantor's right to indemnity [*Schedule 1, Part 2, subsection 60(5)*].
- A guarantor's liabilities remain unchanged where the terms of the credit contract are changed, unless the credit provider gives the guarantor a written notice of the change and obtains their acceptance to the increased liabilities. The provision does not apply in specified circumstances, such as an increase in repayments specified in the contract [*Schedule 1, Part 2, section 61*].

#### **Part 4 — Changes to obligations under credit contracts, mortgages and guarantees**

8.128 The Code contains measures governing changes in obligations under credit contracts, mortgages and guarantees:

- made unilaterally by the credit provider;
- made by mutual agreement between the parties;
- made on account of hardship by the credit provider or by the Court.

8.129 These provisions generally replicate Part 4 of the UCCC which aim to facilitate variations to the credit contract. Part 4 is governed by the general principle that where the contract terms allow, the Code does not generally restrict the change but does require notice and a written record of the change to be given.

#### **Division 1 — Unilateral changes by credit provider**

8.130 The provisions in Division 1 regulate the process where a credit provider acts on a contractual term to unilaterally change a credit contract, mortgage or guarantee [*Schedule 1, Part 4, subsection 63(1)*]. The Division makes it clear that it will not apply to:

- a change to a new annual percentage rate, which is not determined by reference to a reference rate, if both the new rate and time of effect are ascertainable from the contract;
- an increase in repayments, if an automatic increase, as specified under the contract and both the increase and time of effect are ascertainable from the contract;

- an increase in the term of the credit contracts, if the increase occurs only because of an increase in the annual percentage rate or rates payable under the contract; and
- a change made under Division 3.

*[Schedule 1, Part 4, subsection 63(2)]*

8.131 The Code does not give the credit provider any power, additional to the contract terms, to unilaterally change a credit contract.

*[Schedule 1, Part 4, subsection 63(3)]*

### ***Interest rate changes***

8.132 Section 64 contains procedures for notice by credit providers of changes to annual percentage rates and changes in the manner in which interest is calculated or applied under credit contracts.

8.133 The credit provider must give written notice to the debtor of changes in annual percentage rates no later than when the change concerned takes effect. It is an offence not to provide this notice, with a maximum penalty of 100 penalty units *[Schedule 1, Part 4, subsection 64(1)]*. This notice requirement does not apply to a rate determined by referring to a reference rate, if the change is notified in a newspaper circulating throughout each State and Territory no later than when the change takes effect *[Schedule 1, Part 4, subsection 64(3)]*.

8.134 The notice requirement in subsection 64(1) can be met by publishing the change in a newspaper circulating throughout each State and Territory. If notice is provided in this form, the credit provider must give the debtor notice of the change before, or when the next statement of account is given, after the change takes effect. *[Schedule 1, Part 4, subsection 64(2)]*

8.135 Notice of changes in the manner in which interest is calculated or applied must be given at least 20 days before the change concerned takes effect. It will be an offence not to comply with the appropriate procedure (a maximum penalty of 100 penalty units applies). *[Schedule 1, Part 4, subsection 64(4)]*

8.136 The notice requirements in subsections 64(1) and (4) do not apply to changes that reduce the obligations of the debtor. *[Schedule 1, Part 4, subsection 64(5)]*

8.137 The offences in subsections 64(1), (2) and (4) are offences of strict liability. *[Schedule 1, Part 4, subsection 64(6)]*

### ***Repayment changes***

8.138 Section 65 sets out the notice requirements where a credit provider makes a unilateral change to the repayment obligations of the debtor under a contract. A credit provider is required to give at least 20 days notice in writing of:

- a change in the amount or frequency or time for payments by the debtor; or
- a change in the method of calculation of instalments or minimum repayments under a credit contract — this particularly applicable to credit cards.

*[Schedule 1, Part 4, section 65(1)]*

8.139 This requirement is modified in the following circumstances:

- where the change reduces the obligations of the debtor, or results in an extension of time for payment — the credit provider can give notice in the next statement of account sent to the debtor after the change in the contract terms *[Schedule 1, Part 4, section 65(2)]*; and
- where the amount or frequency or time for payments of instalments or minimum repayments is determined according to a calculation and only the calculation is included in the credit contract — the credit provider is only required to give notice of the way in which the calculation has been changed *[Schedule 1, Part 4, section 65(3)]*.

8.140 The offences in subsections 65(1) and (2), which carry a maximum penalty of 100 penalty units, are offences of strict liability. *[Schedule 1, Part 4, subsection 65(4)]*

8.141 The procedures do not apply to changes that occur while no repayments are required to be made. *[Schedule 1, Part 4, subsection 65(5)]*

### ***Credit fees and charges changes***

8.142 Section 66 sets out procedures for notice by credit providers of changes relating to credit fees or charges under credit contracts.

8.143 A credit provider must give written notice to a debtor of any such changes relating to credit fees and charges at least 20 days before the change concerned takes effect. It is an offence not to comply with the appropriate procedure (a maximum penalty of 100 penalty units applies). *[Schedule 1, Part 4, subsection 66(1)]*

8.144 The notice requirement in subsection 66(1) may be met by publishing the change in a newspaper circulating throughout each State and Territory. If notice is provided in this form, the credit provider must give the debtor notice of the change before, or when the next statement of account is given, after the change takes effect (a maximum penalty of 100 penalty units applies). [*Schedule 1, Part 4, subsection 66(2)*]

8.145 The notice requirements in subsection 66(1) do not apply to changes that reduce the obligations of the debtor or extend the time for payment. However, the credit provider must notify the debtor of these changes before or when the next statement of account is given, after the change takes effect (a maximum penalty of 100 penalty units applies). [*Schedule 1, Part 4, subsection 66(3)*]

8.146 The offences in section 66 are strict liability. [*Schedule 1, Part 4, subsection 66(4)*]

#### ***Changes to credit limits etc. in continuing credit contracts***

8.147 Section 67 deals with the decision by a credit provider not to provide any further credit under a continuing credit contract and the ability to increase credit limits.

8.148 The credit contract continues in force for any credit previously provided under the contract, noting that this provision does not prevent termination of the credit contract if permitted by the Code or contract. [*Schedule 1, Part 4, subsection 67(1)*]

8.149 Notice of the decision must be given by the credit provider to the debtor as soon as practicable after the decision is made, as well as after any decision to reduce the overall credit limit under the credit contract. This notice requirement does not apply if the debtor is in default. It is a strict liability offence not to comply with the appropriate procedure (a maximum penalty of 100 penalty units applies). [*Schedule 1, Part 4, subsections 67(2) and (3)*]

8.150 A credit provider cannot unilaterally increase a credit limit under a continuing credit contract unless it is upon the request of the debtor or with their written consent. [*Schedule 1, Part 4, subsection 67(4)*]

#### ***Other unilateral changes by credit provider***

8.151 Section 68 prohibits a credit provider from unilaterally changing a credit contract, mortgage or guarantee without first giving the other party no less than 20 days written notice setting out particulars of the change. It is a strict liability offence with a maximum penalty of 100 penalty units. [*Schedule 1, Part 4, section 68*]

8.152 Section 69 allows a credit provider to comply with sections 64, 65, 66 or 68, by only giving a person notice of a matter as it has been changed, rather than particulars of the change. The credit provider can only rely on this modification of the other provisions where the notice to the person makes clear that the matter has changed, or the credit provider issues to the person a new set of terms and conditions relating to the credit contract, mortgage or guarantee. *[Schedule 1, Part 4, section 69]*

8.153 Unless regulations prescribe otherwise, early termination charges or prepayment charges may also not be unilaterally increased by a credit provider if the annual percentage rate under a contract is currently fixed for a specified term (including the whole term) of the contract. *[Schedule 1, Part 4, section 70]*

### **Changes by agreement of parties**

8.154 Section 71 sets out notice procedures for credit providers regarding changes agreed by the parties to credit contracts, mortgages and guarantees. Notice of any such changes must be given not later than 30 days after the agreement. It will be a strict liability offence not to comply with the appropriate procedure (a maximum penalty of 100 penalty units applies). *[Schedule 1, Part 4, subsections 71(1) and (6)]*

8.155 The notice requirements in subsection 71(1) do not apply where the change defers or reduces the obligations of the debtor for a period of not more than 90 days or to an agreement to increase the amount of credit. *[Schedule 1, Part 4, subsection 71(2)]*

8.156 A credit provider must also give the debtor a written notice containing the information required by the regulations if the parties agree to increase the credit provided under a credit contract (a strict liability offence with a maximum penalty of 100 penalty units applies). *[Schedule 1, Part 4, subsections 71(3) and (6)]*

8.157 It is intended that a regulation will be made, which replicates the UCCC, requiring the following information to be contained in the warning notice:

- date of change in the contract;
- unpaid daily balance amount of credit increase;
- the total and to whom the amounts are payable;
- changes to the annual percentage rate;
- credit fees and charges payable after the change;

- current and future repayment details;
- any commission information under subsection 17(4); and
- any proposed increase in the term of the contract and new expiry date for the contract.

8.158 These notice provisions do not apply to changes on the grounds of hardship and unjust transactions. *[Schedule 1, Part 4, subsection 71(4)]*

### **Changes on grounds of hardship and unjust transactions**

8.159 A debtor can seek the credit provider's agreement to changes to the period of a credit contract together with postponement or reductions of repayments, or postponement of repayments under the contract, if the debtor:

- is unable reasonably (because of illness, unemployment or other reasonable cause) to meet obligations under the contract; and
- reasonably expects to be able to discharge its obligations if the terms of the contract were changed.

*[Schedule 1, Part 4, subsections 72(1) and (2)]*

8.160 A debtor's right to seek a change on the grounds of hardship is limited to credit contracts under which the maximum amount of credit does not exceed \$500,000. This amount may be increased by regulation. *[Schedule 1, Part 4, subsection 72(5)]*

8.161 Where a debtor does seek a change on the grounds of hardship, the credit provider must, within 21 days, respond to the application including the reasons for rejecting the application. The credit provider must also provide details of the external dispute resolution scheme it is a member of, and the debtor's rights under that scheme (a strict liability offence with a maximum penalty of 30 penalty units applies). *[Schedule 1, Part 4, subsections 72(3) and (4)]*

8.162 Where the credit provider agrees to the debtor's application, it must provide a notice of the change to the debtor and guarantor no later than 30 days after the date of the agreement (a strict liability offence with a maximum penalty of 50 penalty units applies). *[Schedule 1, Part 4, section 73]*

8.163 If the credit provider refuses an application for changes under section 72, the debtor may apply to the Court for change the terms of the

credit contract. The Court may make orders to change the terms of the credit contract after giving the debtor, credit provider and any guarantor a reasonable opportunity to be heard. The Court is also empowered to stay enforcement proceedings and to make other orders until it determines the application. A credit provider is entitled to apply to the Court to vary the original order. [Schedule 1, Part 4, sections 74 and 75]

### Reopening of unjust transactions

8.164 The Court can reopen transactions giving rise to a contract, mortgage or guarantee or a change to a contract, mortgage or guarantee, if satisfied that the circumstances in which it was entered into or changed were unjust, where unjust includes unconscionable, harsh or oppressive [Schedule 1, Part 4, subsections 76(1) and (7)]. However, the Court cannot reopen a transaction on the basis of it being unjust where an application may be made for the Court to review unconscionable interest or other charges under section 78 [Schedule 1, Part 4, subsection 76(6)].

8.165 The following principles apply to the interpretation of the term 'unjust' and the phrase 'unconscionable, harsh and 'oppressive':

- they should be given a construction consistent with the beneficial policy intentions of the legislation;
- the meanings of each concept may overlap but each word may also have an independent operation (so that a contract may be unjust because a term is oppressive or burdensome but not unconscionable); and
- the reference to 'unconscionable' encompasses both common law and statutory unconscionability.

8.166 In determining whether or not a contract, mortgage or guarantee is unjust, the Court must have regard to the public interest. The 'public interest' is a term that can bear different interpretations and is not fixed in meaning. In the lending context it can involve competing interests such as:

- the need for certainty in the determination of when a contract will be unjust (*Dale v Nichols Constructions Pty Ltd* [2003] QDC 453); or
- the desirability of protecting consumers where their sole residence is at risk (*Perpetual Trustee Company Ltd v Albert and Rose Khoshaba* [2006] NSWCA 41).

8.167 The Court must also consider ‘all the circumstances of the case’. This may include consideration of the following factors listed in subsection 70(2):

- consequences of compliance and non-compliance with all of the provisions of the contract, mortgage or guarantee;
- relative bargaining power of the parties, including whether terms were or could be negotiated at the time of the contract;
- whether provisions of the contract were unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of the parties;
- impact of age or physical and mental condition on protecting rights of the debtor, mortgagor or guarantor;
- the legibility of the contract;
- whether independent legal or other expert advice was obtained;
- whether the terms were adequately explained and understood;
- the adequacy of the credit provider’s measures to ensure the transaction was understood;
- whether unfair pressure, undue influence or unfair tactics were exerted over the debtor, mortgagor, or guarantor;
- whether the credit provider could have reasonably known at the time of entering or varying the contract that the debtor could not pay without substantial hardship;
  - An assessment by a licensee made under the obligations of Chapter 3 of the Credit Bill may be taken into consideration in determining whether the credit provider could have reasonably known at the time of entering or varying the contract the debtor could not have paid without substantial hardship. (See Chapter 3 of the explanatory memorandum for a detailed discussion of these assessments);
  - A contract may be found to be unjust for reasons other than it being unsuitable for the consumer. Conversely a not unsuitable contract may be found to be unjust. While



there are similarities in the wording between this paragraph and the obligations in Chapter 3, it may be that a contract will be unjust even where it is not unsuitable, or that a contract may be unsuitable but will not necessarily be unjust; or

- the provision applies to all payments due under the credit contract, including balloon payments (*Zhang v Mercedes-Benz Financial Services Australia Pty Ltd* [2008] VCAT 1939);
- whether the contract terms are justified given the risk undertaken by the credit provider;
- for a mortgage — void provisions under section 50;
- terms of other comparable transactions; and
- any other relevant factors.

*[Schedule 1, Part 4, subsection 76(2)]*

8.168 A contract, mortgage or guarantee will not necessarily be unjust because one or more of these criteria applies to the transaction. Conversely it may still be unjust even where none of these factors is made out.

8.169 The application of the unjust contract provisions requires a two step inquiry. First, the Court must determine whether the contract is unjust; and, second, where this is the case, the Court must decide what relief if any is appropriate. *[Schedule 1, Part 4, subsection 76(5)]*

8.170 The Court can only consider any injustice from circumstances that were reasonably foreseeable when the contract, mortgage or guarantee was entered into or changed. *[Schedule 1, Part 4, subsection 76(4)]*

### **Orders on reopening of the transaction**

8.171 Where a transaction is reopened as unjust, the Court is given power to make a range of orders that allow it flexibility in refashioning the bargain (for example, a partial setting aside of the agreement or varying the repayment obligations of a borrower or guarantor). *[Schedule 1, Part 4, section 77]*

## The Court may review unconscionable interest and other charges

8.172 The Court can annul or reduce a change to the annual percentage rate or rates under a credit contract, or annul or reduce an establishment fee or charge or a fee or charge payable on early termination of a credit contract or for prepayment of an amount under a credit contract, if satisfied that it is unconscionable. The Court may also make ancillary or consequential orders which could result in refunded interest or fees charged. *[Schedule 1, Part 4, subsection 78(1)]*

8.173 The only circumstances in which a change to the annual percentage rate or rates or a fee or charge payable on early termination or prepayment of an amount are unconscionable are where it appears to the Court that:

- in relation to changes to the annual percentage rate or rates — the change is unreasonable or unjustifiably discriminates the debtor *[Schedule 1, Part 4, paragraphs 78(2)(a) and (b)]*;
- in relation to an establishment fee or charge — the fee or charge is not equal to the credit provider's reasonable costs, or average reasonable costs in respect of the class of credit, of determining an application for credit and the initial administrative costs of providing the credit *[Schedule 1, Part 4, subsection 78(3)]*; and
- in relation to early termination fees or charges or prepayment of amounts — where the fees or charges or prepayment exceeds a reasonable estimate of the credit provider's loss *[Schedule 1, Part 4, subsection 78(4)]*.

## Representative proceedings

8.174 ASIC may make (and has standing to make) an application to the Court in relation to an unjust or unconscionable contract if it believes it is in the public interest. Such an action may only be brought within two years after the relevant contract is rescinded, discharged or otherwise comes to an end. It is not intended that an application by ASIC would oust the rights of a debtor, mortgagor or guarantor to bring an action; for example, if ASIC succeeds in obtaining a declaration that certain conduct is unjust, then individual borrowers or guarantors may be able to rely on that finding to seek individual relief according to the facts of their situation. *[Schedule 1, Part 4, sections 79 and 80]*

## Joinder of parties

8.175 Section 81 enables the Court to join third parties to proceedings, if they have an interest in the profits of a credit contract or mortgage, or a beneficial interest in a credit contract or mortgage. The Court may make orders affecting the persons if it holds the credit contract or mortgage to be unjust. *[Schedule 1, Part 4, section 81]*

## Part 5 — Ending and enforcing credit contracts, mortgages and guarantees

8.176 Part 5 ensures that a single set of rules applies to the termination and enforcement of credit contracts and mortgages regardless of the form of the transaction. The aim of the provisions in Part 5, which largely replicate Part 5 of the UCCC, is to ensure the credit provider is not able to make a windfall from early termination or default by the debtor. These provisions are related to Part 3 which contains measures regulating the form and content of mortgages and guarantees.

### Division 1 — Ending of credit contract by debtor

#### *Debtor's or guarantor's right to pay out contract*

8.177 The consumer has a statutory right to pay out the credit contract at any time, without needing to meet any formal conditions. The Code sets out the process for calculating the pay-out figure for fixed-term contracts. The pay-out figure includes the amount of credit and interest and other charges but only up to the date of termination. Reasonable enforcement expenses can be included. The credit provider can also charge an early termination fee if the contract provides for this. These provisions link to section 78 under which the court may set aside or vary an early termination fee on the grounds that it is unconscionable. The pay-out figure is reduced by any payments made and any rebate of the premium for consumer credit insurance and mortgaged property insurance (see section 148). *[Schedule 1, Part 5, section 82]*

8.178 The debtor or a guarantor is entitled to a statement of the pay-out figure for fixed-term contracts on providing a written request to the credit provider. A credit provider must give the statement within seven days after the request (a maximum penalty of 50 penalty units applies). The debtor or a guarantor may apply to the Court to determine this if the credit provider does not comply. This enables the debtor to find out exactly what is owed under the credit contract. *[Schedule 1, Part 5, sections 83 and 84]*

8.179 Any failure to provide the statement in accordance with the requirements of the Code, within seven days of the request, will be an offence of strict liability. [*Schedule 1, Part 5, subsection 83(5)*]

***Surrender of mortgaged goods and goods subject to sale by instalments***

8.180 Sometimes the seller of goods allows the buyer time to pay. In such cases the seller remains the owner of the goods until the final payment is made. Apart from the Code, this arrangement would be treated differently from the case where the buyer becomes the outright owner of the goods and gives a mortgage to secure the purchase price, for example, the owner would retain any surplus on sale. Consistent with the policy of treating functionally similar arrangements alike, section 85 contains measures to ensure the same principles apply to mortgages and sales by instalments:

- The buyer can return the goods to the credit provider or require the credit provider to sell the goods where they are in the credit provider's possession [*Schedule 1, Part 5, subsections 85(1) and (2)*].
- Where the goods are returned or the credit provider is required to sell the goods, the credit provider must give the debtor or mortgagor a written notice containing the estimated value of the goods and other information prescribed by the regulations. It is intended that a regulation will be made that replicates the UCCC prescribed written notice. Within 21 days after this notice the debtor or mortgagor is entitled, on request, to the return of the goods provided they are not in default under the credit contract [*Schedule 1, Part 5, subsections 85(3) and (4)*].
- The debtor can nominate a purchaser and the credit provider must sell the goods for the best price reasonably obtainable [*Schedule 1, Part 5, subsections 85(5)*].
- The credit provider must sell the goods (if not required to return them) as soon as reasonably practicable (or at a time agreed between the credit provider and the debtor or mortgagor) for the best price reasonably obtainable [*Schedule 1, Part 5, subsection 85(6)*].
- The sale proceeds (less any amounts the credit provider can deduct) must be credited to the debtor or mortgagor. The credit provider is entitled only to deduct from sale proceeds [*Schedule 1, Part 5, subsections 85(7) and (8)*]:

- the amount required to discharge the contract or guarantee;
- the amount payable to discharge any prior mortgage to which the goods were subject;
- the amount payable in successive discharge of any subsequent mortgages to which the goods were subject and of which the credit provider had notice;
- reasonable enforcement expenses; and
- reasonable expenses relating to possession and sale of mortgaged goods.

8.181 It is a strict liability offence for a credit provider not to comply with section 85 (a maximum penalty of 50 penalty units applies).  
*[Schedule 1, Part 5, subsections 85(10) and (11)]*

8.182 The Court may award compensation if it is not satisfied that the credit provider sold the goods as soon as reasonably practicable for the best price reasonably obtainable. The onus of proving that the section was complied with is on the credit provider. *[Schedule 1, Part 5, section 86]*

***One-off notice to be given the first time a direct debit default occurs***

8.183 Many credit products are offered on the basis that the debtor authorises repayment under a credit contract by direct debiting amounts against an account held by the debtor. As direct debits occur automatically at pre-arranged intervals (for example, monthly), the debtor may not become aware that they are in default for some time, where there are insufficient funds in the debtor's account. This may result in the debtor accruing numerous charges before they become aware of the default.

8.184 Section 87 aims to address this issue by requiring the credit provider to give the debtor (and any guarantor) a notice within 10 business days of the first direct debit payment failing in relation to a direct debit instruction.

8.185 Failure to do so is a strict liability offence with a maximum penalty of 50 penalty units. The default notice must contain the prescribed information. It is intended that a regulation will be made that prescribes the form and information to be contained in the direct debit default notice. *[Schedule 1, Part 5, section 87]*

## Division 2 — Enforcement of credit contracts, mortgages and guarantees

8.186 A credit provider's enforcement rights and obligations depend on the contract and security document and general law including State and Territory property laws. The Code overlays these rights and obligations so that regardless of the form of the transaction, the same outcomes occur.

8.187 The Code specifically:

- sets out the default notice procedures to be followed by a credit provider before the credit provider can begin enforcement proceedings against a defaulting debtor or mortgagor. Before enforcement proceedings, the credit provider must give a default notice, which provides the debtor or guarantor or mortgagor a period of 30 days from the date of the notice to remedy the default. Failure to do so attracts strict liability offence with a maximum penalty of 50 penalty units. The default notice must contain a number of matters under subsection 88(3) including information prescribed by the regulations directed at ensuring the person in default has relevant information relating to the default, date after which enforcement action may begin, debtors' rights and consequences of default. It is intended that a regulation will be made prescribing the form and information to be included in the notice under the UCCC [*Schedule 1, Part 5, subsections 88(1) to (4)*];
- sets out certain circumstances where a default notice is not required, such as where the credit provider has made reasonable attempts to locate the debtor or mortgagor without success or the court has authorised the start of enforcement proceedings [*Schedule 1, Part 5, subsection 88(5)*];
- provides for the right of a debtor or mortgagor to remedy a default within the period specified in a default notice. This has the effect of reinstating the contract or mortgage rendering inoperative any acceleration clause [*Schedule 1, Part 5, section 89*];
- sets out the procedures to be followed by a credit provider before the credit provider can enforce a judgment against a guarantor. Generally, the creditor provider must obtain a judgment against the debtor which remains unpaid for 30 days after the written demand for payment (strict liability offence with a maximum penalty of 50 penalty units applies). There are circumstances where a judgment is not required,

such as where the debtor is insolvent [*Schedule 1, Part 5, section 90*];

- prevents a credit provider from repossessing mortgaged goods, without the consent of the Court, if the amount owing is less than 25 per cent of the amount of credit or \$10,000 (whichever is the lesser) (a maximum penalty of 100 penalty units applies) [*Schedule 1, Part 5, subsection 91(1)*]. This is also an offence of strict liability [*Schedule 1, Part 5, subsection 91(3)*]. This restriction does not apply to continuing credit contracts or where the credit provider reasonably believes:
  - the debtor has or intends to remove or dispose of the goods; or
  - that urgent action is necessary to protect the goods [*Schedule 1, Part 5, subsection 91(2)*];
- restricts the operation of acceleration clauses until a default notice is provided, unless a default notice is not required under subsection 93(2). Section 92 defines an acceleration clause as a clause that allows the credit provider, either on default, or at the lender's discretion, to require repayment of the loan, therefore requiring the debtor to pay the outstanding balance of the loan immediately. An acceleration clause does not include any such term in a credit contract or mortgage that is an 'on demand facility', defined in subsection 92(2). An on demand facility is a credit contract or mortgage where the total amount outstanding is repayable on demand by the credit provider and no agreement, arrangement or understanding exists that repayment will only be demanded on the occurrence or non-occurrence of a particular event [*Schedule 1, Part 5, section 93*];
- gives the debtor, mortgagor or guarantor a right to request the credit provider to postpone enforcement proceedings where the maximum amount of credit is not more than \$500,000 (unless the regulations set a higher amount). The credit provider must respond to the request within 21 days, and, if they do not agree to the request, they must give reasons for this decision to the consumer. Failure to do so attracts a penalty of 30 penalty units [*Schedule 1, Part 5, section 94*]. This is an offence of strict liability [*Schedule 1, Part 5, subsection 94(3)*]. Section 95 sets out the effect of the negotiated postponement. The default notice is taken to not have been given if the debtor, mortgagor or guarantor complies with the conditions of postponement. Generally a credit provider

must give written notice of the agreed conditions no later than 30 days after the agreement is reached. Failure to do so attracts a penalty of 100 penalty units [*Schedule 1, Part 5, section 95*]. This is an offence of strict liability [*Schedule 1, Part 5, subsection 95(3)*]. The debtor may apply to the Court for a postponement if unable to negotiate a postponement with the credit provider [*Schedule 1, Part 5, section 96*]; or

- the credit provider may apply to the Court for a variation to a Court order made under this Division [*Schedule 1, Part 5, section 97*].

### **Enforcement procedures for goods mortgages**

8.188 The Code contains a range of consumer protection measures directed at mortgages of goods, however, it does not regulate the enforcement of mortgages over land, which is left to the general law and State and Territory legislation, except where it relates to default notices.

8.189 These provisions aim to address prevalent abuses and also reflect the fact that goods depreciate rapidly in value and therefore a forced sale is likely to result in a substantial shortfall against the amount of credit outstanding. The provisions:

- restrict entry to residential premises to seize mortgaged goods, unless the occupier has given written consent to enter or the Court has authorised entry. The regulations may prescribe procedures for obtaining and giving consent. It is intended that regulations will be prescribed which replicate the UCCC prescribed procedures. A contravention of this section is a strict liability offence with a penalty of 50 penalty units [*Schedule 1, Part 5, section 99*];
- allow the Court to order entry to residential premises to allow the credit provider to take possession of the mortgaged goods [*Schedule 1, Part 5, section 100*]. The Court may also order a person to deliver the mortgaged goods to a credit provider at a specified time or place or within a specified period [*Schedule 1, Part 5, section 101*]. This is an offence of strict liability [*Schedule 1, Part 5, subsection 101(4)*];
- require the mortgagor to inform the credit provider of the location of the goods or assist the credit provider in locating the goods. A mortgagor who does not comply commits a strict liability offence. A maximum penalty of 50 penalty units applies [*Schedule 1, Part 5, section 98*];



- require the credit provider to give the mortgagor, within 14 days after repossession and before the sale, a notice setting out the estimated value of the goods, enforcement expenses and a statement of the mortgagor's rights and obligations in the prescribed form. It is intended that a regulation will be made that replicates the form and information requirements under the UCCC regulations for the statement of mortgagor's rights and obligations [*Schedule 1, Part 5, subsection 102(1)*];
- specify that, after repossession, a credit provider must not dispose of the goods within 21 days after the date of the notice (unless the Court otherwise authorises) and enable the debtor to recover the goods by reinstating the contract by paying out the arrears and enforcement expenses or paying out the contract in full [*Schedule 1, Part 5, subsections 102(2) and (4)*];
- prohibit the credit provider from disposing of the goods after the 21 days if a stay of enforcement proceedings is in force, or an application under section 70 has not been determined, and until any appeal period has elapsed [*Schedule 1, Part 5, subsection 102(3)*];
- a contravention of section 94 is a strict liability offence and attracts a penalty of 50 penalty units [*Schedule 1, Part 5, subsection 102(5)*];
- give the mortgagor a right to nominate a buyer at the estimated value or higher at which the credit provider must offer to sell to the nominated buyer. A contravention of subsection 103(2) is a strict liability offence with a maximum 50 penalty units [*Schedule 1, Part 5, section 103*];
- specify if payment is not made 21 days after the notice under section 102 is given, the credit provider must sell the goods for the best price reasonably obtainable. The credit provider must account for the proceeds and to give the debtor a further notice after the sale, setting out the gross amount realised on the sale, the net proceeds of the sale, the amount required to pay out the credit contract or the amount due under the guarantee, any further recovery action proposed to be taken by the credit provider, and any further information prescribed by the regulation. It is intended that a regulation will be made replicating the UCCC regulation requiring an itemised account of each deduction made from the gross amount realised on sale. A contravention of section 103 is a strict

liability offence and attracts a penalty of 50 penalty units [Schedule 1, Part 5, section 104]; and

- allow a credit provider that sells mortgaged goods to only deduct specified amounts from sale proceeds, for example, the amounts required to discharge the contract and the credit provider's reasonable enforcement expenses [Schedule 1, Part 5, section 105].

8.190 The Code also provides for rights to compensation if the requirements for the sale of mortgaged goods are not met. Section 106 gives the debtor or mortgagor and a mortgagee under a previous mortgage the right to apply to the Court for an order for compensation or payment by a credit provider for any loss suffered. The Court may make an order if it is not satisfied that the credit provider complied with the procedures for the sale of mortgaged goods. The onus of proving that a sale was exercised in accordance with this Division is on the credit provider that exercised it. [Schedule 1, Part 5, section 106]

### **Enforcement expenses**

8.191 Section 107 prohibits a credit provider from recovering any more than reasonable enforcement expenses from a debtor, mortgagor or guarantor and imposes a penalty if the credit provider does not comply. The court may determine liability to a dispute about the amount of enforcement expenses that may be recovered by the credit provider. [Schedule 1, Part 5, section 107]

### **Mortgagor's remedies**

8.192 The Code inserts a new Division 6 dealing with a mortgagor's remedies. The new provisions give a mortgagor additional rights against a credit provider who takes possession of mortgaged goods in breach of the requirements in Division 2 (enforcement of credit contracts, mortgages and guarantees) or Division 4 (enforcement procedures for goods mortgaged).

8.193 The new sections enable a mortgagor to apply to the Court to regain possession of the goods even though the relevant default has not been remedied. A person who contravenes an order under subsection 108(1) commits a strict liability offence, which attracts a penalty of 30 penalty units. [Schedule 1, Part 5, section 108]

8.194 If an order is made under section 108, the court may order a person who has possession of the goods to deliver them to the mortgagor at a specified time or place or within a specified period. A person who

contravenes an order under subsection 109(1) commits a strict liability offence, which attracts a penalty of 30 penalty units. [*Schedule 1, Part 5, section 109*]

8.195 The Court may make other ancillary or consequential orders the Court considers appropriate where it makes an order under this Division. [*Schedule 1, Part 5, section 110*]

## Part 6 — Penalties for defaults of credit providers

8.196 Part 6 sets out a penalty regime which generally replicates the penalty provisions in Part 6 of the UCCC. The provisions support the ‘truth in lending’ objective of the Code by deterring contraventions of the Code. In addition, Part 6 provides an avenue for debtors to be compensated for loss suffered as a contravention of a provision.

### Penalties for breach of key disclosure and other requirements

8.197 Under the Code a penalty may be ordered where the credit contract fails to disclose a key requirement. The key requirements are different depending whether the credit contract is or is not a continuing credit contract.

**Table 8.1**

<i>Key requirements in connection with a credit contract (other than a continuing credit contract)</i>	
<b>Non-disclosure in the credit contract</b>	
Subsection 17(3)	amount of credit
Subsection 17(4)	annual percentage rate or rates
Subsection 17(5)	calculation of interest charges
Subsection 17(6)	total amount of interest charges payable
Paragraphs 17(8)(a) and (b)	only in respect of retained credit fees and charges
Subsection 17(9)	changes affecting interest and credit fees and charges
Subsection 17(11)	default rate
Paragraphs 17(15)(a) and (b)	name and amount payable to the insurer
<b>Excessive obligation imposed by a credit contract at the time a contract was entered into</b>	
Subsection 23(1)	prohibited monetary obligations

[*Schedule 1, Part 5, subsection 111(1)*]

**Table 8.2**

<i>Key requirements in connection with a continuing credit contract</i>	
<b>Non-disclosure in the credit contract</b>	
Paragraph 17(3)(b)	maximum amount of credit or credit limit
Subsection 17(4)	annual percentage rate or rates
Subsection 17(5)	calculation of interest charges
Paragraphs 17(8)(a) and (b)	only in respect of retained credit fees and charges
Subsection 17(9)	changes affecting interest and credit fees and charges
<b>Excessive obligation imposed by credit contract</b>	
Subsection 23(1)	prohibited monetary obligations
<b>Non-disclosure in the periodic statement of account</b>	
Subsection 34(6)	amount of the interest charge debited to account, timing of the debit, annual percentage rate details
Section 35	opening balance not to exceed closing balance of last statement.

*[Schedule 1, Part 5, subsection 111(2)]*

8.198 A key requirement relating to a disclosure or statement of account extends to requirements set out in Part 2 as to the manner in which the disclosure or statement is to be made. *[Schedule 1, Part 5, subsection 111(3)]*

### **Who can apply for a penalty?**

8.199 The Code gives a party to a credit contract or a guarantor or ASIC the right to apply for a penalty. However, a debtor or guarantor cannot seek a penalty order where the credit provider or ASIC has applied for an order in respect of the same contravention. However, this does not prevent an application from being made for compensation under section 118. *[Schedule 1, Part 5, section 112]*

8.200 Where a credit provider makes an application under Part 6, it must notify ASIC *[Schedule 1, Part 5, subsection 119(3)]*. ASIC may then apply to be joined as a party in order to represent the public interest and the interests of debtors *[Schedule 1, Part 5, section 120]*.

## **The Court's discretion regarding penalties**

8.201 Where an application to the Court is made, the Court must declare whether or not the credit provider has contravened a key requirement. *[Schedule 1, Part 5 subsection 113(1)]*

8.202 However, where the Court decides a key requirement has been contravened, it has the discretion to impose a penalty. The purpose of this provision is to allow the credit provider, in the course of their application, to seek a declaration as to whether or not their conduct has in fact breached a key requirement; that is, a credit provider can bring an application without having to first concede that they have breached the Code. *[Schedule 1, Part 5, subsection 113(2)]*

## **Other relevant matters in penalty proceedings**

### *General matters*

8.203 The Code requires the Court to consider a number of factors when determining whether to impose a penalty and the quantum of any such penalty. The Court must take into account the following factors:

- the conduct of the credit provider and the debtor before and after the credit contract was entered into;
- whether the contravention was deliberate;
- the loss, if any, suffered by the debtor because of the contravention;
- when the credit provider first became aware, or ought reasonably to have become aware, of the contravention;
- any systems or procedures of the credit provider to prevent or identify contraventions;
- whether the contravention could have been prevented by the credit provider;
- any action taken by the credit provider to remedy the contravention or compensate the debtor or to prevent further contraventions;
- the time taken to make the application and the nature of the application; and
- any other matter the court considers relevant.

*[Schedule 1, Part 5, subsection 113(4)]*

***Related contraventions***

8.204 Where a contravention of a key requirement occurs because of another contravention of a key requirement, the Court must consider it a contravention of the same kind. Where a key requirement contains several requirements (for example, subsection 17(5) requires the contract document to contain the method of calculation and frequency with which interest is charged), the Court must treat contraventions of more than one of those requirements as a single contravention. *[Schedule 1, Part 5, subsection 113(5)]*

***Prudential standing***

8.205 When considering whether or not to impose any penalty on the credit provider for contravening a key requirement, the Court must have regard primarily to the prudential standing of the credit provider (or any of its subsidiaries) if the credit provider takes deposits or is a borrowing corporation; and requests the Court to have regard to its prudential standing. The aim of this provision was to protect smaller credit providers who take deposits (for example, credit unions) from the impact of a penalty that may affect the viability of the entity and the investments of its depositors. *[Schedule 1, Part 5, subsection 113(3)]*

***Suppression of publication of application***

8.206 If the Court considers it appropriate, it may order that particulars of, or any matters relating to, an application for an order under this Division may not be published. *[Schedule 1, Part 5, subsection 113(6)]*

**The amount of the penalty**

8.207 The Code imposes different maximum limits on the amounts that may be ordered as a penalty depending on who makes the application.

***Applications by the debtor or guarantor***

8.208 Where the debtor or guarantor makes the application, the maximum penalty is generally the interest payable under the contract, or the interest payable for the relevant billing cycle if the contravention was in respect of a statement of account. The Court may impose a greater penalty that is not less than the amount of the loss suffered where it is satisfied that the debtor has suffered loss. *[Schedule 1, Part 5, section 114]*

8.209 The Code enables any order to pay a debtor or guarantor a penalty may be set off against any amount that is due or becomes due

under the credit contract. Where there is no such amount, the amount of the penalty is a debt due by the credit provider to the debtor or guarantor. The Court may include any other directions it considers appropriate in relation to the payment of the amount owed as a result of the order.

*[Schedule 1, Part 5, section 115]*

8.210 To make these provisions operational in the Commonwealth context, a special appropriations provision has been introduced. This is to ensure that it is compliant with Section 81 of the Australian Constitution.

### ***Applications by the credit provider or ASIC***

8.211 If the credit provider or ASIC makes the application, the Code caps the maximum penalty at \$500,000 for all contraventions of the same key requirement in Australia. Payment of a penalty, where the credit provider or ASIC makes the application, is to be paid to ASIC on behalf of the Commonwealth. *[Schedule 1, Part 5, sections 116 and 117]*

8.212 Notwithstanding an application being made by the credit provider or ASIC, the debtor or guarantor may make a separate application for compensation for loss arising from convention of a key requirement. The amount of compensation cannot exceed the loss suffered and does not affect the amount of the penalty imposed under section 116. *[Schedule 1, Part 5, section 118]*

8.213 Where a credit provider or ASIC applies to the Court for an order, the application may apply to:

- any one or more credit contracts; and
- all or any class of credit contracts entered into during a specific period.

*[Schedule 1, Part 5, subsection 119(1)]*

8.214 The Court can require such applications to be published in a newspaper circulating throughout one or more States or Territories.

*[Schedule 1, Part 5, subsection 119(2)]*

### **Directions pending the Court's decision**

8.215 The Court may, before finalising an application by a debtor or guarantor, make interlocutory orders to protect the interest of debtors or guarantors that may be affected by the application. Such directions may include restrictions on credit providers taking enforcement action under a credit contract affected by the application. In the absence of such directions, no restrictions apply on the credit provider's ability to enforce

a debtor's obligations under an affected contract, or to assert their rights over any property taken as security. Credit providers may apply to the Court for a variation of the direction. *[Schedule 1, Part 5, section 121]*

### **Time limit for applications**

8.216 The Code imposes a time limit of six years (from the date of the breach) in which a person may bring an application relating to a contravention of a key requirement. The aim of this provision is to provide a suitable time period in which contravention can be uncovered while the credit provider is still liable for a penalty. *[Schedule 1, Part 5, section 123]*

### **Effect of penalty on criminal liability**

8.217 An order for a credit provider to pay a penalty under the Code does not affect their criminal liability for any other offences against the Code or the regulations. *[Schedule 1, Part 5, section 122]*

### **Effect of other contraventions**

8.218 Where a credit provider contravenes a requirement under the Code (other than a key requirement), the Court may make orders (on the application of ASIC or any person affected by the contravention) that the credit provider make restitution or pay compensation to any person affected by the contravention and any other consequential orders it considers appropriate. *[Schedule 1, Part 5, section 124]*

## **Part 7 — Related sale contracts**

8.219 Part 7 establishes a statutory scheme of linked credit provider liability, with the aim of protecting the consumer from insolvency of a supplier by ensuring the consumer has at least one defendant (the credit provider) capable of compensating it for loss.

8.220 The related sale contract provisions in Part 7 substantially replicate Part 7 of the UCCC.

8.221 The main elements of the linked credit provider provisions are:

- the supplier remains the party primarily liable to customers for breach of the contract of sale;



- the customer has the additional right of claiming damages from the linked credit provider up to the amount payable by the customer under the credit contract;
- where a customer brings an action against a linked credit provider the supplier must generally be joined in the proceedings;
- judgments against linked credit provider are only enforceable to the extent that the judgment against the supplier is unsatisfied; and
- the supplier is liable to indemnify the credit provider for any loss or liability incurred.

## **Definitions and application of Part 7**

### *Sale contracts*

8.222 Part 7 applies to sale contracts (or proposed sale contracts) for the sale of goods or supply of services financed (or proposed to be financed) by consumer credit. [Schedule 1, Part 7, sections 125 and 126]

### *Linked credit provider*

8.223 A linked credit provider means a credit provider:

- with whom the supplier has a contract, arrangement or understanding to supply credit to consumers in respect of goods or services it supplies;
- to whom the supplier regularly refers persons for the purpose of obtaining credit;
- whose credit is offered or made available (including making available contracts or application forms) to consumers by the supplier; or
- with whom the supplier has a contract, arrangement or understanding under which contracts, applications or offers for credit from the credit provider may be signed by persons at the supplier's premises.

[Schedule 1, Part 7, subsection 127(1)]

***Tied continuing credit***

8.224 For the purposes of the Code, subsection 127(2) defines tied continuing credit as credit provided to a debtor for the purchase of goods or services supplied by a supplier where the credit provider is a linked credit provider. [Schedule 1, Part 7, subsection 127(2)]

***Tied loan contract***

8.225 Subsection 127(3) defines a ***tied loan contract*** as a credit contract (other than a continuing credit contract) between the debtor and the credit provider where the credit provider (is a linked credit provider of a supplier) and knows or ought to know that the credit is to finance goods and services supplied by the supplier. [Schedule 1, Part 7, subsection 127(3)]

**Liability of credit providers for suppliers' misrepresentations**

8.226 Section 128 makes a credit provider liable for representations, warranties or statements made by a supplier of goods or services to a debtor in relation to a relevant tied loan contract or tied continuing credit contract. The credit provider is entitled to be indemnified by the person who made the representation, warranty or statement and any person on whose behalf it was made. [Schedule 1, Part 7, section 128]

**Liability of credit providers in relation to goods**

8.227 The provisions in sections 129 to 133 are generally in the same terms as section 73 of the *Trade Practices Act 1974*, except that they also apply to unincorporated credit providers.

***Right to damages***

8.228 Section 129 establishes the joint liability of a credit provider (together with a supplier) for loss or damage suffered by a debtor as a result of misrepresentation, breach of contract or failure of consideration in relation to a credit contract for the supply of credit by a linked credit provider in respect of the supply of goods or services. [Schedule 1, Part 7, subsection 129(1)]

8.229 The provision also sets out the circumstances for credit providers' defences to proceedings about contracts that are linked:

- Where the debtor independently approached the credit provider — this is a complete defence;
- For a tied loan contract:

- before it became linked, the credit provider after due inquiry, was satisfied as to the supplier’s good financial standing and business conduct; and
- after becoming linked, but before the contract was entered into, the credit provider had no reason to suspect that the debtor might be entitled to recover for loss or damage suffered as a result of the supplier’s conduct, or that the supplier might be insolvent;
- For a tied continued credit contract, because of the nature and volume of the business carried on by the linked credit provider and any other relevant matters, if the linked credit provider had no reason to suspect that a breach might occur.

*[Schedule 1, Part 7, subsection 129(2)]*

***Limits on debtor’s right of action***

8.230 Section 130 contains provisions about the limits on the debtor’s right of action against the linked credit provider under section 129.

8.231 The debtor may set off the credit provider’s liability under that provision in proceedings *[Schedule 1, Part 7, subsection 130(1)]*. The rights of the debtor to bring proceedings solely against the credit provider are limited (but not in the case of an insolvent supplier that cannot be located or where a judgment would not be satisfied) as is the amount of the liability of the credit provider *[Schedule 1, Part 7, subsections 130(2) to (4)]*. The amount is not to exceed the sum of:

- the amount of credit under the tied loan contract or tied continuing credit contract;
- the interest (if any) or damages in the nature of interest allowed or awarded against the linked credit provider by the Court; and
- the amount of costs (if any) awarded by the Court against the linked credit provider or supplier or both.

*[Schedule 1, Part 7, subsection 130(4)]*

8.232 Procedures for enforcement of judgments against the linked credit provider in relation to the liability are also set out. If a debtor obtains judgment against both the supplier and the linked credit provider, it may not be enforced against the credit provider unless demand has been made on the supplier and the demand remains unsatisfied for 30 days.

*[Schedule 1, Part 7, subsections 130(5) and (6)]*

***Liability of supplier***

8.233 Section 131 establishes the liability of the supplier to the linked credit provider (unless otherwise agreed between the parties) for the loss suffered by the credit provider as a result of liability under section 129. Unless the Court otherwise determines, the liability of the supplier includes the linked credit provider's cost of defending the claim. *[Schedule 1, Part 7, section 131]*

***Interest***

8.234 Courts may award interest to debtors against a supplier or a linked credit provider from the time when the debtor becomes entitled to recover the amount until the date of the judgment at a rate prescribed by the regulations. It is intended that a regulation will be made that replicates the UCCC prescribed rate of interest (that is, the annual percentage rate under the relevant credit contract as at the date of the judgment or the date immediately before the contract was terminated if the contract is no longer in force). *[Schedule 1, Part 7, section 132]*

***Subrogation of credit provider***

8.235 Section 133 subrogates a linked credit provider found liable in proceedings under section 129 (to the extent that the judgment is enforced against the credit provider) to the rights that the debtor would have had against the supplier or any other person but for the judgment as a result of the cause of the liability. *[Schedule 1, Part 7, section 133]*

**Termination of related transactions**

***Contract conditional on obtaining credit***

8.236 A right to terminate a sale contract is conferred by section 134 on a purchaser of goods or services where the purchaser failed to obtain credit on reasonable terms and made it known to the supplier that the credit was required. This applies to contracts where the goods and services have been supplied, but does not apply to a sale contract for real property unless the supplier was aware that the purchaser intended to obtain the credit from the supplier or the linked credit provider. *[Schedule 1, Part 7, subsections 134(1), (2) and (4)]*

8.237 Table 8.3 sets out the rights resulting from termination.

**Table 8.3**

Supplier	If goods returned — entitled to reasonable compensation for damages or deterioration of goods (other than fair wear and tear) and the reasonable value of the service supplied under the sale contract. If goods not returned — entitled to cash price of goods.
Purchaser	Entitled to a refund of the money paid under the sale contract (subject to the supplier's entitlement).

*[Schedule 1, Part 7, subsection 134(3)]*

***Termination of tied credit contract where sale contract terminated***

8.238 Section 135 entitles a debtor to terminate a tied loan contract or a tied continuing credit contract if the related sale contract is rescinded or discharged. The termination has the effect of terminating any related guarantee or mortgage. The termination provisions do not apply if the credit provided was not induced by the supplier or credit provider.

*[Schedule 1, Part 7, subsections 135(1), (2) and (7)]*

8.239 Table 8.4 sets out the rights resulting from the termination.

**Table 8.4**

Credit provider	Entitled to recover from the debtor any part of the amount of credit that has not been paid to the supplier, from any mortgagor or guarantor, any secured amount of credit not paid to the supplier, and from the supplier any amount of any loss suffered as previously agreed.
Debtor	Entitled to recover from the credit provider any interest charges or other amounts paid.
Any mortgagor or guarantor	Entitled to recover from the credit provider any amounts paid.

*[Schedule 1, Part 7, subsections 135(3) to (5)]*

8.240 A supplier must notify a linked credit provider that a sale contract has been rescinded or discharged. Failure to do so is an offence which carries a maximum penalty of 50 penalty units. *[Schedule 1, Part 7, subsection 135(6)]*

***Termination of a linked maintenance services contract if a credit contract is terminated***

8.241 Section 136 entitles a debtor to terminate a sale contract to supply maintenance services, and to recover a proportionate rebate of the consideration paid, if a related tied loan contract or tied continuing credit contract is rescinded or discharged before the end of the sale contract. The termination provisions do not apply if the credit provided was not induced by the supplier or credit provider.

8.242 The regulations may prescribe how and when the debtor must be informed and the manner of calculating the proportionate rebate. It is intended that a regulation will be made that replicates the time, form, content and formula used in the UCCC regulations. It is an offence for a credit provider not to notify a debtor of their rights in the prescribed manner. It is intended that a regulation will be made that replicates the form and time (that is, 21 days) prescribed under the UCCC regulations. A strict liability offence with a maximum penalty of 50 penalty units applies. *[Schedule 1, Part 7, section 136]*

***Termination of contracts under this Part***

8.243 An entitlement to terminate a sale contract or credit contract under Part 7 is to be exercised in writing *[Schedule 1, Part 7, section 137]*. The Court has power to make orders about the termination of a contract under Part 7 *[Schedule 1, Part 7, section 138]*. Part 5, relating to ending and enforcing credit contracts, mortgages and guarantees, does not apply to the termination of a contract under Part 7 *[Schedule 1, Part 7, section 139]*.

***Other provisions***

8.244 A supplier is prohibited from:

- requiring a purchaser of goods or services to apply for, or obtain, credit from a particular credit provider (the offence carries a maximum penalty of 100 penalty units) *[Schedule 1, Part 7, section 140]*; or
- demanding or accepting payment for goods or services in the form of a post-dated bill of exchange or promissory note with a face value of more than the cash price of the goods or services (the offence carries a maximum penalty of 100 penalty units) *[Schedule 1, Part 7, section 141]*.

8.245 In bringing the UCCC into the Commonwealth jurisdiction, breaches of these provisions have also been made offences of strict liability. *[Schedule 1, Part 7, subsections 140(2) and 141(3)]*

## Part 8 — Related insurance contracts

8.246 Part 8 of the Code deals with insurance contracts that are connected with the credit being provided to the debtor. The cost of insurance is often financed under a credit contract and can add substantially to the cost of credit. Further, insurance over mortgaged property is usually required to be taken out under the terms of the mortgage document.

8.247 Part 8 of the Code complements the *Insurance Contracts Act 1984* by providing targeted measures directed at credit providers, suppliers and insurers that limit the way in which insurances are packaged with credit, to address inappropriate sales. Their aim is to ensure that consumers turn their minds to the best insurance product at the point of sale.

8.248 The measures replicate Part 8 of the UCCC and include:

- restrictions on requiring that insurance be taken out or arranged by the credit provider or supplier;
- restrictions on financing insurance premiums under a credit contract;
- limits on commissions paid by an insurer; and
- automatic termination of an insurance contract where the credit contract is terminated.

### Meaning of a credit-related insurance contract

8.249 Section 142 defines a credit-related insurance contract, for the purposes of the Code:

- as insurance over mortgaged property, where the mortgaged property secures the obligations of the debtor under the credit contract;
- consumer credit insurance (as defined in Part 13), where the insurance insures the obligations of the debtor under the credit contract; and
- the Code does not apply to insurance over mortgaged property that is insurance for an extended period of warranty for goods.

*[Schedule 1, Part 8, section 142]*

8.250 Insurance is voluntary under section 143 except for compulsory insurance (as defined by Part 13), mortgage indemnity insurance and insurance over mortgaged property. The aim of this provision is to prevent ‘insurance forcing’ where credit is made available on condition that insurance is also taken out or taken out with a particular insurer. This means the consumer cannot be required to take out consumer credit insurance. *[Schedule 1, Part 8, subsection 143(1)]*

8.251 There is no requirement for the debtor or guarantor to take out insurance or pay the cost of insurance if the credit provider or supplier has already arranged insurance. Nor can the credit provider or supplier misrepresent that voluntary insurance is required. Where the credit provider or supplier can lawfully insist on insurance, the debtor or guarantor cannot be required to take out insurance with a particular insurer, or to take out insurance, where any of the terms on which the insurance is provided are unreasonable. A breach of the section is an offence of strict liability and a criminal offence, with a maximum penalty of 100 penalty units. *[Schedule 1, Part 8, subsections 143(1) to (3)]*. The insured is also entitled to recover the whole premium paid under the contract from the credit provider or supplier. *[Schedule 1, Part 8, subsections 143(4)]*

8.252 Credit providers or suppliers often offer reductions in the cost of credit as an incentive for consumers to acquire credit and insurance products together (that is, this combination of products is usually referred to as ‘bundling’). Section 143 does not prohibit credit providers or suppliers offering or agreeing to reduce the cost of credit only on the condition that a prospective debtor or guarantor takes out insurance (or takes out that insurance with a particular insurer) provided that where the prospective debtor or guarantor declines to take out the insurance or to take out insurance with a particular insurer, the credit is still available (albeit without the proposed reduction in the cost of that credit). *[Schedule 1, Part 8, section 143]*

### **Financing of insurance premiums over mortgaged property**

8.253 Section 144 prevents a credit provider from financing premiums for insurance over mortgaged property for more than one year at a time. Restrictions also apply on knowingly debiting the premium to the debtor’s account more than 30 days before the commencement of the insurance. A maximum penalty of 100 penalty units applies for a contravention of these restrictions. The insured is also entitled to recover the premium. *[Schedule 1, Part 8, section 144]*



### **Commission for consumer credit insurance**

8.254 Section 145 limits commissions payable by the insurer in respect of consumer credit insurance to 20 per cent of the premium. The key aspect of the definition of consumer credit insurance is that it insures the capacity of the debtor to make repayments under the credit contract. That is, it is insurance in respect of a risk relating to the borrower's capacity to make repayments (for example, due to a change in income or their financial circumstances (see Part 13)). *[Schedule 1, Part 8, section 145]*

8.255 The cap was imposed in response to the unnecessary or forced 'packing' of loan contracts with insurance premiums where high commissions are offered to encourage intermediaries to distribute their products. An increase in the percentage of commission correspondingly reduces the benefits that can be offered under the policy to the insured.

8.256 The cap applies to a credit provider, a supplier under a sale contract in relation to which there is a tied loan contract or tied continuing credit contract, or an agent of the credit provider or supplier. A contravention of this provision is a strict liability offence with a maximum penalty of 100 penalty units. The insured is also entitled to recover the commission. *[Schedule 1, Part 8, section 145]*

### **Supply of copy of credit-related insurance contract by insurer**

8.257 Copies of insurance policies for credit-related insurance contracts financed by credit contracts must be given to debtors within 14 days after acceptance of the insurance proposal by the insurer. It is intended that the prescribed particulars of the credit-related insurance contract under the UCCC regulations will also be required to be given to debtors where they have a beneficial interest in such contracts of insurance. This is a strict liability offence with a maximum penalty of 100 penalty units applies. *[Schedule 1, Part 8, section 146]*

### **Rejection of debtor's proposal for insurance**

8.258 Section 147 sets out procedures to be followed when an insurer rejects a proposal for credit-related insurance to be financed by a credit contract. This includes informing the debtor and credit provider and refunding or crediting in full any amount paid. This is a strict liability offence with a maximum penalty of 100 penalty units applies. *[Schedule 1, Part 8, section 147]*

## Termination

8.259 On termination of the credit contract any relevant credit-related insurance contract financed under the credit contract is also terminated. The credit provider must pay or credit the debtor with a rebate of the premium paid under such a credit insurance contract in force immediately before the termination. The regulations may prescribe the manner of calculating the rebate. It is intended that the formula used in calculating the rebate under the UCCC regulations will be prescribed for the purposes of section 148. This does not apply to a credit-related insurance contract that provides death cover, if the credit contract is terminated on the death of a debtor. *[Schedule 1, Part 8, section 148]*

8.260 Section 149 entitles a debtor to terminate a relevant credit-related insurance contract over mortgaged property on the termination of a credit contract and recover from the insurer the proportionate rebate of premium paid. Credit providers must inform debtors of their rights in accordance with the regulations. The regulations may also prescribe the manner of calculating the rebate. It is intended that a regulation will be made that replicates the form of notice and the formula for calculating the premium rebate prescribed under the UCCC regulations. It is an offence for a credit provider not to notify a debtor of their rights on any such termination of a credit contract (this is a strict liability offence with a maximum penalty of 50 penalty units applies). *[Schedule 1, Part 8, section 149]*

## Part 9 — Advertising and related conduct

8.261 Part 9 of the Code regulates the promotional activities of persons offering credit. These provisions substantially replicate Part 9 of the UCCC which are generally intended to protect consumers from misleading advertising and other undesirable conduct, such as harassment and credit hawking.

### *Advertising*

8.262 Advertising the availability of credit is prohibited unless the advertisement complies with certain requirements in relation to the cost of the credit and any other requirements prescribed by the regulations. A maximum fine of 100 penalty units applies. *[Schedule 1, Part 9, section 150]*

8.263 Specifically, advertisements stating the amount of any repayment must include the annual percentage rate (expressed as a nominal percentage rate per annum) and information about credit fees and charges if they are payable. Alternatively, the advertisement can contain the comparison rate. A breach of this provision is an offence of strict liability. *[Schedule 1, Part 9, subsection 153(2)]*. Advertisements containing

comparison rates must also comply with the disclosure requirements in Division 2 of Part 10 of the Code. It is a defence to non-compliance with this disclosure requirement if the person proves they could not, by exercising reasonable care, have prevented the non-compliance. *[Schedule 1, Part 9, sections 150 and 153 and subsection 151(2)]*

8.264 A presumption exists, in the absence of proof to the contrary, that a person has caused an advertisement to be published where the person has an interest in the goods and services promoted or the supply of those goods and services, and the advertisement specifies relevant details of the person. *[Schedule 1, Part 9, section 151]*

8.265 Section 152 contains a defence against contraventions of the advertising requirements. This defence only applies to printers, publishers or proprietors of newspapers, licensees of broadcastings or television stations, exhibitors of films or any person acting with their authority where the person did not suspect or had no reason to suspect the advertisement would constitute an offence. *[Schedule 1, Part 9, section 152]*

#### ***False or misleading representations***

8.266 Section 154 creates an offence for making false or misleading representations. The offence applies to any persons who make representations about matters material to entry into a credit contract or a related transaction or attempts to induce a person to enter such a contract or transaction. It therefore applies to debtors or guarantors, to brokers, and to third parties (including, for example, valuers). A maximum fine of 50 penalty units applies. *[Schedule 1, Part 9, section 154]*

#### ***Harassment***

8.267 The Code also contains a prohibition in section 155 on credit providers or suppliers harassing a person in attempting to have them apply for credit or enter into a credit contract or related transaction. A maximum fine of 100 penalty units applies. *[Schedule 1, Part 9, section 155]*

#### ***Credit hawking***

8.268 The Code contains measures aimed at restricting door-to-door canvassing. These measures prohibit a credit provider from visiting a residence for the purpose of inducing a person to apply for, or obtain credit, except by prior arrangement with the person who normally resides there. A maximum fine of 100 penalty units applies. This restriction does not apply where the person is visiting a residence to offer goods or services for sale where credit is offered to finance the sale. *[Schedule 1, Part 9, section 156]*

### ***Recovery of loss***

8.269 A person may recover loss resulting from a breach of the advertising rules or as a result of false and misleading representations. [Schedule 1, Part 9, subsection 150(5) and section 154]

## **Part 10 — Comparison rates**

8.270 In addition to the advertising requirements in Part 9, the Code requires the mandatory use of comparison rates in promotional material that advertise an interest rate. Part 10 sets out when the comparison rate is to be included, how to calculate the comparison rate and other disclosure requirements. A comparison rate reflects the total cost of credit arising from interest charges and other fees and charges. The object of the measures is to help consumers identify the true cost of credit, which allows for much easier comparison between loan products.

8.271 The comparison rate requirements are based on Part 9A of the UCCC. A review of the comparison rate disclosure requirements (enabled by an extension of the sunset provision) has resulted in Division 3 of Part 9A of the UCCC (dealing with comparison rate schedules) not being enacted as Commonwealth law.

## **Key definitions and application of comparison rates provisions**

8.272 A comparison rate reflects the total cost of credit per annum arising from interest charges and any other prescribed credit fees and charges [Schedule 1, Part 10, subsections 157(3) and 166(2)]. It is intended that a regulation will be made that replicates the comparison rate formula prescribed in the UCCC regulations. That formula excluded a government fee, charge or duty from the comparison rate calculation.

8.273 Under the UCCC, valuation fees were also included in the comparison rate calculation where there was no uncertainty over whether a consumer would be charged a valuation fee, even though the exact amount of the fee to be charged was not known at the time the comparison rate was disclosed. In such cases, a reasonable estimate of the likely valuation fee was included for the purposes of calculating the comparison rate. It is intended that the same approach be applied to valuation fees under the Code once the formula has been prescribed.

8.274 Also under the UCCC, where a Government agency to which a fee or charge must be paid deals with the public only through a contracted service provider, any service charges paid to this service provider were considered to be a government fee or charge for the purposes of the comparison rate formula. It is intended that the same approach be applied

to government fees or charges under the Code once the formula has been prescribed.

8.275 To assist consumers to understand the true cost of credit, a comparison rate must be disclosed in advertisements for consumer credit if an interest rate is advertised. *[Schedule 1, Part 10, subsection 157(2)]*

8.276 Part 10 applies to consumer credit products, meaning any form of facility for the provision of credit. However, Part 10 does not apply to continuing credit contracts. *[Schedule 1, Part 10, sections 159 and 158]*

### **Comparison rate in advertisements**

8.277 Where a credit advertisement contains an annual percentage rate, it must contain the comparison rate for the amounts and terms that represent the typical amount and term offered by the credit provider. The regulations may prescribe the amounts and terms for which the comparison rate is to be calculated. It is intended that the same amounts and terms as prescribed in the UCCC regulations be prescribed for the purposes of the Code. *[Schedule 1, Part 10, sections 160 and 161]*

8.278 For the purposes of Part 10, credit advertisement is broadly defined to include any medium that states or implies the availability of credit (but does not include a notice or document required to be provided under the Code or a publication that only lists reference rates). *[Schedule 1, Part 10, section 159]*

### **Information about comparison rate**

8.279 Sections 162 to 164 set out the following disclosure requirements where credit advertisements contain comparison rates:

- disclosing the name of the consumer credit product, the amount and term of credit to which each comparison rate applies;
- stating if the loan is secured or unsecured if the comparison rate is calculated for a prescribed amount. It is intended that the same amounts and terms as prescribed in the UCCC regulations be prescribed for the purposes of the Code;
- including a prescribed warning. It is intended that a warning about the accuracy of the comparison rate will be prescribed similar to warning statements under the UCCC regulations;
- identifying the comparison rate as a comparison rate;

- not disclosing a comparison rate less prominently than any advertised annual percentage rate or repayment amount; and
- relating to electronic display media (including television and the internet), specific requirements apply to comparison rates and the warning where the credit advertisement is spoken or uses text.

*[Schedule 1, Part 10, sections 162 to 164]*

### **Comparison rate in other documents**

8.280 Section 165 applies (with necessary changes) the comparison rate requirements in Division 2 to other documents that contain a comparison rate. *[Schedule 1, Part 10, section 165]*

### **Grace period following changes in interest or fees**

8.281 If there is a change in any advertised annual percentage rate or credit fee or charge, section 167 provides a seven-day grace period before the credit advertisement contravenes this Part. *[Schedule 1, Part 10, section 167]*

### **Part 11 — Consumer leases**

8.282 Part 11 of the Code sets out a separate regime to regulate consumer leases of goods where no right or obligation to purchase the leased goods exists. This is because these types of leases are ordinarily not regarded as involving the provision of credit. However, they have not been exempted completely from the Code as this would increase the level of regulatory difference between leases and other similar forms of finance, and encourage the inappropriate use of leases to avoid the Code completely.

8.283 Where a lease contains a right or option to purchase the goods the outcome is functionally the same as a credit contract. For this reason the Code deems these transactions credit contracts (see section 9).

8.284 The regulation of consumer leases under Part 11 of the Credit Bill largely replicates Part 10 of the UCCC. It contains separate disclosure requirements and applies some of the consumer protection measures that apply to consumer credit contracts. These measures are generally considered necessary because:

- lessees can mistakenly believe that they have an ability to buy the goods when they do not;

- the amount paid under the lease may be considerable (that is, equivalent to that paid under a credit contract) but the lessee has no right to the goods when the lease ends; and
- a level playing field is necessary for financiers who provide consumer credit and those that finance goods through consumer leases.

### Meaning of consumer lease

8.285 A consumer lease under section 169 is a contract of hire entered into by a natural person or a strata corporation where they do not have a right or option to purchase the goods. *[Schedule 1, Part 10, section 169]*

### Consumer leases to which Part 11 applies

8.286 Section 170 restricts the application of Part 11 only to those consumer leases with the following features:

- the goods are hired wholly or predominantly for personal, domestic or household purposes. The predominate purpose for which goods are hired is defined in subsection 170(5);
- a charge is, or may be made, for the hiring of the goods and the charge, together with any other amount payable under the consumer lease, exceeds the cash price of the goods; and
- the lessor hires the goods as part of a business carried on in Australia.

*[Schedule 1, Part 11, section 170]*

8.287 Section 171 excludes short-term or indefinite leases and employment leases. *[Schedule 1, Part 11, section 171]*

8.288 ASIC is given power to effect exemptions and modifications to the Code. The application of the Code in its entirety can be excluded in respect of:

- a consumer lease specified by ASIC *[Schedule 1, Part 11, subsection 171(4)]*; and
- a class of consumer leases *[Schedule 1, Part 11, subsection 171(6)]*.

8.289 An exemption of a consumer lease as specified by ASIC is stated not to be a legislative instrument. This statement is declaratory of

the law, consistent with section 5 of the *Legislative Instruments Act 2003*.  
[Schedule 1, Part 11, subsection 171(5)]

8.290 Section 172 sets out a presumption that the Part 11 regime applies to a consumer lease unless the contrary is established. Similarly, a presumption exists that goods are hired for business (rather than personal, household or domestic) purposes if the lessee makes a declaration, before hiring the goods, in the prescribed form and accompanied by the prescribed warning. [Schedule 1, Part 11, section 172]

8.291 The presumption created by the declaration has been amended consistently with the approach taken to credit contracts in section 13.  
[Schedule 1, Part 11, subsection 172(3)]

8.292 The amendment will provide an effective response to the problems previously associated with the abuse of declarations as:

- where, before the contract was entered into, goods are hired for domestic purposes it would be unlikely that this would not be known or ascertainable by reasonable inquiry by the lessor; and
- lessors who do not make any reasonable inquiries into the use of the goods will find it difficult to rely on a declaration where they were in fact used for a domestic purpose.

8.293 Section 172 also creates a defence against any Part 10 offence where the lessor has made reasonable enquiries as to the purpose of the lease and does not believe the goods were hired other than wholly or predominantly for business or investment purposes. [Schedule 1, Part 11, subsection 172(4)]

8.294 An offence for inducing a person to make a false or misleading business purpose declaration in relation to consumer leases has been inserted as there was no penalty in the UCCC which applied in these circumstances. The penalty for this offence is 100 penalty units, two years imprisonment, or both. The strict liability attached to this penalty will significantly enhance the role of ASIC in enforcing the provision.  
[Schedule 1, Part 11, subsection 172(6)]

### **Form of and information to be included in consumer leases**

8.295 Section 173 prohibits lessors entering into a lease that is not in writing, signed by the lessee and discloses certain details of the transaction. This is a strict liability offence with a maximum penalty of 100 penalty units. [Schedule 1, Part 11, section 173]



8.296 Lessors also face a strict liability offence with a maximum penalty of 100 penalty units if they enter into a consumer lease that does not disclose the following matters where ascertainable:

- a description of the goods;
- the amount of any charges payable (including government charges);
- the amount of each rental payment;
- the number of payments required;
- details as to when the payments are due; and
- information as to when the lease may be terminated and a statement of liabilities (if any) on termination.

*[Schedule 1, Part 11, section 174]*

8.297 Section 175 requires the lessor to give the lessee a copy of the consumer lease, together with a statement in the prescribed form explaining the rights and obligations of the lessee. It is intended that the prescribed statement under the UCCC regulations will also be prescribed for the purposes of the Code. This is a strict liability offence with a maximum penalty of 50 penalty units. *[Schedule 1, Part 11, section 175]*

8.298 The provision of further goods under a consumer lease or a change made to a consumer lease (resulting from a deferral or waiver of payment) is treated by section 176 as not creating a new consumer lease or a credit contract. *[Schedule 1, Part 11, section 176]*

### **Other provisions applicable to consumer leases**

8.299 Section 177 applies the following provisions (relating to credit contracts) to consumer leases:

- changes to credit contracts on the grounds of hardship and unjust transactions (except for section 78 dealing with unconscionable interest and other charges) (see Division 3 of Part 4);
- information as to leased goods (see section 98);
- entry to residential premises to take possession of goods (see section 99);

- orders by the Court for entry and repossession (see sections 100 and 101); and
- miscellaneous matters such as tolerances and assumptions (see Part 12).

*[Schedule 1, Part 11, section 177]*

### **Notice of repossession**

8.300 A restriction on taking repossession action is set out in section 178. This requires the lessor to give 30 days written notice of an intention to repossess goods which are the subject of a consumer lease. This is a strict liability offence with a maximum penalty of 50 penalty units. *[Schedule 1, Part 11, subsections 178(1) and (3)]*

8.301 However, notice is not required where:

- repossession at the end of the term is a right under a fixed term lease;
- the lessor believes on reasonable grounds that the lessee has, or intends to dispose of leased goods;
- the lessor cannot locate the lessee, having made reasonable attempts;
- the lessee is insolvent; or
- the Court authorises repossession.

*[Schedule 1, Part 11, subsection 178(2)]*

### **Termination of lease**

8.302 Section 179 enables a lessee to end a consumer lease at any time by returning the goods hired. The amount payable on such termination is the lesser of the amount payable under the consumer lease or as determined by regulation. *[Schedule 1, Part 11, section 179]*

## **Part 12 — Miscellaneous**

### **Tolerances and assumptions**

8.303 Division 1 of Part 12 sets out certain assumptions that may be made in relation to disclosures required by the Code. It also gives power

for regulations to be made providing for further assumptions. The assumptions relate to:

- pre-contractual statements;
- credit contracts;
- mortgage documents or guarantees;
- statements of account;
- notices; and
- consumer leases.

*[Schedule 1, Part 12, subsection 180(1)]*

8.304 Information disclosed by a credit provider will be taken to be correctly disclosed if it is within the tolerances allowed by regulations and where disclosure is made at a stated date. The Credit Bill specifies assumptions for:

- disclosures of interest charges;
- disclosures of repayments;
- disclosures of credit fees and charges;
- disclosures in consumer leases;
- when information is ascertainable; and
- disclosures of names.

*[Schedule 1, Part 12, section 180]*

8.305 The regulations may vary an assumption or provide for additional assumptions. It is intended that the assumptions prescribed under the UCCC regulations will also be prescribed for the purposes of the Code. For example, permitting rounding off and permitting disclosures to be made at a stated date. *[Schedule 1, Part 12, sections 181 and 182]*

## **Documentary provisions**

8.306 Specific documentary requirements are placed on the credit provider by Division 2 of Part 12. These measures require the credit provider to provide copies of certain documents at the written request of a

debtor, mortgagor or guarantor and for the documents to be legible, clearly expressed and comply with any prescribed requirement. For example, the print or type must not be less than 10 point. In addition, this Division makes provision for signing documents on another person's behalf. The requirements relate to the following documents:

- any notice required under the Code;
- any credit contract;
- any mortgage;
- any guarantee; and
- any credit-related insurance contract.

*[Schedule 1, Part 12, sections 183 to 186]*

8.307 If the Court is satisfied, on application by ASIC, that the documents did not conform with the legibility and language requirements of section 184, the Court may prohibit the credit provider from using a provision of the credit contract in the same or similar terms in future documents *[Schedule 1, Part 12, subsection 184(2)]*. It is an offence to contravene subsection 184(2), attracting a maximum penalty of 100 units *[Schedule 1, Part 12, subsection 184(3)]*.

8.308 It is an offence of strict liability for a credit provider to fail to provide a debtor, mortgagor or guarantor with a copy of a credit contract, mortgage, guarantee, a credit-related insurance policy or a notice under the Code requiring a person to take action. *[Schedule 1, Part 12, subsection 185(4)]*

8.309 In addition, the Code permits any contract, mortgage or guarantee, and some documents to be made, given or provided in accordance with laws relating to electronic disclosure except where it has been prescribed that it not be so made, given or provided. Because of the importance of some transactions, documents or information and to ensure that these are received by the recipient, the regulations may prohibit certain classes of transactions, documents or information being made, given or provided by electronic communication. It is intended that the classes of transactions, documents or information prohibited under the UCCC regulations also be prohibited under the regulations made under the *Electronic Transactions Act 1999*. These include a guarantee to which the Code applies, copies of a guarantee, a credit contract, or a contract document given under section 57, and default notices under section 88. *[Schedule 1, Part 12, section 187]*

## General provisions

### *Assignments*

8.310 The Code facilitates assignments of credit providers' rights by providing that the Code applies to the assignee with no further obligation imposed on the credit provider. Debtors', mortgagors' or guarantors' rights are also unchanged. Similar provisions exist for assignments by debtors, mortgagors or guarantors. [*Schedule 1, Part 12, sections 188 and 189*]

### *Apportionment of payments*

8.311 The debtor can specify in writing how the credit provider should apply a payment where there are several credit contracts, but this is subject to any prior agreement. It is a strict liability offence to contravene this section. A maximum penalty of 30 penalty units applies. [*Schedule 1, Part 12, section 190*]

### *Contracting out*

8.312 To ensure that the consumer protections created by the Code are not circumvented, section 191 prohibits a provision of a contract or other instrument from avoiding or modifying the effects of the Code. Similarly, indemnities by debtors or guarantors for a creditor's loss or liability are also prohibited. Credit providers who are a party to such contracts or instruments contravene the Code (is a strict liability offence with a maximum penalty of 100 penalty units). [*Schedule 1, Part 12, section 191*]

### *Indemnities*

8.313 This provision addresses some particular difficulties that arose from the application of the UCCC to certain types of mortgage securitisation programs. The difficulties were seen to arise from the possible application of a rule of law which, on the grounds of public policy, rendered void any attempt by a person to obtain or enforce an indemnity given by another person in respect of liability for an act or omission by the first person which constitutes an offence at law. Section 192 statutorily sets the common law rule aside. [*Schedule 1, Part 12, section 192*]

### *Effect of non-compliance*

8.314 A credit contract, mortgage or guarantee is not illegal, void or unenforceable, merely because of a contravention of the Code, unless the Code contains an express provision to that effect. [*Schedule 1, Part 12, section 193*]

***Giving notice or other document***

8.315 The Code requires documents such as credit contracts, mortgages and guarantees to be in writing. In some cases a credit provider will be excused from their obligation to give a notice or other document to a person that they have reasonably been unable to contact. *[Schedule 1, Part 12, subsections 194(1) and (2)]*

8.316 The Code also contains provisions that aim to ensure that joint borrowers and guarantors have reasonable flexibility in choosing how many identical copies of notices and statements of account they require. Where there are two or more joint debtors, mortgagors or guarantors one of them can be nominated by all or any of them to receive notices or other documents (except default notices) and the notice need not be addressed to all of them. However, where they live at the same address they can jointly consent to receiving a single copy at that address which is to be addressed jointly to them. The regulations may prescribe the form of the nomination or consent. It is intended that the nomination and consent form prescribed under the UCCC regulations will also be prescribed for the purposes of the Code. *[Schedule 1, Part 12, subsections 194(3) to (9)]*

***Manner of giving notice or other document***

8.317 The *Acts Interpretation Act 1901* makes provision for how a notice or other document required or permitted by the Code may be given to a person or required to be given to another person under the Code.

8.318 A written notice (or other document) may be given to individuals:

- by delivering it to the person personally; or
- by leaving it at or sending it by pre-paid post to, the address of the place of residence or business of the person last known to the person serving the document.

8.319 A written notice (or other document) may be given to bodies corporate by leaving it at, or sending it by pre-paid post to, the head office, a registered office or a principal office of the body corporate (section 28A of the *Acts Interpretation Act 1901*).

8.320 Section 195 provides for more specific provisions which allows the person who is a debtor, mortgagor or guarantor to nominate in writing an appropriate address. These provisions apply in priority over the *Acts Interpretation Act 1901* provision.

8.321 The *Electronic Transactions Act 1999* provides that consent is required for notices to be given electronically (section 9 of the *Electronic Transactions Act 1999*).

***Date of notice or other document***

8.322 Section 196 modifies the ‘postal rule’ by providing for the date on which the notice or other document will be taken to have been given. These are:

- by personal service — the date it is received or the date that the notice or document bears (whichever is the later);
- by post — on the date it bears or the date when it would have been delivered in the ordinary course of post (whichever is the later); and
- by electronic communication — at the time the electronic communication enters the information system (section 14 of the *Electronic Transactions Act 1999*).

*[Schedule 1, Part 12, section 196]*

***Extension of time***

8.323 The Court may extend a period if authorised by the Code to do so even though the period has elapsed. *[Schedule 1, Part 12, section 197]*

***Orders of the Court***

8.324 An order of the Court in force under the Code, (including as varied) has effect according to its tenor. *[Schedule 1, Part 12, section 198]*

***Conduct of agents and related matters***

8.325 Section 199 restates the general law that the conduct of an officer, agent or employee of a credit provider acting within his or her actual or ostensible authority will be imputed to the credit provider. However, it limits this general law principle by providing that the credit provider will not be taken to know (or have reason to know) where the officer’s, agent’s or employee’s belief was not acquired in that capacity and they were the actual person dealing with the transaction. *[Schedule 1, Part 12, subsections 199(1) and (5)]*

8.326 A credit provider or person associated with a credit provider is also prohibited from purporting to act as an agent of a debtor, mortgagor or guarantor in entering into a credit contract, mortgage or guarantee. For example, a debtor may not authorise a loan officer of a credit provider to

sign a contract on its behalf. However, this does not prevent the common commercial practice of credit providers authorising associated persons (for example, under agencies and like arrangements) from entering into contracts with the debtor on the creditor provider's behalf. [*Schedule 1, Part 12, subsection 199(2)*]

***Deletion of provision regarding reciprocal conferral of powers and jurisdictions***

8.327 Section 177 of the UCCC, which enables regulation to be made to give effect to a cross-vesting scheme of administrative and judicial powers has not been transferred to the Code as it is not necessary under the Commonwealth regime.

**Provisions relating to offences**

***Deleted sections of the UCCC***

8.328 Sections 178 to 182 of the UCCC have been deleted as equivalent Commonwealth penalty provisions already exist.

**Table 8.5**

<i>Topic</i>	<i>Existing Commonwealth law — Crimes Act 1914</i>	<i>UCCC</i>
Penalty at end of provision	Section 4D	Section 178
Penalty units	Section 4AA	Section 179
Summary offences	Section 4H	Section 180
Double jeopardy	Section 4C	Section 181
Aiding and abetting, attempts	Sections 11.1 and 11.2 of the Criminal Code	Section 182

**Division 4 — Offences by officers, agents or employees**

8.329 Proceedings may be taken against an officer, agent, or employee of a credit provider or other person irrespective of whether proceedings have been taken against the credit provider or other person. [*Schedule 1, Part 12, section 200*]

***Offences by corporations***

8.330 If a corporation contravenes the Code or the regulations, each officer of the corporation is taken to have contravened the provision if the



officer knowingly authorised or permitted the contravention. Proceedings may be brought against an officer even if proceedings are not brought against the corporation or if the corporation is not convicted. [*Schedule 1, Part 12, section 201*]

#### ***Limitations***

8.331 A three-year limitation period exists for bringing proceedings for an offence against the Code or the regulations. The period may be extended with the consent of the Attorney-General. [*Schedule 1, Part 12, section 202*]

#### ***Application of section 4K of the Crimes Act 1914***

8.332 To maintain the interpretative effect of the UCCC, section 4K of the *Crimes Act 1914* does not apply in relation to an offence against this Code or the regulations. [*Schedule 1, Part 12, section 203*]

### **Division 5 — Exemptions from the Code**

8.333 Two new provisions have been introduced into the Code, allowing for exemptions to be made by ASIC and by regulations.

#### ***Exemptions by ASIC***

8.334 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.

8.335 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.

8.336 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.

8.337 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 regulation***

8.338 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.

8.339 It is intended that regulations will be made to replicate the exclusions under the UCCC, from specified provisions of the Code, of the following classes of credit:

- credit that does not exceed \$50;
- credit under the Queensland Government Rental Purchase Plan Scheme;
- credit by a firm to a partner of the firm;
- student loans;
- credit to a person's estate by the estate's administrator;
- credit under the *Aged Care Act 1997*; and
- credit provided by the Western Australian Firefighter's Benefit Fund.

## **Part 13 — Principal definitions**

### **General definitions**

8.340 Section 204 contains definitions of words and expressions used in the Code. In some cases, the definition expands the usual meaning of the word. For example, the definition of 'mortgage' extends the general definition to include all forms of possessory and non-possessory security. It also catches a seller's retention of title, the terms sale of land and the conditional sale of goods. [*Schedule 1, Part 13, section 204*]

## **Part 14 — Miscellaneous provisions relating to interpretation**

8.341 Part 14 contains miscellaneous provisions relating to interpretation.

8.342 These were previously contained in Schedule 2 of the UCCC which contained uniform interpretation provisions of a kind that are usually contained in the Interpretation Act of a State or Territory.

8.343 Most of those provisions have not been transferred to the Code because they are covered by the *Acts Interpretation Act 1901*. The

provisions that are not addressed by the *Acts Interpretation Act 1901* and thus remain in the Code are:

- preliminary matters including displacement of Part 14 where contrary intention appears in the Code [*Schedule 1, Part 14, section 205*];
- material that is not part of the Code (for example, headings, punctuation, and notes) [*Schedule 1, Part 14, section 206*];
- how Commonwealth, State and Territory Acts should be cited in the Code (for example, use of short titles) [*Schedule 1, Part 14, section 207*]; and
- compliance with prescribed forms [*Schedule 1, Part 14, section 208*].

8.344 Division 3 contains the definitions of general interpretive terms and references used in the Code where they not already covered by the *Acts Interpretation Act 1901*. [*Schedule 1, Part 14, sections 209 to 213*]

8.345 Division 4 sets out the functions and powers conferred by the Code where they are not already covered by the *Legislative Instruments Act 2003*. These are:

- the power to make instruments or decisions includes power to amend or repeal [*Schedule 1, Part 14, section 214*];
- matters for which statutory instruments may make provision [*Schedule 1, Part 14, section 215*];
- presumption of validity and power to make a statutory instrument [*Schedule 1, Part 14, section 216*]; and
- exercise of powers under the Code between enactment and commencement [*Schedule 1, Part 14, section 217*].

8.346 Section 218 deals with the interpretation of provisions in the Code relating to distance, time and age. [*Schedule 1, Part 14, section 218*]



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# **Chapter 9**

## **Regulation impact statement**

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### **Part 1: Introduction**

9.1 The National Consumer Credit Protection Bill 2009 (Bill) is the centrepiece of a legislative package that implements the first phase of decisions by the Australian Government and the Council of Australian Governments (COAG) in 2008.

9.2 COAG reached an in-principle agreement on 26 March 2008 that the Australian Government would assume responsibility for regulating mortgage credit and mortgage advice, including non-deposit taking institutions and mortgage brokers, as well as margin loans. On 3 July 2008, COAG agreed that the Australian Government would also assume responsibility for regulating all other consumer credit products and requested the COAG Business Regulation and Competition Working Group report back at the 2 October meeting with a detailed implementation plan for other credit.

9.3 Against that backdrop, in September 2008 the Australian Government decided to:

- first, enact the Uniform Consumer Credit Code (UCCC) of the States and Territories and, where relevant, proposed amendments to the UCCC, as Commonwealth legislation;
  - the new national framework would be administered by the Australian Securities and Investments Commission (ASIC), which would be given enhanced enforcement powers;
- secondly, to extend the scope of the current regulatory framework so that the new national consumer credit framework would:
  - include consumer lending for investment properties;
  - regulate the provision of margin loans;

- require all providers of consumer credit and credit-related brokering services and advice to be members of an external dispute resolution body;
- provide for a licensing regime requiring all providers of consumer credit and credit-related brokering services and advice to obtain a licence from ASIC;
- require licensees to observe a number of general conduct requirements, including responsible lending practices;
- regulate the provision of credit for small businesses; and
- introduce specific conduct obligations, where warranted, for particular credit activities or products.

9.4 On 2 October 2008, COAG agreed to an implementation plan for the regulation of consumer credit. COAG agreed to a phased approach to reform, beginning with the transfer of responsibility key credit regulation, including the UCCC as phase one. COAG also agreed to an implementation plan for phase two, the regulation of remaining areas of consumer credit, including pay day lending (for example, pawnbrokers), credit cards, store credit, investment and small business lending, and personal loans, so that the reform package is completed in the first half of 2010.

9.5 A regulation impact statement (RIS) was prepared and considered in the context of consideration of the decisions by the Australian Government in September 2008. A copy of that RIS is in Chapter 10 of the explanatory memorandum. The September 2008 RIS includes background information, including the market and regulatory environment for consumer credit and margin lending, and consultation processes that had been carried out to that date. It also includes a diagram of the two-phased approach to implementation, that was endorsed by COAG.

9.6 This RIS should be read in conjunction with the September 2008 RIS. It focuses on analysis of key measures in the Bill that substantively change the regulatory framework. The following measures are discussed:

- ASIC's enforcement power;
- consumer lending for residential investment properties;
- licensing of participants; and
- responsible lending practices.

9.7 The issues of credit for small business, and specific conduct obligations, are part of the second phase and are not dealt with in the Bill or in this RIS.

## Part 2: Consultation

### Consumer credit

#### *Green Paper on Financial Services and Credit Reform*

9.8 On 3 June 2008, the Government released the *Green Paper on Financial Services and Credit Reform: Improving, Simplifying and Standardising Financial Services and Credit Regulation*.

9.9 The Green Paper discussed the regulation of mortgages, mortgage brokers and margin loans, and proposed options for the Commonwealth taking over regulation in this area. With respect to other consumer credit products such as credit cards, personal loans and micro loans, the Green Paper asked for submissions on whether these products should also be regulated solely by the Commonwealth or whether there is a role for the States and Territories in this area.

9.10 Some 150 submissions were received in response to the Green Paper, and an overwhelming majority supported the Commonwealth assuming responsibility for the regulation of all consumer credit:

- From the industry's perspective, this support was driven by the reduction in compliance burden that would be achieved by reducing the number of different regulatory regimes under which they are required to operate.
- From the consumer advocates' perspective, this support was driven by the better protections and efficiencies a consistent national regime offers.

9.11 Most submissions supported the enactment of the UCCC, including the outstanding projects, as Commonwealth legislation and identified ASIC as the appropriate regulator:

- Licensing (with compulsory membership of External Dispute Resolution (EDR) Schemes) and disclosure requirements were seen as key features. In addition, several submissions highlighted the need for the concept of responsible lending, and consideration of capacity to repay requirements.

- A common view was that putting lenders and brokers into the *Financial Services Reform Act 2001* (FSR) regime was inappropriate as selling and/or providing credit was fundamentally different to providing and/or advising on investments (*Mortgage & Finance Association Australia; Gadens lawyers; ABA*).
- Of the few submissions that suggested Chapter 7 of the *Corporations Act 2001* (Corporations Act) would be appropriate, most commented that the existing requirements would require modification to apply appropriately to credit products and providers (*AXA Asia Pacific*).
- Several submissions supported, or understood need for, staged implementation (*Financial Services Ombudsman, Financial Planning Association*).
- It was suggested that the implementation costs would be minimised if the Commonwealth adopted the UCCC with minimal changes (*Legal Aid NSW and QLD and Australian Finance Conference*).

***Other consultations, reviews and regulation impact statements***

9.12 The NSW Government has undertaken extensive consultation on the draft *NSW National Finance Brokers Package*, and prepared a regulation impact statement. That package has been a reference point for many of the proposals in this package, particularly the responsible lending conduct provisions.

9.13 In late 2003, the Ministerial Council on Consumer Affairs (MCCA) took submissions on its Discussion Paper, *Fringe Credit Providers*. Thirty-eight responses were received. Following consideration of submissions, the proposals were substantially reworked and included in a *Decision-Making Regulatory Impact Statement and Final Public Benefit Test*, dated March 2006.

9.14 An inquiry in 2007 into home lending practices and procedures by the *House of Representatives Standing Committee on Economics, Finance and Public Administration* recognised the importance of consistently regulating non-bank lenders and mortgage brokers by recommending that the Commonwealth take over the regulation of credit including the regulation of mortgages. The Committee suggested that credit be included in the definition of a financial product for the purposes of the Corporations Act.



9.15 The Productivity Commission released its final report on *Australia's Consumer Policy Framework* (including regulation of consumer credit) on 8 May 2008. It recommended that the Commonwealth take over the regulation of credit and develop generic consumer law.

9.16 KPMG Consulting undertook consultation and released a report *NCP Review of the Consumer Credit Code* in December 2000, which has been the catalyst for the proposed amendments to the default notices and vendor terms provisions.

9.17 The Australian Government, through the Treasury, established an implementation taskforce consisting of officials from the Commonwealth Treasury, ASIC and the States and Territories in order to progress the COAG decisions in relation to consumer credit. That taskforce has met regularly to discuss policy approaches on various aspects and consider draft provisions. In addition, a consultative group of industry and consumer representatives has been involved in considering draft provisions as they have been prepared. The Industry and Consumer Consultative Group has involved representatives from the following bodies:

- *Finance industry* — Australian Finance Conference, Australian Bankers' Association, Abacus — Australian Mutuals (the Association of Building Societies and Credit Unions), National Financial Services Federation, Mortgage and Finance Association of Australia, Finance Brokers Association of Australia, Investment and Financial Services Association, Financial Planning Association, Insurance Council;
- *Consumer advocate* — Australian Consumers Association (CHOICE), Consumer Law Action Centre;
- *Dispute resolution* — Financial Ombudsman Service, Credit Ombudsman Service Ltd; and
- *Legal* — Consumer Credit Legal Centre (NSW), Law Council of Australia.

9.18 Consultations with the Industry and Consumer Consultative Group were not conducted in public. The consultations ranged from higher level discussions on broader policy matters through to consideration of draft provisions. Members gave feedback at a combination of face-to-face and telephone meetings, and by providing written comments. The consultations were conducted on a confidential basis. The first meeting was held on 31 October 2009 with meetings held on a monthly basis thereafter.

9.19 Key aspects of the feedback from the consultations with the Industry and Consumer Consultative Group has been factored into the final form of the proposals on consumer credit and is described in more detail under the relevant headings below.

### **Part 3: Regulation impact assessments**

9.20 This part includes individual regulation impact assessments for the following measures in the Bill:

- ASIC's enforcement power;
- consumer lending for residential investment properties;
- the licensing requirements; and
- responsible lending conduct.

#### **Impact assessment methodology**

9.21 Impacts can be divided between three impact groups (consumers, business and government). Typical impacts of an option on consumers might be changes in access to a market, the level of information and disclosure provided, or prices of goods or services. Typical impacts of an option on business would be the changes in the costs of compliance with a regulatory requirement. Typical impacts on government might be the costs of administering a regulatory requirement. Some impacts, such as changes in overall confidence in a market, may impact on more than one impact group.

9.22 The assessment of impacts in this regulation statement is based on a seven-point scale (-3 to +3). The impacts of each option are compared with the equivalent impact of the 'do nothing' option. If an impact on the impact group would, relative to doing nothing, be beneficial, the impact is allocated a positive rating of +1 to +3, depending on the magnitude of the relative benefit. On the other hand, if the impact imposes an additional cost on the impact group relative to the status quo, the impact is allocated a negative rating of -1 to -3, depending on the magnitude of the relative cost. If the impact is the same as that imposed under the current situation, a zero score would be given, although usually the impact would not be listed in such a case.

9.23 The magnitude of the rating of a particular impact associated with an option has been assigned taking into account the overall potential impact on the impact group. The reference point is always the status quo

(or 'do nothing' option). Whether the cost or benefit is one-off or recurring, and whether it would fall on a small or large proportion of the impact group (in the case of business and consumers), is factored into the rating. For example, a cost or benefit, even though large for the persons concerned, may not result in the maximum rating (+/-3) if it is a one-off event that only falls on a few individuals. Conversely, a small increase in costs or benefits might be given a moderate or high rating if it would be likely to recur or if it falls on a large proportion of the impact group. The rating scale for individual impacts is explained in the Table.

**Rating an individual impact**

**Table 9.1**

+3	+2	+1	0	-1	-2	-3
Large benefit/ advantage compared to 'do nothing'	Moderate benefit/ advantage compared to 'do nothing'	Small benefit/ advantage compared to 'do nothing'	No substantial change from 'do nothing'	Small cost/ disadvantage compared to 'do nothing'	Moderate cost/ disadvantage compared to 'do nothing'	Large cost/ disadvantage compared to 'do nothing'

9.24 The ratings for the individual impacts compared to the status quo are then tallied to produce an overall outcome for the option. If it is positive, it indicates that the option is likely to produce a more favourable cost/benefit ratio than the status quo. If it is zero there would be no overall benefit from adopting the option, and if negative the option would provide overall a less favourable cost/benefit ratio than the 'do nothing' option. Ordinarily, options that have the highest positive score would be the favoured courses of action.

9.25 What is classed as a 'large', 'moderate' or 'small' cost or benefit depends on the nature of the problem and options being considered. Of course, the costs and benefits associated with options to address a problem costing billions of dollars per year are likely to be of a much greater absolute magnitude than the costs and benefits of options for dealing with a rather modest issue that affects only a handful of persons. However, as all the ratings are made relative to the status quo/ do nothing option for a particular problem, the absolute value of 'large' or 'moderate' or 'small' is not really important. All that matters is that within a problem assessment, the impacts of each option are given appropriate ratings relative to the status quo and each other. If that occurs, it will be sufficient for the methodology to yield an overall rating that assists in assessing the relative merits of options, from a cost/benefit perspective, to address the particular problem.

9.26 An example of the rating calculation for an option, using the seven-point scale ratings of impacts, is in the Table below. The example is based on a purely hypothetical scenario that a new type of long-wearing vehicle tyre is being sold and marketed, but it has become apparent that the new style of tyres have a higher risk of exploding while in motion than conventional tyres. The example is designed merely to illustrate how the rating scale might be used to compare a proposal's costs and benefits option to the 'do nothing' option — it is not intended to be a comprehensive or realistic assessment of options to address such a problem.

**Illustrative rating for the problem of a long-wearing tyre that may fail**

**Option A: Do nothing**

**Table 9.2**

	<i>Benefits</i>	<i>Costs</i>
<i>Consumers</i>	Access to a cheaper solution for vehicle tyres.	Risk of tyre failure that can result in personal and property damage as a result of collision. Damage can be severe but cases are rare.
<i>Industry</i>		Some compensation payments to persons as a result of collisions caused by the tyre.
<i>Government</i>	Advantages for waste management perspective.	

**Option B: Ban on sale of the new tyre****Table 9.3**

	<i>Benefits</i>	<i>Costs</i>
<i>Consumers</i>	No persons will be affected by tyre failure and resultant damage. (+3)	Lack of access by consumers to long-wearing vehicle tyres, increasing the cost of vehicle maintenance. (-2)
<i>Industry</i>	No compensation payments for accident victims. (+1)	Transitional costs involved with switching back all manufacturing/marketing operations to conventional tyres. (-3)
<i>Government</i>		Conventional tyres produce more waste which is costly to deal with. (-1)
<i>Sub-rating</i>	<b>+4</b>	<b>-6</b>
<i>Overall rating</i>	<b>-2</b>	

**Option C: Industry — developed quality control standards****Table 9.4**

	<i>Benefits</i>	<i>Costs</i>
<i>Consumers</i>	Much lower risk of tyre failure and resultant damage than status quo. (+2)	
<i>Industry</i>	Significantly less compensation payments for accident victims. (+1)	Developing and monitoring industry-wide quality control standards. (-2)
<i>Government</i>		
<i>Sub-rating</i>	<b>+3</b>	<b>-2</b>
<i>Overall rating</i>	<b>+1</b>	

9.27 In the above hypothetical example, Option C appears to have a better impact for consumers and a better overall cost/benefit rating than Option B.

### **3.1: ASIC enforcement powers (including penalties and sanctions)**

9.28 As mentioned above, a decision has been made to enact the UCCC of the States and Territories and, where relevant, proposed amendments to the UCCC, as Commonwealth legislation. Further, a licensing framework for credit service providers will be introduced. It has also been decided that the new national framework will be administered by ASIC, which would be given enhanced enforcement powers.

9.29 This part of the assessment focuses on options for enhanced enforcement powers for ASIC.

#### ***Problem identification***

9.30 The UCCC relies heavily on criminal sanctions to encourage compliance. The sanctions are fines expressed in penalty units, with a maximum of 30, 50 and 100 units. Section 179 of the UCCC defines each penalty unit as \$100, so the maximum penalties are \$3,000, \$5,000 or \$10,000.

9.31 In addition, a regime known in the UCCC context as ‘civil penalties’ apply to a range of breaches, particularly those that relate to a failure to undertake appropriate disclosure. These breaches may also permit the debtor or guarantor to make an application for an order relating to a breach by the lender. It is important to note that these types of orders under the UCCC are distinct from the ‘civil penalty’ regime under the Corporations Act. Under the UCCC, the penalty amount is applied for by, and the penalty can be payable to, a private person (such as an affected consumer), whereas a ‘civil penalty’ order under the Corporations Act involves a regulator applying for a pecuniary penalty payable to the government. For the purposes of the discussion in this RIS, the UCCC-type order will be described as ‘consumer enforcement’. Civil penalty orders are intended to mean the type of civil penalty order found in the Corporations Act, which involves a regulator applying for a penalty amount to be paid to the government.

9.32 The UCCC does not include any infringement notice provisions.

9.33 In addition to reenacting the UCCC as Commonwealth law, it is also proposed to introduce a licensing framework, similar to that applying under Chapter 7 of the Corporations Act.

9.34 The limitations of some of the Corporations Act sanctions have been noted in the *Final Report of the Regulation Taskforce, Rethinking Regulation (2006)* and in the *Review of Sanctions in Corporate Law (Treasury, 2007)*. In summary, disadvantages of criminal sanctions in the context of financial sector regulation is that they:

- can result in an overly cautious approach by businesses to compliance, which can stifle innovative approaches which would otherwise be desirable to encourage; and
- are time-consuming and costly to prosecute for the regulator and the defendant.

9.35 Accordingly, reliance solely or too heavily on criminal sanctions and pecuniary penalties can lead to:

- some behaviours that would otherwise contribute to overall economic efficiency and dynamism not occurring, because business is too cautious to risk criminal prosecution (especially for breach of rules against 'higher level' undesirable behaviours); and
- some 'lower level' undesirable behaviours persisting because it is too costly and/or time consuming for regulators to address it.

9.36 The costs of responding to actions for consumer enforcement under the UCCC were raised by industry groups as a problem in the context of the National Compensation Policy (NCP) review of the Consumer Credit Code (December 2000).

9.37 In the recent consultations, it was reported that the relevant authorities were not consistent in their approach to compliance/enforcement activity in relation to the UCCC. Some have prosecuted matters in court. Queensland authorities reported prosecuting one or two matters per year, at a cost of \$50,000 to \$60,000 per matter. Authorities in some other jurisdictions have reported relying on other methods, such as direct approaches to credit providers seeking variations on behalf of affected consumers. This issue was noted in the March 2006 RIS on *Fringe Credit Providers* (see 'Consultation' above). The different approaches among jurisdictions to compliance activities is likely to be due to a combination of factors. The resources associated with pursuing court action is likely to be one of those factors.

### **Objectives**

9.38 The main objective of the enforcement power regime is to provide ASIC with enforcement options that help to minimise losses from:

- undesirable behaviour that the laws permit;
- desirable behaviour that the laws deter;
- the costs of enforcement.

### **Options**

#### *Status quo*

9.39 ASIC does not currently have enforcement powers in relation to consumer credit (except for being able to take action in relation to any misleading, deceptive and/or unconscionable conduct on the part of financial product providers and intermediaries in their advertising and sale of consumer credit products). That position could not be maintained — there would have to be some enforcement powers in the national credit framework.

9.40 However, an equivalent to a *status quo* position would be to import the existing penalty regime of UCCC to cover breaches of that part of the new credit framework, and duplicate the enforcement regime of Chapter 7 of the Corporations Act for the new licensing framework. The enforcement provisions in the *Australian Securities and Investments Commission Act 2001* would also apply. Accordingly, there would be a combination of criminal offences and civil penalties (derived from the Corporations Act equivalents), plus the criminal offences and consumer enforcement provisions currently in the UCCC.

#### *Option A: A combination of criminal (including infringement notices), civil penalties and consumer enforcement*

9.41 Under Option A, there would not simply be a duplication of the penalties in the UCCC and Chapter 7. Instead, the enforcement structure would include a tiered approach to sanctions, which would reflect considerations of the *Review of Sanctions in Corporate Law* (Treasury, 2007) and the *Commonwealth Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (AGD, 2007).

- Criminal penalties would continue to apply to offences which constitute serious or substantial wrongdoing, for example predatory lending or equity stripping. Such behaviour would have the effect or potential effect that warrants the strongest deterrent or punishment, or that market participants would



expect an element of retribution for the wrongdoing. Criminal penalties would reflect those for similar offences in the Corporations Act.

- Civil penalties would be applied to offences which constitute conduct where it is considered that a criminal sanction is not warranted, because the wrongdoing is not 'serious' or 'substantial' in nature.
- The consumer enforcement regime in the UCCC would also be maintained for the breaches equivalent to those that they currently apply to in the UCCC.
- Infringement notices would be applied to offences for relatively minor offences, where a high volume of contraventions is expected, and where a penalty must be imposed immediately to be effective.

### ***Impact analysis***

#### *Affected groups*

9.42 The groups affected by the new regime of ASIC enforcement powers would be: consumers of credit; industry participants, including lenders and advisers; and the Government and ASIC.

9.43 In terms of industry participants, the licensing system existing in Western Australia provides some guidance as to the regulatory population. Western Australia has reported that there are approximately 190 credit providers registered in that jurisdiction, of whom approximately 100 operate nationally. These figures does not include approved-deposit taking institutions (ADIs) registered under the *Banking Act 1959* (approximately 500 nationally) that may operate in Western Australia, as ADIs are not required to be licensed under the Western Australian legislation. However, many ADIs would be subject to the proposed consumer credit framework regulatory.

9.44 In addition to credit providers, the proposed regulatory framework also covers persons whose business involves suggesting consumers enter credit contracts, and assisting them enter contracts. Such participants would primarily (though not exclusively) be comprised of finance brokers. There are approximately 3,000 licensed finance brokers in Western Australia, and of those, around 200 have addresses outside Western Australia.

9.45 Persons other than brokers that are part of the credit supply chain and may be covered by aspects of the proposed regulatory framework include aggregators and mortgage managers. It is estimated that between one and two hundred persons would fall into those groups. Persons whose business is the collection of debts (either as assignee or as agent of a credit provider) will also be subject to aspects of the proposed regime, including licensing.

9.46 Based on the above, it is estimated that the affected population, in terms of industry participants, could be as high as 10,000 nationally.

9.47 As to consumers, almost all the adult population are users or potential users of credit facilities. The Dun and Bradstreet consumer credit expectation survey for the March 2009 quarter (published in January 2009) reports that 18 per cent of Australians intended to seek new credit, or increase the limits of existing credit, in the March 2009 quarter.

*Summary of expected impacts*

9.48 In comparison with the status quo, the distinction between Option A and the *status quo* position is the use of infringement notices.

9.49 There are direct and indirect costs and benefits associated with those facilities. In terms of direct benefits, the costs for both the regulator and the regulated population would be far less than using the criminal and civil enforcement avenues already there. For example, the legal costs of defending a consumer enforcement case under the UCCC are reported to be in the range of \$40,000 to \$140,000 (see NCP Review of Consumer Credit Code, December 2000, at p134). It is reasonable to assume the costs of bringing the action are similar. If administrative actions were used as an alternative they would potentially save much of those costs, although defended matters may ultimately require a court process.

9.50 Lower-level (that is, less serious) transgressions are more likely to be pursued by the regulator under Option A. This outcome has benefits for consumers because it would improve overall standards of industry behaviour, but it carries some potential additional compliance costs for industry participants in comparison with the *status quo*.

9.51 In the 2008-09 Additional Estimates process, the proposed regulator, ASIC, was allocated \$66.7 million in funding over four years to administer the new national consumer credit function. A proportion of that funding will be allocated to enforcement functions. Including the more flexible avenues under Option A would enable the enforcement budget to be used more effectively than under the status quo option.

*Status Quo***Table 9.5**

	<i>Benefits</i>	<i>Costs</i>
<i>Consumers</i>		Some lower level undesirable behaviours by credit industry participants that have a negative impact on consumers may remain unaddressed.
<i>Business</i>	Consistency with Chapter 7 of the Corporations Act enforcement regime will facilitate familiarity with the new regime and limited transitional costs.	May have a 'freezing effect' on responsible risk taking and commercial decision making by industry participants. High costs of defending court proceedings for breaches.
<i>Government</i>	Consistency with Chapter 7 of the Corporations Act enforcement regime will facilitate ASIC's familiarity with the new regime.	High costs for pursuing enforcement action in individual cases may restrict ASIC's enforcement capacity

Option A

**Table 9.6**

	<i>Benefits</i>	<i>Costs</i>
<i>Consumers</i>	Greater likelihood that low level and minor breaches that nevertheless impact on consumers will be addressed by the regulator. (+1)	
<i>Business</i>	Reduced costs of responding to enforcement action for lower level breaches. (+1)  Less rigorous and costly compliance management systems for lower level breaches. (+1)	Transitional costs associated with becoming familiar with a new compliance regime. (-1)  More likely to become subject to enforcement action for lower level breaches. (-1)
<i>Government</i>	Lower cost options for responding to lower level breaches. (+2)	Transitional costs to become familiar with new compliance regime. (-1)
<i>Sub-rating</i>	<b>+5</b>	<b>-3</b>
<i>Overall rating</i>	<b>+2</b>	

*Consultation*

9.52 In the context of the NCP Review of the Consumer Credit Code (December 2000), the role of consumer enforcement under the UCCC was considered (see page 133ff). At that time, industry groups criticised inclusion of consumer enforcement because:

- the penalty was disproportionate to the gravity of the breach, and therefore was inefficient;
- there were significant costs associated with defending consumer enforcement proceedings that may discourage some entrants to the market;
- there were already a range of remedies available to officials and consumers — consumer enforcement does not produce any improved industry behaviour;
- the consumer enforcement regime has a number of functions other than encouraging compliance (for example, provision

of compensation and licensing) and the multiple functions can create tensions;

- consumer enforcement encourages excessive disclosure and skews industry resources toward compliance with obligations that, in relative terms, may be deserving of less attention than other obligations that are not subject to those actions.

9.53 On the other hand, the report noted that consumer groups strongly supported the role of consumer enforcement as assisting produce competition in the credit market, arguing that consumer enforcement has been fundamental in ensuring a compliance culture among credit providers.

9.54 The report concluded (at page 137) that the consumer enforcement regime in the UCCC facilitates the objective of truth in lending, as well as providing a significant redress mechanism for borrowers. They facilitate fair trading outcomes including:

- provision of redress mechanisms for consumers; and
- minimal misleading, deceptive or unconscionable conduct by market participants.

9.55 The report did not recommend removal of the consumer enforcement regime in the UCCC.

9.56 In the development of the national credit framework, options for ASIC's enforcement powers and the inclusion of criminal, civil and infringement notices was discussed with ASIC, the Criminal Law Branch of Attorney-General's Department and the Financial Services and Credit Reform Implementation Taskforce (FSCRIT). FSCRIT is chaired by Australian Treasury and comprises officials from the States and Territories. The State and Territory officials were mainly from agencies responsible for administration of the UCCC, but also included some central agency representatives. Enforcements issues were also raised more generally with the Industry and Consumer Consultation Group (see discussion above under the 'Consultation' heading).

9.57 A theme of the discussions was a concern, particularly on the part of FSCRIT members, that the proposed new regulator ASIC would have sufficient regulatory tools to take action to address undesirable behaviours, and do so in a consistent manner across jurisdictions. ASIC favoured including infringement notices in the combination of enforcement tools and those views were taken into consideration.

9.58 In relation to these issues, the main matters raised by industry and consumer groups were that the sanctions are commensurate with the level of undesirable behaviour and that the regulator has appropriate enforcement,

9.59 These concerns have been considered in the development of ASIC enforcement powers and penalties and are reflected in the inclusion of infringement notices in the proposed enforcement regime.

***Conclusion and recommended option***

9.60 The main disadvantage of Option A compared to the status quo are transitional costs for the regulator and the regulated population in becoming familiar with a different compliance regime, including developing associated procedures. However, those costs are outweighed by the benefits to government, business and consumers associated with having a wider range of enforcement options available to the regulator, particularly in relation to the lower level breaches.

9.61 The recommended option is Option A.

### **3.2 Consumer lending for residential investment properties**

***Problem identification***

9.62 Loans for the purchase of residential investment properties for investment purposes (that is, not for owner-occupied properties) are currently excluded from the scope of the UCCC.

9.63 There have been long-standing concerns in respect of the conduct of credit providers in connection with the provision of credit for residential investment properties. Examples of conduct that has adversely impacted on consumers include the provision of credit for properties that are sold as part of a 'scheme' operations that might include the following aspects:

- inflated prices for the residential investment property, including two-tiered property schemes where prospective borrowers are cold-called and flown interstate, and sold a property that is significantly above the market value;
- misrepresentations and misleading information provided to consumers about residential property investments, including future taxation and income streams;
- arrangements that involve consumers putting their homes at risk by using it as security in respect of the investment

property loan, especially low or middle income borrowers who would otherwise not be eligible for a loan.

9.64 One or more of the above features have, in many cases, produced negative financial consequences for consumers — in particular, an inability to make the required repayments as required and facing forfeiture of the investment property and/or the consumer's home as a result.

9.65 To address those concerns, the Government has decided to extend the scope of the consumer credit framework to cover credit provided for the purpose of purchasing residential investment properties. The effect of that extension would be to subject credit providers for residential investment properties to registration and licensing requirements and responsible lending conduct obligations.

9.66 Having regard to that decision, the problem to be addressed in this RIS is the scope of the extension to residential investment property.

### *Objective*

9.67 The objective in regulating credit for residential investment properties is to significantly reduce the frequency of negative financial outcomes for consumers in the residential investment credit market without imposition of unnecessary regulatory costs and impositions.

### *Options*

#### *Status quo*

9.68 Retaining the status quo position (that is, no regulation of consumer credit for residential investment properties) is not a feasible option in light of the Government's decision. However, a description of the costs and benefits associated with the status quo are included as a benchmark against which the other options may be measured.

#### *Option A: Broad scope*

9.69 Under Option A (the broad approach), all scenarios involving the provision of credit to consumers (as that term is defined in the UCCC) for the purpose of residential investment properties would be covered by the new regulatory framework. In particular, the credit provision would be covered:

- regardless of the quantum of the loan;
- even if more than one investment residence is to be purchased;

- even when the residence to be purchased is under construction or bought 'off the plan';
- whether or not the consumer provides security over their existing property (particularly their own home) to provide additional collateral for the credit.

*Option B: Narrow scope*

9.70 Under Option B (the narrow approach), there could be one or more exclusions from the scope of the additional regulation, on the basis that participants in such transactions do not require the protections that would be provided under the consumer credit regulatory framework. For example, the exemptions that might be given would be including:

- for loans of amounts exceeding a specified (high) value, or to purchase more than one residential investment property;
- purchases for residences that have not been constructed or construction is not complete;
- loans for investment properties that do not involve the consumer providing additional security over existing assets, particularly their own residences.

*Impact analysis*

9.71 The groups affected by the new regime for would be consumers of credit; industry participants (principally lenders and, indirectly, advisers); and the Government and ASIC.

9.72 The businesses that would be potentially affected by the extension of the scope of the arrangements to residential investment properties would include a subset of the credit providers referred to under the 'ASIC enforcement powers' section. Not all credit providers would be affected because some providers do not deal in home loans. Also affected would be advisers in respect of investment home loans, such as mortgage brokers. Persons conducting business as 'property spruikers', whose business model includes encouraging or assisting clients to obtain credit from a particular source for an investment property purpose, would also be affected.



9.73 In its 2005 report *Property Investment Advice — Safe as houses*, the Parliamentary Joint Committee on Corporations and Securities noted that about 13 per cent of Australian households receive rental income (up from about 9 per cent in 1995), compared with about 6.5 per cent in both the United States of America and Canada, and 2 per cent in the United Kingdom. A large proportion of those investment properties would be financed with credit. The Committee noted that, in 2005, more than 30 per cent of home loans are for investment purposes. Figures from the Reserve Bank Bulletin from January 2009 (table D5) indicate that the proportion of home loans for investment purposes is still just above 30 per cent.

9.74 Both the providers of investment home loans, and persons assisting others to enter investment home loans (such as mortgage brokers) would be affected by a regulatory framework that includes investment home loans within its scope. If a broad scope were adopted, they would be required to comply with the same obligations as participants in providing other types of consumer credit under the new framework, including:

- obtaining a licence to carry on the business;
- as a consequence of licensing, being required to be members of external dispute resolution facilities and meet other obligations, such as conducting their business honestly and fairly;
- making assessments prior to entering into arrangements of whether clients are likely to be have the capacity to meet certain obligations, including obligations to repay.

9.75 Most of the participants in the investment home loan credit market would also offer their products and services in relation to loans for owner-occupied dwellings, which are clearly within the scope of the existing regulatory framework and the proposed new national credit framework. Accordingly, they would be required to meet obligations such as obtaining a licence in any event. However, the incorporation of investment home loans within the scope of the framework would mean that the transaction-based obligations, such as disclosure and assessment, would need to be met in relation to a wider class of transactions. The transaction-based disclosure and assessment obligations are described in detail in the regulation impact assessment under the ‘Responsible lending conduct requirements’ section below (Part 3.4).

9.76 The distinction between Options A and B would mean that the transaction-based obligations would only need to be met in a narrower range of transactions. However, few, if any, participants would be

relieved of the ‘one-off’ obligations, such as obtaining a licence. That is because few, if any, participants have a business model that only involves dealing in the types of loan transactions that would fall within the possible exempt categories. Under Option B, almost all participants would deal with both exempt and non-exempt classes of transactions.

9.77 Accordingly, the difference in compliance costs between the status quo and Option A is likely to be very great for those participants that deal exclusively in investment home loans, as they would not fall outside the regulatory framework altogether under the status quo. Only a small proportion of participants would fall in that category. Most would fall within the scope of the framework for their other business activities (for example, owner/occupier home loans), and the additional compliance costs would result from the regime being applied to a wider range of transactions. The difference in compliance costs for industry participants between Options A and B is not likely to be significant as few participants would have businesses that operate solely or largely in the transaction classes proposed for exemption under Option B.

9.78 For consumers considering investment properties, the benefits of the regulatory framework for credit applying to investment properties will be:

- access to enhanced pre-contractual disclosure;
- remedies, including remedies for unjust conduct; and
- statutory rights to apply for a hardship variation.

9.79 Consumers will also be protected through the application of the national credit laws in that:

- unscrupulous operators may be excluded from the market due to the licensing requirements; and
- participants will be under obligations to ensure the credit contracts for borrowers are not unsuitable and that they can afford the repayments.

9.80 Consumers that suffer serious adverse financial outcomes, including loss of their homes, due to default on credit contracts regarding investment properties can occur in large groups in cases where a major investment property scheme fails. Among the affected groups are some who, as a result of their losses, are likely to utilise government assistance in the form of, for example, the age pension. Minimising such occurrences produce a small financial benefit for government.

9.81 The difference Options A and B is that, under Option B, some transactions would not be covered by the regulatory framework due to exemptions being applied. For consumers, in cases where they have no need for the protections of the regulatory framework, Option B would be slightly preferable because they would not have to deal with disclosure information or respond to assessment queries. This benefit is offset by the risk that the exemptions might extend to some cases where the consumer would be protected from suffering loss due to the protections offered by the regulatory framework.

## Status quo

**Table 9.7**

	<i>Benefits</i>	<i>Costs</i>
<i>Consumers</i>	Access to a wide range of property investment opportunities using credit to significantly or wholly fund the investment.	Some consumers suffer negative financial consequences, sometimes of a severe nature (such as losing home), as a result of entering into non-viable credit arrangements for the purchase of residential investment properties.
<i>Industry</i>	Low compliance costs.	Publicity for high profile negative cases impacts on consumer confidence in the residential investment sector.
<i>Government</i>	Low supervisory/enforcement costs.	Providing financial assistance to affected consumers who would otherwise not have required it.

Option A

Table 9.8

	<i>Benefits</i>	<i>Costs</i>
<b>Consumers</b>	<p>Enhanced access to information before entering contracts for higher quality decision-making. (+2)</p> <p>Significant reduction of misconduct causing negative financial outcomes for borrowers (including foreclosure on investment properties and/or homes due to a failure to properly assess capacity of the borrowers to meet repayments before entering into the loan). (+2)</p> <p>Some borrowers will be able to negotiate hardship variations during financial stress, enabling them to avoid having to sell the property at a loss or for a discounted value. (+1)</p>	<p>Compliance costs of the regulatory framework are likely to be passed through to consumers. However, many major credit providers also operate in the regulated sector already, so could apply their existing compliance procedures to investment loans (noting that in some cases they may already do so voluntarily). (-1)</p>
<b>Industry</b>	<p>Lower instances of negative outcomes for consumers are likely to increase overall consumer confidence in the sector. (+2)</p>	<p>Overall higher compliance costs. Providers not already in the regulated market would need to make significant changes to their compliance programs and business practices. (-2)</p>
<b>Government</b>	<p>Lesser need for financial assistance for negatively impacted consumers. (+1)</p>	<p>Increased resources will be required to enforce and maintain this extension of the existing regulatory regime. Most of these costs will fall on ASIC. (-2)</p>
<b>Sub-rating</b>	+8	-5
<b>Overall rating</b>	+3	

*Option B***Table 9.9**

	<i>Benefits</i>	<i>Costs</i>
<i>Consumers</i>	Same benefits as for Option A but to a lesser extent, due to the narrower scope. (in total +4)	Same or similar costs as for Option A. (-1)
<i>Industry</i>	Same benefits as for Option A but to a lesser extent, due to the narrower definition. (+1)	Same or similar costs as for Option A but to a lesser extent, due to the narrower scope. (-1)
<i>Government</i>	Same benefits as for Option A. (+1)	Same or similar costs as for Option A but to a lesser extent, due to the narrower scope. (-1)
<i>Sub-rating</i>	+5	-3
<i>Overall rating</i>	+2	

9.82 The tables which compare be reference to the status quo appear to indicate that regulation of residential investment credit has the greatest overall benefit to consumers, in the form of a reduction of negative outcomes. For government and industry, both would indirectly benefit from a reduction in negative consumer outcomes but there are offsetting costs as a result of the regulation. Overall, a broad definition, while it has increased costs, has a higher overall benefit relative to the status quo than a narrow approach.

9.83 It is also noted that broader approach has some benefits relative to a narrow approach because:

- it avoids costs associated with resolving disputes around the 'edges' of the exemptions about whether a particular transaction is covered or not; and
- it avoids arbitrary rules (such as dollar thresholds) to govern which transactions by the regulatory framework and which fall outside, which might be exploited by unscrupulous providers.

### ***Consultation***

9.84 In the course of the consultations with the Industry and Consumer Consultation Group, referred to in the 'Consultation' heading above.

9.85 Options A and B were discussed in detail. Stakeholders generally favoured inclusion of investment property credit without any significant modifications or variations, so that participants may apply the same procedures to these investment loans for other home loans. Stakeholders agreed that:

- there was no particular exemption or circumstance associated with consumer credit for residential investment purposes for which the protection offered by regulation was not required; and
- the definition of the type of investment credit to be regulated should be broad.

### ***Conclusion and recommended option***

9.86 Within the parameters of the decision to extend the application of the UCCC to credit for residential investment properties, the preferred position is to adopt a broad definition of the activity to be regulated (Option A).

## **3.3 Licensing of participants**

### ***Problem identification***

9.87 In general, licensing a regulated population is intended to ensure that a particular product or service is provided to the public with a certain assurance of competence and quality. Licensing systems are common in financial services, where there are considerable information asymmetries that justify regulatory intervention.

9.88 These issues are particularly evident in respect of finance brokers and intermediaries. They were documented in detail in the RIS developed in the preparation of the Finance Brokers Bill drafted by New South Wales. That Bill was superseded by the proposal for the Commonwealth to take over the regulation of credit. The RIS noted that undesirable market practices included:

- recommending products that give higher commissions to brokers but which are inappropriate, higher cost and/or unaffordable for clients;

- misrepresenting applicants' financial details to ensure they qualify for loans in order that brokers obtain commissions, and when, if the lender was aware of the borrower's actual financial position, they would reject the application;
- 'upselling' loans to higher amounts to increase commissions;
- engaging in 'equity stripping' with lenders, that is, arranging emergency loans for borrowers in financial difficulty (particularly those facing foreclosure of the family home) with high-cost credit providers, in the expectation that the borrower will ultimately default permitting subsequent transfer of equity in a consumer's home to the broker and the lender.

9.89 Concerns such as those were considered in the context of the decisions of the Australian Government and COAG in 2008 that providers of credit and of advice relating to credit are to become subject to a national licensing system administered by ASIC.

9.90 The issue discussed in this RIS is the preferred form of the licensing framework.

### *Objectives*

9.91 The main objectives in establishing a licensing system for lenders and brokers of credit is to have a market environment for credit in which:

- lenders and brokers/intermediaries act honestly and have adequate resources and competency to carry on their businesses;
- borrowers who suffer losses because of a breach of their obligations by lenders or brokers/intermediaries are able to obtain compensation; and
- dishonest or incompetent lenders and brokers/intermediaries are prevented from continuing to operate.

## **Options**

### *Status quo*

9.92 Under the current State-based regulatory framework there is no consistent requirement for providers of credit and services related to credit to be licensed. Some, but not all, states have established requirements in

this area. Western Australia has a comprehensive licensing system for mortgage lenders and brokers. Victoria and the Australian Capital Territory have registration systems covering credit providers and brokers.

9.93 In light of the terms of the decisions by the Australian Government and COAG to introduce a national licensing system for credit administered by COAG the status quo is not a feasible option, but it has been included as a reference point against which the costs and benefits of other options can be compared.

### **Option A: Establish a new licensing system modelled on Chapter 7 of the Corporations Act**

9.94 The issues raised above in relation to credit and credit-related advice are of a similar nature to those that prompted the establishment of the licensing system in Chapter 7 of the Corporations Act for investment products and related advice. Accordingly, a licensing model along those lines, adapted to suit credit, would clearly be an option for consideration in this context.

9.95 Key elements of this option would include:

- The licensing framework would be included in the new consumer-credit legislation.
- Any individual or entity proposing to provide credit (lenders) or credit-related services (brokers/intermediaries) would be required to obtain a licence from ASIC.
- Licensees would be subject to a range of general conduct obligations modelled on the obligations in the Corporations Act, including that the business is run honestly, efficiently and fairly.
- Competency/training requirements would be included, particularly for providers of credit-related advice.
- Licensees would be required to implement appropriate compensation arrangements such as professional indemnity insurance.
- ASIC would be provided with appropriate enforcement powers, including powers to suspend or cancel licences and to issue bans.



**Option B: Expand the existing Chapter 7 of the Corporations Act licensing framework to include providers and brokers/intermediaries of credit**

9.96 Rather than establish a new framework, another option would be to simply expand the existing Chapter 7 licensing system to include credit and credit-related services. Key elements of this option would include:

- The main elements of the existing Chapter 7 licensing framework (Australian Financial Services Licence — AFSL) would be expanded to incorporate participants providing credit and credit-related services.
- Participants would be licensed by obtaining an AFSL, but there would be new categories of AFSLs to encompass credit-related services.
- The requirements regarding AFSLs (training, compensation, ASIC enforcement) would apply.

***Impact analysis***

9.97 The groups affected by the new regime for licensing would be consumers of credit; industry participants including lenders and advisers; and the Government and ASIC. Reference should also be made to the discussion in Part 3.1 under the heading of *Impact Analysis*, in respect of the likely regulated population.

9.98 The main group affected is industry participants who will need to become holders of an Australian credit licence (ACL) in order to continue engaging in credit activities. Currently there is a licensing scheme in Western Australia and a registration scheme in the Australian Capital Territory and Victoria for lenders and brokers. For persons operating across jurisdictions, or nationally, the position will be simplified in that they will now only need to hold a single licence.

9.99 The most significant impact will be on those who only conduct business in States or Territories where there is currently no licensing or registration scheme. It can be anticipated that these businesses will face significant transitional costs. However, within this group the impact will be less on those persons (predominantly brokers but also some lenders) who are members of an industry body, the Mortgage and Finance Association of Australia, as these persons, in order to qualify for membership, must already meet some of the proposed obligations (for example, they must be a member of an EDR Scheme and hold professional indemnity insurance).

9.100 From the participant perspective, licensing will involve one-off costs in applying for a licence, together with ongoing licence fees. There will be also be one-off costs of preparing the application and the costs of complying with the ongoing obligations associated with the licence, including, in particular:

- training and supervision costs; and
- maintaining adequate compensation arrangements (for example, professional indemnity insurance).

9.101 In respect of training and supervision, it is proposed that the Bill will include clauses requiring licensees to ensure that representatives understand and adhere to compliance arrangements. It is expected that ASIC will provide guidance on what it considers are the relevant competency standards.

9.102 It is proposed that the Bill will provide for an obligation to maintain such compensation arrangements as are specified, either in the regulations or formally by ASIC. It is likely that professional indemnity insurance is one type of compensation arrangement likely to be specified.

9.103 The costs of the above will vary greatly with the size of the licensee's business and the extent to which external advisors are engaged to assist with the process. However, guide, the one-off costs under the existing licensing regime for financial services would be a minimum of several hundred dollars in up-front and annual expenditure for a small firm with no employees or external advisors, through to many thousands of dollars for a large firm.

9.104 It is not considered that there would be any significant difference in the compliance cost impact for industry between Option A and Option B. As noted above, the submissions in response to the Government's *Green Paper on Financial Services and Credit Reform* indicated a reasonable level of industry support for Option A.

9.105 Consumers will benefit from licensing in that:

- unscrupulous operators will be excluded from the market where they fail to meet the licensing requirements (whereas at present they can move to a jurisdiction with no or minimal entry requirements if they are banned in another State or Territory); and
- the standards of conduct in the industry should improve over time due to the obligations attached to licensing.

9.106 Establishing a licensing regime, or extending the existing regime to cover credit advice, would involve significant resources on the part of the regulator. In the 2008-09 Additional Estimates process, the proposed regulator, ASIC, was allocated \$66.7 million in funding over four years to administer the new national consumer credit function. A proportion of that funding will be used in connection with the establishing the licensing framework for consumer credit, including processing applications.

## Status quo

**Table 9.10**

	<i>Benefits</i>	<i>Costs</i>
<i>Consumers</i>		Many reported cases of consumers being overcharged or becoming victims of equity-stripping as a result of 'sharp' practices by some providers of credit and related services.
<i>Industry</i>	Limited compliance costs for industry in most jurisdictions.	Differences in regulatory requirements across jurisdictions results in increased compliance costs for national businesses.
<i>Government</i>		

**Option A: Establish a new licensing system modelled on Chapter 7 of the Corporations Act**

**Table 9.11**

	<i>Benefits</i>	<i>Costs</i>
<i>Consumers</i>	Significantly reduced risk of losses to consumers not properly advised of risk, and access to suitable remedies in cases when it occurs. (+4)	Costs of products and services may increase as industry passes on higher compliance costs. (-1)  No measurable impact on costs or accessibility of credit or related services as a result of exits by market participants reacting to the licensing requirements is expected.
<i>Industry</i>	Greater integrity in the market may lead to greater confidence and participation by consumers. (+1)  Uniformity of rules across borders would provide opportunities for efficiencies for national credit businesses. (+1)	Higher compliance costs due to new obligations relating to licensing, training, PI insurance and conduct obligations. System can be specifically tailored to credit, but holders of AFSLs also providing credit services would have to comply with separate requirements. (-3)
<i>Government</i>		Resources would be required to establish and maintain the licensing framework. (-1)
<i>Sub-rating</i>	+6	-5
<i>Overall rating</i>	+1	

**Option B: Expand the existing Chapter 7 of the Corporations Act licensing framework to include providers and brokers/intermediaries of credit**

Table 9.12

	<i>Benefits</i>	<i>Costs</i>
<i>Consumers</i>	Significantly reduced risk of losses to consumers not properly advised of risk, and access to suitable remedies in cases when it occurs. (+4)	Costs of products and services may increase as industry passes on higher compliance costs. (-1)  No measurable impact on costs or accessibility of credit or related services as a result of exits by market participants reacting to the licensing requirements is expected.
<i>Industry</i>	Greater integrity in the market may lead to greater confidence and participation by consumers. (+1)  Uniformity of rules across borders would provide opportunities for efficiencies for national credit businesses. (+1)	Higher compliance costs due to new obligations relating to licensing, training, PI insurance and conduct obligations. As compared to Option A, there may be some synergies arising from combining the licensing requirements with the existing AFSL regime, but there would be additional costs because the AFSL framework is not tailored to credit. (-3)
<i>Government</i>		Resources would be required to establish and maintain the licensing framework. (-1)
<i>Sub-rating</i>	+6	-5
<i>Overall rating</i>	+1	

**Consultation**

9.107 Licensing was a key focus of the Industry and Consumer Consultation Group, referred to in the 'Consultation' heading above. Stakeholders discussed:

- the desirability of a separate licensing scheme for credit providers, rather than including credit in the definition of

‘financial products’ in the existing AFSL regime in the Corporations Act:

- stakeholders generally opposed the incorporation of consumer credit into the AFSL regime as credit was fundamentally different to other financial products (note that margin loans were an exception because of their close connection with investment products regulated under the Corporations Act), so the favoured option was the creation of a tailored framework for consumer credit including a standalone licensing scheme;
- ways to minimise costs to industry where the same entity holds an AFSL and an ACL (including, for example, the desirability of having the same licence number where possible);
- transitional arrangements, including the desirability of the legislation being supplemented by regulatory guidance from ASIC; and
- a range of technical issues, such as:
  - the circumstances in which a person who is assigned a loan by a licensed credit provider should be required to become licensed; and
  - a number drafting options for draft legislative clauses.

9.108 Feedback received from the group has been factored in to the design of Option A. In particular, it is proposed that a streamlined mechanism for licensing will be incorporated for persons that already hold an AFSL, or certain licences under State-based regulatory frameworks.

9.109 It should be noted that some stakeholders were also members of the consultation group in relation to margin loans (which is addressed in a separate Bill), where the unique aspects of this product, and its intermingling with shares or other financial products, led to a different approach to regulation.

#### ***Conclusion and recommended option***

9.110 Options A and B would both offer significant benefits to consumers and overall benefits in comparison with the status quo. The cost-benefit profiles for both yield identical outcomes using this methodology, so the choice between them is finely balanced.

9.111 The advantages of Option A are that incorporating a licensing framework into the existing AFSL system in Chapter 7 of the Corporations Act would offer potential efficiencies for government in establishing and maintaining the framework and, for those businesses that already hold an AFSL for other products, they would already be familiar with the system.

9.112 The disadvantage, in comparison with Option B, is that the existing framework was not designed with credit products in mind. It would require significant tailoring to ensure it applied appropriately, though both exemptions and variations. Those would result in introduce additional complexities and costs for participants, as well as introduce perceived anomalies.

9.113 An independent system can be tailored to its purpose at the outset, and reduce the risk of elements that are unnecessary in the credit context to be applied unnecessarily. For example, the arguably requirements in the AFSL licensing framework for licensees to have compensation arrangements in place may not need to be of the same nature or size when the consumer has received credit as when they have invested funds. Similarly, remedies for consumers associated with unlicensed conduct are likely to need to be different, as remedies such as rescission are most appropriate in the investment rather than the credit environment.

9.114 On balance, Option A is preferred.

### **3.4 Responsible lending conduct requirements**

#### *Problem identification*

9.115 According to the May 2008 final Productivity Commission's report on the Review of Australia's Consumer Policy Framework (the PC Report) there has been an increased use of credit in Australia over the last 20 years.

9.116 This growth has contributed to historically high levels in the stock of debt held by households as well as increased commitments required to service debt. Evidence suggests that these increases have come about mostly as a result of the growth in the size of home loans.

9.117 The distribution channels for the provision of credit to consumers (such as the use of various intermediaries) and the development of products such as no and low documentation loans have often resulted in a separation from the borrower from the lender and limited or filtered the documentation and enquiries made regarding a consumer's financial position when seeking to apply for credit.

9.118 Concerns have been expressed that this 'separation' factor, when combined with incentives for persons in the distribution chain to issue loans, have resulted in many consumers entering into credit transactions that are unsuitable for their credit requirements and/or are unsuitable, in the sense that they are, or become, unable to meet the relevant obligations without suffering hardship.

9.119 Consumer defaults, particularly on home loans, can cause intense personal hardship to individuals and families and, due to the flow-on effects on such issues as housing prices, can have broader economic implications if they occur on a large scale.

9.120 In response to those concerns, in September 2008 the Australian Government decided that the phase one of the implementation plan on national consumer credit regulation framework should include the regulation of responsible lending conduct. This decision was endorsed by COAG on 2 October 2008.

9.121 The problem addressed in this RIS is, what the key elements of the new regulatory framework for responsible lending conduct should be.

### ***Objectives***

9.122 The key objective is to establish a regulatory framework for responsible lending conduct (in accordance with the decisions of the Australian Government and COAG) in a manner that strikes a reasonable balance between the goals of minimising the incidence of consumers entering unsuitable credit contracts, and the goal of maximising access to credit for consumers who have the desire and ability to service it.

### ***Options***

#### *Status quo*

9.123 Retaining the status quo position (that is, no formal regulatory framework for responsible lending conduct) is not an option in light of the 2008 decisions of the Australian Government and COAG. However, a description of the costs and benefits associated with the status quo are included as a benchmark against which the other options may be measured.



*Option A: Regulation of the provision of credit advice*

9.124 Under Option A, advice to consumers about credit would be regulated in the same way to the regulation of advice about financial products under the Corporations Act. This option would include regulatory elements such as:

- requiring the adviser to undertake sufficient inquiries into the consumer's personal circumstances (not only financial circumstances) and conducting sufficient investigation;
- requiring the adviser to have a reasonable basis for any financial product advice;
- requiring the advice to be of a standard that is appropriate for the client;
- requiring the adviser to document all advice and the basis for that advice in a Statement of Advice to a level of detail that allows the consumer to decide whether to act on the advice and requiring a number of prescribed mandatory inclusions in the statement;
- requiring disclosure of any commissions that are payable or receivable by the adviser or the adviser's employers, and any other interests that might be capable of influencing the advice given for every financial product recommended;
- requiring mandatory provision of a Statement of Advice to the consumer within five working days; and
- imposing higher level obligations on advice that recommends the replacement of one product with another.

*Option B: Responsible lending conduct obligations*

9.125 Under Option B, there would be regulation of certain conduct in relation to credit contracts, which would be known as 'responsible conduct' obligations. Those rules would provide for persons involved in the credit supply chain to observe a number of obligations, chiefly that:

- persons providing credit (credit providers), persons suggesting credit or assisting persons to obtain credit (credit assisters); representatives of such persons and debt collectors would all be required to issue to consumers a credit guide, which includes basic information about the identity of the participant, dispute resolution, and compensation arrangements;

- credit assisters suggesting persons enter credit contracts would be required to make preliminary assessments about the suitability of the contract, in terms of whether it meets the consumers' requirements and also whether the consumer can meet the financial obligations under the proposed contract; and
- credit providers would, before entering into a credit contract with the consumer, be required to conduct a suitability assessment.

### ***Impact analysis***

9.126 The groups affected by the amendments are consumers of credit; industry participants including credit providers and credit service providers; the Government and ASIC.

9.127 In terms of benefits to consumers, regulation of credit advice and applying responsible conduct obligations both offer the prospect of preventing consumers entering unsuitable contracts. However, as the responsible conduct obligations would apply to advisers and lenders, it is likely to be somewhat more effective at achieving that goal. Option A, however, offers consumers the prospect of higher quality advice more generally (rather than merely preventing unsuitable contracts). Overall, the benefits for Options A and B are of a similar magnitude.

9.128 The costs of complying with the obligations for the type of regulation under Chapter 7 (Option A) are familiar to businesses that provide financial product advice. The RIS for the Corporations Legislation Amendment (Simpler Regulatory System) Bill (2007) noted that the industry has indicated that the cost of preparing a statement of advice is approximately \$260 on average. That estimate was based on cost estimates provided by industry for producing a Statement of Advice, which primarily consists of the time that an adviser would spend on documenting the client's information and the advice provided. It does not include the costs of making appropriate inquiries of the client and doing the analysis.

9.129 The costs associated with complying with Option B would primarily relate to the obligations to prepare and provide a credit guide and undertake the suitability assessments.

9.130 The provision of a credit guide is expected to be of a similar compliance cost to the Chapter 7 requirement to provide a Financial Services Guide. The major costs associated with the guide for most licensees would be in compiling and checking that the information is accurate and meets the requirements of the legislation. Many licensees

may choose to use external advisors in that process. If in printed form, it would cost the same to produce as a small pamphlet or brochure — the unit cost being dependent on volume.

9.131 The requirement to undertake a suitability assessment will involve making reasonable inquiries about how the proposed credit would impact on the consumer's financial situation. Such inquiries might include obtaining information regarding:

- the consumer's current income and expenditure, and the maximum amount the consumer is likely to have to pay under the proposed contract;
- any expected significant changes in the consumer's financial circumstances.

9.132 The extent of the required inquiries will be dependent on the circumstances of the individual case, in particular the significance of the proposed credit in the context of the consumer's overall finances. Prudent lenders and credit brokers/advisers would ordinarily make inquiries along similar lines as of their normal business operations, in order to assess the customers' capacity to repay. It is proposed that provision will be made to minimise duplication of inquiries where a consumer deals with intermediaries rather than with the lender directly.

9.133 Industry groups expressed significant concern about the compliance costs associated with applying an advice regime for credit similar to the advice framework in Chapter 7. As between Option A and B, the least costly option in terms of compliance costs is likely to be Option B.

*Status quo*

**Table 9.13**

	<i>Benefits</i>	<i>Costs</i>
<i>Consumers</i>	Ready access to advice and credit.	Relatively high rates of consumers suffering financial hardship due to over indebtedness or default on consumer credit contracts.
<i>Industry</i>		Costs associated with managing default cases and resulting disputes.
<i>Government</i>		Costs associated with supporting consumers in financial hardship as a result of credit default/foreclosures.

*Option A: Regulation of the provision of credit advice*

**Table 9.14**

	<i>Benefits</i>	<i>Costs</i>
<i>Consumers</i>	Less risk of entering unsuitable transactions that include obligations that consumers are not able to meet without hardship. (+2)  Higher quality of credit advice generally, which is likely to lead to better financial outcomes from credit transactions. (+1)	Costs of, and access to, credit advice is likely to increase. (-2)
<i>Industry</i>	Higher consumer confidence in quality and professionalism of credit advisers. (+1)  Reduced costs associated with managing default cases and resulting disputes. (+1)	Increased compliance costs associated with credit advice, such as statements of advice. (-3)
<i>Government</i>	Reduced costs associated with supporting consumers suffering hardship as a result of credit default/foreclosure. (+1)	Regulatory and enforcement associated with establishing and maintaining regulation of consumer credit advice. (-1)
<i>Sub-rating</i>	6	-6
<i>Overall rating</i>	0	

*Option B: Responsible lending conduct obligations***Table 9.15**

	<i>Benefits</i>	<i>Costs</i>
<i>Consumers</i>	Reduced frequency of consumers entering credit contracts that are unsuitable for them and/or they do not have the capacity to repay. (+3) Access to remedies for damage in certain cases of unsuitable credit contracts. (+1)	The cost of complying with the conduct requirements is likely to be passed on in the cost of credit related fees and charges. (-1)
<i>Industry</i>	Reduced costs associated with managing default cases and resulting disputes. (+1)	Increased compliance costs regarding unsuitability and limited record keeping (less than Option A). (-2)
<i>Government</i>	Reduced costs associated with supporting consumers suffering hardship as a result of credit default/foreclosure. (1)	Regulatory and enforcement associated with establishing and maintaining regulation of conduct standards. (-1)
<i>Sub-rating</i>	+6	-4
<i>Overall rating</i>	+2	

**Consultation**

9.134 The Industry and Consumer Consultative Group (referred to in the Consultation section above) was consulted in relation to this issue.

9.135 Industry participants were very strongly opposed to a proposal that would apply a regulatory framework similar to Chapter 7 of the Corporations Act to advice relating to credit. Participants cited high compliance costs and complexity of the advice framework under Chapter 7 and submitted that it would be inappropriate to apply a framework designed primarily to an investment context to advice in relation to credit.

9.136 Consumer advocates expressed the view that responsibility for making responsible lending decisions should rest with the credit providers — not only those providing advice.

9.137 The views of stakeholders on this issue were a key consideration in development of the alternative Option B, which is based on responsible lending conduct and unsuitability assessments.

***Conclusion and recommended option***

9.138 Option B is preferred. As it requires persons suggesting consumers enter contracts, and persons actually entering contracts, to consider suitability, it is likely to be more effective than Option A at reducing the incidence of consumers entering unsuitable credit contracts and suffering hardship. Further, the overall compliance costs of associated with the option are likely to be lesser than the costs associated with regulating advice in a similar manner to advice regarding financial products similar to the current framework in the Corporations Act.

**Part 4: Implementation and review**

9.139 The recommended options would be implemented primarily through the introduction of the National Consumer Credit Protection Bill 2009 and consequential amendments to legislation including the Corporations Act and the *Australian Securities and Investments Commission Act 2001*. Associated regulations would also be required.

9.140 There will be an opportunity to refine the framework established in phase one of the project in the course of developing phase two, which is proposed to include investment credit.

9.141 The new credit laws would, like the regulatory framework for regulation of corporate regulation and financial services, be the subject of ongoing monitoring and review by the Australian Government.

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# **Chapter 10**

## **Attachment A: Regulation impact statement**

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### **Executive summary**

10.1 This is the regulation impact statement (RIS) referred to in paragraph 9.5 of Chapter 9 of this explanatory memorandum. This RIS discusses:

- The development and implementation of a national regulatory framework for consumer credit (including margin loans) to be undertaken in two stages. The key components of the proposed framework seek to establish consumer protection across all consumer credit products and services. The framework is proposed to be developed by enacting relevant State and Territory based consumer credit regulations as Commonwealth statute; and consolidating and enhancing the framework as necessary to reduce the regulatory burden on business and strengthen protection in specific areas.
- Consultation on aspects of the proposed framework including the need for any enhancements (as outlined in the high level implementation plan and discussed herein) and its implementation.

### **Background**

#### **Consumer credit**

10.2 Consumer credit is credit given by shops, banks and other financial institutions to consumers so that they can buy goods and services for personal, household or domestic purposes. Consumer credit encompasses for example, credit cards, payday loans and personal loans as well as mortgages.

10.3 The provision of consumer credit is a significant industry in Australia. As of June 2008, total consumer credit on issue, including

securitisations, was \$1,113.4 billion. Of this, housing credit on issue stood at \$957.8 billion and other personal credit on issue was \$155.6 billion. The largest sector of consumer credit is residential mortgages, which are estimated to account for over 86 per cent of all consumer loans.<sup>4</sup>

10.4 Industry participants include providers (also known as lenders and issuers) and brokers/advisers who act as intermediaries between providers and consumers. Providers are increasingly relying on brokers to originate loans — in 2003 25 per cent of home loans were originated by mortgage brokers, this rose to 37 per cent in 2007.<sup>5</sup>

10.5 The States and Territories currently regulate the provision of consumer credit by any provider through the Uniform Consumer Credit Code (UCCC).

10.6 While the provision of consumer credit is currently excluded from being a financial product under Chapter 7 of the *Corporations Act 2001* (Corporations Act), Australian Securities and Investment Commission (ASIC) does regulate some consumer protection aspects of consumer credit. Specifically, the *Australian Securities and Investment Commissions Act 2001* (ASIC Act) prohibits conduct that is misleading or deceptive, or is likely to mislead or deceive, in relation to the provision of credit products and services.

10.7 The Council of Australian Governments (COAG) reached an in-principle agreement on 26 March 2008 that the Australian Government would assume responsibility for regulating mortgage credit and mortgage advice, including non-deposit taking institutions and mortgage brokers, as well as margin loans. Subsequently, on 3 July 2008, COAG agreed that the Australian Government would also assume responsibility for regulating all other consumer credit products and requested the Business Regulation and Competition Working Group report back at the 2 October meeting with a detailed implementation plan for other credit.

#### ***Current regulation of consumer credit***

10.8 The UCCC's scope is limited to the provision of consumer credit for personal, household or domestic purposes. As such consumer credit sought for investment purposes and credit-related advice is not regulated.

10.9 The main provisions contained in the UCCC include the following:

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4 Reserve Bank of Australia.

5 Australian Mortgage Industry – Volume 7, Fujitsu and JPMorgan, March 2008.



- provisions relating to the credit contract, including the form and content of the contract, how information about the contract is disclosed to the consumer, and how the contract may be changed;
- special provisions relating to circumstances where consumers are affected by hardship, including powers of a court to intervene in such circumstances;
- provisions relating to the enforcement of credit contracts, in particular what steps creditors must undertake before they can enforce a contract against a defaulting debtor;
- extensive provisions relating to civil penalties for breaches of the UCCC;
- special provisions regarding related sales and insurance contracts, as well as consumer leases; and
- provisions relating to the advertising of credit, including requirements for including a comparison rate.

#### *History of the Uniform Consumer Credit Code*

10.10 In 1993, the States and Territories agreed that consumer credit laws should be nationally uniform. They entered a Uniform Credit Laws Agreement (the Uniformity Agreement) under which the UCCC was developed. The UCCC is template legislation, substantially uniform in all Australian States and Territories. It was enacted in Queensland by the *Consumer Credit (Queensland) Act 1994* pursuant to the Uniformity Agreement, and in the other States and Territories through various arrangements.

10.11 Under the Uniformity Agreement, amending the consumer credit legislation requires approval by two thirds of the members of the Ministerial Council for Uniform Credit Laws (the Council), which is a subcommittee of the Ministerial Council on Consumer Affairs (MCCA). Membership of the Council consists of the State and Territory Ministers responsible for consumer credit laws. Changes to the Uniformity Agreement itself require the unanimous approval by the Council.

10.12 The Australian Government is not a member to the Uniformity Agreement and does not have a formal vote in matters relating to the UCCC. It is however invited to comment on all matters relating to the UCCC considered by the Council.

*Outstanding UCCC projects*

10.13 To address gaps in the UCCC and changes in the credit environment, MCCA has already decided to implement some specific amendments to the UCCC. These amendments are expected to be introduced prior to the Commonwealth assuming responsibility and therefore reflected in the UCCC which will be transferred over at that time. These are:

- *'Instalment' lending* — amendments will ensure that vendor finance contracts for the purchase of land, 'conditional sale agreements' and 'tiny terms contracts' are brought within the scope of the Code.
- *Default notices* — to improve the enforcement process for both lenders and borrowers by giving consumers clearer and more relevant and understandable information when they default.
- *Amendments to address 'fringe' lending practices* — to address avoidance practices, increase the reviewability of credit fees and charges, improve regulator access to remedies, prohibit 'blackmail' securities and require lenders to supply basic direct debit information.
- *Reform of Mandatory Comparison Rates* — to reform and streamline the operation of mandatory comparison rates (MCR) by responding to the independent review.

10.14 MCCA is also undertaking a number of projects in relation to the UCCC, which are in varying stages of development. These projects will be passed to the Commonwealth when it assumes responsibility and will be considered in the context of the national approach to the regulatory framework:

- *Reverse mortgages and other equity release products* — to improve consumer outcomes in relation to equity release products.
- *Pre-contractual disclosure* — to provide consumers with simple, accessible, relevant, concise and comprehensible pre-contract information.
- *Universal membership of External Dispute Resolution (EDR) Schemes* — to explore the feasibility of requiring all credit providers to belong to an approved EDR scheme.

- *Credit card responsible lending* — to explore options to address credit card over-indebtedness.

***Additional State and Territory specific regulation***

10.15 By agreement among the States and Territories certain areas are exempted from the uniformity requirements applying to the UCCC. Additionally, some jurisdictions have moved unilaterally to address specific concerns. Accordingly, there are a number of differing requirements which are intended to augment the operation of the UCCC in the States or Territories in which they have application. For example:

- Victoria, New South Wales, Western Australia and the Australian Capital Territory have some limited broker specific regulation. The Western Australian legislation requires all finance brokers to be licensed and members of an EDR Scheme.
- New South Wales, Australian Capital Territory, Victoria and Queensland have legislation which limits the rate of interest and fees which can be charged on consumer credit products. South Australia expects to pass similar legislation by the end of 2008.
- Victoria has passed legislation which is to commence in March 2009 which will subject credit contracts to the unfair contract terms provisions in the Fair Trading Act. Victoria has also passed legislation due to take effect in March 2009 which requires all credit providers to be members of an external dispute resolution scheme. In addition, Victoria is examining the requirement for enhanced registration of credit providers.
- South Australia is expected to pass legislation by the end of 2008 which will allow credit disputes to be heard in lower courts.
- Tasmania is expected to introduce a Bill into Parliament shortly that will restrict the advertising of high cost credit products.
- The Australian Capital Territory has legislation which imposes responsible lending requirements on credit cards providers.

*Draft New South Wales National Finance Brokers Package*

10.16 In addition to the UCCC and specific regulation mentioned above, the States and Territories have also agreed to national reforms aimed at regulating the finance broking industry, as recommended in the relevant decision-making RIS, subject to consultation on a draft Bill.

10.17 To this end, in November 2007, the New South Wales Government released the Draft National Finance Brokers Package for public consultation on behalf of all jurisdictions.

10.18 The draft Finance Brokers Bill (NSW) proposes to license all brokers to ensure that only reputable, skilled brokers transact with consumers and small businesses to obtain credit that suits their purposes and that they can afford. Applicants would be required to:

- pass probity checks;
- maintain mandatory membership of an approved EDR Scheme;
- attain prescribed educational qualifications or skills (not below a Certificate IV); and
- obtain mandatory professional indemnity insurance.

10.19 In addition, the draft Bill imposes a requirement that brokers confirm a person's capacity to repay before applying for credit; disclose certain information and have a reasonable basis for any recommendation. Further, brokers would not be able to charge a fee before credit was obtained.

10.20 Over 100 submissions were received and consultations conducted by NSW have revealed broad support for the draft Bill. However some concerns remain in relation to a few specific provisions, namely the capacity to repay, stay of enforcements and professional indemnity requirements.

10.21 In light of the COAG decisions it has been agreed that the Commonwealth will take over the project, and conduct further consultation on the remaining concerns. In accordance with the conditional approval given to the project by the Office of Best Practice Regulation, an updated assessment of the regulatory impact of the proposed regime will be undertaken once the details are established.

## Margin loans

10.22 Margin lending describes an arrangement under which investors borrow money to buy financial products (such as listed shares, fixed interest securities and units in managed funds). The underlying financial products are then used to secure the loan for those products. The amount the investor can borrow depends on the loan to valuation ratio (LVR) offered by a lender of each stock.

10.23 As with most other loans, investors must pay interest on the amount borrowed under a margin loan, however regular repayments are not generally required. Instead, repayments are only required when the investment is subject to a 'margin call'. This occurs where the market value of the investment falls below the level agreed under the contract. A margin call requires the investor to take appropriate action to return the LVR to the agreed limits stated under the contract. This can be done by paying extra cash, selling some of the assets or giving the lender additional security. The lender is under no obligation to contact the investor when a margin call is made. The responsibility falls on the investor to take appropriate action in accordance with the timeframes, potentially less than 24 hours, as prescribed in the margin loan agreement.

10.24 There has been a rapid growth in the value of margin loans with the total value increasing from under \$5 billion in June 1999 to over \$37 billion in December 2007. More recently the total value of margin loans has dropped back to around \$32 billion in response to the recent market turbulence. Consistent with the growth over the past nine years, the number of clients taking out margin loans has increased from 87,000 in 2000 to 202,000 in 2008.

### *Current regulation of margin loans*

10.25 Margin loan facilities are based on complex contractual arrangements between the lender and the client. Primary disclosure of the terms and conditions governing the loan occurs through the lending agreement signed between the two parties.

10.26 Margin loans consist of a credit component and an investment component. Where the investment aspect involves a financial product such as shares, Australian Government regulation in the form of Chapter 7 of the Corporations Act applies.

10.27 In addition, where the investment aspect involves a listed share, Australian Securities Exchange (ASX) *Listing Rules* might apply. The Listing Rules set standards of behaviour for listed entities and include ASX's continuous disclosure requirements.

10.28 Misleading and deceptive conduct in relation to margin lending is regulated under the *Australian Securities and Investments Commission Act 2001* (ASIC Act). Under this legislation ASIC can, for instance, take action against misleading advertising or misleading statements made by financial advisers in relation to the provision of margin loans.

10.29 The credit component of the margin loan transaction is currently largely unregulated. Margin loans are not regulated by the States and Territories under the UCCC, as credit provided for investment purposes is excluded.

10.30 The Corporations Act excludes all credit under the agreement with the States and Territories. However, where a margin loan is provided through a financial planner as part of an overall financial plan, ASIC considers that the Corporations Act applies to all the elements of the plan, including the margin loan facility as it is considered to be an investment vehicle.

10.31 As margin loans are supplied by a variety of providers, including banks, various industry standards, such as the Australian Bankers' Association *Code of Banking Practice*, may apply.

10.32 The Code of Banking Practice, which applies to personal and small business bank customers, sets out the banking industry's key commitments and obligations to customers on standards of practice, disclosure and principles of conduct for their banking services. This Code is not legislation; however, banks that adopt this Code are contractually bound by their obligations under this Code.

10.33 If the provider of a margin loan has adopted the Code of Banking Practice there is an obligation on the bank to exercise care and skill in determining a customer's ability to repay the loan. Under this Code members are required to provide both an internal and EDR Scheme for customer disputes.

10.34 However, margin loans are increasingly being provided by non-deposit taking institutions. Clients of these lenders do not benefit from the protection of the Code of Banking Practice.

## **Financial Services Reform — Chapter 7 of the Corporations Act**

10.35 The *Financial Services Reform Act 2001* (FSR) put in place a regulatory framework for the provision of a wide range of investment and risk management style financial products and advice related to those products, including securities, derivatives, general and life insurance,

superannuation, deposit accounts and non-cash payments. This regime was incorporated as Chapter 7 of the Corporations Act.

10.36 The regulatory framework introduced under Chapter 7 sought to promote confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; fairness, honesty and professionalism by those who provide financial services; fair, orderly and transparent markets for financial products; and the reduction of systemic risk and the provision of fair and effective services by clearing and settlement facilities.

10.37 The FSR regime provides for:

- All financial services providers are licensed and subject to uniform obligations and requirements by ASIC in the provision of the services for which they are licensed.
- All providers of financial services (including issuing, broking and advice) are uniformly regulated in the provision of the regulated financial products (noting tailoring of provisions for specific products and circumstances).
- Minimum standards such as training, disclosure, considerations in giving financial product advice, and general conduct are required of licensees in their dealings with retail clients:
  - there are tiered training requirements, dependent on the level of advice and type of product being provided;
  - membership of an EDR Scheme is compulsory;
  - providers are required to conduct their services efficiently, honestly and fairly;
  - there must be a reasonable basis on which providers base their advice; and
  - disclosure of information to retail clients in relation to the provider's financial services business (in a Financial Services Guide), financial services advice (in a Statement of Advice) and financial services products (in a Product Disclosure Statement) is required.
- All providers must have adequate compensation arrangements (generally professional indemnity insurance).

10.38 The Government has tasked the *Financial Services Working Group* to reform financial services disclosure documents in order to introduce simple, standard and readable documents which are more easily understood by consumers and allow for greater ease of product comparability.<sup>6</sup> Once implemented, these reforms may reduce compliance burden involved in complying with FSR and therefore produce cost savings.

## Problem identification

### Consumer credit

10.39 *The inter-jurisdictional processes for changing the UCCC have led to prolonged delays in implementing necessary reforms leading in some cases to their effective abandonment.* Amending the UCCC is a slow and arduous process requiring agreement among all jurisdictions. The protracted time frames for developing national finance broker regulation and for closing off some identified loopholes in the UCCC such as those related to the regulation of fringe lenders, are cases in point. Such delays have compromised the capacity of the regulatory regime to respond to market developments and the effectiveness of protections for those acquiring credit products and services, particularly in a market where products and practices are evolving rapidly.

10.40 *The introduction of various State and Territory specific regulations has resulted in inconsistent consumer protection and has added red tape and unnecessary compliance costs on service providers.* While the UCCC notionally provides for consistent administration and enforcement of a consumer protection code nationally, jurisdictions have unilaterally imposed additional requirements separate from the UCCC. Consequently, protections available to consumers acquiring credit are not uniform across jurisdictions and have resulted in providers who operate nationally or in multiple jurisdictions incurring additional compliance costs arising from the need to vary their business practices. Where this occurs, complexity and additional costs are imposed on consumers and businesses.

10.41 *There is evidence that some consumers who access credit through brokers are not achieving appropriate outcomes.* The concerns with the lack of regulation of brokers are well documented in the RIS prepared for the National Finance Broking Regulation. For example, the number and range of credit products currently offered by providers are too

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6 Complexity to be Tackled in Financial Services Working Group to Start Immediately, Joint press release by Ministers Sherry and Tanner, 5 February 2008.



numerous and too complex to allow the majority of consumers to make fully informed decisions. As a result many consumers are turning to brokers. However, the use of a broker may not produce the best outcome, and could lead to considerable detriment, for the consumer. This is because consumers are often dependent on the broker's skill and expertise and therefore vulnerable to exploitation. Unfortunately, it appears some brokers may provide inappropriate advice and this occurs for a variety of reasons, including a lack of skill, remuneration based incentives and unscrupulousness.

10.42 *There is evidence that some consumers are experiencing financial difficulties caused by over-indebtedness.* There are a number of causes of this, for example, some consumers do not appreciate the implications of obtaining credit, and/or have an unrealistic appreciation of their capacity to repay. In addition, some providers' assessment practices maximise the amount of credit able to be granted but which cannot be repaid by the consumer without substantial hardship. The concern with the lack of a requirement on participants to establish a consumer's capacity to repay are well documented (albeit in a limited context) in the RIS on responsible lending practices in relation to consumer credit cards.

10.43 *Consumers' access to dispute resolution mechanisms other than the Courts is limited under the UCCC as participants are not required to be members of an EDR Scheme.* Therefore consumers who are unable to resolve a dispute directly with a provider who is not voluntarily a member does not have access to dispute resolution services outside of the court process. Court processes are often complex, time consuming and costly and therefore not a particularly viable solution.

10.44 *Currently consumers have only limited protections when obtaining credit for investment or small business purposes.* The UCCC does not regulate credit provided for investment purposes, nor credit provided to small businesses. That means, for example, the mortgage over a person's home is regulated under the UCCC but the same person's mortgage over another home, for investment purposes, is not. That person is not necessarily any more knowledgeable when entering into that contact, and may have used their primary residence as security, but does not have access to the protections offered by the UCCC. Furthermore, a loan to small business may also be used indirectly to fund personal consumption or be secured by personal assets, particularly in the case of an unincorporated operator, but is not afforded protections under the UCCC. The FSR regime only regulates investment in financial products (for example, shares but not real property) and related advice — not the credit used to obtain it.

10.45 *There is evidence that some consumers are poorly informed about the key features and risks of certain credit products.* The UCCC contains a number of provisions regulating disclosure, mainly

pre-contractual which focuses on the contractual obligations rather than the features and risks of the actual product. As such, it appears that the existing disclosure requirements may not be sufficient to prevent confusion and financial loss.

10.46 *The penalty provisions in the UCCC are largely limited to civil remedies for breaches of the legislation.* There is no provision for a regulator to intervene through administrative action. In addition, the regulator does not have standing in court. This means the regulator cannot deal with minor breaches of the legislation in a manner commensurate with their impacts or take action on behalf of consumers as a general population.

## **Margin loans**

10.47 With the strong performance of the ASX over the recent years, the instance of margin calls has been very low. However, with the stock market moving into a time of more uncertain growth, there has been some concern surrounding retail clients' understanding of how their margin loan product operates. Recent market volatility has been alarming for small investors, particularly those who have only experienced positive markets previously. This has highlighted the current absence of consumer protection regulation concerning margin loans, particularly in relation to retail investors.

10.48 There are serious concerns that consumers are not necessarily aware of the extent to which margin lending contracts place the risk of changes to market conditions on them. In particular, some contracts allow the lender to unilaterally withdraw the facility or withdraw a particular company's stock from their acceptable list of equities over which margin lending is accepted, thereby forcing full repayment.

10.49 Furthermore, it is not clear that investors fully understand how the LVR ratio works and that the loan provider is able to change this in a very short period of time.

10.50 There are also serious concerns that marketing material, separate from the contract itself, highlighting 'bull market' gains make margin loans seem much simpler than they in fact are and do not fully disclose the downside risks.

## Policy objectives

10.51 To give effect to the COAG decisions of 26 March and 3 July, in that the Australian Government will assume responsibility for the regulation of consumer credit and margin loans.

10.52 To provide a comprehensive, nationally consistent consumer credit regime, by addressing conflicts or gaps in the existing consumer credit regime where there is evidence that consumers are suffering loss and other detriment or an unnecessary compliance burden is being placed on business.

10.53 To determine the most appropriate way to handle margin loans to ensure people who invest through them are aware of the associated risks.

10.54 To reduce the regulatory burden on business, better protect the interests of consumers and ensure the regulatory regime contributes to ensuring the Australian economy is modern and strong.

## Implementation options

### *Implementation scope*

10.55 The terms of the COAG agreement are quite broad and allow the Commonwealth to determine the precise scope and mechanism for implementing the national regulation of consumer credit and margin loans. Although the Commonwealth has not previously regulated consumer credit the States and Territories, as well as industry participants and consumer groups, have substantial knowledge of the issues involved and will be used to inform the development of the national regime.

10.56 A primary weakness of the existing UCCC is its inability to respond to market developments in a timely manner because of the co-operative amendment process. This will be overcome when enacted as Commonwealth law, in part because, where possible, it will be drafted on a principles basis so that it does not necessarily need to be amended to regulate new products and behaviours. In addition, a national regime will provide consumers and participants with consistency by reducing duplication and inconsistent obligations.

10.57 Despite those inherent improvements, given the concerns identified above it would seem that simply enacting the UCCC as Commonwealth law will not be sufficient to comprehensively regulate consumer credit in a way which achieves the Government's objectives. Some potential enhancements which could be made have been identified

below. Their necessity, and the impacts their introduction would have, will be evaluated on the basis of views solicited through further consultations.

***Potential enhancements to the regulation of consumer credit under the national regime***

10.58 *The scope of the regime may need to be framed so as to capture additional transactions and services.*

10.59 The UCCC only regulates the provision of consumer credit. That is, the UCCC does not regulate the provision of credit-related advice, and excludes credit provided to consumers for investment purposes and loans made to small businesses. This means that some transactions undertaken by consumers are outside of the protections offered by the UCCC.

10.60 However, the draft Finance Brokers Bill has been specifically crafted to regulate the provision of advice by brokers/advisors in all jurisdictions in relation to all consumer and small business credit.

10.61 The absence of a comprehensive approach for regulating credit advice is widely acknowledged as a key deficiency of the current regime. Changes in the credit environment and the increased availability of a range of products being offered by a range of lenders have seen consumers rely more heavily on finance brokers/advisors when considering their lending options, yet there is no regulation of these transactions. That is, the UCCC only regulates the actual lending portion of the transaction and not the advice. There is no regulatory requirement that advice is appropriate for the consumer and there is evidence that in its absence consumers have suffered detriment.

10.62 Consumer borrowing for investment purposes is not regulated by the UCCC. Individual investors are often not sophisticated and consider investing in real property to be a lower risk activity than other investments. Such investment is often long term and involves large sums of debt. Past increases in property prices and average household incomes have promoted consumer confidence which has led to increased borrowing to fund investment. However recent downturns in property and financial markets have left some investors with reduced levels of equity and liquidity. These investment credit contracts are not subject to regulatory oversight and protection. By comparison, the FSR regime regulates investment in financial products, and advice in relation to it.

10.63 Similarly, small business operators are not necessarily sophisticated investors. Small businesses may not have sufficient resources to obtain detailed advice, negotiate favourable contract terms or

engage in costly and complex legal arrangements to resolve disputes. The extension of protections under the national credit regime to small businesses is similar to the scope of the FSR regime for financial products.

10.64 In contrast to the UCCC, Chapter 7 of the Corporations Act regulates the provision of financial services products (such as shares but not real property) and advice related to those products provided to all retail clients.

10.65 The need to extend the scope of the legislation to other transactions and services has not yet been determined and will be the subject of consultation.

*All industry participants may need to be licensed*

10.66 The UCCC does not contain a licensing regime. However in recognition of the need for, and benefits of, licensing the States and Territories have agreed to a licensing scheme for the brokers/advisers of all consumer and small business credit in all jurisdictions, as proposed in the draft Finance Brokers Bill.

10.67 A licensing regime generally restricts entry to those people who are appropriately skilled and of good character. Licensing is a mechanism by which obligations can be imposed on participants. In addition, it provides for more effective and efficient enforcement. It allows the population to be known to the regulator, who can then ensure that required standards are met and impose penalties for non-compliance. Experience suggests that, in the absence of a licensing regime, unscrupulous or unskilled people can operate in the market for some time before being identified. Once identified there is often no mechanism to resolve disputes outside of the courts.

10.68 There is wide ranging community and industry support for the introduction of a comprehensive licensing regime (for example, *Finance Sector Union, Credit Ombudsman Service, Finance Brokers Association Australia, Mortgage & Finance Association Australia*).

10.69 In addition, the Productivity Commission recommended a licensing system for finance brokers, and a licensing or registration system for credit providers (with both requiring participation in an approved EDR Scheme). Chapter 7 requires all financial service providers be licensed.

10.70 Should a licensing requirement be included in the national regime, it may be inappropriate to only license brokers/advisors (as proposed in the draft Finance Brokers Bill) and not providers as well,

given they can also interact directly with consumers. However the obligations imposed may vary depending on the role of the participant.

*Industry participants may need to provide additional disclosure to consumers.*

10.71 The UCCC already requires certain disclosure, mainly pre-contractual. However this has not been adequate to properly inform consumers of all the risks associated with specific credit products, such as reverse mortgages.

10.72 Without all relevant information, consumers are not able to make well reasoned decisions. Making inappropriate decisions can lead to financial stress.

10.73 In recognition that some people may not understand the risks involved with reverse mortgages the States and Territories are currently considering the need for specific disclosure. A consultation RIS is being prepared by the States on this matter.

10.74 In addition, the States and Territories have commissioned research into pre-contractual disclosure to ensure it is simple, accessible, relevant, concise and comprehensible.

10.75 Further, the proposed amendments to address 'fringe' lending practices include requiring additional disclosure in relation to direct debit authorities and clarifying disclosure requirements for annual percentage rates.

10.76 The need to impose any additional disclosure requirements, such as ongoing or product specific disclosure requirements, will be considered in the second phase.

*The expected conduct and behaviour of industry participants in relation to their dealings with consumers may need to be regulated.*

10.77 The UCCC contains some conduct requirements. However, numerous submissions to various consultations papers have suggested these provisions are not sufficient. There is evidence that practices such as 'equity stripping', 'churning', the provision of inappropriate advice, the provision of credit to consumers who can not afford to repay it and the charging of excessive fees have occurred, to the detriment of consumers.

10.78 The consumer is in a position where they are dependent on the broker's skill and expertise and therefore vulnerable to exploitation. It is in the industry's interest that consumers value the services which are available. One way to achieve consumer confidence is to ensure market participants behave in an appropriate manner.

10.79 The application of general conduct requirements is a principled (as opposed to prescriptive) method of addressing concerns which may otherwise be manifested as specific obligations and products features.

10.80 The concept of requiring responsible lending practices was consistently raised by consumer advocacy groups (such as *Care Inc Financial Counselling & Consumer Law Centre ACT*, *Consumer Credit Legal Centre NSW*, *ACTU* and the *Financial Sector Union*) in responses to the Green Paper.

10.81 The draft Finance Brokers Bill proposes to address this issue in part by imposing a requirement that the consumer's capacity to repay be considered before any credit product is recommended (a RIS was prepared). The draft Finance Brokers Bill also requires that the advisor/broker has a reasonable basis for recommending a particular credit product.

10.82 In addition, the States and Territories are considering imposing additional conduct requirements, in the form of responsible lending provisions, on credit card providers to address concerns with over-indebtedness. A consultation RIS was prepared.

10.83 Chapter 7 of the Corporation Act requires providers conduct their services efficiently, honestly and fairly.

10.84 If additional conduct requirements were to be introduced it is envisaged that they would oblige participants to observe a number of general conduct requirements such as those imposed by Chapter 7. In addition, credit-specific requirements, such as establishing a person's capacity to repay and banning specific predatory lending practices, could be imposed. The need for any additional conduct requirements, and the specifics of the obligations they would impose if adopted, have not yet been determined and will be the subject of consultation.

*Industry participants may need to provide access to appropriate dispute resolution services.*

10.85 Under the UCCC membership to EDR Schemes is voluntary. Tribunals have been established to deal with complaints related to consumer credit. Western Australia, and more recently Victoria, are the only jurisdictions to have introduced legislation which requires brokers/advisors to be members of an external dispute resolution scheme.

10.86 The importance of mandating access to an EDR Scheme is that they provide consumers who are unable to resolve a dispute directly with their provider with a free, fair and independent dispute resolution

mechanism. The alternative is often the complex, time consuming and costly court process which is not particularly viable.

10.87 In the absence of a legislative requirement several industry associations, such as the *Mortgage & Finance Association of Australia* and the Australian Bankers' Association *Code of Banking Practice*, require their members be members of EDR Schemes.

10.88 The draft Finance Brokers Bill proposes to mandate membership of approved EDR Schemes for all brokers. Chapter 7 mandates membership of an ASIC approved EDR Scheme.

10.89 In recognition of the value of access to EDR Schemes, the States and Territories had commenced examining the feasibility of requiring all credit providers to belong to an approved EDR Scheme. However, this work was postponed following the COAG decisions.

10.90 The need to impose a requirement to provide access to dispute resolution services has not yet been determined and will be the subject of consultation. If such a requirement were to be introduced it is envisaged that access to EDR Schemes would be free to consumers and similar to the schemes which operate for the purposes of Chapter 7 of the Corporations Act.

*The regime will need to be enforced by a national regulator, namely ASIC, in a way which minimises avoidance of the requirements.*

10.91 The UCCC is enforced by each State and Territories' Fair Trading Office. The UCCC contains a range of civil penalties. The regulators lack the ability to intervene quickly and to act unilaterally in instigating court proceedings against persons acting inappropriately or failing to meet required standards.

10.92 The amendments to address 'fringe' lending practices proposed by the States and Territories recommend giving government consumer agencies standing in court proceedings.

10.93 Moving to a single national regulator is consistent with having a national scheme. ASIC is the logical choice, given its experience in enforcing the Corporations Act and its existing infrastructure and relationships with financial services providers. This conclusion is supported by the fact that ASIC was repeatedly identified as the appropriate regulator in submissions to the Green Paper and by the Productivity Commission in its report of May 2008.

10.94 The alternative national regulator, the Australian Competition and Consumer Commission, has little experience in the regulation and



licensing of financial services or credit, nor the established relationships with those providers. Further, it would be expected that the incremental cost of extending ASIC's oversight to credit would be less than that required to extend the Australian Competition and Consumer Commission functions to credit regulation.

10.95 The States and Territories have indicated they do not want a continuing enforcement role once the Commonwealth assumes responsibility for credit. However they reserve the right to enforce generic consumer protection laws where applicable.

10.96 The need for any enhancement to ASIC's enforcement powers (such as the ability to impose administrative and criminal penalties, have standing in court cases and the ability to ban industry participants), have not yet been determined and will be the subject of consultation.

***Proposed regulation of margin loans under Chapter 7 of the Corporations Act***

10.97 The proposed regulation of margin loans under Chapter 7 is included in Phase 1 of the proposed implementation plan.

10.98 The *Simplifying and Standardising Financial Services and Credit Regulation* Green Paper proposed three options for margin loans: 1) maintain the status quo; 2) include margin loans as a financial product under the Corporations Act and apply the Chapter 7 regime; and 3) develop a separate regulatory regime for margin loans.

10.99 A number of submissions were received however, whether margin loans need to be regulated, and if so the appropriateness of Chapter 7 to do so, has not yet been determined and will be subject to further consultation.

***Implementation mechanisms***

10.100 Due to constitutional limitations, the preferred approach to any regulation of credit would be to amend the Corporations Act. There are two options for the implementation of Commonwealth regulation of consumer credit.

**Option A**

10.101 Extend Chapter 7 of the Corporations Act to regulate the provision of all consumer credit products and related advice including consumer mortgages for investment purposes, and loans to small businesses, as a financial product.

Option B

10.102 Enact the UCCC (including outstanding projects) to the extent possible and the relevant provisions of the draft National Finance Brokers Bill, supplemented with additional licensing, conduct and disclosure provisions as required to comprehensively regulate the provision of consumer credit and related advice, including consumer mortgages for investment purposes, and loans to small businesses as a new chapter of the Corporations Act.

**Assessment of impacts**

**Impact group identification**

10.103 The groups affected by the amendments are consumers of credit; industry participants including providers and brokers/advisers; and the Government and ASIC.

**Assessment of costs and benefits**

**Option A: Extend Chapter 7 of the Corporations Act to include all consumer credit products.**

**Table 10.1**

	<i>Benefits</i>	<i>Costs</i>
<i>Consumers</i>	<p>The licensing requirements will ensure that all advice will be provided by people with relevant training. In addition, the disclosure requirements will ensure that all personal credit advice will be appropriate to the consumer having regard to their personal circumstances. This may reduce the potential for consumers to make inappropriate financing decisions or obtain inappropriate credit.</p> <p>Mandated access to ASIC approved EDR Schemes in the event of disputes is quicker, cheaper and easier than having to rely on court processes.</p>	<p>There may be additional financial cost to consumers as businesses pass on increased costs. These costs are expected to be high as Chapter 7 will require different processes/systems to those currently used.</p> <p>Some consumers may not be able to obtain credit because a more rigorous assessment of their financial circumstances (that is, capacity to repay) would determine they were not eligible. However this is the appropriate outcome.</p>

	<i>Benefits</i>	<i>Costs</i>
<b><i>Industry</i></b>	<p>Some credit providers (that is, ADI's and financial services advisors) already hold a licence under Chapter 7. The additional regulatory burden on those participants will not be high.</p>	<p>Implementation costs will be higher than for Option B as complying with Chapter 7 will require different processes/systems to those currently used.</p> <p>Additional compliance requirements (licensing, disclosure, conduct) would apply, especially to those who are not already licensed under Chapter 7.</p> <p>The current Chapter 7 requirements are considered onerous and are not tailored to credit providers/products.</p>
<b><i>Government</i></b>	<p>ASIC has knowledge of Chapter 7 and already has mechanisms in place to licence providers and enforce conduct requirements.</p> <p>ASIC would be able to access documented advice provided to clients to monitor compliance with the law.</p>	<p>There may be more resistance from industry than under Option B as Chapter 7 imposes different requirements to those currently mandated for credit.</p> <p>ASIC will need to license and monitor a larger population than they do currently and therefore will require additional funding.</p> <p>Chapter 7 would still need refinement as the risk profile of credit products requires a different regulatory treatment from financial products for investments.</p>

**Option B: Enact relevant provisions of the UCCC and the draft Finance Brokers Bill, supplemented as required, as Commonwealth law**

**Table 10.2**

	<i>Benefits</i>	<i>Costs</i>
<i>Consumers</i>	<p>Generally consistent with existing consumer credit regime, that is consumers of credit for personal use are already aware of requirements and protections under UCCC.</p> <p>All advice will be provided by people with relevant training. In addition, all personal credit advice will be appropriate to the consumer having regard to their personal circumstances, which may reduce the potential for consumers to make inappropriate financing decisions or obtain inappropriate credit.</p> <p>Mandated access to ASIC approved EDR Schemes in the event of disputes is quicker, cheaper and easier than having to rely on court processes.</p>	<p>There may be additional financial cost to consumers as businesses pass on increased costs. However increased costs are expected to be lower than under Option A because businesses already comply with UCCC.</p> <p>Some consumers may not be able to obtain credit because a more rigorous assessment of their financial circumstances (that is, capacity to repay) would determine they were not eligible. However this is the appropriate outcome.</p>
<i>Industry</i>	<p>Generally consistent with existing consumer credit regime, that is providers of consumer credit are already aware of obligations under UCCC.</p> <p>Implementation costs will be lower than under Option A as businesses already have processes/systems for UCCC.</p>	<p>Increased regulatory burden on businesses offering margin loans and other financial products as they will have to comply with two regimes</p>
<i>Government</i>	<p>The transition to the new regime by both consumers and industry will be easier and cheaper than Option A and therefore more readily adopted given the existing understand and acceptance of the UCCC.</p> <p>The fundamentals of UCCC are strong and appropriate for the regulation of credit.</p>	<p>ASIC will need to develop knowledge of UCCC.</p>

**Preferred approach — Option B**

10.104 Despite its gaps, the UCCC provides a well developed foundation for the regulation of consumer credit, which is well known by industry and consumers. Moving the UCCC under Commonwealth control resolves many of its weaknesses. Further the UCCC framework can be enhanced with additional licensing, conduct and disclosure provisions,

drawn from the draft Finance Brokers Bill and supplemented as required, to provide for the comprehensive regulation of consumer credit.

10.105 Chapter 7 of the Corporations Act does not contain the necessary credit specific provisions, such as dealing with defaults, repossession and hardship requirements. In addition, its licensing, conduct and disclosure frameworks are specifically designed for the regulation of financial services that are not necessarily appropriate or applicable to credit products given the different risks involved. This is consistent with the views expressed by the financial sector in response to the Green Paper. However, Chapter 7 may provide a basis from which to produce the additional regulation necessary to supplement the UCCC and draft Finance Brokers Bill.

## **Business cost calculator**

### *Consumer credit*

10.106 Until the details of the proposed national regime (including the licensing, conduct and disclosure requirements) are decided it is difficult to estimate the cost of compliance to business. It is expected that there will be an initial cost to businesses in transitioning to the new system, such as obtaining their license. In addition, it is expected that there will be on-going costs involved in disclosure, compliance, training and membership of an EDR Scheme.

10.107 Consultations to date have suggested that implementation costs would be minimised if the Commonwealth adopted the UCCC with minimal changes (for example, *Legal Aid NSW & QLD and Australian Finance Conference*). The proposed regime will be subject to further consultation in order to achieve a design which minimises compliance costs while delivering enhanced protections to consumers.

10.108 It should be noted that these costs are offset in part by savings from no longer having to comply with multiple State and Territory based regulation, which is often duplicated or inconsistent. In addition, a national regime of consumer credit regulation will allow, over time, for streamlining and consolidation.

### *Margin loans*

10.109 Until the details of the regulation, if any, for margin loans are decided it is difficult to estimate the cost of compliance to business. Consultations noted that introducing a new regime, as opposed to extending Chapter 7, would be more costly for both businesses and government.

10.110 Traditionally, margin loans have been sold through AFS licensees. Although the provision of margin loans, or advice in relation to them, are not currently subject to the obligations imposed by Chapter 7 the extension of those requirements would not be expected have a large impact for existing AFS licensees.

10.111 If margin loans were to be regulated under Chapter 7, it is expected that the majority of the cost will be borne by those industry participants who are not already AFS licensees, and that some of those costs would be passed on to consumers.

10.112 If margin loans were to be regulated, Option 3 would appear to result in the creation of a separate regime for margin loans that would unnecessarily mirror Chapter 7, creating regulatory overlap for businesses offering margin loans and other financial products. This would create inefficiencies for businesses that would be required to obtain separate licences for different products and develop disclosure documents for those products under different regimes.

#### *Staging*

10.113 The national regime could be implemented as either a single step or a staged process:

10.114 Under a single step process a national regulatory regime could be introduced only after all of the work had been done to refine the existing regime, undertake the necessary consultation and approval processes, and draft the entire package of legislation. This would delay the implementation of any reform for several years, during which time the current problems with the regulatory regime would remain unaddressed.

10.115 Alternatively, a national regulatory regime could be introduced in stages. This would involve the early introduction of Commonwealth law addressing the most urgent problems (such as mortgage credit and advice, margin loans and other matters), followed by the later introduction of additional features, after further consideration.

10.116 The **first phase** would include the enactment of the UCCC, relatively unchanged, as Commonwealth law which ensures continuity and certainty for both business and consumers. As industry currently complies with the UCCC there would be minimal operational difference in transferring existing legislation to the Commonwealth. It is expected that several of the currently outstanding projects will have already been enacted as amendments to the UCCC by this time.

10.117 Depending on the outcomes of consultation, the key changes from the existing regime introduced in Phase 1 would be:

- the extension of the regime to consumer mortgages for real property;
- the licensing of all industry participants, which could be based on the provisions in the draft Finance Brokers Bill;
- compulsory membership in an EDR Scheme; and
- the introduction of general conduct provisions, including the requirement that a person's capacity to repay be considered when determining eligibility for credit.

10.118 ASIC would also assume responsibility from the State and Territory Fair Trading Offices for regulating consumer credit in Phase 1. This would enable ASIC to commence producing educational material and licensing industry participants, giving industry time to transition into the new scheme. In addition, it would immediately reduce duplication or inconsistency in regulatory burden inherent in complying with multiple State and Territory jurisdictions.

10.119 The **second phase** would focus on determining the need for specific conduct, disclosure and product requirements and the extension of the scope of the law to cover remaining investment loans and loans to small businesses.

10.120 Managing the single stage implementation of such a large reform is considered to be more difficult than a staged process. These difficulties were demonstrated during the introduction of the FSR regime in 2001. Industry participants and the regulator were overwhelmed by the quantum of changes and the compressed timeline in which they were required to comply with the new regime.

10.121 The inbuilt delay in implementing the reform as a single package is undesirable, given the pressing concerns with certain aspects of consumer credit. Further, should any aspect of a single package be delayed the entire project would be delayed. In contrast, a staged process ensures that important and non-controversial aspects can proceed urgently.

10.122 In response to the Green Paper several submissions noted that, should the Commonwealth take over the regulation of all consumer credit, a staged implementation would be advisable (for example, *Financial Services Ombudsman*, *Financial Planning Association*).

## Consultation

### Consumer credit

#### *Green Paper on Financial Services and Credit Reform*

10.123 On 3 June 2008, the Government released the *Green Paper on Financial Services and Credit Reform: Improving, Simplifying and Standardising Financial Services and Credit Regulation*.

10.124 The Green Paper discussed the regulation of mortgages, mortgage brokers and margin loans, and proposed options for the Commonwealth taking over regulation in this area. With respect to other consumer credit products such as credit cards, personal loans and micro loans, the Green Paper asked for submissions on whether these products should also be regulated solely by the Commonwealth or whether there is a role for the States and Territories in this area.

10.125 Some 150 submissions were received in response to the Green Paper, and an overwhelming majority supported the Commonwealth assuming responsibility for the regulation of all consumer credit.

- From the industry's perspective, this support was driven by the reduction in compliance burden that would be achieved by reducing the number of different regulatory regimes they are required to operate under.
- From the consumer advocates' perspective, this support was driven by the better protections and efficiencies a consistent nation wide regime offers.

10.126 Most submissions supported the enactment of the UCCC, including the outstanding projects, as Commonwealth legislation and identified ASIC as the appropriate regulator.

- Licensing (with compulsory membership of EDR Schemes) and disclosure requirements were seen as key features. In addition, several submissions highlighted the need for the concept of responsible lending, and consideration of capacity to repay requirements.
- A common view was that putting lenders and brokers into the FSR regime was inappropriate as selling and/or providing credit was fundamentally different to providing and/or advising on investments (*Mortgage & Finance Association Australia; Gadens lawyers; ABA*).



- Of the few submissions that suggested Chapter 7 of the Corporations Act would be appropriate, most commented that the existing requirements would require modification to apply appropriately to credit products and providers (*AXA Asia Pacific*).
- Several submissions supported, or understood the need for, staged implementation (*Financial Services Ombudsman, Financial Planning Association*).
- It was suggested that the implementation costs would be minimised if the Commonwealth adopted the UCCC with minimal changes (*Legal Aid NSW and QLD and Australian Finance Conference*).

***Other consultations, reviews and regulation impact statements***

10.127 The Government has established an implementation taskforce consisting of officials from the Commonwealth Treasury, ASIC and the States and Territories in order to progress the COAG decisions in relation to consumer credit.

10.128 The New South Wales Government has undertaken extensive consultation on the draft *NSW National Finance Brokers Package*. These consultations have identified consensus on a majority of provisions. The Commonwealth Treasury will undertake further consultation on the disputed provisions. (A decision-making RIS was given conditional clearance by the Office of Best Practise Regulation in 2006.)

10.129 The New South Wales Government released a consultation RIS on responsible lending practices in relation to consumer credit cards on 22 August 2008. Submissions are due by 3 October.

10.130 A decision making RIS for fringe credit providers was approved by the Office of Best Practise Regulation in 2006.

10.131 An inquiry in 2007 into home lending practices and procedures by the *House of Representatives Standing Committee on Economics, Finance and Public Administration* recognised the importance of consistently regulating non-bank lenders and mortgage brokers by recommending that the Commonwealth take over the regulation of credit including the regulation of mortgages. The Committee suggested that credit be included in the definition of a financial product for the purposes of the Corporations Act.

10.132 The Productivity Commission released its final report on *Australia's Consumer Policy Framework* (including regulation of consumer credit) on 8 May 2008. It recommended that the Commonwealth take over the regulation of credit and develop generic consumer law.

10.133 KPMG Consulting undertook consultation and released a report *NCP Review of the Consumer Credit Code* in December 2000, which has been the catalyst for the proposed amendments to the default notices and vendor terms provisions.

### **Margin loans**

10.134 Some 20 submissions in relation to margin loans were received in response to the Green Paper.

10.135 There was general support for the inclusion of margin loans as a financial product in Chapter 7 of the Corporations Act (*Grant Thornton, Australasian Compliance Institute, Financial Planning Association, Australian Financial Counselling & Credit Reform Association Incorporated, Australian Institute of Credit Management*).

10.136 It was noted that introducing a new specific regime (as opposed to extending Chapter 7) would be costly for both government and participants, would add further regulation to a system that already suffers from inefficient regulatory overlap and increase the risk of future inconsistency (*Macquarie Bank, National Australia Bank, Australasian Compliance Institute, ANZ*).

10.137 Some submissions called for further research and analysis before any action was taken and cautioned against a 'knee jerk' reaction to recent failures such as Opes Prime and Lift Capital, which involved products not sold by the majority of the industry (*Australian Bankers Association, Securities and Derivatives Industry Association, Investment and Financial Services Association Ltd*).

### **Recommended option and Conclusion**

10.138 Cabinet is asked to agree to the two-staged implementation plan as described below, subject to the outcomes of a detailed consultation process.

***Implementation Plan***

**Diagram A: Development and Implementation Plan**

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10.139 The recommended approach achieves synergies with existing regimes (UCCC and FSR) thus reducing the regulatory burden as much as possible while at the same time achieving the Government's objectives.

## **Implementation and Review**

10.140 The phased approach proposed for development and implementation of the consumer credit regulatory framework (as described in the diagram above) will be subject to detailed consultation with relevant stakeholders. Consultation will be undertaken on the planned implementation process and throughout the development of draft legislation and could include:

- officials from State and Territory governments and ASIC;
- a special group of key industry experts and consumer advocates; and
- wider community consultation on draft legislation and specific areas such as the draft Finance Brokers Bill.

10.141 In addition, this RIS will be updated to assess the impacts and analyse the costs and benefits of the proposed preferred design of the various features.

