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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

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NATIONAL CONSUMER CREDIT PROTECTION (TRANSITIONAL AND  
CONSEQUENTIAL PROVISIONS) 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)

*[Click here and insert the name of the Bill]*

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# ***Table of contents***

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|   |    |
|---|----|
| Glossary .....  | 1  |
| General outline and financial impact .....                                      | 3  |
| Chapter 1      Preliminary, Dictionary and other matters .....                  | 5  |
| Chapter 2      Transition from the old Credit Codes to the<br>Credit Bill ..... | 9  |
| Chapter 3      Registration of persons engaging in credit<br>activities .....   | 23 |
| Chapter 4      Consequential amendments.....                                    | 55 |



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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>  |
|---|--|
| ACL                                       | Australian credit licence  |
| ADI                                       | authorised deposit-taking institution  |
| AFSL                                      | Australian financial services licence  |
| APRA                                      | Australian Prudential Regulation Authority   |
| ASIC                                      | Australian Securities and Investments Commission   |
| ASIC Act                                  | <i>Australian Securities and Investments Commission Act 2001</i>   |
| 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  |
| EDR Scheme                                | External Dispute Resolution Scheme   |
| MCCA                                      | Ministerial Council on Consumer Affairs  |
| Minister                                  | Minister responsible for administering the Act, determined in accordance with section 19A of the <i>Acts Interpretation Act 1901</i>   |
| new Credit Code                           | Schedule 1 to the National Consumer Credit Protection Bill 2009  |
| old Credit Code                           | Consumer Credit (Name of State/Territory) Code, and the Consumer Credit (Name of State/Territory) Regulations  |
| Transitional Bill                         | National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009  |



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# **General outline and financial impact**

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## **Outline**

The National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009 (Transitional Bill) sets out the transitional and consequential arrangements to support the transfer of the regulation of credit from the States and Territories to the Commonwealth.

The States and Territories regulate consumer credit through an applied laws mechanism enacted in the *Consumer Credit (Queensland) Act 1994* (Qld) and applied in States and Territories since 1996, known as the Consumer Credit Code (old Credit Code).

Schedule 1 to the Transitional Bill deals with the transition from the regime provided in the old Credit Code to the new consumer credit regime provided for in both the National Consumer Credit Protection Bill 2009 (Credit Bill) and Schedule 2 to the Transitional Bill, including:

- the application of the existing legislation or the proposed legislation to legal proceedings that arose before the change;
- the rights or liabilities a person may have under the existing legislation; and
- the extent to which the existing legislation may continue to have effect under the Credit Bill.

Schedule 2 sets out the requirement for persons currently engaging in credit activities to become registered with the Australian Securities and Investments Commission (ASIC), prior to applying for an Australian credit licence (ACL).

Schedule 3 includes consequential amendments to other laws.

***Date of effect:*** The Transitional Bill commences on Royal Assent. Schedules to the Transitional Bill have a commencement linked to commencement of the Credit Bill.

***Proposal announced:*** The proposal to transfer responsibility for regulating consumer credit to the Commonwealth was announced by the Council of Australian Governments (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 required to be paid by persons regulated by the national framework, payment of which commences during the 2009-10 financial year. The amount of revenue generated from these fees will depend, in part, on the number and type of persons seeking to be licensed.

***Compliance cost impact:*** The main compliance cost impact arises in relation to persons who will be subject to the licensing regime. This will primarily involve the initial costs associated with applying for an Australian credit licence, which include the payment of fees to lodge application documentation with ASIC, annual compliance costs and costs of external dispute resolution membership.

Further details in relation to the compliance requirements associated with the licensing of providers of credit and credit services are set out in the Regulation Impact Statement accompanying the Credit Bill.

## **Summary of regulation impact statement**

### **Regulation impact on business**

The Transitional Bill is part of a package, the key component of which is the Credit Bill. A summary of the regulation impact statement for the package is included in the explanatory memorandum to the Credit Bill.

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# **Chapter 1**

## ***Preliminary, Dictionary and other matters***

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### **Outline of chapter**

- 1.1 Chapter 1 of this explanatory memorandum outlines:
- the preliminary matters such as the short title and commencement of the National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009 (Transitional Bill);
  - the definitions for the Transitional Bill; and
  - other matters such as the regulation-making powers.

### **Summary of new law**

- 1.2 The drafting of the provisions will, for the avoidance of doubt, prevent the Transitional Bill from resulting in an acquisition of property contrary to paragraph 51(xxxi) of the Constitution.

### **Detailed explanation of new law**

#### **Part 1 — Preliminary**

- 1.3 The Transitional Bill commences on the day on which it receives Royal Assent. Schedules 1 and 3 commence at the same time as Schedule 1 to the National Consumer Credit Protection Bill 2009 (Credit Bill), which is the National Credit Code). Schedule 2 commences on the later of Royal Assent to the Transitional Bill or the commencement of the National Credit Code. *[Part 2, section 2]*

#### **Part 2 — Dictionary**

- 1.4 The Dictionary contains definitions of key terms used in the Transitional Bill *[Part 2, section 4]*. Key definitions are outlined below.

1.5 The term ‘carried over provision’ of the old Credit Code of a referring State or Territory is defined as a provision of the old Credit Code of that State or Territory that:

- was in force immediately before commencement; and
- corresponds to a provision of the new Credit Code.

1.6 ‘Contract or other instrument’ includes credit contracts, mortgages, guarantees, consumer leases and sale contracts.

1.7 ‘Commencement’ means the commencement of the Code in the Credit Bill.

1.8 The term ‘new Credit Code’ means Schedule 1 to the Credit Bill and includes regulations and instruments made under that Schedule.

1.9 The term ‘old Credit Code’ covers all State and Territory jurisdictions and means, for [name of State/Territory] — the Consumer Credit [name of State/Territory] Code, and the Consumer Credit [name of State/Territory] Regulations, within the meaning of the Consumer Credit [name of State/Territory] Act of [name of State/Territory], as in force from time to time before commencement.

1.10 A fundamental term used in the Transitional Bill is ‘corresponds’. It is defined to mean that a provision (the old provision) of the old Credit Code of a referring State or a Territory corresponds to a provision (the new provision) of the new Credit Code (and vice versa) if:

- the old provision and the new provision are substantially the same, unless the regulations specify that the two provisions do not correspond; or
- the regulations specify that the two provisions correspond.

*[Part 2, section 5]*

1.11 Item 12 of the Transitional Bill may result in certain provisions of the old Credit Code to be taken to be included in the new Credit Code.  
*[Schedule 1, Part 2, item 12]*

## Part 3 — Other matters

### *Regulations may deal with transitional matters*

1.12 The Transitional Bill includes various powers to make regulations, to allow flexibility to deal with unforeseen transitional issues that may arise in the future.

1.13 There is a power to make regulations required or permitted to be prescribed, or that are necessary or convenient to be prescribed. *[Part 3, subsection 6(1)]*

1.14 There is a power to prescribe transitional matters (including application and savings) arising out of enactment of the Credit Bill or transition from the old Credit Codes to the Credit Bill, and those regulations take effect despite anything else in the Transitional Bill. *[Part 3, subsection 6(2)]*

1.15 Finally, there is a power to modify by regulation provisions in Schedule 1 or 2, and the provisions will take effect as so modified. *[Part 3, subsection 6(3)]*

1.16 As some transitional regulations may need to take effect retrospectively, they may be expressed to take effect from a date before the regulations are registered under the *Legislative Instruments Act 2003* *[Part 3, subsection 6(4)]*. However, a court must not convict a person of an offence, or order a person to pay a pecuniary penalty, in relation to the conduct on the grounds that it contravened either the Transitional Bill or Credit Bill, if the person's conduct before the registration date of such regulations would not have resulted in a contravention. *[Part 3 subsection 6(5)]*

## Acquisition of property

1.17 It is not anticipated that the treatment of existing rights under the Transitional 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 other than on just terms 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 Transitional Bill, the relevant law or instrument is taken not to apply. *[Part 3, section 7]*



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## **Chapter 2**

# ***Transition from the old Credit Codes to the Credit Bill***

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### **Outline of chapter**

2.1 Chapter 2 of this explanatory memorandum describes the provisions in Schedule 1 to the National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009 (Transitional Bill) which provide for a transition from the regime under the old Credit Code of a referring State or a Territory to the Commonwealth regime.

2.2 The provisions are largely based on Part 10 of the *Corporations Act 2001* (Corporations Act), which dealt with the transition from the former Corporations Law scheme to the Corporations Act in 2001.

### **Summary of new law**

2.3 The transitional provisions deal with matters including:

- treatment of credit contracts, mortgages, guarantees and consumer leases made before commencement of the new Credit Code;
- treatment of pre-commencement court proceedings and orders; and
- the Australian Securities and Investments Commission's (ASIC) role in relation to bringing or continuing appeal, review or enforcement proceedings.

### **Detailed explanation of new law**

#### **Part 1 — Introduction**

2.4 The guide to Schedule 1 states that it deals with the transition from the regime provided for in the old Credit Codes of the referring States and the Territories to the new regime provided for in both the National

Consumer Credit Protection Bill 2009 (Credit Bill (including the new Credit Code)) and Schedule 2 to the Transitional Bill. It also notes that the regulations may provide for matters in addition to those in the Schedule and that they may modify how the Schedule applies. [*Schedule 1, Part 1, item 1*]

## **Part 2 — Transition from the old Credit Codes to the new Credit Code**

### *Division 1 — Object of this Part*

2.5 Broadly, the object of Part 2 is to provide for a smooth transition from the regime provided for in the old Credit Code of a referring State or Territory to the regime provided for in the new Credit Code, so that persons are, to the greatest extent possible, put in the same position immediately after commencement of the Transitional Bill as they would have been if the old Credit Code had been Commonwealth legislation and the new Credit Code were a continuation of the old Credit Code so applying [*Schedule 1, Part 2, subitem 2(1)*]. In resolving ambiguity about the operation of Part 2, an interpretation consistent with that object should be preferred [*Schedule 1, Part 2, subitem 2(2)*].

### *Division 2 — Treatment of contracts and other instruments made before commencement*

#### *Application of the new Credit Code*

2.6 The new Credit Code does not apply directly to contracts and other instruments made before commencement — defined in the Transitional Bill as the day the new Credit Code in the Credit Bill commences [*Schedule 1, Part 2, subitem 3(1)*]. In this document, that day is also referred to as ‘commencement’ (unless the contrary intention appears).

2.7 However, with the exception of some provisions, the new Credit Code applies to instruments that are in force and governed by the old Credit Code on the date of commencement as if those instruments had been made after commencement [*Schedule 1, Part 2, subitems 3(2) and (3)*]. This is to allow for the continuation of rights and liabilities regarding credit contracts, mortgages, guarantees, consumer leases and sale contracts that existed at the commencement of the new Credit Code to be maintained.

2.8 The excluded provisions are:

- a provision in which the new Credit Code applies such as credit for the purchase, renovation, improvement or refinancing of residential property for investment purposes [*Credit Bill, Schedule 1, section 5*];

- a provision in which short term credit provides that certain fees and charges are to count when working out if the fees and charges imposed in relation to a provision of credit exceed 5 per cent of the amount of credit [*Credit Bill, Schedule 1, subsection 6(2)*];
- a provision which provides for a rebuttable presumption that the new Credit Code applies [*Credit Bill, Schedule 1, section 13*];
- a provision which limits the things a mortgage can cover; and provides that a mortgage is void to the extent it contravenes that provision [*Credit Bill, Schedule 1, section 50*];
- a provision under which a debtor can request a change to certain terms of their credit contract on the grounds of hardship [*Credit Bill, Schedule 1, subsections 72(5) and 94(4)*]; and
- a provision which provides for a rebuttable presumption that a lease is a consumer lease [*Credit Bill, Schedule 1, section 172*].

2.9 Certain provisions in the old Credit Code, which deal with provision of credit to which that Code applies and presumptions relating to application of that Code, apply to old instruments as if those provisions were the equivalent sections of the new Credit Code. [*Schedule 1, Part 2, subitem 3(4)*]

2.10 In transferring consumer credit 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) [*Credit Bill, Schedule 1, Part 4, subsection 72(5)*]. 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 [*Credit Bill, Schedule 1, Part 5, subsection 94(4)*].

2.11 Under the old Credit Code, the threshold for hardship variations and stays of enforcement is 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). This arrangement is maintained in relation to existing contracts in relation to hardship provisions and requests for stays of enforcement after commencement. [*Schedule 1, Part 2, subitems 3(5) and (6)*]

***Division 3 — Treatment of court and tribunal proceedings and orders***

*Treatment of proceedings brought in a court under the old Credit Code before commencement*

2.12 Various provisions provide for the continuation of court proceedings, civil and criminal, which were on foot on commencement.

2.13 Court proceedings ('old proceedings') are those in relation to which the following elements are satisfied:

- the proceedings were brought in a court before commencement;
- the proceedings were brought in relation to a provision of the old Credit Code of a referring State or a Territory;
- the proceedings were not enforcement proceedings, or appeal or review proceedings, in relation to an order of a court;
- the proceedings had not been concluded or terminated before commencement; and
- either:
  - if the proceedings are primary proceedings — no final determination had been made before commencement; or
  - if the proceedings are interlocutory proceedings — this item applies to the primary proceedings to which the interlocutory proceedings relate.

*[Schedule 1, Part 2, subitem 4(1)]*

2.14 Old proceedings do not include proceedings in a tribunal that were brought under the old Credit Code before commencement.

*[Schedule 1, Part 2, item 6]*

2.15 Old proceedings which are on foot are substituted by equivalent new proceedings exercising federal jurisdiction under the new Credit Code and are taken to have been brought in the same court. *[Schedule 1, Part 2, subitem 4(2)]*

2.16 The new proceedings relate to the new rights and liabilities ('substituted rights and liabilities') created in the general transitional provisions discussed below. *[Schedule 1, Part 2, items 10 and 11]*

2.17 The court is obliged to treat the steps taken under State jurisdiction before commencement as though they were taken for the new proceedings. [*Schedule 1, Part 2, subitem 4(4)*]

2.18 Further, if the earlier steps included an interlocutory order, the rights and liabilities of all persons will be those that they would have had if the order had been made by the same court, in the exercise of federal jurisdiction, for the purpose of the new proceeding. [*Schedule 1, Part 2, subitem 4(5)*]

2.19 With respect to interlocutory order proceedings, the court may make orders:

- cancelling or varying rights or liabilities that a person has under the interlocutory order;
- substituting other rights or liabilities for rights or liabilities a person has under the interlocutory order;
- adding rights or liabilities to the rights or liabilities a person has under the interlocutory order; and
- enforcing, or otherwise dealing with conduct contrary to, a right or liability a person has under the interlocutory order in the same way as it could enforce, or deal with, the right, liability or conduct if the right or liability had arisen under or because of an order made by the court in the exercise of federal jurisdiction under the new Credit Code.

[*Schedule 1, Part 2, subitem 4(6)*]

*References to court proceedings and orders in the new Credit Code*

2.20 A reference in the new Credit Code to the taking of a proceeding in a court is taken to include a reference to proceedings taken in a court before commencement under the corresponding provision of the old Credit Code. This rule only relates to proceedings in a court (not proceedings in a tribunal) [*Schedule 1, Part 2, subitem 5(1)*]. Similarly, a reference in the new Credit Code to an order made by a court under a provision of the new Credit Code includes a reference to an order made by a court before commencement under the corresponding provision of the old Credit Code [*Schedule 1, Part 2, subitem 5(2)*]. However, the application of that rule does not make a person liable to any penalty (whether civil or criminal) or enable enforcement proceedings, appeal or review proceedings in relation to such an order or enable proceedings by way of appeal or other review of such an order [*Schedule 1, Part 2, subitem 5(3)*]. It is expected that transitional provisions of the States and Territories will deal with appeal, review and enforcement in relation to orders made under the old Credit Code.

2.21 In the event that an order is varied or set aside on appeal or review, the reference in the new Credit Code to the order is taken to have applied from the time from which the variation or setting aside takes or took effect. [*Schedule 1, Part 2, subitem 5(4)*]

2.22 There is a power to make regulations so that the particular references in the new Credit Code to court proceedings do not include references to orders made under the old Credit Code. [*Schedule 1, Part 2, subitem 5(5)*]

*Treatment of tribunal proceedings and orders under the old Credit Code before or after commencement*

2.23 The new Credit Code does not apply State and Territory tribunal proceedings, tribunal orders or rights and liabilities in relation to proceedings before or after the commencement of the new Credit Code [*Schedule 1, Part 2, subitem 6(1)*]. The Transitional Bill and Credit Bill are not intended to exclude or limit the operation of a law of a referring State or Territory about proceedings that are brought in a tribunal or orders made by a tribunal or rights and liabilities arising from tribunal proceedings under the old Credit Code before or after commencement [*Schedule 1, Part 2, subitem 6(2)*].

*Interlocutory proceedings*

2.24 For the purpose of interpreting provisions in Part 2 about related interlocutory proceedings, two interlocutory proceedings related to each other are taken both to be related to the primary proceeding. [*Schedule 1, Part 2, item 7*]

***Division 4 — General transitional provisions relating to other things done etc. under the old Credit Code***

2.25 Division 4 contains provision to preserve the effect of things done by, or for the purposes of, the ‘carried over provisions’ of the old Credit Code. It also creates equivalent rights and liabilities to those that existed under provisions that were no longer in force immediately before commencement, and deals with how time limits under the old Credit Code are treated.

*Limitations on the scope of Division 4*

2.26 Except as specifically provided for, the general provisions are not limited by Divisions 2 and 3 or regulations made pursuant to the regulation-making powers discussed above. [*Schedule 1, Part 2, subitem 8(4)*]

2.27 Orders and proceedings made or begun in courts or tribunals before commencement of the Transitional Bill are dealt with by other specific provisions discussed above. *[Schedule 1, Part 2, items 4 to 7]*

2.28 Accordingly, the rules in Division 4 do not generally apply to:

- court or tribunal orders;
- rights or liabilities under an order made by a court or tribunal;
- proceedings brought (including appeal, review or enforcement proceedings) or a step in such proceedings in a court or tribunal; or
- rights of appeal, review or enforcement in relation to court or tribunal orders.

*[Schedule 1, Part 2, subitem 8(2)]*

2.29 However, despite the provisions which create rights and liabilities under the Transitional Bill, equivalent rights and liabilities acquired or incurred under the old Credit Codes do apply to any right or liability to which a new court proceeding established under item 4. *[Schedule 1, Part 2, subitem 8(3)]*

*Provisions of this Division may have an overlapping effect*

2.30 Division 4 deals at a broad level with concepts to achieve the object of Part 2. Some of the provisions will have effects that overlap or interact to some extent, with each other. This effect is intended and the provisions should not be regarded as dealing with mutually exclusive situations. *[Schedule 1, Part 2, item 9]*

*Things done by or under carried over provisions continue to have effect*

2.31 Things done under, or for the purposes of, a carried over provision of the old credit Code of a State or Territory that have an 'ongoing significance' immediately before commencement are taken to have been done under, or for the purposes of, the new Credit Code. *[Schedule 1, Part 2, subitem 10(1)]*

2.32 A number of examples of things which may have been done under ‘carried over provisions’ of the old Credit Code, and which continue to have effect under the new Credit Code, are set out in item 10. The examples are:

- the making of an instrument or order (but not including the making of an order by a court or tribunal);
- the making of an application or claim (but not including the making of an application or claim to a court or tribunal);
- the granting of an application or claim (but not including the granting of an application or claim by a court or tribunal);
- the making of an appointment or delegation;
- the commencement of a procedure or the taking of a step in a procedure (but not including the bringing of proceedings in a court or tribunal);
- requiring a person to do, or not to do, something (but not including a requirement contained in an order made by a court or tribunal); and
- the giving of a notice or document.

*[Schedule 1, Part 2, subitem 10(2)]*

2.33 Also set out are examples of things done under the old Credit Code that have ‘ongoing significance’, including:

- a statutory demand served on a guarantor under the old Credit Code that was in effect immediately before the Credit Bill commenced is taken to have been served on the guarantor under section 90 of the new Credit Code; and
- a credit provider that is required under the old Credit Code to give to the debtor periodic statements of account that was in effect immediately before the Credit Bill commenced is taken to be required to give to the debtor periodic statements of account under section 33 of the new Credit Code.

*[Schedule 1, Part 2, subitem 10(3)]*

2.34 There is a power to make regulations about whether specific things done under the old Credit Code are taken to have, or not to have, ongoing significance. *[Schedule 1, Part 2, subitem 10(4)]*

*Creation of equivalent rights and liabilities to those that existed before commencement under carried over provisions of the old Credit Code*

2.35 Rights and liabilities (civil or criminal) equivalent to those that existed under the old Credit Codes immediately before the commencement of the new Credit Code are created [Schedule 1, Part 2, item 11]. Rights and liabilities are defined in the Dictionary [Part 2, section 4].

2.36 If a person acquired or incurred a right or liability under a 'carried over provision' of the old Credit Code, and that right or liability was in existence immediately before commencement of the new Credit Code, the person is deemed to have acquired or incurred an equivalent right or liability under the corresponding provision of the new Credit Code; this is known as a 'substituted right or liability' [Schedule 1, Part 2, item 11]. If the right or liability was subject to a time limit under the old Credit Code, the treatment of the time limit for the substituted right or liability is dealt with in a separate provision [Schedule 1, Part 2, item 13].

2.37 Procedures, proceedings or remedies are available under the new Credit Code in respect of substituted rights and liabilities. [Schedule 1, Part 2, subitem 11(3)]

*Creation of equivalent rights and liabilities to those that existed before commencement under repealed provisions of the old Credit Code*

2.38 Rights and liabilities accrued or incurred under provisions of the old Credit Code that had been repealed prior to commencement are treated the same way in which rights and liabilities under a carried over provision of the old Credit Code; that is, the person is deemed to have acquired or incurred an equivalent right or liability under the corresponding provision of the new Credit Code [Schedule 1, Part 2, item 12]. If the right or liability was subject to a time limit under the old Credit Code, the treatment of the time limit for the substituted right or liability is dealt with in a separate provision [Schedule 1, Part 2, item 13]. Procedures, proceedings or remedies are available under the new Credit Code in respect of substituted rights and liabilities [Schedule 1, Part 2, subitem 12(4)].

*Old Credit Code time limits etc.*

2.39 A process, a status of a person or an instrument commenced under the old Credit Code from a particular time before the new Credit Code started, and is continued under the new Credit Code, is still taken to have started at the particular time it started before the new Credit Code commenced. Time limits that, in effect, straddle the commencement of the new Credit Code, or the starting point of which was known or had been determined before the commencement, although it may actually begin to run after the commencement, continues to run, from the same starting

point, as if the same time limit were applicable under the new Credit Code. *[Schedule 1, Part 2, subitems 13(2) and (3)]*

2.40 If a right or liability that was acquired or incurred under the previous law continues in effect under the new Credit Code as a substituted right or liability, any time limit applicable to that right or liability continues to apply, and is reckoned from the same starting point. *[Schedule 1, Part 2, subitem 13(4)]*

2.41 A time limit for these purposes can be either a period specified as a time limit within which something must be done, or the specified duration of an instrument or a status. *[Schedule 1, Part 2, subitem 13(2)]*

*Preservation of significance etc. of events or circumstances*

2.42 An event, circumstance or other thing that occurred before commencement that had a particular significance, status or effect for the purposes of a carried over provision of the old Credit Code has the same significance, status or effect after commencement, for the purposes of the corresponding provision in the new Credit Code. *[Schedule 1, Part 2, item 14]*

*References in the new Credit Code generally include references to events, circumstances or things that happened or arose before commencement*

2.43 A reference in the new Credit Code to an event, circumstance or thing of a particular kind is not confined to any such event, circumstance or thing happening or arising after the commencement of the Bill, but can also include such an event, circumstance or thing that happened before the commencement, unless the contrary intention is expressed *[Schedule 1, Part 2, item 15]*. For example, a provision in the new Credit Code which refers to a person consenting to a certain course of action can include a case in which consent was given before the new Credit Code.

*References to things taken or deemed to be the case etc.*

2.44 If a law of a referring State or Territory had effect before commencement to take or deem something to have happened or to be the case under the old Credit Code of that State or Territory; and that effect was continuing immediately before commencement, then it is deemed that thing had actually happened or were actually the case, or as if that thing actually had that other effect. *[Schedule 1, Part 2, item 16]*

*Penalty units in relation to pre-commencement conduct remain at \$100*

2.45 The amount of a penalty unit in relation to an offence that can be prosecuted after commencement in relation to conduct that occurred solely before commencement is deemed to be \$100, despite section 4AA of the *Crimes Act 1914* *[Schedule 1, Part 2, item 17]*.

### **Part 3 — Application of the Credit Bill (other than the new Credit Code) and Schedule 2 to the Transitional Bill**

2.46 Part 3 of Schedule 1 deals with transitional matters relating to application of both the Credit Bill (other than the new Credit Code) and Schedule 2 to the Transitional Bill.

#### *Application of the Credit Bill*

2.47 The Credit Bill does not apply in relation to a contract or other instrument made before commencement, except where a specific provision deals with the application of the new Credit Code [*Schedule 1, Part 3, subitems 18(1) and (3)*]. For example, a person does not engage in a credit activity after commencement merely because the person is the credit provider under a credit contract made before commencement.

2.48 There is a regulation-making provision which may provide for the application of the Credit Bill to a person (including the licensing of that person) in relation to credit activities engaged in after commencement in relation to a contract or other instrument that:

- was made before commencement;
- was in force immediately before commencement; and
- the old Credit Code of a referring State or a Territory applied to immediately before commencement.

#### *[Schedule 1, Part 3, subitem 18(2)]*

2.49 Part 4-3 of the Credit Bill (which deals with the jurisdiction and procedure of courts) applies to proceedings brought under the new Credit Code in relation to an existing contract [*Schedule 1, Part 3, subitem 18(3)*]. Regulations may be made in relation to these proceedings [*Schedule 1, Part 3, subitem 18(4)*].

#### *Application of Chapter 3 of the Credit Bill*

2.50 Chapter 3 of the Credit Bill (which deals with responsible lending conduct) applies to conduct engaged in, on and after 1 January 2011 in relation to contracts made after commencement. That general rule is subject to regulation-making powers with respect to the application of the Credit Bill and Schedule 2 to the Transitional Bill. [*Schedule 1, Part 3, item 19*]

2.51 Timing of the commencement of the responsible lending conduct provisions in Chapter 3 of the Credit Bill is set in order to give industry

participants sufficient time to change their business systems and processes to be able to comply with their new obligations.

*Application of Schedule 2 to the Transitional Bill*

2.52 The transitional provisions dealing with registration of persons engaging in credit activities in Schedule 2 to the Transitional Bill do not apply to existing contracts made before the commencement of the Credit Bill. However, regulations may provide for a different application of Schedule 2 to particular persons and credit activities. [*Schedule 1, Part 3, item 20*]

**Part 4 — Transitional provisions relating to ASIC**

*Regulations about ASIC's approach during the transitional period*

2.53 Regulations may provide for an approach ASIC must take in administering the new legislation until 30 June 2011 (or a later date as specified in the regulations). This might, for example, be an approach in relation to provision of education or assistance to industry participants regarding compliance matters. [*Schedule 1, Part 4, item 21*]

*Regulations about transfer of information etc. to ASIC*

2.54 The regulations may provide for the transfer of information, documents, assets or liabilities to ASIC from a referring State or a Territory; or an authority of a referring State or a Territory. [*Schedule 1, Part 4, item 22*]

2.55 These regulations will enable the transfer of assets (including records) and liabilities to ASIC from the State and Territory regulators.

*ASIC's role in relation to appeal, review or enforcement proceedings*

2.56 ASIC has the functions and powers in relation to appeal, review or enforcement proceedings that are expressed to be conferred on it by or under a law of the Commonwealth or a Territory. [*Schedule 1, Part 4, subitem 23(1)*]

2.57 It is envisaged that complementary provisions in State and Territory legislation will give ASIC functions and powers in relation to appeal, review or enforcement proceedings. However, ASIC is not subject to any directions in the performance of such functions or the exercise of such powers; and is not under a duty to perform such functions or exercise such powers. [*Schedule 1, Part 4, subitem 23(2)*]

2.58 In the event that a Minister of a referring State or a Territory appoints a person (other than ASIC) to bring or continue appeal, review or enforcement proceedings in the State or Territory, ASIC may give the person any information and documents that ASIC has in relation to the proceedings. *[Schedule 1, Part 4, subitem 23(3)]*

2.59 An appeal, review or enforcement proceedings in these provisions is defined to mean appeal or review proceedings; or an enforcement proceedings in relation to an order made by a court, but does not apply to tribunal orders or proceedings. *[Schedule 1, Part 4, subitem 23(4)]*



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## **Chapter 3**

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

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### **Outline of chapter**

3.1 Chapter 3 of this explanatory memorandum relates to the registration of persons engaging in credit activities. Schedule 2 to the National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009 (Transitional Bill) sets out the requirement for persons currently engaging in credit activities to become registered with the Australian Securities and Investments Commission (ASIC), prior to applying for an Australian credit licence (ACL).

3.2 The procedures for applying for an ACL and the consequent obligations are contained in Chapter 2 of the National Consumer Credit Protection Bill 2009 (Credit Bill), and are discussed in Chapter 2 of the explanatory memorandum to that Bill.

3.3 The key elements of the two-stage registration and licensing scheme are that:

- it requires persons who currently engage in credit activities to, initially, be registered with ASIC, and to subsequently apply for 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 registration or licence, or to ban person from engaging in credit activities.

## **Context of amendments**

3.4 Currently there is little 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.

3.5 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.

3.6 The continuing development of a greater and more complex range of credit products in the market has made it much straightforward for consumers to determine whether a product is suitable for their needs and has 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.

3.7 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.

3.8 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.

3.9 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;

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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.

3.10 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.

3.11 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.

3.12 Developments in the delivery of credit mean that the distinctions between lenders, brokers and those giving advice are no longer straightforward, and, in consequence, a comprehensive approach to licensing all market participants is preferable.

3.13 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>

3.14 The main objective in introducing the licensing system is to address these concerns 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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<sup>2</sup> *Review of Australia's Consumer Policy Framework*, Productivity Commission Inquiry Report, No. 45, 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.

## **Summary of new law**

3.15 The national licensing scheme for persons engaging in credit activities is established in Chapter 2 of the Credit Bill. It is complemented by Schedule 2 to the Transitional Bill which puts in place transitional arrangements that require persons who engage in credit activities prior to 1 January 2010 to be registered, before applying for an ACL.

3.16 The key elements of the scheme are that:

- it requires persons who currently engage in credit activities to, initially, register with ASIC between 1 November and 31 December 2009, and to subsequently apply for an ACL between 1 January and 30 June 2010;
- 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.

3.17 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 or a consumer lease (including where the lender has ceased providing credit, and where an assignee has purchased the debts from the original credit provider);
- exercising rights as a mortgagee or the beneficiary of a guarantee;

- 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 mortgage managers and aggregators); or
- suggesting or providing assistance in respect of a specific credit product with a particular credit provider.

3.18 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 the value of a residential investment property; or
- to refinance credit provided for these purposes.

3.19 The definition of 'credit' otherwise expressly excludes credit provided for business or investment use.

3.20 A two-stage approach is being adopted, with participants first being registered and then transitioning to a licence. Persons are required to register with ASIC in the period from 1 November 2009 to 31 December 2009.

3.21 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 Transitional Bill would be unable to be registered.

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

3.23 A registered person can authorise third parties to engage in credit activities on their behalf, without these persons having to be registered in their own right. These persons are known as ‘credit representatives’. The registered person is generally responsible for their conduct, and must specify in writing the credit activities they can engage in.

3.24 ASIC has the power to suspend or cancel a 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.

3.25 After becoming registered a person who intends to continue to engage in credit activities will have to apply for a licence in the period from 1 January 2010 to 30 June 2010. The licensing requirements are discussed in detail in Chapter 2 of the explanatory memorandum to the Credit Bill.

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

| <i>New law</i>  | <i>Current law</i>  |
|---|---|
| Introduces new regulation for lenders or intermediaries.                              | 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 regulation 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. |

| <i>New law</i>   | <i>Current law</i>   |
|--|--|
| <p>The main differences with the law operating in Western Australia are:</p> <ul style="list-style-type: none"> <li>• the entry requirements are similar, including that the applicant is a fit and proper person, but 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

### Definitions of words and phrases

3.26 The definition of words and phrases with specific meanings in the Transitional Bill is determined as follows:

- expressions that have a particular meaning in the Transitional Bill are listed in subsection 4(1) [*Part 2, subsection 4(1)*];
- expressions that have a particular meaning in the Credit Bill have the same meaning in the Transitional Bill, unless a contrary intention appears [*Part 2, subsection 4(2)*]; and
- the definitions in Part 1-2 of the Credit Bill apply as if the references to ‘this Act’ included references to Schedule 2 of the Transitional Bill [*Schedule 2, Part 1, item 2*].

### Registration of persons who engage in credit activities

3.27 A person who engages in credit activities will have a two-month window in which to register with ASIC, between 1 November 2009 and 31 December 2009 (or a later date as prescribed in the regulations). [*Schedule 2, Part 3, item 11*]

3.28 A registered person will then need to apply for a licence between 1 January 2010 and 30 June 2010 (or a later date as prescribed in the regulations), and can continue to engage in credit activities until their licence application is determined by ASIC. *[Schedule 2, Part 2, items 5 and 6]*

3.29 Once ASIC has determined their licence application, they either:

- can continue to engage in credit activities as authorised under the licence — where the licence application is granted; or
- must cease engaging in credit activities or otherwise commit an offence — where the licence application is refused.

3.30 From 1 January 2010 (or a later date as prescribed in the regulations) persons who are not registered who intend to engage in credit activities must apply for and receive a licence before commencing business. *[Schedule 2, Part 2, items 3 and 4]*

3.31 Table 3.1 summarises the changes in requirements over time.

**Table 3.1**

|                                     |  |
|-------------------------------------|--|
| 1 November 2009 to 31 December 2009 | All persons engaging in credit activities will need to apply to be registered.   |
| 1 January 2010 to 30 June 2010      | All persons engaging in credit activities will commit an offence unless they are registered or licenced.<br>All persons engaging in credit activities for the first time on or after 1 January 2010 must apply for and receive a licence before commencing business.   |
| 1 July 2010 to 30 June 2011         | All persons engaging in credit activities will commit an offence unless they are registered and have applied for a licence (and not had their application rejected) or they are licenced.<br>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: <ul style="list-style-type: none"> <li>• where the application is granted — continue to engage in credit activities; or</li> <li>• where the application is rejected — cease engaging in credit activities or they will commit an offence.</li> </ul> |
| 1 July 2011 onwards                 | From this date at the latest, all persons engaging in credit activities must hold a licence.   |

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

3.32 The Dictionary to the Credit Bill contains detailed definitions of when a person will engage in credit activities, and therefore when the requirement to be registered arises. This part contains a summary of these provisions; a more detailed explanation is in Chapter 2 of the explanatory memorandum to the Credit Bill.

3.33 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 (or their assignees), 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 [*Credit Bill, Part 1-2, Division 3, items 1, 3, 4 and 5 in the table in subsection 6(1) and section 10*]; and
- 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 [*Credit Bill, Part 1-2, Division 3, item 2 in the table in subsection 6(1) and sections 7 to 9*].

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

- they 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 [*Credit Bill, 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 [*Credit Bill, 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 [*Credit Bill, 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 *[item 4 in the table in 6(1) in the Credit Bill]*:
  - 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 *[item 5 in the table in 6(1) in the Credit Bill]*:
  - 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 *[Credit Bill, Part 1-2, Division 3, section 10]*. The definition does not extend to equitable assignees.

3.35 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.

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

3.36 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.

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

3.37 A person will provide credit assistance regardless of whether they deal directly with the consumer or with the consumer's agent. This serves to 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.

3.38 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.

3.39 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. *[Credit Bill, Part 1-2, Division 3, section 9]*

3.40 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 registration requirements will apply to all these persons.

3.41 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 a consumer, but, nevertheless act as an intermediary, for example by preparing or passing on information at the request of a consumer or by another intermediary, and their role is wholly or partially to secure credit or a lease.

- 3.42 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.

## **Part 2 — Transitional prohibitions relating to credit activities**

*Division 1 — Prohibition that applies only from 1 January 2010 to 30 June 2010, or in other prescribed period*

3.43 A person who engages in credit activities between 1 January 2010 and 30 June 2010 (or a later date prescribed in the regulations) will commit an offence unless they are either registered or hold a licence. *[Schedule 2, Part 2, item 3 and subitems 4(1) and (2)]*

- 3.44 The effect is that:
- a person who was registered by 31 December 2009 can continue to engage in credit activities until 30 June 2010, by which time they will have had to apply for a licence; and
  - any person who commences a new business after 1 January 2010, or were not registered by that date, will commit an offence unless they apply for and obtain an ACL before beginning to engage in credit activities.

3.45 However a person who engages in a credit activity in this period has a defence where:

- that person engages in the credit activity on behalf of a registered person or a licensee;
- the registered person or licensee is authorised to engage in credit activities of that type;

- the person's conduct is within the authority of the registered person or licensee; and
- the person themselves is either:
  - an employee or a director of the registered person or licensee, or of a related body corporate of the registered person or licensee; or
  - a credit representative of the registered person or licensee.

*[Schedule 2, Part 2, subitem 4(3)]*

3.46 A 'credit representative' is a person formally appointed to act on behalf of the registered person or licensee, in accordance with either section 64 or 65 of the Credit Bill. *[Schedule 2, Part 4, item 33]*

3.47 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 either subsection 64(1) or 65(1) of the Credit Bill.

*[Schedule 2, Part 1, item 2 and Credit Bill, Part 1-2, Division 2, section 5]*

3.48 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 either the registered person or licensee, and that their conduct was authorised by or conducted on behalf of that person.

3.49 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.

3.50 Consumers have specific remedies against persons where they engage in credit activities while unregistered, 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. *[Schedule 2, Part 4, item 37 and Credit Bill, Part 4-2, Division 2, section 180]*

*Division 2 — Prohibition that applies only from 1 July 2010 to 30 June 2011, or in other prescribed period*

3.51 A person who engages in credit activities between 1 July 2010 and 30 June 2011 (or a later date prescribed in the regulations) will commit an offence unless:

- they already hold a licence; or
- they are registered and have applied for a licence (so that they can continue operating until their application is determined by ASIC).

*[Schedule 2, Part 2, item 5 and subitems 6(1) and (2)]*

3.52 This allows registered persons who have applied for a licence prior to 1 July 2010 to continue to engage in credit activities until ASIC has determined their licence application, and to then either:

- where the licence application is granted — engage in credit activities as authorised under the licence; or
- where the licence application is refused — cease engaging in credit activities or otherwise commit an offence.

3.53 A defence for persons engaging in credit activities in this period applies (in equivalent terms to that in item 4 as discussed in paragraph 3.45), where:

- the person engages in the credit activity on behalf of a registered person or a licensee;
- the registered person or licensee is authorised to engage in credit activities of that type;
- the person's conduct is within the scope of the authority of the registered person or licensee; and

- the person themselves is either:
  - an employee or a director of the registered person or licensee, or of a related body corporate of the registered person or licensee; or
  - a credit representative of the registered person or licensee.

*[Schedule 2, Part 2, subitem 6(3)]*

*Division 3 — Application of Division 3 of Part 2-1 of the National Credit Act in relation to registered persons and this Schedule*

3.54 This Division applies provisions of the Credit Bill during the transitional period, to assist in the enforcement of the requirement that a person is registered, by creating offences in specified circumstances.

3.55 The Division has effect during the period from the commencement of the Transitional Bill to 30 June 2011 (or a later date prescribed in the regulations). *[Schedule 2, Part 2, item 7]*

3.56 A person will commit an offence where:

- they falsely hold out that they are authorised to engage in a credit activity (for example, that they are registered when this is not the case) *[Schedule 2, Part 2, paragraphs 8(a) to (d)]*.
- 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 *[Schedule 2, Part 2, paragraph 8(e)]*.
- 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 (for example, because they are not registered) *[Schedule 2, Part 2, item 10]*.

3.57 A person will also commit an offence where although registered themselves, they conduct business with another person who is engaging in a credit activity and is not registered when required to be. This provision will in practice only have effect from 1 January 2010, as the requirement to be registered commences on that date. *[Schedule 2, Part 2, item 9]*

### **Part 3 — Registration of persons who engage in credit activities**

#### *Division 1 — How to become registered*

3.58 Division 1 sets out the process for becoming registered. To make the transition from State and Territory to Commonwealth regulation as simple as possible, the procedure for becoming registered is straightforward, while still designed to allow for some persons to be automatically excluded because of their past conduct or history.

3.59 A person may apply to ASIC to be registered between 1 November and 31 December 2009 (or a later date prescribed in the regulations). The application must be in the approved form [*Schedule 2, Part 3, item 11*]. An applicant can be a natural person, a body corporate, a trustee or a partnership.

3.60 To be eligible to be registered, the applicant must be a member of an EDR Scheme that has been approved by ASIC. [*Schedule 2, Part 3, paragraph 12(1)(b)*]

3.61 ASIC may only register the applicant where they have applied in accordance with item 11, and have made a statement which certifies that none of the criteria resulting in automatic exclusion apply:

- where the applicant is a natural person — to that person;
- where the applicant is a body corporate — to any directors or secretaries who will perform duties in relation to the credit activities to be authorised by the registration; and
- where the applicant is a partnership or trust — to any partners or trustees, again where those persons will perform duties in relation to the credit activities to be authorised by the registration.

#### *[Schedule 2, Part 3, paragraphs 12(1)(a) and (c)]*

3.62 The criteria resulting in automatic exclusion relate to matters where there has been an adverse public outcome, which means there is an unacceptable risk to consumers from allowing the person to be registered. It will be a question of fact whether a person meets any of these criteria. Where they do, ASIC is required to refuse the registration and cannot exercise any discretion.

3.63 The criteria are:

- the person has been banned or disqualified either from engaging in credit activities under Part 2-4 of the Credit Bill,

or from providing financial services under Part 7.6 of the *Corporations Act 2001* (Corporations Act);

- the person has been banned or disqualified from engaging in credit activities under State or Territory law (whether as a result of a licence being suspended or cancelled, or as a result of injunctions or other orders of a court);
- where the person was previously registered, that any such registration is not suspended or has not been cancelled;
- where the person was previously the holder of an Australian financial services licence under the Corporations Act, and their licence is currently suspended or was cancelled in the last seven years:
  - because of mental or physical incapacity (under either paragraph 915B(1)(d) or subparagraph 915B(4)(b)(iii) of the Corporations Act); or
  - after a hearing (under section 915C of the Corporations Act);
- the person is insolvent; or
- where the applicant is a natural person:
  - the person is disqualified from managing corporations under Part 2D.6 of the Corporations Act;
  - the person has been convicted of serious fraud within 10 years of the application being made; or
  - a prescribed State or Territory order is in effect against that person — this provision results in persons being excluded where they are subject to orders such as ‘control orders’ made by a court in respect of criminal gangs.

*[Schedule 2, Part 3, subitem 12(2)]*

3.64 A person is *insolvent* where:

- if they are a natural person — they are a person who is an insolvent under administration (within the meaning of the Corporations Act);

- if they are a body corporate — it is a body corporate that is an externally administered body corporate (within the meaning of the Corporations Act); or
- if they are a partnership — it is a partnership against which a creditor's petition or a debtor's petition is presented under Division 2 or 3 of Part IV of the *Bankruptcy Act 1966*.

*[Credit Bill, Part 1-2, Division 3, section 5]*

3.65 A person will have been convicted of *serious fraud* if they have been convicted of an offence involving fraud or dishonesty, being an offence and against a law of the Commonwealth, or of a State or Territory, or any other law punishable by imprisonment for life or for a period, or maximum period, of at least three months. *[Credit Bill, Part 1-2, Division 3, section 5]*

3.66 ASIC can also refuse an application for registration if it believes the application is false or misleading or there is a material omission. This would cover, for example, the situation where a person states they are a member of an EDR Scheme, when this is not the case. *[Schedule 2, Part 3, subitem 12(3)]*

3.67 ASIC is required to give the applicant written notice of its decision to grant or refuse the registration. Where ASIC grants the registration it must advise the applicant of the date on which they become registered, which is the date when ASIC enters their name on its register. Where ASIC refuses to register the application it must give reasons for its decision. *[Schedule 2, Part 3, subitems 12(4) and (5)]*

3.68 An applicant who has had their registration application refused can seek a review of ASIC's decision by the Administrative Appeals Tribunal. *[Schedule 2, Part 4, item 39 and Credit Bill, Part 7-1, Division 3, section 327]*

3.69 It is explicitly provided that a registration 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 registration. *[Schedule 2, Part 3, item 13]*

*Division 2 — The conditions on the registration*

3.70 At the request of the registered person on an approved form, or on its own initiative, ASIC can impose conditions, or vary or revoke conditions on a registration. ASIC must ensure the registration includes a condition that specifies the credit activities the person is authorised to engage in. *[Schedule 2, Part 3, subitems 14(1), (2), (3) and (6)]*

3.71 ASIC must give the registered person written notice of the imposition, variation or revocation of any condition, with the change taking effect on the day specified in the notice. Except where the condition is imposed on registration, ASIC must first give the registered person an opportunity to make submissions and give evidence at a private hearing. *[Schedule 2, Part 3, subitems 14(4) and (5)]*

3.72 ASIC's power to vary or revoke conditions does not extend to any conditions prescribed by regulation. *[Schedule 2, Part 3, subitem 14(7)]*

3.73 Where the registered person is regulated by the Australian Prudential Regulation Authority (APRA), special procedures apply. *[Schedule 2, Part 3, item 15]*

3.74 If the registered person is either an authorised deposit-taking institution (ADI) or a related body corporate of an ADI, and the proposed condition, in ASIC's opinion, has or would have the result of preventing the ADI from being able 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. Before exercising the power, the Minister must first consider advice from ASIC on the proposed action, being advice given after ASIC has consulted with APRA on the proposed action. *[Schedule 2, Part 3, subitem 15(2)]*

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

3.76 If the registered person is not an ADI but still regulated by APRA, ASIC must consult with APRA in relation to any new conditions, or varying existing conditions, where they would prevent the registered person from carrying on all or any of its usual activities. This is intended to allow for a consistency in approach by the two regulators. *[Schedule 2, Part 3, subitem 15(1)]*

### *Division 3 — Obligations of registered persons*

#### General conduct obligations

3.77 Once registered, a person will be required to conduct their business in accordance with a number of specific obligations. Given that applicants engaging in credit activities will not previously have been subject to 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 these standards.

3.78 A person must be a member of an EDR Scheme in order to be registered, and must remain in an EDR Scheme while registered.  
*[Schedule 2, Part 3, subitem 16(1)]*

3.79 The following obligations apply, irrespective of the date of registration, to registered people from 1 January 2010 (or a later date as prescribed in the regulations) *[Schedule 2, Part 3, subitem 16(2)]*:

- to do all things necessary to ensure that the credit activities authorised by the registration are engaged in efficiently, honestly and fairly *[Schedule 2, Part 3, paragraph 16(3)(a)]*;
- to comply with any conditions on the registration *[Schedule 2, Part 3, paragraph 16(3)(b)]*;
- to comply with the credit legislation *[Schedule 2, Part 3, paragraph 16(3)(c)]*;
- to take reasonable steps to ensure that its representatives comply with the credit legislation *[Schedule 2, Part 3, paragraph 16(3)(d)]*;
- to take reasonable steps to ensure that clients of the registered person are not disadvantaged by any conflict of interest that may arise wholly or partly in relation to credit activities engaged in by the licensee *[Schedule 2, Part 3, paragraph 16(3)(e)]*; and
- to comply with any additional obligations imposed by regulation *[Schedule 2, Part 3, paragraph 16(3)(f)]*.

3.80 The obligations are principle-based, so that registered persons can have flexibility in adopting practices that suit their organisation. For example, if a registered person only provides one type of credit product then it will be more straightforward for them to meet the obligations than a large organisation with diverse products and distribution channels.

3.81 The obligations are continuing once a person is registered. While the period of registration will be relatively short, situations may still arise where a registered person needs to make changes to their business systems in order to continue complying with these obligations.

3.82 In respect of the requirement to engage in credit activities efficiently, honestly and fairly, each criterion must be considered independently. For example, the efficiency criterion cannot be used to justify conduct that is unfair or dishonest. That is, if a registered person adopts a practice that is efficient but is also unfair or even dishonest (for

example, consistently arranging for consumers to sign contract documents without any explanation) that conduct would, in all likelihood, be in breach of the obligation. [*Schedule 2, Part 3, paragraph 16(3)(a)*]

3.83 The registered person must also ‘do all things necessary’ to meet this requirement. This is a higher requirement than in relation to other obligations, where the registered person must only ‘take reasonable steps to ensure’ a specified outcome. This emphasises that one of the policy objectives of the Credit Bill and the Transitional Bill is to introduce standards of conduct which will result, over time, in improved outcomes for consumers from the credit contracts and consumer leases they enter into.

3.84 A registered person must comply with the credit legislation [*Schedule 2, Part 3, paragraph 16(3)(c)*]. **Credit legislation** is defined as:

- the Credit Bill;
- the Transitional Bill;
- Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001*; 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.

[*Credit Bill, Part 1-2, Division 3, section 5*]

3.85 This obligation requires the registered person to conduct their business with an appreciation of the credit legislation and with respect for the law (particularly in their dealings with consumers), and to consider the application of the credit legislation to all aspects of their operation.

3.86 A registered person must take reasonable steps to ensure that its representatives comply with this legislation [*Schedule 2, Part 3, paragraph 16(3)(d)*]. **Representatives** refers to the following classes of persons:

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

[*Credit Bill, Part 1-2, Division 3, section 5*]

3.87 This obligation will have limited application as the Transitional Bill largely places obligations directly on the registered person rather than its representatives. Generally, a registered person will be responsible for the conduct of their representatives, and answerable to third parties for any misconduct. A registered person needs to be confident that their representatives will comply with the law, or else take appropriate action (for example, limiting the scope of their authority).

3.88 What constitutes reasonable steps will vary according to the nature and scale of the business. For example, where the registered person has only a single retail outlet it will be able to adopt simpler procedures to ensure it is complying than a registered person with a number of credit representatives in a range of different locations.

3.89 A registered person must take reasonable steps 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 person or by its representatives, that is, that they must manage any conflicts appropriately. *[Schedule 2, Part 3, paragraph 16(3)(e)]*

3.90 This obligation only applies to conflicts of interests that arise by operation of law. It does not require a registered person to take action in respect of different interests of parties where they do not constitute a conflict of interest at law.

### **Example 3.1: Conflict of interest**

The client of a finance broker is at risk of being disadvantaged by a conflict of interest arising out of a fiduciary relationship between the client and the broker. On becoming a registered person the finance broker would be expected to take reasonable steps to avoid this outcome.

### **Example 3.2: No conflict of interest**

The lender, in preferring the interests of its shareholders, disadvantages the client of a lender. As there is no conflict of interest in law in this case, the lender, on becoming a registered person, does not need to take reasonable steps to avoid this outcome.

### Obligations to assist ASIC

3.91 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. *[Schedule 2, Part 3, items 17 to 19]*

3.92 First, a registered person must provide ASIC with information about their credit activities, whether in response to a written direction from ASIC or where this is required by the regulations. [*Schedule 2, Part 3, subitems 17(1) and 18(1)*]

3.93 It will be an offence of strict liability if a registered person fails to comply with a notice to provide information to ASIC within the time specified in the notice or fails to provide information as prescribed by the regulations. [*Schedule 2, Part 3, subitems 17(6), and (8) and 18(4) and (5)*]

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

3.95 All of these offences also have a criminal penalty, and a civil penalty of 2,000 penalty units, so that ASIC may appropriately penalise any contravention of these provisions. [*Schedule 2, Part 3, subitems 17(6) and (7) and 18(2) and (3)*]

3.96 A written direction by ASIC for information is expressly stated not to be a legislative instrument. This is declaratory of the position, consistent with section 5 of the *Legislative Instruments Act 2003*. [*Schedule 2, Part 3, subitem 17(4)*]

3.97 A registered person must also give reasonable assistance to ASIC as requested, in relation to whether the person and their representatives are complying with credit legislation. [*Schedule 2, Part 3, item 19*]

3.98 A request from ASIC in writing it is not a legislative instrument. This statement is declaratory of the law, consistent with section 5 of the *Legislative Instruments Act 2003* rather than itself creating an exemption. [*Schedule 2, Part 3, subitem 19(2)*]

3.99 Reasonable assistance is not defined in the Transitional Bill, but is intended to cover conduct such as making and keeping appointments with ASIC staff, and cooperating in a reasonable way with requests by ASIC for assistance.

3.100 This offence has a criminal penalty of 25 penalty units, or imprisonment for 6 months or both, and a civil penalty of 2,000 penalty units, to ensure consistency with section 912E of the Corporations Act. [*Schedule 2, Part 3, subitems 19(1) and (3)*]

3.101 The assistance may include the registered person showing ASIC books of the registered person. This requirement is not to be read as requiring the registered person to show books where it would not

otherwise be required to do so as a result of the proper exercise of ASIC's powers. *[Schedule 2, Part 3, subitem 19(4)]*

*Division 4 — When registrations can be suspended, cancelled or varied*

3.102 All registered persons are required to apply for a licence by 30 June 2010 (or a later date specified in the regulations). 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 their registration is automatically cancelled. They can no longer legally engage in credit activities unless they make a new licence application which is approved by ASIC. *[Schedule 2, Part 3, items 6 and 20]*

3.103 If the person applies for, and is granted a licence by ASIC, their registration is cancelled, as it has been superseded by the licence. *[Schedule 2, Part 3, item 20]*

3.104 For the purposes of certainty, it is expressly provided that all registrations cease to operate on 30 June 2011 (or a later date specified in the regulations). *[Schedule 2, Part 3, item 21]*

3.105 ASIC can direct a registered person, by written notice, to apply for a licence within 28 days. The power can be used by ASIC to smooth the transition from registration to licensing by bringing forward an application for a licence by a registered person or where there is a need to ascertain sooner rather than later whether a person can satisfy the requirements for holding a licence, and, therefore, remain active in the credit market. *[Schedule 2, Part 3, subitem 22(1)]*

3.106 A direction given by ASIC is not a legislative instrument. This statement is merely declaratory of the law, consistent with section 5 of the *Legislative Instruments Act 2003*. *[Schedule 2, Part 3, subitem 22(3)]*

3.107 ASIC may suspend or cancel the person's registration if they do not apply for a licence as required by the written notice. *[Schedule 2, Part 3, subitem 22(2)]*

**Example 3.3**

ASIC receives numerous complaints from consumers alleging serious misconduct by a registered person, Mr F. ASIC conducts inquiries into the conduct of Mr F generally. As a result it decides to use its power to serve a notice on Mr F, requiring him to apply for his licence before 30 June 2011.

ASIC may also decide to impose penalties on Mr F for breaches of the law, and consumers may seek to recover loss or damage as a result of his misconduct.

In assessing whether or not Mr F is a fit and proper person, in order to decide whether or not to grant him a licence, ASIC can take into account the complaints from consumers and the information obtained during its surveillance of his operation.

3.108 ASIC can also suspend or cancel a registration. It can do so without a hearing in limited circumstances only. First, ASIC can take this action at the request of the registered person or where they cease to engage in credit activities. *[Schedule 2, Part 3, paragraphs 23(1)(a) and (b)]*

3.109 Secondly, ASIC can also take prompt or immediate action where any of the excluding criteria specified in subitem 12(2) apply to the registered person, such as where, for example, the person is insolvent or has had their Australian financial services licence cancelled. *[Schedule 2, Part 3, paragraphs 23(1)(c) to (h)]*

3.110 Finally, where the registered person is not a natural person, ASIC can also suspend or cancel a registration without a hearing where a prescribed State or Territory order is made against a director or secretary (in the case of a body corporate) or a partner or trustee (in the case of a partnership or trust), where that person performs duties in relation to credit activities authorised by the registration. *[Schedule 2, Part 3, paragraph 23(1)(i)]*

3.111 ASIC can also suspend or cancel a registration after a hearing, on the following grounds:

- the registered person has either contravened one or more of the conduct obligations in item 16, or ASIC has reason to believe that they are likely to contravene them;
- the application for registration contained information that was false or materially misleading; or
- where the registered person is not a natural person, that any of the excluding criteria specified in subitem 12(2) apply to a director or secretary (in the case of a body corporate) or a partner or trustee (in the case of a partnership or trust) where that person performs duties in relation to credit activities authorised by the registration.

*[Schedule 2, Part 3, item 24]*

3.112 ASIC is required to exercise its discretion in considering whether any of the grounds should result in a suspension or cancellation. Where a director, secretary, partner or trustee now meets any of the specified excluding criteria ASIC would need to consider the nature of the conduct by the person, and the extent of their role and influence in the business of the body corporate, partnership or trust in deciding whether or not to suspend or cancel the registration.

3.113 The circumstances in which action can be taken to suspend or cancel the registration of an APRA-regulated body contain additional requirements, such that:

- where the registered person is an ADI or a related body corporate of an ADI — the power to cancel or suspend the registration can only be exercised by the Minister [*Schedule 2, Part 3, subitem 25(2)*]; and
- in all other cases where the registered person is regulated by APRA — ASIC must consult with APRA in relation to any new conditions, or varying existing conditions [*Schedule 2, Part 3, subitem 25(1)*].

3.114 ASIC may vary a registration as a result of a change in the name of the registered person. This is to ensure that where a registered person has changed their name, consumers are able to search the register using the new name. [*Schedule 2, Part 3, item 26*]

3.115 Where ASIC suspends a registration, the registration will have no effect, except where ASIC specifically provides for this in the suspension. [*Schedule 2, Part 3, item 27*]

3.116 Notwithstanding that ASIC has suspended or cancelled a registration it can specify that the registration continues for the purpose of specified provisions of the Transitional Bill in relation to either a specified matter or for a specified period, or both. [*Schedule 2, Part 3, item 31*]

3.117 This is intended to allow ASIC to deal flexibly with suspensions or cancellations by requiring the registered person to comply with some of the obligations that attach to registered persons, rather than all of these obligations ceasing with the suspension or cancellation. For example, ASIC could require a person whose registration is suspended or cancelled to nonetheless remain a member of an EDR Scheme for a specified period, so that affected consumers may still have access to the scheme for the purposes of having any complaints resolved.

3.118 ASIC may revoke a suspension of a registration at any time. [*Schedule 2, Part 3, item 28*]

3.119 ASIC is required to give written notice of any suspension, or its revocation, or the cancellation or variation of a registration to the registered person. ASIC must also publish notice of this action on its website. *[Schedule 2, Part 3, subitems 29(1) and (3)]*

3.120 When ASIC gives notice of the suspension or cancellation of a registration it must also provide a statement of its reasons for taking this action. *[Schedule 2, Part 3, item 30]*

3.121 Any change to a registration by ASIC takes effect from the date on which the notice is given to the registered person, except where the registration was cancelled under item 23. *[Schedule 2, Part 3, subitem 29(2)]*

#### **Part 4 — Application of other provisions of the National Credit Act in relation to registered persons and this Schedule**

3.122 This Part of the Transitional Bill specifies how certain provisions of the Credit Bill apply to registered persons. The provisions only apply during the period from commencement until 30 June 2011 (or later as prescribed by the regulations). *[Schedule 2, Part 4, item 32]*

3.123 In general terms, the following provisions of the Credit Bill apply as if references to licensees or licences were references to registered persons or registrations, or as if obligations or rights applying to or in relation to licensees were obligations or rights applying to or in relation to registered persons:

- Part 2-3 which deals with credit representatives and representatives of licensees *[Schedule 2, Part 4, item 33]*;
- Part 2-4 which deals with banning and disqualification of persons from engaging in credit activities *[Schedule 2, Part 4, item 34]*;
- Division 2 of Part 2-5 which deals with financial records of licensees *[Schedule 2, Part 4, subitem 35(1)]*;
- Division 4 of Part 2-5 which deals with auditors *[Schedule 2, Part 4, subitem 35(2)]*;
- Chapter 3 which deals with responsible lending conduct *[Schedule 2, Part 4, item 36]*;
- Chapter 4 which deals with remedies *[Schedule 2, Part 4, item 37]*;

- Chapter 5 which deals with administration [*Schedule 2, Part 4, item 38*]; and
- Chapter 7 which deals with miscellaneous matters [*Schedule 2, Part 4, item 39*].

3.124 Table 3.2 summarises the nature or effect of these provisions from the Credit Bill, which are discussed in more detail in the explanatory memorandum to the Credit Bill.

**Table 3.2**

|   |
|---|
| <p><i>Part 2-3 Credit representatives</i></p> <p>Part 2-3 of the Credit Bill has effect so that:</p> <ul style="list-style-type: none"> <li>• Registered persons can authorise credit representatives to act on their behalf in writing.</li> <li>• Registered persons must notify ASIC of the appointment of credit representatives.</li> <li>• Registered persons are liable for the conduct of credit representatives.</li> </ul>  |
| <p><i>Part 2-4 Banning and disqualification of persons</i></p> <p>ASIC can take action under section 80 of the Credit Bill to ban an individual from engaging in credit activities where it has cancelled or suspended a registration of a person.</p>  |
| <p><i>Division 2 of Part 2-5 Financial records of licensees</i></p> <p>A registered person must:</p> <ul style="list-style-type: none"> <li>• maintain financial records that correctly record and explain their business of engaging in credit activities; and</li> <li>• comply with requirements in relation to the keeping and location of those records, and their production to ASIC.</li> </ul> <p>The requirements in Division 3 of Part 2-5 of the Credit Bill, in respect of keeping trust account records, only commence on licensing.</p> |
| <p><i>Division 4 of Part 2-5 Audit reports</i></p> <p>The Application of Division 4 of Part 2-5 of the Credit Bill is extended to reports by auditors required under subitem 17(3). As a result registered persons are required to cooperate with the auditor in the preparation of the report.</p> <p>The power to make regulations under section 106 of the Credit Bill is extended to include regulations in respect of reports under subitem 17(3).</p>   |
| <p><i>Chapter 3 Responsible lending conduct</i></p> <p>Chapter 3 of the Credit Bill will have minimal application to registered persons (given the different timetable for commencement of these provisions). To the extent it may apply to registered persons, it is provided that they do not need to comply with the provisions in respect of disclosure of an ACL number and information about internal dispute resolution procedures.</p>  |

*Chapter 4 Remedies*

Chapter 4 of the Credit Bill (which deals with remedies) applies as if:

- all references to ‘this Act’ included references to Schedule 2 to the Transitional Bill; and
- all references to civil penalty provisions included references to civil penalty provisions within the meaning of the Transitional Bill.

It is specifically provided that the power of a court to make orders giving remedies to consumers against persons engaging in unlawful credit activities is extended to apply where the conduct is unlawful because it contravenes item 4 or 6.

*Chapter 5 Administration*

Chapter 5 of the Credit Bill (which deals with administration) applies as if all references to ‘this Act’ included references to Schedule 2 to the Transitional Bill.

It is specifically provided that a person will have qualified privilege in relation to information given to ASIC relevant to a decision by ASIC whether to register a person or whether to suspend or cancel a registration.

*Chapter 7 Miscellaneous*

Chapter 7 of the Credit Bill (which deals with miscellaneous matters) applies as if all references to ‘this Act’ included references to Schedule 2 to the Transitional Bill.

*[Schedule 2, Part 4, items 33 to 39]*

## **Part 5 — Exemptions and modifications**

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

- Divisions 1 and 2 of Part 2 — the requirement to be a registered person;
- Part 3 — the provisions determining whether or not a person can be registered, the obligations applying to them when registered, and the procedures for ASIC taking action in respect of a registration;
- the definitions in the Transitional Bill and the Credit Bill, as they apply in Divisions 1 and 2 of Part 2, and in Part 3 of the Transitional Bill; and
- instruments made for the purposes of any of the above three matters.

*[Schedule 2, Part 5, item 40]*

3.126 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 *[Schedule 2, Part 5, subitem 41(1)]*:
  - a particular person; or
  - a credit activity that is engaged in relation to a specified credit contract, mortgage, guarantee or consumer lease;
- by ASIC exempting or modifying their application to *[Schedule 2, Part 5, subitems 41(3) and (4)]*:
  - a class of persons; or
  - a class of credit activities; or
- by an exemption or modification of their application in the regulations to *[Schedule 2, Part 5, item 42]*:
  - a class of persons; or
  - a class of credit activities.

3.127 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 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*. *[Schedule 2, Part 5, subitem 41(2)]*

3.128 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. *[Schedule 2, Part 5, subitem 41(5)]*

3.129 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).

*[Schedule 2, Part 5, subitem 41(6)]*

## **Part 6 — Regulations relating to infringement notices**

3.130 Regulations can be made to allow for infringement notices to be issued by ASIC, effectively imposing a fine on a person as an alternative to:

- imposing a civil penalty, provided the fine does not exceed one-fortieth of the maximum penalty that a court could impose [*Schedule 2, Part 6, subitems 43(1) and (2)*]; and
- imposing a penalty in respect of a strict liability offence, provided the fine does not exceed one-fifth of the maximum penalty that a court could impose [*Schedule 2, Part 6, subitems 43(3) and (4)*].



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# **Chapter 4**

## **Consequential amendments**

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### **Outline of chapter**

4.1 Chapter 4 of this explanatory memorandum outlines consequential amendments to various statutes, which are contained in Schedule 3 to the National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009 (Transitional Bill).

### **Summary of new law**

4.2 A consequential amendment to the *Australian Securities and Investments Commission Act 2001* (ASIC Act) gives effect to certain administrative requirements relating to the Australian Securities and Investments Commission's (ASIC) role as the regulator of consumer credit under the National Consumer Credit Protection Bill 2009 (Credit Bill) and the Transitional Bill.

4.3 A consequential amendment to the *Corporations Act 2001* (Corporations Act) serves to assist business by minimising administrative requirements through aligning the licence number for the Australian financial services licence and the Australian credit licence (ACL) where a person holds both.

### **Detailed explanation of new law**

#### ***Australian Securities and Investments Commission Act 2001***

4.4 ASIC has responsibility for the administration of certain Acts or parts of Acts, in addition to the Corporations Act, which are set out in subsection 12A(1) of the ASIC Act.

4.5 Given ASIC's new role as the regulator for consumer credit, it is necessary to amend this provision by inserting the name of the Credit Bill and the Transitional Bill. [*Schedule 3, item 1*]

***Corporations Act 2001***

4.6 Each Australian financial services licence must have a unique licence number, which ASIC must notify to the holder under section 913C of the Corporations Act.

4.7 Where a person is the holder of an Australian financial services licence (AFSL) and an ACL, the licence number that ASIC gives to the AFSL held by that person must be the same number as the person's ACL number. *[Schedule 3, items 2 and 3]*

4.8 This amendment complements subsection 43(2) of the Credit Bill.