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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

NATIONAL CONSUMER CREDIT PROTECTION (TRANSITIONAL AND CONSEQUENTIAL PROVISIONS) BILL 2009

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be Moved on Behalf of the Government

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

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Glossary

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

Abbreviation	***Definition***
ADI	Authorised Deposit-taking Institution
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
Code	National Credit Code in Schedule 1 to the National Consumer Credit Protection Bill 2009
Corporations Act	*Corporations Act 2001*
Credit Bill	National Consumer Credit Protection Bill 2009
Proclamation Date	The date section 3 of the Credit Bill commences
Uniform Consumer Credit Code	Consumer Credit Code and regulations of the relevant State or Territory
RFC	Registrable Corporation under section 7 of the *Financial Sector (Collection of Data) Act 2001*
Transitional Bill	National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009
Transitional Period	The period starting on the day when section 3 of the Credit Bill commences (Proclamation Date) and ending on 30 June 2011 (or a later day as prescribed by the regulations)

General outline and financial impact

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

- certain definitions;
- provisions that relate to the implementation timetable, so that:
  - changes to the implementation timetable can occur through regulations to facilitate an orderly transition;
  - the commencement and cessation of interrelated provisions are synchronised; and
  - the commencement of the responsible lending conduct requirements and the National Credit Code are adjusted;
- exemptions and defences available during the Transitional Period; and
- the reviewability of Australian Securities and Investments Commission (ASIC) decisions (including enforcement decisions) by the Administrative Appeals Tribunal (AAT).

Date of effect: The amendments take effect when the affected provisions in the Transitional Bill take effect. The dates of effect of Schedules to the Transitional Bill are linked to the dates of effect of relevant parts of the Credit Bill.

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

Compliance cost impact: A compliance cost impact statement is included in the explanatory memorandum to the Transitional Bill.

Chapter 1
Amendments to the National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009

Implementation timetable

1.1 The purpose of many of the amendments explained in this Supplementary Explanatory Memorandum is to effect changes to the implementation timetable and respond to developments since the introduction of the Credit Bill. In particular, the amendments will result in the application of:

- the National Credit Code (Code) from 1 January 2010;
- the responsible lending conduct obligations to some market participants from 1 January 2010; and
- certain enhancements to the Code from 1 July 2010.

1.2 Changes to the commencement of obligations under the Credit and Transitional Bills can be made by regulations.

Application of the National Credit Code (Amendments 2 to 4 and 7 to 12)

1.3 Several key concepts are used to achieve the implementation of the Credit and Transitional Bills.

- Amendment 2 inserts the definition of ***'carried over instrument***' into the Dictionary in item 4 in the Transitional Bill. The term ***'carried over instrument'*** means an existing contract or other instrument which was subject to the Uniform Consumer Credit Code applying in each State and Territory. The concept of ***'carried over instrument'*** has been introduced to allow for the transition of existing contracts and instruments into the Code.
- Amendment 3 revises the definition of ***'commencement'*** in the Dictionary in item 4 of the Transitional Bill. The term ***'commencement'*** will now be defined as the start of

1 January 2010, or a later day prescribed in the regulations, rather than the day section 3 of the Credit Act commences (Proclamation Date). The term ***'commencement'*** is used in many provisions and, in most cases, it is appropriate that those provisions take effect at that later time. Where this is not the case (for example, because the provision may need to take effect earlier), those provisions have been redrafted so that they will not take effect on ***'commencement'***; that is, they continue to take effect on the earlier date.

- Amendment 4 inserts the definition of ***'interim period'*** into the Dictionary in item 4 of the Transitional Bill. This period starts on commencement (as defined) and ends on 30 June 2010, or a later day prescribed by the regulations. The concept of ***'interim period'*** has been introduced to provide for the deferral of the commencement of certain enhancements to the Code until 1 July 2010.

1.4 Amendment 7 inserts Division 1A into Schedule 1 of the Transitional Bill. It provides that the Code applies both after and before commencement (as defined), subject to the operation of items 2B and 3. These items deal with the treatment of contracts made after and before commencement respectively. ***[Schedule 1, Part 1, Division 1A, item 2A]***

1.5 Amendment 8 revises Division 2 of Schedule 1 of the Transitional Bill, which is about the treatment of contracts and other instruments made after and before commencement (as defined).

Contracts made <u>after</u> the commencement of the National Credit Code

1.6 The Code applies to contracts and other instruments made <u>after</u> commencement (as defined) ***[Schedule 1, Part 1, Division 2, subitem 2B(1)].***

1.7 However, certain enhancements to the Code do not apply to contracts and other instruments made in the ***'interim period'***. The commencement of these enhancements is deferred until 1 July 2010. These enhancements are:

- the extension of the Code to credit provided for investment in residential properties (subparagraphs 5(1)(b)(ii) and (iii)) ***[subitem 2B(2)]***;
- amendments to the presumptions relating to the application of the Code to credit contracts and consumer leases (sections 13 and 172). During the interim period sections 11 and 150 of the Uniform Consumer Credit Code apply instead. ***[subitem 2B(3)]***;

- the introduction of the requirement for credit providers to respond to applications for hardship variations or postponement of enforcement proceedings (subsections 72(3) and 94(2)) ***[subitems 2B(4) and (7)]***;

- the introduction of the direct debit default notice (section 87) ***[subitem 2B(5)]***; and

- amendments to the content of default notice requirements (subsection 88(3)). During the interim period subsection 80(3) of the Uniform Consumer Credit Code (where applicable) applies instead ***[subitem 2B(6)].***

Contracts made before the commencement of the National Credit Code

1.8 The Code applies to contracts and other instruments made and in force before its commencement (‘***carried over instruments***’) where the Uniform Consumer Credit Code applied ***[Schedule 1, Part 1, Division 2, subitem 3(1)].***

1.9 Certain provisions of the Code never apply to carried over instruments for constitutional reasons. These are:

- the extension of the Code to credit provided for purposes of investment in residential properties (section 5) ***[subitem 3(2)]***;

- amendments to the types of fees and charges that are included to work out if the fees and charges imposed in relation short term credit exceeds 5 per cent (subsection 6(2)) ***[subitem 3(3)]***;

- amendments to the presumptions relating to the application of the Code to credit contracts and consumer leases (sections 13 and 172) ***[subitem 3(2)]***;

- amendments to provisions relating to prohibited securities (subsections 50(2),(3),(4),(5) and (8)) ***[subitem 3(3)]***; and

- the increase to the thresholds under which a debtor can request a hardship variation or stay of enforcement (subsections 72(5)) and 94(4)) ***[subitems 3(4) and (5)].***

1.10 The relevant provisions of the Uniform Consumer Credit Code continue to apply instead ***[Schedule 1, Division 2, subitems 3(2) and (4)].***

1.11 As with new contracts, the commencement of certain enhancements to the Code are also deferred during the interim period for carried over instruments ***[subitems 3(6), (7), (8) and (9)].*** During the interim period the relevant provisions of the Uniform Consumer Credit Code (where applicable) apply instead ***[subitem 3(8)].***

1.12 Amendments 9 to 11 insert the term ***'in relation to a carried over instrument'*** to provisions which deal with treatment of court proceedings brought in a court under the Uniform Consumer Credit Code before commencement (as defined) and references to court proceedings and orders in the Code to ensure that those provisions cover existing contracts.

1.13 Amendment 12 provides that a contract that is not an existing contract is not subject to the rules in Division 4 which deal with matters such as: preserving the effect of things done by, or under the carried over provisions of the Uniform Consumer Credit Code; creating equivalent rights and liabilities to those that existed under the Uniform Consumer Credit Code; and how time limits under the Uniform Consumer Credit Code are treated.

Application of the Credit Bill other than the responsible lending conduct obligations and the Code (Amendment 14)

1.14 Amendment 14 inserts item 17A and revises items 18, 19 and 20 in Schedule 1 of the Transitional Bill. These provisions clarify some aspects of the application of the Credit Bill. ***[Schedule 1, Division 1, subitems 17A(1) and 18(1)]***

1.15 The substantive effect of these provisions is:

- Other than Chapter 3 and the Code, the Credit Bill applies from commencement (as defined), including in relation to contracts or other instruments made after commencement ***[subitems 17A(1) and 18(1)].***
- In relation to contracts or other instrument made before commencement (as defined), there is a power to make regulations to apply the Credit Bill, where a person engages in credit activities after commencement in relation to such a contract or instrument ***[subitem 18(2)].***
  - It is proposed to make regulations applying some aspects of the Credit Bill, including licensing, to this category of conduct.
- Where proceedings are brought under the Code after commencement (as defined) in relation to contracts or other

instrument made before commencement, Part 4-3 of the Credit Bill applies to those proceedings ***[subitem 18(3)].***

1.16 Amendment 14 also clarifies the existing general power in section 329 of the Credit Bill to make regulations.

- It is specifically provided that regulations made under this clause may either apply on the date the Credit Bill commences or on a later date ***[subitem 17A(2)]***.

- It is expressly stated that the power to make regulations in relation to where court proceedings should be heard (under both the Credit Bill and the Code), can be exercised in relation to a contracts or other instrument made before 'commencement' ***[subitem 18(4)].***

Application of Chapter 3 of the Credit Bill (responsible lending conduct obligations) (Amendments 5, 14 and 39)

1.17 Amendment 14 also revises item 19 in Schedule 1 of the Transitional Bill, which relates to the application of the responsible lending conduct obligations during the Transitional Period.

1.18 Amendment 5 inserts a definition of ***'registrable corporation'*** which is broadly equivalent to the term Registered Financial Corporation (RFC), commonly used by the Australian Prudential Regulation Authority. This definition has the same meaning as provided by section 7 of the *Financial Sector (Collection of Data) Act 2001*.

1.19 The responsible lending conduct obligations other than the disclosure requirements (primarily the obligations related to the unsuitability tests) will now apply to registered persons and licensees which are not RFCs or Authorised Deposit-taking Institutions (ADIs) from commencement (as defined) ***[subitem 19(2)]***. This will primarily apply to smaller lenders and credit assistants, such as mortgage brokers.

1.20 Bringing forward these obligations ensures that there is continuity in relation to the regulation of persons providing credit services who are currently subject to legislative requirements under a State or Territory law. This avoids having a period in which these persons might not be subject to any substantive obligations in their dealings with consumers.

1.21 All of the responsible lending conduct obligations will commence for ADIs and RFCs on 1 January 2011 (or a later date as prescribed). This date has not changed and recognises the time needed by these entities to adjust their business and information technology systems. ***[subitem 19(1)]***

1.22 The responsible lending conduct disclosure requirements (for example, the provision of the quote, the requirement to provide copies of assessments on request and credit guides) will still commence on 1 January 2011 (or a later date as prescribed).

1.23 Amendment 39 revises item 36 in the Transitional Bill to apply the responsible lending conduct obligations to registered persons ***[subitem 36(1)]***. This removes the incentive to delay obtaining a licence to avoid the responsible lending conduct obligations applying during the relevant period.

1.24 The amendment is necessary so that both licensees and registered persons are subject to the responsible lending conduct obligations in accordance with the new implementation timetable ***[subitem 36(2)].***

1.25 The amendment also specifies which provisions in Chapter 3 of the Credit Bill do not apply to registered persons ***[subitem 36(3)]***. These provisions relate to the need to quote an Australian credit licence number and provide information about internal dispute resolution procedures in credit guides.

1.26 Amendments 14 and 39 also clarify that copies of an assessment made before the start of the disclosure requirements (1 January 2011) do not need to be provided to consumers ***[subitems 19(3), 19(4) and 36(4)].*** Amendment 14 clarifies that regulations may apply to pre-existing contracts ***[subitem 19(5)].***

Application of Schedule 2 of the Transitional Bill (registration) (Amendments 14, 16 and 17)

1.27 Amendment 14 makes consequential changes to item 20 in Schedule 1 of the Transitional Bill, which relates to the application of Schedule 2 (Registration). It clarifies that the power to make regulations for the application of Schedule 2 (including the requirement to be registered) applies in relation to a 'carried over instrument' (rather than the definition previously applying), so that the terminology is consistent with other provisions of the Bill.

1.28 Amendment 17 changes the date in item 3 in Schedule 2 by using the new definition of ‘commencement’. Amendment 16 is a related amendment to the division heading.

Application of sections 64 and 65 of the Credit Bill (authorisation of credit representatives) (Amendments 33, 35 to 38)

1.29 Amendment 35 inserts item 32A which has the purpose of applying clauses 64 and 65 of the Credit Bill to registered persons prior to the commencement of the substantive obligations in subitem 16(3).

1.30 This amendment is necessary to enable a registered person, prior to commencement of those obligations, to authorise credit representatives to engage in credit activities on its behalf, and to allow body corporate credit representatives, such as companies, to sub-authorise to natural persons. It therefore ensures they will be able to comply with these obligations as soon as they commence.

1.31 Amendments 36 to 38 are consequential amendments required to insert references to the new item 32A into item 33, which deals with the application of Part 2-3 of the Credit Bill to credit representative of a registered person during the Transitional Period.

1.32 Amendment 33 provides for a consequential amendment to item 32. Item 32 includes a list of items to which Part 4 in Schedule 2 of the Transitional Bill does not apply. This change is needed as a result of the insertion of item 32A and amendment to item 39. Part 4 specifies how certain provisions of the Credit Bill apply to registered persons.

Application of Chapter 7 of the Credit Bill (Amendment 40)

1.33 Amendment 40 introduces a revised version of subitem 39(1) that clarifies the application of Chapter 7 of the Credit Bill during the Transitional Period. Chapter 7 deals with regulation-making powers and other miscellaneous matters.

1.34 The amendment provides that, during the Transitional Period, references in Chapter 7 of the Credit Bill to ‘this Act’ are to be read as references to ‘this Act and the Schedule 2 to the Transitional Act’. The effect of this is that provisions in Chapter 7 in relation to licence holders are extended to apply to registered persons (in Schedule 2 to the Transitional Bill).

1.35 The amendment applies to all provisions in Chapter 7 except for sections 327, 339 and 331.

Transfer of information to ASIC (Amendment 1)

1.36 Item 22 of Schedule 1 to the Transitional Bill provides that regulations may be made 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. These regulations will enable arrangements for the transfer of information, documents, assets or liabilities to ASIC from the State and Territory regulators.

1.37 Currently, the commencement of item 22 is linked to the commencement of part of the Credit Bill. In order to give ASIC and the States and Territories more time to make arrangements for the transfer of information, documents, assets or liabilities, Amendment 1 provides that item 22 will commence on the date of Royal Assent of the Transitional Bill, enabling regulations facilitating the transfer to be made earlier.

ASIC approach (Amendment 15)

1.38 Item 21 of Schedule 1 of the Transitional Bill contains the power to make regulations about ASIC's approach during the Transitional Period.

1.39 Amendment 15 revises the start date of item 21 to be the Proclamation Date (rather than commencement (as defined)).

Expanded definitions relating to banning (Amendments 25, 31 and 32)

1.40 Paragraphs 12(2)(c), 23(1)(e) and 24(2)(c) of the Transitional Bill (Banning Item Provisions) provide that whether or not a person has been banned from engaging in a credit activity under a law of a State or Territory (including by having a State or Territory credit licence cancelled or suspended) is relevant to decisions by ASIC whether to grant, suspend or cancel a registration.

1.41 Amendments 25, 31 and 32 apply, during the Transitional Period, an expanded definition of the phrases ***'banned from engaging in a credit activity under a law of a State or Territory'*** and ***'State or Territory credit licence'***. This expanded definition provides that a reference to a ***'credit activity'*** in the Banning Item Provisions includes a reference to an activity that would be a credit activity if the Code had applied from the Proclamation Date of the Credit Bill.

1.42 These amendments are predicated on the basis that the Code commences at a later point in time than the Proclamation Date of the Credit Bill. During this period a person will not be engaging in credit activities without the expanded definition.

1.43 The effect of these amendments is to enable ASIC, when deciding whether to grant, suspend or cancel a person's registration, to consider whether that person has been banned from engaging in a credit activity under a law of a State or Territory, notwithstanding that the Code has not commenced. Without these amendments, ASIC would not be able to take such State or Territory banning orders into consideration until the person was able to engage in credit activities, which in the absence of these amendments would require the Code to have commenced.

Linking critical dates (Amendments 6, 20, 21, 24, 26, 27, 29, and 34)

1.44 A number of the critical dates in the Transitional Bill may be extended by regulation. These amendments ensure that, where appropriate, extending some dates will automatically extend related critical dates. This will provide greater certainty in the commencement of the provisions and reduce the need for regulations.

1.45 Amendment 6 inserts the term ***'transition end day'*** into the Dictionary in item 4 which is also a critical date in these registration requirements and means 30 June 2011, or a later day prescribed by the regulations.

1.46 Amendments 21, 24, 27 and 34 replace the date in items 5, 7, 16 and 32 with the ***'transition end day'***. Amendment 20 is a subsequent amendment to the division heading as a result of amendment 21.

1.47 Amendment 26 inserts item 15A, which is an application provision with critical dates in relation to the obligations of registered persons. Amendment 28 omits subitem 16(2), which is superseded by item 15A.

1.48 Amendment 29 substitutes item 21 with a new item about the cancellation of all registrations on the 'transition end day'.

Defences (Amendments 18, 19, 22 and 23)

1.49 Items 4 and 6 in Schedule 2 provide that a person must not engage in credit activities during certain periods if they are not registered.

1.50 Amendments 18 and 19, and 22 and 23 amend items 4 and 6 respectively by providing an additional defence to engaging in credit activities when not registered. The effect of these amendments is that a person does not commit an offence where they are a representative of a person and the person is exempt from the need to be registered.

1.51 The exemption can arise as a result of an exemption under paragraph 41(1)(a) of Schedule 2, or as a result of a class order exemption by ASIC under paragraph 41(3)(a) or an exemption by regulation under paragraph 42(a).

1.52 This defence places the onus of proof on the defendant. The reason for this approach is that a defence of this type may raise complex factual matters that cannot be readily established by ASIC but will be within the knowledge of the person relying on the defence. For example, that person will be in the best position to prove that their conduct has been authorised by their principal or that they have satisfied the conditions imposed on an exemption.

AAT review of ASIC decisions (Amendment 40)

1.53 Amendment 40 inserts subitem 39(2), which provides that section 327 of the Credit Bill applies to decisions made by ASIC under Schedule 2 of the Transitional Bill (other that decisions relating to the exercise of ASIC exemption and modification powers) during the Transitional Period.

1.54 Section 327 of the Credit Bill sets out the regime for the review of ASIC decisions by the Administrative Appeals Tribunal (AAT). Amendment 24 to the Credit Bill is expected to alter the application of section 327, so that ASIC's compliance and enforcement decisions will not be subject to review by the AAT. This amendment is explained in the Supplementary Explanatory Memorandum to the Credit Bill.

1.55 The effect of amendment 40, in applying the revised section 327 in subitem 39(2), is that decisions made by ASIC made under Schedule 2 of the Transitional Bill will not be subject to review by the AAT.

1.56 However, the introduction of subitem 39(2) does not affect the reviewability of decisions related to the exercise of ASIC's exemption and modification powers under subitem 41(3) of Schedule 2 made during the Transitional Period. Decisions made under subitem 41(3) are legislative instrument, which are already subject to review by Parliament under the *Legislative Instruments Act 2003*.

ASIC exemptions (Amendment 41)

1.57 Amendment 41 modifies ASIC's ability to exempt persons from the requirement to be registered to engage in credit activities under paragraph 41(1)(a) in Schedule 2 of the Transitional Bill.

1.58 As currently drafted, the provisions only allow ASIC to exempt a single person under each exemption. This restriction limits the utility of the exemption mechanism in providing relief in appropriate circumstances.

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

1.60 The revision to item 41 does not affect the status of such exemptions under the *Legislative Instruments Act 2003*, as noted in subitem 41(2) of the Transitional Bill; subitem 41(2) remains declaratory of the existing position.

Technical Amendments (Amendments 13 and 30)

1.61 Amendment 13 corrects a grammatical error by deleting the repeated word 'that' from item 10 in Schedule 1 of the Transitional Bill.

1.62 Amendment 30 amends the grounds under item 23 of the Transitional Bill on which ASIC can suspend or cancel a person's registration to include instances where a person does not engage in credit activities, as well as ceases to engage, in credit activities. This drafting alteration ensures that, if no credit activities have ever been engaged in by the registered person, ASIC may still suspend or cancel a person's registration.