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National Regulation of Consumer Credit: Credit (Commonwealth Powers) Bill 2009 (Qld)

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Moves have been afoot for some years for the states and territories to pass nationally consistent laws to regulate credit providers, culminating in the October 2008 agreement by the Coalition of Australian Governments (COAG) that the Commonwealth would take over the regulation of consumer credit. In order to achieve this, state and territory legislative power to regulate consumer credit must be conferred upon the Commonwealth Government to enable it to effectively take over control of this matter by virtue of s 51(xxxvii) of the Commonwealth Constitution.

*The Commonwealth Parliament has passed three Acts forming the **National Consumer Credit Protection** legislation package. The states wishing to participate will now need to pass laws enabling the Commonwealth's national laws to operate. Queensland's contribution to this referral process is the introduction of the **Credit (Commonwealth Powers) Bill 2009 (Qld)** on 10 November 2009.*

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CONTENTS

EXECUTIVE SUMMARY	
1 INTRODUCTION.....	1
2 BACKGROUND.....	1
2.1 CURRENT REGULATORY ENVIRONMENT.....	3
3 BACKGROUND TO NATIONAL CONSUMER CREDIT LEGISLATION	5
3.1 COALITION OF AUSTRALIAN GOVERNMENTS (COAG) AGREEMENT	6
3.2 DEVELOPMENT OF COMMONWEALTH LEGISLATION	7
4 OVERVIEW OF THE NATIONAL CONSUMER CREDIT PROTECTION ACT 2009 (CTH).....	9
4.1 AUSTRALIAN CREDIT LICENCE	9
4.1.1 Who Must Obtain an ACL?	10
4.1.2 Obtaining an ACL.....	12
4.1.3 Licensee Obligations.....	14
4.1.4 Suspension and Cancellation	15
4.1.5 Bans and Disqualifications	16
4.1.6 Impacts of Licensing Requirements.....	16
4.2 RESPONSIBLE LENDING OBLIGATIONS.....	17
4.2.1 Application of the Responsible Lending Obligations.....	18
4.2.2 Credit Provider's Obligations	19
4.2.3 Credit Assistance	20
4.3 SANCTIONS AND REMEDIES	21
4.3.1 Enhanced Enforcement Powers for ASIC.....	21
4.3.2 Criminal Sanctions.....	22
4.3.3 Civil Penalties	22

4.3.4	Infringement Notices	23
4.3.5	Consumer Remedies	23
4.3.6	Dispute Resolution	26
4.4	NATIONAL CREDIT CODE	27
4.5	COMPLIANCE AND ENFORCEMENT	29
4.6	ADMINISTRATION MATTERS.....	30
5	NATIONAL CONSUMER CREDIT PROTECTION (TRANSITIONAL AND CONSEQUENTIAL PROVISIONS) ACT 2009 (CTH).....	30
6	CONSTITUTIONAL BASIS OF THE NCCP ACT AND THE TRANSITIONAL BILL.....	31
7	CREDIT (COMMONWEALTH POWERS) BILL 2009 (QLD).....	32
7.1	REFERRAL OF MATTERS	33
7.2	TERMINATION OF REFERENCES	33
7.3	REPEALS AND TRANSITIONAL PROVISIONS.....	34
7.4	CONTINUATION OF INTEREST RATE CAP	35
7.5	ASIC PROVISIONS	35
7.6	COMMENCEMENT	36
8	STAKEHOLDER RESPONSES	36
8.1	SUITABILITY ASSESSMENTS AND LOW-INCOME EARNERS	36
8.2	ACCESS TO LOW COST FORUMS TO RESOLVE DISPUTES	37
8.3	CRIMINAL PENALTIES.....	37
8.4	DEFERMENT OF TIMEFRAMES.....	38
8.5	GENERAL COMMENTS.....	38
	RECENT QPL RESEARCH PUBLICATIONS 2010.....	41

EXECUTIVE SUMMARY

The regulation of consumer credit – essentially loans for personal, domestic or household purposes, such as a mortgage or a personal loan – has traditionally been the province of the states and territories, with the Commonwealth Government having very limited powers of oversight. While considerable progress towards consistent national regulation of consumer credit has been achieved with the enactment of the Uniform Consumer Credit Code, which applies in each jurisdiction, gaps and inconsistencies remain.

Following the October 2008 agreement by the Coalition of Australian Governments (COAG) that the Commonwealth would take over the regulation of consumer credit, the Commonwealth Parliament passed three Acts forming the **National Consumer Credit Protection (NCCP)** legislation package. The jurisdictions wishing to participate will now need to pass legislation referring to the Commonwealth Parliament their parliaments' power to regulate consumer credit, thereby allowing the new NCCP legislation to operate. Queensland's contribution to this referral process is the introduction of the **Credit (Commonwealth Powers) Bill 2009 (Qld)** on 10 November 2009.

Sections 1 and 2 of this Research Brief provide some **background** to the problems encountered by some consumers in a market where there is unprecedented choice of credit products and a variety of traditional and non-traditional ('fringe') lenders. While the benefits to consumers are many, there are examples – often given considerable media exposure – of 'shonky' lenders and finance brokers enticing people into loans that are unsuited to their needs or that they cannot afford. A short overview of the **current regulatory environment** is also provided, noting that the Uniform Consumer Credit Code (UCCC) currently governs the provision of consumer credit in the states and territories but that, over time, many jurisdictions have enacted laws additional to the UCCC resulting in inconsistencies and gaps in how credit providers are regulated throughout Australia.

Section 3 examines the moves towards **nationally consistent regulation of credit providers** over the past decade, culminating in the agreement by COAG that the Commonwealth would take over the regulation of consumer credit and pass the necessary laws to do so. The states and territories must pass legislation in their respective parliaments to refer their power over consumer credit to the Commonwealth Parliament enabling it to enact consumer credit protection laws based on s 51(xxxvii) of the *Commonwealth Constitution*.

Section 4 discusses the national consumer credit legislation package passed by the Commonwealth Parliament, comprising the **National Consumer Credit Protection Act 2009 (NCCP Act)**, the **National Consumer Credit Protection (Fees) Act 2009** and the **National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009 (Transitional Act)**, which was assented to in late 2009. The discussion in this section focuses on the following key aspects of the NCCP Act:

- the nationwide licensing scheme under which persons engaging in specified credit activities must obtain an **Australian Credit Licence** from the

- Australian Securities and Investment Commission (ASIC). The discussion includes the criteria for obtaining a licence; licensee obligations; suspensions and cancellations of licences; and bans and disqualifications (**section 4.1**);
- **responsible lending obligations** which seek to ensure that licensees do not place consumers in credit contracts and leases that are unsuitable and that they cannot afford to service without suffering substantial hardship (**section 4.2**);
 - **sanctions and remedies** which operate in a tiered fashion, depending upon the type of contravention and the nature of the licensee in breach. The sanctions take the form of criminal penalties (including jail terms in some instances); civil penalties; and infringement notices. There are also a number of consumer remedies that the court can provide including injunctions and compensation orders. In relation to ‘small claim’ type matters, consumers will be able to opt in to a streamlined, less technical, lower cost ‘small claim’ court procedure in lower courts such as a Magistrates Court. Consumers will also have the option of seeking resolution of disputes with credit providers through mandatory external dispute resolution schemes (**section 4.3**);
 - a **National Credit Code** which will replace the UCCC but will have some enhancements and extensions of coverage to provide more protection for consumers (**section 4.4**);
 - **compliance and enforcement** measures undertaken by ASIC (**section 4.5**);

A brief outline of the **Transitional Act 2009** is set out in **Section 5**. This Act seeks to facilitate the transition of state and territory regulation of consumer credit to the Commonwealth and ASIC.

Section 6 of the Brief discusses the **constitutional basis** of the Commonwealth’s NCCP legislation package, which relies primarily on a referral of state power over consumer credit matters, giving the Commonwealth Parliament the ability to enact the aforementioned legislation based on the referral of powers provision in s 51(xxxvii) of the *Commonwealth Constitution*.

Section 7 examines the **Credit (Commonwealth Powers) Bill 2009 (Qld)** introduced into the Queensland Legislative Assembly on 10 November 2009 by the Hon PJ Lawlor MP, Minister for Tourism and Fair Trading. This Bill provides the necessary referral of the Queensland Parliament’s powers over consumer credit matters to the Commonwealth Parliament to enable the Commonwealth’s National Consumer Credit Protection legislation package to apply in Queensland. The Bill makes two references of matters to the Commonwealth (an initial reference and an amendment reference); provides for a termination of those references by proclamation; repeals some Queensland Acts; and continues the current 48% interest, fees and charges cap imposed on ‘payday loans’ for the time being.

Finally, **Section 8** considers some responses by various **stakeholders** to the new legislation.

1 INTRODUCTION

Protecting consumers from unscrupulous credit providers and loans that they cannot afford has become increasingly difficult. An ever increasing range of credit products has become available, accompanied by the entry of non-traditional (or ‘fringe’) lenders and finance brokers into the market.

The regulation of consumer credit – essentially credit for personal, domestic or household purposes, such as a mortgage or a personal loan – has traditionally been the province of the states and territories, with the Commonwealth Government having very limited powers of oversight. While considerable progress towards consistent national regulation of consumer credit has been achieved with the enactment of the [Uniform Consumer Credit Code](#), which applies in each jurisdiction, gaps and inconsistencies remain.

Moves have been afoot for some years for the states and territories to pass nationally consistent legislation to improve consumer protection, culminating in the October 2008 agreement by the Coalition of Australian Governments (COAG) that the Commonwealth would take over the regulation of consumer credit. In order to achieve this, state and territory legislative power to regulate consumer credit must be conferred upon the Commonwealth Government to enable the latter to effectively take over this matter by virtue of s 51(xxxvii) of the [Commonwealth of Australia Constitution Act](#) (the [Commonwealth Constitution](#)). This referral is needed because the Commonwealth Government’s substantive powers in this area are limited by the provisions of the *Commonwealth Constitution*.

The Commonwealth Parliament has passed three Acts forming the **National Consumer Credit Protection** legislation package. The states wishing to participate will now need to pass laws enabling the Commonwealth’s national laws to operate. Queensland’s contribution to this referral process is the introduction of the [Credit \(Commonwealth Powers\) Bill 2009 \(Qld\)](#) by the Hon PJ Lawlor MP, Minister for Tourism and Fair Trading, on 10 November 2009.

2 BACKGROUND

Credit has become more accessible to consumers over the past few decades. In particular, the deregulation of the finance market in the late 1980s provided impetus for the entry of non-bank lenders and intermediaries into the market, generating more competition and lowering the cost of credit. Consumers seeking loans in the 21st century have a larger choice of loan products than ever before.

As at the end of June 2009, figures produced by the Australian Treasury show that the nominal value of consumer loans has grown at around 13% per year since June

1988 and, as of June 2009, total consumer credit on issue was \$1.1 trillion. Housing related credit was \$997.6 billion, and other personal credit was \$136.2 billion. The largest sector of consumer credit is home mortgages, representing around 88% of all consumer loans. Credit cards, personal loans and other types of personal credit represent around 12% of consumer loans.¹ The recent economic downturn did, however, appear to have slowed the rate of growth in consumer credit during early 2009 as people seemed to be taking more care in their borrowing activities and lenders tended to tighten their lending standards.²

The advantages to consumers from the larger range of credit providers and credit products are many. Indeed some of these products – such as ‘low-doc’ loans – allow people who might have difficulty obtaining a loan from traditional lenders, due to uncertain income or lack of established credit history, to buy their first home, while short-term or ‘payday’ loans allow consumers access to a small amount of credit to tide them over a sudden financial crisis.

On the flipside, there has, however, been a rise in the number of consumer complaints about unscrupulous lenders and brokers enticing people to take out loan products that they cannot afford or are unsuited to their needs. The myriad of often bewildering options and the consumer’s need to rely on the product knowledge of brokers and lenders have left vulnerable, low-income consumers susceptible to the sharp practices of some dishonest credit providers. The March 2008 Queensland Parliamentary Library publication, [‘Predatory Lending: Time to Regulate?’](#) (RBR No 2008/07), discussed (at pp 13-14) a number of issues that have arisen from the absence of, or inconsistencies in, the regulation of consumer credit providers. For instance, it was noted that Queensland’s Office of Fair Trading (OFT) had received a number of complaints about finance brokers who gave misleading or no information about fees connected with the loan product or did not take the consumer’s personal circumstances into account when organising the loan. No doubt, the current global economic downturn has added to the financial stress that can result from being placed in unsuitable loan contracts.

Examples were provided in the above Research Brief (pp 24-26) of instances where the consumer was on a low income and/or had a poor credit history which should have alerted the lender to, before the loan was provided, inquire about the capacity of the consumer to service the loan without suffering great financial hardship. In some instances, the consumer had a limited grasp of English and, in others, consumers were so desperate to obtain finance that they were prepared to sign a

¹ [Australian Treasury Submission](#) to the [‘Inquiry by the Senate Standing Committee on Economics into the National Consumer Credit Protection Bill 2009 and related bills’](#), August 2009, Attachment A (p 39).

² [Australian Treasury Submission](#), pp 30-31, referring to a graph provided by the Reserve Bank of Australia.

declaration that the loan was for ‘business purposes’ thus removing the loan from the ambit of the UCCC which only protects contracts for loans for personal, domestic or household purposes.

2.1 CURRENT REGULATORY ENVIRONMENT

Until now, the provision of consumer credit has been the responsibility of states and territories while other financial services, such as insurance, superannuation and investment, have been subject to Commonwealth regulation.

At present, the Australian Securities Investment Commission (ASIC) has oversight of financial products and services – including the licensing of participants. The *Corporations Act 2001 (Cth)* requires providers of financial products and advice to hold a licence and be subject to other parts of the Financial Services Reform (FSR) regime, including belonging to an External Dispute Resolution (EDR) scheme. However, as credit is not a ‘financial product’ under the *Corporations Act*, mortgage and finance brokers and credit providers are not subject to its licensing requirements nor to ASIC oversight (apart from the extent to which the *Australian Securities Investment Commission Act 2001 (Cth) (ASIC Act)* applies to corporations generally to prohibit unconscionable, misleading or deceptive conduct and provides other similar consumer protections). ASIC has not, in the past, been able to oversee credit providers’ adherence to disclosure obligations when providing consumer credit nor ensure that lenders or brokers assess whether the product is suitable for the consumer and that the consumer is able to repay the loan.³

In Queensland, as with other states and territories, provision of consumer credit is regulated under the consumer protection provisions of the various Fair Trading Acts and, particularly, by the *Uniform Consumer Credit Code (UCCC)*.⁴ The UCCC covers matters such as advertising of credit products and the requirement to provide ‘comparison rates’; representations in relation to entering into contracts; and credit providers’ disclosure obligations. The UCCC also allows for rearrangements to be made if a consumer faces financial hardship (e.g. through job loss or illness) to enable the consumer to still repay the loan. This might be, for example, by extending the loan, thereby reducing the amount of each repayment. If the credit provider does not agree to vary the contract, the consumer can apply to the court to make the change. The court can also reopen unjust transactions.

³ This matter is dealt with in more detail in the Queensland Parliamentary Library’s publication, ‘[Predatory Lending: Time to Regulate?](#)’, Research Brief No 2008/07, March 2008, p 31ff.

⁴ The *Consumer Credit Code (UCCC)* is an Appendix to the *Consumer Credit (Queensland) Act 1994 (Qld)*.

However, a court option may well be beyond the financial means of the very consumers who would most wish to avail themselves of this avenue of redress, and this opportunity arises only after the consumer is enmeshed in a contract that an upfront assessment might have shown was unsuitable for the consumer in the first place. Importantly, not all aspects of broking activity are covered by the UCCC. There is no specific requirement for credit providers to assess the suitability of the loan for the particular consumer or the consumer's capacity to repay the loan. Credit providers are not obliged to belong to any EDR scheme which allows a consumer a quick and inexpensive means of informally resolving disputes with the credit provider without recourse to the technical and costly court process. An example of an EDR scheme is the Credit Ombudsman Service Limited (COSL) which will, in the event of a dispute, attempt to negotiate a solution with the lender that is suitable to the consumer.⁵

Further, a range of different legislative provisions outside of the UCCC have been enacted by various jurisdictions to provide additional protection for consumers in the relevant jurisdiction. An example of such is the introduction of interest rate caps on short term consumer credit ('payday loans') in four states, including Queensland. Some states and territories have 'broker specific' legislation, with Western Australia's legislation being the most specific, imposing a licensing regime on finance brokers.

Many mortgage brokers and finance brokers are members of the [Mortgage & Finance Association of Australia](#) (MFAA), the peak industry body representing more than 12,500 mortgage, land and finance professionals.⁶ While not having the same impact as legislative oversight, to become a member of the MFAA, persons must meet particular education, qualification and experience standards. Amongst other things, members have to hold professional indemnity insurance; comply with any laws regulating the provision of credit and with the MFAA [Code of Practice](#); and hold membership of an EDR scheme. Further, members must only recommend products that are appropriate to the consumer's needs, must make necessary inquiries to determine the consumer's capacity to repay, and must disclose details about the product and any known fees and commissions. Breaches of the Code can incur various sanctions, including expulsion from the MFAA.⁷

As most brokers around Australia are MFAA members, it is likely that the broker selected by the consumer will possess required qualifications and experience,

⁵ Credit Ombudsman Service Limited, [Submission No 18](#) to the House of Representatives Standing Committee on Economics Finance and Public Administration, '[Inquiry into home loan lending practices and processes used to deal with people in financial difficulty](#)', July 2007.

⁶ [MFAA website](#), '[The Essentials of Borrowing #1](#)'.

⁷ MFAA, [Code of Practice](#).

belong to an ASIC-approved EDR scheme, and be subject to the MFAA's disciplinary rules. However, of concern are those 'rogue' operators who have been expelled from the MFAA or do not meet the necessary requirements to become members of the MFAA in the first place. This leaves consumers with only those limited protections offered under the [UCCC](#) or the state and territory Fair Trading Acts. Providers of consumer credit in Queensland have been largely unregulated and have not been subject to ASIC oversight nor that of the OFT, apart from in relation to adhering to the consumer protection provisions of the [Fair Trading Act 1989 \(Qld\)](#).

3 BACKGROUND TO NATIONAL CONSUMER CREDIT LEGISLATION

The Ministerial Council on Consumer Affairs (MCCA), comprising consumer affairs ministers from the Commonwealth, states and territories, has been working on creating nationally consistent regulation of brokers and lenders for a number of years. In November 2007, a MCCA working group released the [National Finance Broking Scheme Consultation Package](#) that included a draft national Bill, prepared by NSW, seeking to provide a national framework for such regulation. Certain aspects of the draft national Bill are similar to provisions of the new National Consumer Credit Protection legislation package passed by the Commonwealth Parliament in October 2009, which is the subject of this Research Brief.

At the time the *Consultation Package* was released, it was believed that the states and territories would enact uniform legislation. The then Commonwealth Treasurer warned states and territories that they needed to act more quickly to enact uniform legislation or else hand over their power to regulate in this area to the Commonwealth.⁸ Bolstering the position for a Commonwealth 'takeover' of consumer credit, in September 2007, the Commonwealth House of Representatives Standing Committee on Economics, Finance and Public Administration tabled its report on the [Inquiry into Home Loan Lending Practices and the Processes Used to Deal with People in Financial Difficulty](#). A key recommendation of the Committee was for the Commonwealth Government to assume control of the credit industry and the regulation of credit providers.⁹

⁸ Costello warns states on high-risk loans', *ABC News Online*, 19 August 2007.

⁹ See also, Productivity Commission, '[Review of Australia's Consumer Policy Framework](#)', Productivity Commission Inquiry Report No 45, 30 April 2008 which recommended a licensing scheme for finance brokers and a licensing or registration scheme for lenders.

3.1 COALITION OF AUSTRALIAN GOVERNMENTS (COAG) AGREEMENT

On [3 July 2008](#),¹⁰ before the draft national Bill was finalised, COAG agreed to progress towards national regulation of consumer credit with the Commonwealth assuming responsibility for regulating mortgage brokers, margin lenders and other consumer credit providers. The endeavour forms part of COAG's drive for a National Seamless Economy as it seeks to replace many state and territory laws with one national law, removing the need for businesses operating across many jurisdictions to comply with differing legislative requirements.¹¹

On [2 October 2008](#) COAG followed up with a phased Implementation Plan for the reforms with Phase 1 being the transfer to the Commonwealth of responsibility for key consumer credit regulation; the development of a national regulatory platform around an enhanced and expanded [UCCC](#); the implementation of a licensing regime administered by ASIC; and the imposition of industry-wide responsible lending obligations. Phase 2 would build on the first phase by considering the regulation of other lending types, such as small business lending; and the regulation of other areas such as payday lending, credit cards, personal loans, interest rate caps and reverse mortgages.¹² The Queensland Minister for Fair Trading, the Hon PJ Lawlor MP, has said that the Queensland Government has strongly urged the Commonwealth to include an interest rate cap as part of its national payday lending laws and that jurisdictions with existing interest rate caps will be keeping them while the Commonwealth assesses how the first phase of the new reforms operates in jurisdictions with caps as against places without caps.¹³

For the Commonwealth to take over the regulation of consumer credit and pass the necessary legislation, the states and territories must pass legislation in their respective parliaments to refer that power to the Commonwealth Parliament enabling it to enact consumer credit laws based on [s 51\(xxxvii\)](#) of the *Commonwealth Constitution*. The Commonwealth, State and Territory Governments agreed that legislation to give effect to the first phase would be introduced in 2009. Each state and territory has participated in the transition

¹⁰ COAG Communiqué, 3 July 2008, p 3. The issue was canvassed briefly in an earlier meeting on [26 March 2008](#), p 17.

¹¹ [Australian Treasury Submission](#), p 8.

¹² [Australian Treasury Submission](#), p 8.

¹³ Hon PJ Lawlor MP, Minister for Tourism and Fair Trading, [Second Reading Speech, Credit \(Commonwealth Powers\) Bill 2009 \(Qld\)](#), *Queensland Parliamentary Debates*, 10 November 2009, pp 3165-3167, p 3167.

process via the Financial Services and Credit Reform Implementation Task Force, chaired by the Commonwealth.¹⁴

It is understood that an Intergovernmental Agreement (IGA) supports the enactment of the consumer credit legislation and sets out the consultation requirements in relation to any amendments the Commonwealth proposes to make to the legislation it has enacted based on the referral of state power.¹⁵

3.2 DEVELOPMENT OF COMMONWEALTH LEGISLATION

The National Consumer Credit Protection (NCCP) legislation package seeks to deliver on the Commonwealth Government's commitment to modernise Australia's consumer credit laws, gives effect to the COAG agreement, and implements Phase 1 of the Implementation Plan to transfer credit regulation to the Commonwealth.

The [National Consumer Credit Protection Bill 2009 \(Cth\) \(NCCP Bill\)](#), the [National Consumer Credit Protection \(Transitional and Consequential Provisions\) Bill 2009 \(Cth\)](#) and the [National Consumer Credit Protection \(Fees\) Bill 2009 \(Cth\)](#)¹⁶ were introduced into the House of Representatives by the Hon C Bowen MP, Minister for Financial Services, on 25 June 2009.¹⁷ The introduction of the legislation package was preceded by a period of consultation with industry and consumer groups, starting with the release of the Commonwealth Government's [Financial Services and Credit Regulation Green Paper: Improving, Simplifying and Standardising Financial Services and Credit Regulation](#) in June 2008, followed by the publication of the draft National Consumer Credit Protection Bill in April 2009. The [NCCP Bill](#) introduced into the Parliament reflects some of the feedback and outcomes of that consultation process.

In addition, the [Corporations Legislation Amendment \(Financial Services Modernisation\) Bill 2009 \(Cth\)](#) was also introduced on 25 June 2009 seeking to impose obligations on providers of margin loans and associated advice to be licensed, to be members of an External Dispute Resolution scheme, and to comply

¹⁴ Hon PJ Lawlor MP, [Second Reading Speech](#), p 3166. A second key consultation body is the Industry and Consumer Consultative Group, comprising representatives from peak industry associations, consumer advocates and dispute resolution and legal representatives: see [Australian Treasury Submission](#), p 10.

¹⁵ [Australian Treasury Submission](#), p 12.

¹⁶ The [National Consumer Credit Protection \(Fees\) Act 2009 \(Cth\)](#) allows fees to be imposed in relation to various activities under the NCCP reforms, such as applying for an Australian Credit Licence or lodging other documents.

¹⁷ The Hon Chris Bowen MP is also Minister for Superannuation, Corporate Law and Minister for Human Services.

with various disclosure and notification requirements. It also imposes responsible lending requirements. [The Corporations Legislation Amendment \(Financial Services Modernisation\) Act 2009 \(Cth\)](#) was assented to on 6 November 2009. When the Act commences, margin lending will be regulated within the *Corporations Act 2001*.

The NCCP Bills were referred to the Senate Economics Legislation Committee on 25 June 2009 and the Senate Committee tabled its Report ([Senate Committee Report](#)) on 7 September 2009.¹⁸ The recommendations by the Committee relate to deferring some of the new laws to commence on 1 July 2010 to give the credit industry a chance to prepare and to allow State and Territory Parliaments time to pass necessary referral legislation, while others relate to the more substantive provisions of the [National Consumer Credit Protection Act 2009 \(Cth\) \(NCCP Act\)](#), some of which will be discussed below.

The above Bills passed the Senate on 26 October 2009, following various amendments, a number of which give effect to various Senate Committee recommendations.¹⁹ The [NCCP Act](#) was assented to on 15 December 2009.²⁰ While the substantive provisions of the NCCP Act will take effect on 1 July 2010, the legislation allows for the transfer of relevant credit information, documents and other things from the states and territories to ASIC before the commencement of the National Credit Code.

[Draft Regulations](#) and explanatory material were released for public consultation on 20 November 2009.²¹

¹⁸ Australian Parliament, Senate Economics Legislation Committee, 'National Consumer Credit Protection Bill 2009 and related bills', [Report](#), tabled 7 September 2009. An order of the Senate on 13 May 2009 now provides each of the Senate's eight legislative and general purpose standing committees with a **Legislation Committee** (to deal with referred bills, the Estimates process and to oversee the performance of departments) and a **References Committee** (to deal with other referred matters): see Senate Standing Order 25 at: http://www.aph.gov.au/Senate/pubs/standing_orders/index.htm.

¹⁹ For access to the Senate amendments and links to the [Explanatory Memorandum](#) and other material, see the [Bill's Homepage](#) on the Australian Parliament site.

²⁰ The [National Consumer Credit Protection \(Fees\) Act 2009 \(Cth\)](#) and the [National Consumer Credit Protection \(Transitional And Consequential Provisions\) Act 2009 \(Cth\)](#) were assented to on 16 November 2009 and 15 December 2009, respectively, but will not commence until the [NCCP Act](#) commences.

²¹ ASIC is progressively issuing guidelines on various aspects of the NCCP Act, including the procedures for obtaining an ACL; licensee obligations, competencies and training; responsible lending; financial resource requirements; dispute resolution: see [ASIC Guidance on Credit](#).

4 OVERVIEW OF THE NATIONAL CONSUMER CREDIT PROTECTION ACT 2009 (CTH)

The [National Consumer Credit Protection Act 2009 \(Cth\) \(NCCP Act\)](#) is the main piece of legislation in the NCCP legislation package and seeks to implement the components of Phase 1 of the transfer of consumer credit regulation to the Commonwealth.²² The key features are:

- a nationwide licensing regime (Australian Credit Licence) administered by ASIC;
- responsible lending obligations imposed on credit providers;
- enhanced powers of enforcement for ASIC and stronger sanctions for misconduct by credit providers;
- improved access by consumers to dispute resolution schemes and to streamlined and less technical court processes; and
- replacement of the state and territory [Uniform Consumer Credit Code \(UCCC\)](#) with a National Credit Code which is very similar to the UCCC but contains some refinements, enhancements and extensions.

4.1 AUSTRALIAN CREDIT LICENCE

As noted in the [Explanatory Memorandum](#) to the NCCP Bill (p 28), there is no real consistency among states and territories in the way in which credit providers are regulated. In Western Australia, for instance, finance brokers must be licensed while in Victoria they must be registered. In New South Wales, there is no licensing requirement but broking activities are strictly regulated and brokers must have a contract with the consumer setting out various particulars such as credit details, and disclosing other matters, such as commissions and benefits receivable from lenders and others. Victorian legislation also imposes some, but less extensive, disclosure obligations and a broker can be disqualified from operating in certain circumstances. The Australian Capital Territory has a registration system and legislation imposing obligations on brokers. Queensland, along with the Northern Territory, Tasmania and South Australia, currently has no legislative requirements for registration or licensing for entry into the industry.²³ The result has been that credit providers operating across Australia have to hold different

²² Some legal commentators have suggested that, on its face, the Act has many features of the current Australian Financial Services Licensing system, including licensee obligations: see A Galvin & M Anastas, ‘Federal Consumer Credit Reforms to Proceed, *Corrs in Brief*, October 2009, p 5.

²³ ‘[Predatory Lending: Time to Regulate?](#)’, Research Brief No 2008/07, pp 33-40.

licences or registrations, the obtaining of which are subject to varying requirements.

Chapter 2 of the [NCCP Act](#) provides for a new national licensing regime for providers of consumer credit. The [Explanatory Memorandum](#) (p 4) stresses the difference between these new licences and Australian Financial Services Licences (AFSL) under the *Corporations Act 2001*. When the holder of an Australian Credit Licence (ACL) provides credit to a consumer, the credit has to be repaid by the consumer, whereas money provided by an AFSL holder is for the purchase of, or investment in, a financial product that generally includes the expectation of a benefit or return from the payment.

4.1.1 Who Must Obtain an ACL?

Persons (whether natural persons, bodies corporate, partnerships, or trustees: see definition in **Part 1-2, Div 4**) engaging in activities regarding the provision of credit to consumers must obtain an ACL.²⁴ A person will engage in ‘credit activity’ if the person (see **s 6**):

- **provides credit under a credit contract** (as defined in ss 4-5 of the National Credit Code (NCC) – i.e. a contract under which credit is or may be provided to a natural person or strata corporation wholly or predominantly for personal, domestic or household purposes, or to purchase, renovate, improve or refinance a residential investment property used predominantly for residential purposes, and a charge is imposed for the credit);²⁵
- **provides a credit service**, defined in **s 6** as:
 - providing credit assistance (see **s 8**) i.e. suggests²⁶ or assists a consumer in relation to a specific credit contract or lease with a particular credit

²⁴ **Ch 2, Part 2-6** provides for ASIC and for Regulations to exempt or modify the application of licensing provisions so that certain persons and particular activities might be exempted from licensing or from the full impact of licensing provisions or requirements in order to accommodate different practices within the credit industry. For instance (under ss 21 and 23 of the draft Regulation), point-of-sale retailers providing credit assistance (but not if they actually provide credit or leases at the point-of-sale) will be exempt, with a review of this to occur within a year. Debt collectors who hold a state or territory licence and are authorised by a lender to collect a debt will be exempt for 12 months pending further consultation.

²⁵ The new NCC, which will replace the [UCCC](#), extends its reach to credit provided to purchase, renovate, improve or refinance a residential investment property used predominantly for residential purposes or to refinance credit so provided. The UCCC did not extend to this.

²⁶ For example, suggests that the consumer apply for a particular credit contract or for an increase in the credit limit of a particular credit contract, or to remain in a particular credit contract with a particular credit provider: see [Explanatory Memorandum](#), p 17.

provider or lessor. The [Explanatory Memorandum](#) (p 18) observes that a person will provide assistance regardless of whether they deal directly with the consumer or the consumer's agent (e.g. the children of an elderly parent who is applying for a credit contract); or

- acting as an intermediary (such as a finance broker but could also cover mortgage managers and aggregators: see **s 9**)²⁷ between a borrower and lender;
- **provides a consumer lease.** The NCC (s 170) provides that a consumer lease is a lease where the goods are hired wholly or predominantly for personal, domestic or household purposes; and a charge is or may be made for the hiring of the goods and the charge and other amounts payable exceeds the cash price of the goods;
- **is a mortgagee** or a person exercising the rights or obligations of a mortgagee in relation to a mortgage to which the NCC applies – i.e. it secures obligations under a credit contract or a related guarantee and the mortgagor is a natural person or a strata corporation;
- **is a beneficiary of a guarantee** or a person exercising the rights or obligations of a beneficiary of a guarantee to which the NCC applies – i.e. it guarantees the obligations of a debtor under a credit contract and the guarantee is given by a natural person or a strata corporation;
- **receives an assignment of the rights of the credit provider or lessor** (even if the lender has ceased to provide credit, and includes assignees that have purchased the debts from the original provider).

The holder of an ACL will be able to lend and collect money due under a credit contract, act as a broker or intermediary, or help a consumer with a specific credit product.

Engaging in credit activities without an ACL on and after 1 July 2011 will be an offence, unless the person is an employee or a director of a licensee or a related body corporate of the licensee, or a credit representative of a licensee (**s 29**). The offence attracts a criminal penalty of 100 penalty units (\$11,000 for an individual)

²⁷ As indicated by the [Explanatory Memorandum](#) (p 18) the definition of 'intermediary' in **s 9** is sufficiently broad to require every person who may act as an intermediary between the consumer and the credit provider to have an ACL given that a consumer may go through a number of people between their first point of contact and the final lender without knowing the roles of all those people. Nor will it matter that the type of credit or the credit provider is not yet known. An intermediary need not have direct face-to-face contact with the consumer but merely pass on information.

or 2 years imprisonment or both, and a civil penalty of 2,000 penalty units.²⁸ Other offences regarding the need to be licensed are found in Part 2-1, Div 3.

A licensee can authorise a third party (the ‘credit representative’) to engage in credit activities on his or her behalf and the licensee must specify the credit activities the credit representative may engage in (see [Explanatory Memorandum](#), p 32). **Chapter 2, Part 2-3 (ss 64-72)** of the [NCCP Act](#) provides for the authorisation of credit representatives and the circumstances in which an authorisation has no effect (e.g. where the licence does not permit the particular activity or where the person is banned from engaging in credit activity). The licensee is generally responsible for the conduct of the credit representative²⁹ and, therefore, can be made liable to consumers for any loss or damage suffered as a result of the representative’s conduct (see **ss 74-78**).

Consumers will be able to seek remedies against unlicensed credit providers, as discussed later.

4.1.2 Obtaining an ACL

Persons engaging in activities regarding the provision of credit to consumers will, firstly, have to seek registration with ASIC between 1 April and 30 June 2010 (and have to demonstrate EDR scheme membership and not meet any criteria that would result in automatic exclusion, such as being insolvent or having a conviction for serious fraud). They will then have until 31 December 2010 to apply for an ACL (see [National Consumer Credit Protection \(Transitional and Consequential Provisions\) Act 2009 \(Cth\) \(Transitional Act 2009\)](#), Sch 2, Part 3). Those starting business after the ACL system commences are not registered and, therefore, must apply for an ACL before beginning operation. It will be an offence for anyone to engage in credit activities without an ACL on and after 1 July 2011 at which time all registrations will be cancelled.

During the Senate Committee Inquiry, industry representatives, including the Business Council of Australia and the ABA and leading credit providers submitted that starting some aspects of the scheme in January 2010 gave too little time in which to make preparations for the new reforms, to change business and IT

²⁸ Section 4AA of the *Crimes Act 1914* (Cth) provides that 1 penalty unit is \$110. Section 4B(3) provides that for a body corporate, unless there is a contrary intention, the court may impose a penalty of not more than 5 times the amount of the maximum pecuniary penalty for a natural person.

²⁹ Various offences and consequent penalties are provided. See also s 73 enabling ASIC to give a licensee personal information about credit representatives for specified purposes (such as to decide if action should be taken against the representative).

systems, and to train employees and staff. This concern was enhanced by the fact that many details of the new requirements were in yet to be finalised Regulations, meaning that the full impact of the needed changes would not be known in time to design and implement IT and business systems alterations before the laws took effect.³⁰ Amendments were made to the NCCP legislation, following a recommendation by the [Senate Committee Report](#) (p 6), to defer implementation of the reforms to July 2010 to allow sufficient time for industry to adjust and for states to provide the necessary referrals of legislative power to the Commonwealth.

The [Explanatory Memorandum](#) (p 39) comments that because applicants for registration will not previously have been required to be registered under the Commonwealth provisions, the obligations applying to registered persons are limited to those that they can meet immediately (e.g. to conduct their business honestly, efficiently and fairly, and to comply with any laws or conditions on the registration (see, e.g. [Transitional Act 2009](#), Sch 2, Part 3, Item 16)). The licensing requirements build on the foregoing registration requirements and the criteria for obtaining an ACL are more onerous than those for registration.

Criteria for obtaining an ACL include (see **ss 36-37** for more detail):

- whether the applicant is a fit and proper person to be involved in the provision of credit services (taking into account relevant matters such as past conduct, for instance whether the applicant has been banned or disqualified under the *Corporations Act*, or a law of any state or territory, or under the NCCP legislation; whether the applicant been insolvent; or has a recent criminal conviction; and other relevant matters);
- whether the applicant is likely to meet the licensee obligations imposed by s 47;
- minimum training requirements accompanied by adequate financial and human resources to meet the licensee's obligations, such as systems to meet responsible lending obligations.

Certain persons can be ‘streamlined’ to an ACL without needing to satisfy ASIC about the above criteria. These are Authorised Deposit-taking Institutions (ADIs) (e.g. banks, credit unions which are already subject to stringent oversight), as well as those finance brokers who meet the requirements for holding an A or B Class licence under the Western Australia licensing regime because they will have already been subject to the required levels of supervision to not need to meet the competencies and qualifications required under the new ACL system (see **ss 38-40** and [Explanatory Memorandum](#), p 48).

However, **s 40** provides that ASIC cannot grant an ACL to applicants who are subject to banning or disqualification orders or to a prescribed state or territory

³⁰ [Senate Committee Report](#), pp 3-4, referring to submissions from the Business Council of Australia (No 26); the ABA (No 48); GE Capital Finance (No 35).

order. In addition, ASIC may refuse to grant the ACL if the above criteria are not met.³¹

ACLs can be made subject to conditions (see ss 44-46) and consultation with the Australian Prudential Regulation Authority (APRA) is required in certain circumstances where the condition might affect the licensee's APRA regulated business, or with the Minister if the licensee is an ADI.

4.1.3 Licensee Obligations

To retain an ACL, the licensee is required to conduct their operations in accordance with specific obligations, particularly those set out in s 47, and must have systems and procedures in place to meet them. Obligations are principle-based and include (but are not limited to):³²

- doing all things necessary to ensure that credit activities are carried out honestly, efficiently and fairly;
- maintaining competencies to engage in the credit activities as well as ensuring that the licensee's representatives are adequately trained and have relevant competencies;
- maintaining adequate resources to engage in credit activities and having adequate risk management systems (if the licensee is not regulated by APRA);
- complying with licence conditions and the credit legislation and taking reasonable steps to ensure that the licensee's representatives comply with the legislation (e.g. through proper training etc.);
- maintaining adequate compensation arrangements (such as adequate professional indemnity insurance) to compensate consumers for loss or damage because of any breach of the NCCP requirements;
- having adequate systems and arrangements in place to ensure compliance with the obligations and a written plan to document such systems and arrangements;
- having adequate arrangements to ensure that the consumer is not disadvantaged by any conflict of interest that arises wholly or partly in relation to credit

³¹ Natural justice requirements are provided in ss 41-42: when ASIC decides to refuse the ACL the applicant has the right to be heard before the refusal; reasons for refusing must be given and, under s 327 the applicant has a right to apply to the Administrative Appeals Tribunal.

³² The [Australian Treasury Submission](#), p 15, notes that the primary obligations under s 47 are similar to those applying under the *Corporations Act* to Australian Financial Service Licences. However, the main differences are the allowance, under s 47(2), for compliance with some obligations to vary according to the nature, scale and complexity of the licensee's activities, and that the obligation regarding conflict of interest applies only to conflicts that arise by operation of law.

activities of the licensee or its representatives. For instance, the licensee might be a finance broker (who might be asked by the consumer to seek out loans at market rates) but also be a lender (who might want to provide the loan at a higher rate). The [Explanatory Memorandum](#) (p 52) states that the obligation only applies in relation to conflicts that arise by operation of law;

- complying with new responsible lending obligations (discussed below);
- having an ASIC-approved internal dispute resolution process and being a member of an approved External Dispute Resolution (EDR) scheme which enables consumer disputes to be resolved in an informal manner outside the court system at no cost to the consumer.

The [NCCP Act](#) also requires licensees to provide ASIC with licensee information, obtain audits, and do other things to help ASIC to perform its regulatory functions (see **ss 49-53**). Non-compliance is an offence of strict liability. Certain other record keeping and documentation requirements are also imposed on licensees under **Ch 2, Part 2-5** (e.g. keeping of financial records, trust accounts, and obtaining audit reports). Various sanctions apply for non-compliance.

4.1.4 Suspension and Cancellation

ASIC will have broad powers in relation to licensees, including being able to quickly cancel or suspend a licence, without a hearing, if it is necessary to protect consumers from the risk of financial harm and to maintain the integrity of the licensing scheme (see **Part 2-2, Div 5, s 54**). Examples of circumstances where urgent suspension or cancellation might occur are where a licensee has been convicted of serious fraud, becomes incapable of managing his or her affairs due to physical or mental incapacity, becomes insolvent, or becomes subject to a state or territory order.³³

Under **s 55**, ASIC can suspend or cancel a licence, after a hearing during which the licensee can make submissions, on grounds that the licensee has breached, or is likely to breach, its s 47 obligations; the ACL application contained false or materially misleading information; or ASIC has reason to believe the licensee is no longer a fit and proper person to hold the ACL, having regard to s 55(2) and (3).³⁴

³³ In addition, **s 54** enables a licence to be suspended or cancelled without a hearing on the application of the licensee or if the licensee ceases trading.

³⁴ ASIC will publish a notice of suspension or cancellation on its website as soon as possible (**s 60**). A notice of suspension or cancellation must be accompanied by a statement of reasons (**s 61**).

4.1.5 Bans and Disqualifications

In order to protect the public, ASIC can ban a person from engaging in some or all credit activities, for a specified period or forever, in any of the circumstances set out in s 80.³⁵ The effect of the banning order is that the person cannot engage in conduct contrary to the order (such as engaging in a credit activity) and will commit an offence in doing so. Civil penalties of 2,000 penalty units and criminal penalties of up to 100 penalty units or 2 years imprisonment, or both, can apply (s 82).

The circumstances in which ASIC can make a banning order are: where the person's ACL is suspended or cancelled; the person becomes insolvent; the person is convicted of fraud; the person has breached, or is likely to breach, credit legislation, or has been or is likely to be involved in a contravention of such legislation; or ASIC has reason to believe the person is not a fit and proper person to engage in credit activities; or if a person becomes subject to a state or territory order; or in any other prescribed circumstances.

A hearing must, except in the urgent circumstances (see s 80(4)-(6)) described above, be afforded to the affected person before the banning order is made.³⁶

If ASIC has cancelled an ACL or made a permanent banning order against a person, it can apply to the court for an order to disqualify the person, for a specified period or permanently, from engaging in credit activities or specified credit activities, or specified credit activities in specified circumstances or capacities (s 86).

No longer will a person (e.g. broker or lender) banned from undertaking credit activities or who has lost his or her licence in one jurisdiction be able to start up operations in another jurisdiction because the national licensing scheme operates to prevent an unlicensed or banned person from working anywhere in Australia.

4.1.6 Impacts of Licensing Requirements

The [Explanatory Memorandum](#) (pp 7-8) indicates that the greatest impact of the new measures will be felt by credit providers in states and territories currently without any licensing or registration scheme as those persons will have to apply for an ACL and pay the necessary lodgement fees. In addition, credit providers will

³⁵ A banning order can allow the person to engage in specified acts or do specified acts in specified circumstances, subject to any conditions (s 81).

³⁶ Notice of the order must be published on [ASIC's website](#) as soon as practicable (s 84(3)). A copy of the order has to be given to the person along with a statement of reasons.

have continuing obligations, including training and supervising employees and maintaining adequate compensation arrangements.

4.2 RESPONSIBLE LENDING OBLIGATIONS

It has been noted that the growth in the number of loan products and the entry of new types of lenders and intermediaries into the credit industry have tended to reduce the level of contact between the consumer and the lender.³⁷ This can mean that there are fewer inquiries made about the consumer's personal and financial circumstances, resulting in unfortunate outcomes for the consumer if they soon become unable to repay a loan that was probably unsuited to their circumstances from the start. The practices that have been engaged in by unscrupulous credit providers were outlined in the introductory parts of this Research Brief and have formed the backdrop for the national regulation of credit providers in their dealings with consumers.

The Productivity Commission Inquiry Report, '[Review of Australia's Consumer Policy Framework](#)', considered that poor lending practices had contributed to borrowers' financial stress and recommended the consideration of 'responsible lending' measures. As noted earlier, the [UCCC](#) goes some way towards protecting consumers. It does impose various disclosure obligations but it does not comprehensively require brokers or lenders to assess the suitability of the loan for the consumer and his or her relevant circumstances in terms of capacity to repay.

New responsible lending obligations for ACL holders are found **Chapter 3** of the [NCCP Act](#). As noted by the [Explanatory Memorandum](#) (p 4), the new requirements '*set in place expected standards of behaviour of licensees when they enter into consumer credit contracts or leases, where they suggest a credit contract or lease to a consumer, or assist a consumer to apply for a credit contract or lease*'. They also reflect current industry practice, including the Banking Code of Practice. Further, it appears that the new obligations are consistent with overseas developments but attempt not to impose too many restrictions that could hamper the provision of credit, as has happened in some countries. For instance, the USA recently introduced legislation that imposes age restrictions.³⁸

In essence, the obligations seek to ensure that licensees do not provide, suggest or assist with a contract that is unsuitable for the particular consumer. It has been suggested that observance of the obligations will build consumer trust in lenders, whether the lender is a non-ADI or an ADI. ADIs are prudentially regulated and

³⁷ [Explanatory Memorandum](#), p 80.

³⁸ [Australian Treasury Submission](#), p 17.

have strong disincentives against irresponsible lending. It may be that the result will be improved competition between non-ADIs and ADIs, generating better deals for consumers.³⁹

The responsible lending requirements, other than not providing unsuitable credit, take effect on 1 January 2011; the obligation not to arrange or provide unsuitable credit takes effect on 1 July 2010 for non-ADIs and non-Registered Finance Companies (non-RFCs) and on 1 January 2011 for ADIs and RFCs. A breach of the obligations can attract a range of criminal and civil penalties (discussed later).

4.2.1 Application of the Responsible Lending Obligations

This section of the Research Brief focuses on the obligations imposed by **Ch 3, Part 3-2** on credit providers – the actual lenders of the credit – and, to a lesser extent, the obligations imposed by **Part 3-1** on licensees providing credit assistance on a contract for which they are not the actual lender (e.g. finance brokers). However, in passing, it should be mentioned that responsible lending obligations also apply to:

- licensees providing assistance in relation to consumer leases for which they are not the lessors (dealt with in Part 3-3 which largely replicates the requirements for credit assistance for credit contracts);
- licensees who are lessors under consumer leases (covered in Part 3-4 and which are similar to the requirements for credit providers entering into credit contracts);
- credit representatives who act on behalf of licensees or registered persons (dealt with in Part 3-5, which requires such representatives to provide information about their identity and the licensee for whom they act, other information such as commissions receivable etc. in the credit guide given to the consumer along with the licensee's own credit guide); and
- debt collectors authorised to collect repayments on behalf of credit providers (covered in Part 3-6).⁴⁰

Much of the required conduct is similar among most licensee types, for example, the need to provide a credit guide to consumers, although the information to be included in it will vary, and the requirement to assess the suitability of the credit contract for the consumer.

³⁹ [Australian Treasury Submission](#), p 16.

⁴⁰ **Part 3-7** allows ASIC and/or Regulations to make exemptions and modifications to Ch 3.

In each case, a breach may attract criminal or civil penalties. For instance, in the case of a credit provider, the criminal penalty for placing a consumer in an unsuitable loan is a maximum of 2 years in prison or 100 penalty units, or both.

4.2.2 Credit Provider's Obligations

The responsible lending obligations on credit providers (**Ch 3, Part 3-2**) require that a credit guide be given to a consumer when it seems likely he or she will be provided with credit (**s 126**). The guide must inform the consumer who the credit provider is and his or her licence number; explain the credit provider's internal dispute resolution process and the EDR provider in the event there is a dispute; and state that the credit provider has to assess the suitability of the loan for the consumer as well as the consumer's capacity to pay back the loan (a copy of which assessment can be requested by the consumer). If the rights or obligations of a credit contract are assigned to another licensee, the new licensee must provide a guide as soon as possible (**s 127**).

The key responsible lending obligation on credit providers is to undertake two fundamental assessments before the consumer is given a loan or an increase on the credit limit of an existing loan (**ss 128-132**):

- an assessment to determine that the loan is not unsuitable for a consumer; and
- an assessment to determine that the consumer has the capacity to repay. A 'capacity to repay' will exist if the consumer is assessed as being able to meet regular repayments and other known or likely costs, such as administrative charges or fees, without substantial financial hardship (a similar concept to that used in ss 72-75 of the [NCC](#)). If the consumer will only be able to repay by selling their home, it is presumed that substantial hardship will be suffered, unless the contrary is established (see s 133(3)).

An assessment about unsuitability is made through undertaking reasonable inquiries about the consumer's requirements and objectives for the contract, for instance, to determine if the type, length, rate etc. meet the relevant purpose; and about the consumer's financial situation. The assessment must be made no more than 90 days before the credit contract is entered into or the increase in the credit limit occurs.

The licensee must also take reasonable steps to verify the information (e.g. asking the consumer to provide documentation, such as payslips, bank statements, to substantiate their financial position). It might also be necessary, depending on the circumstances, to look at the consumer's credit history and if there have been any defaults on existing or previous loans.

The credit contract must be assessed as unsuitable for the consumer if, at the time of the assessment, it is likely that:

- the consumer will be unable to comply with the consumer's financial obligations, or could only comply with substantial hardship; or
- the contract will not meet the consumer's requirements or objectives; or
- if the Regulations prescribe circumstances in which a credit contract is unsuitable, that those circumstances will apply (**s 131**).

It is an offence for credit providers to enter into a credit contract or increase the credit limit of an existing contract if the contract is unsuitable for the consumer (**s 133**). Civil and criminal penalties apply and can include a fine of up to 100 penalty units or 2 years imprisonment, or both.

Consumers will be entitled to a copy of the assessment on request and not providing it can attract civil and criminal penalties (**s 132**).

4.2.3 Credit Assistance

The obligations on providers of credit assistance in relation to a credit contract or lease are covered by **Part 3-1** and differ in some respects from credit providers' obligations. However, they cannot be discussed here in much detail. A comprehensive overview is provided by the [Explanatory Memorandum](#) (pp 84-100). In essence, it appears that licensees providing credit assistance have greater disclosure requirements. Again, civil and criminal penalties may apply for breaches of the responsible lending obligations.

As with credit providers, once it is likely the assistance will be provided, the consumer must be given a credit guide (**s 113**). The guide contains similar information as discussed above in relation to credit providers (i.e. information about the licensee, that assessments about suitability of the contract and the consumer's capacity to repay the loan will be undertaken). It must also contain information about possible fees and charges imposed by the assistant, six credit providers with whom the assistant mostly deals, and an overview of commission arrangements between the assistant and those credit providers.

The credit assistant must also, before providing assistance, give a quote to the consumer which advises about the maximum cost to the consumer of the service provided by the assistant (**s 114**). The credit assistant must not charge more than this.

The assistant must, before providing assistance, make a preliminary assessment and undertake reasonable inquiries and verifications of the suitability of the contract for the consumer (or of the increased credit limit if such increase is sought, or the suitability of an existing contract if the assistance relates to remaining in an existing contract), and the consumer's capacity to repay (**ss 115-119**). The assessment must be given to the consumer upon request (**s 120**).

At the same time as credit assistance is provided, a credit proposal disclosure must be given to the consumer (**s 121**) which must set out a reasonable estimate of likely commissions to be received if the loan is secured, and fees and charges payable by the consumer (e.g. legal fees, valuation fees).

4.3 SANCTIONS AND REMEDIES

Chapter 4 of the [NCCP Act](#) sets out tiered sanctions and remedies for consumers, and the dispute resolution and court framework to support the new legislation. Following transfer of consumer credit regulation to the Commonwealth, ASIC will take over enforcement of the new laws from the state and territory fair trading and consumer affairs agencies. The [Explanatory Memorandum](#) (pp 118-119) states that the key policy objective of the amendments is to retain accessibility to dispute resolution in terms of location, simplicity and costs, taking into account the different jurisdictional context when transferring the regulation of credit from the states and territories to the Commonwealth. Some of the bodies providing dispute resolution services will change and will no longer be state and territory tribunals. This is due to constitutional limitations on Commonwealth legislation conferring federal jurisdiction upon state and territory tribunals that are not courts within the ambit of Ch 3 of the *Commonwealth Constitution*.

It seems that the tiered approach to sanctions provides ASIC with the flexibility needed to tailor its action and the penalty to the type of contravention and the nature of the licensee in breach. For instance, an infringement notice might well deter a small broker from further breaches of the legislation but not provide a significant disincentive for larger lending corporations.⁴¹

4.3.1 Enhanced Enforcement Powers for ASIC

Enhanced enforcement powers for ASIC is intended to be provided through extending the range of sanctions and penalties available. These will be discussed in the relevant contexts below. As noted earlier, ASIC also has various administrative powers such as being able to suspend or cancel an ACL, or ban persons from the industry. In addition, ASIC's current regulatory powers under the [ASIC Act 2001](#) will be mirrored in the new NCCP legislation.

⁴¹ [Australian Treasury Submission](#), p 19.

4.3.2 Criminal Sanctions

Criminal sanctions will apply where the offence warrants such measures and will reflect the nature and magnitude of the relevant breach or licensee misconduct. There is an attempt to maintain consistency with offence provisions in the financial services licensing aspect of the *Corporations Act 2001* (Cth). The [Explanatory Memorandum](#) (p 121) suggests that, in general, the activities that will attract the strictest criminal sanctions will be those having the most serious ‘moral’ culpability, such as providing credit when not licensed to do so; or entering, or suggesting or assisting a consumer to enter into an unsuitable credit contract. It notes that ‘*the jail terms available for putting someone into an ‘unsuitable’ contract [are] intended to target ‘equity stripping’ and predatory lending*’.

Criminal jurisdiction, how proceedings are conducted, and the laws to be applied are set out in **ss 203-208**. Jurisdiction for criminal matters is, pursuant to **s 204**, conferred on relevant state and territory courts. ASIC is usually responsible for laying the charges in relation to [NCCP Act](#) offences.

4.3.3 Civil Penalties

Civil penalties are dealt with in **Chapter 4, Part 4-1** and will apply where the misconduct affects, or could affect, the integrity of the credit market but there may be a lack of malicious or reckless intention. The [Explanatory Memorandum](#) (p 122) observes that civil penalties are used instead of criminal penalties in some responsible lending obligations.

Civil penalty provisions in the [NCCP Act](#) impose obligations on certain persons and civil remedies may be sought in relation to contraventions of these provisions.

Part 4.1, Div 2 authorises the court to make a declaration that a person has contravened a civil penalty provision and order the person to pay a pecuniary penalty. ASIC may seek a declaration of contravention of a civil penalty provision against a person. The time limit for bringing the proceedings is within six years of a person contravening a civil penalty provision (**s 166**). Only ASIC may apply to the court for the declaration or order (**s 165**). If made, the declaration is conclusive evidence of the breach which then enables ASIC to pursue a pecuniary penalty against the person for the breach. The pecuniary penalty imposed by the court is one that the court considers appropriate (**s 167**). A contravention of a civil penalty provision is not a criminal offence (**s 168**).

The burden of proof for civil penalties is lower than that for criminal sanctions. The maximum civil penalty for all applicable offences is \$220,000 for individuals and \$1,100,000 for corporations (**s 167**).⁴²

A consumer can also rely on the declaration when pursuing a consumer remedy (discussed below). In this way, the seeking of the declaration by ASIC could be said to found a type of ‘class action’ where individual consumers rely on the declaration as a basis for an application for compensation orders for the various amounts of loss each has suffered. This might be useful if the consumers who may have been impacted upon by a breach cannot be ascertained easily.⁴³

Amendments were made by the Senate to insert notes into **ss 178-180** of the NCCP Act following the Senate Committee’s recommendation that consumers should be able to seek remedies without a court having awarded a civil penalty first. This recommendation followed submissions by consumer advocates and the Credit Ombudsman Service Ltd that the Bill, as originally drafted, did not appear to allow this.

4.3.4 Infringement Notices

Infringement notices are generally issued (pursuant to Regulations made under s 331) where it is likely that there will be many breaches of a particular requirement or where it is seen that a penalty should be imposed on-the-spot to encourage the offender to change his or her conduct in future (see [Explanatory Memorandum](#), p 122) and where the offence is not one that necessarily warrants court action. The offences to which infringement notices apply tend to be minor. They will apply to strict liability offences under the new legislation and to civil penalty contraventions where provided for in the Regulations. Such notices are issued at the discretion of ASIC (see [Explanatory Memorandum](#), p 122).

4.3.5 Consumer Remedies

Chapter 4, Part 4-2 of the [NCCP Act](#) allows consumers to take action against credit providers who contravene the law and provides a range of remedies for consumers who have suffered loss or damage as a result of the breach or other

⁴² Administration and procedural provisions for such penalties are consistent with Part 9.4B of the *Corporations Act*: see [Explanatory Memorandum](#), p 122.

⁴³ As noted in the [Australian Treasury Submission](#), p 22.

licensee misconduct, or where the credit provider is unlicensed.⁴⁴ As observed by the [Explanatory Memorandum](#) (p 124), such consumer actions also serve to curb unwarranted behaviour.

The courts can grant one or more of the following remedies:⁴⁵

- injunctions (**s 177**), on application by ASIC or a person, if the court is satisfied a person is engaging, or will engage, in conduct that would contravene the NCCP Act. The court may also order damages as well as, or instead of, the injunction;
- compensation orders for loss or damage (**s 178**) where a licensee has contravened a civil penalty provision or committed an offence against the NCCP Act (other than the NCC) and a consumer has suffered, or is likely to suffer, loss or damage. A consumer, or ASIC on behalf of the consumer, can seek compensation through either a specific monetary order, or a more general order as listed in **s 179(2)**. Both types of orders are limited to breaches of, or offences against, the NCCP Act but not the NCC as the latter has self-contained remedies. The compensation orders can only be made within six years of the cause of action accruing (i.e. from when loss or damage is suffered). The types of orders under s 179(2) are designed to allow the court to do what is just between the parties when real restitution is not possible. These orders may include voiding a contract or part thereof; varying the contract; refusing to enforce all or some terms of it; or directing the person to refund money or property or to pay the amount of loss or damage to the consumer (see [Explanatory Memorandum](#), p 133).

For instance, a consumer who is placed in an unsuitable credit contract by a *licensed* credit provider and has suffered loss or damage can seek an injunction to stop the provider from taking more interest payments (**s 177**); seek compensation for the loss or damage (**s 178** and the maximum will be in accordance with the monetary limits of the relevant court); and seek an order varying the contract or enforcing some or part of it (**s 179**).

If the consumer is placed in an unsuitable contract by an *unlicensed* credit provider, the consumer can seek a court order to, for instance, prevent the unlicensed provider from making a profit from the contract; compensate the consumer for the loss or damage suffered as a result; or prevent or reduce any loss or damage suffered or likely to be suffered (**s 180**). The types of orders that can be made are the same as those in s 179(2). These orders can be made even if the credit provider

⁴⁴ If a person has contravened the [NCCP Act](#) and is liable to both a fine and to compensate the consumer for loss or damage suffered as a result but cannot afford to pay both, **s 181** provides for the court to give preference to the compensation order before the fine is paid.

⁴⁵ The court can provide one or more remedies in respect of the same breach: **s 184**.

has notified the consumer he or she is not licensed. The [Explanatory Memorandum](#) (p 136) comments that it was considered that unlicensed credit providers should not be able to avoid paying compensation through mere disclosure. The consumer to whom the disclosure is made may not be deterred from entering into the contract if they are particularly vulnerable (e.g. they might need the money urgently to buy medication).

ASIC can seek an adverse publicity order against a person who has breached or committed an offence against the NCCP Act (**s 182**).

If proceedings are brought for a contravention of a civil penalty provision and the court considers that the contravention has or may have occurred but that the person has acted honestly and, having regard to all the circumstances of the case, the person ought fairly to be excused for the contravention, the court may relieve the person either wholly or partly from liability (**s 183**).

'Small Claims' Procedures

If the amount sought by a consumer is less than \$40,000,⁴⁶ a consumer can, under **s 199**, opt-in to a streamlined 'small claim' court procedure for certain orders which is started in lower courts (e.g. a Magistrates Court, local court, or the Federal Magistrates Court). The opt-in can be for the following orders (see s 199(2)):

- orders for compensation for loss or damage claims up to \$40,000 under the [NCCP Act](#) under s 178, as described above, and under ss 106, 107(3) and 118 of the [NCC](#);
- orders under various provisions of the NCC where the value of the contract, mortgage, guarantee or consumer lease is no more than \$40,000;
- orders under the NCC regarding unjust transactions (s 76), unconscionable fees and charges (s 78), repossession of goods (s 108) where the value of the contract, mortgage, guarantee or consumer lease is no more than \$40,000, and
- orders for a hardship variation under ss 74-75 of the NCC (due to illness, unemployment or other reasonable cause); or to postpone enforcement action under s 96 of the NCC. There is no monetary limit for such procedures. It was thought that consumers seeking such requests would likely be those most in need of a quick and low cost process for assistance.⁴⁷

Such streamlined small claim procedures are geared towards consumers representing themselves to minimise costs, although they can ask for permission to

⁴⁶ Unless a higher amount is prescribed by Regulation.

⁴⁷ [Explanatory Memorandum](#), p 146.

be represented; and informal legal procedures (e.g. the court will not be bound by rules of evidence and technicalities). Further, because adverse costs awards can deter consumers, especially those who are seeking a hardship variation due to financial circumstances, from accessing the court system there is a rebuttable presumption against adverse cost orders in these types of proceedings (**s 200**).

It should also be noted that consumers will not generally incur costs in applying for a hardship variation or asking for a postponement of an enforcement proceeding by a lender, whether it is heard as a small claims proceeding or not (see **s 200**).

These small claim procedures seek to overcome some concerns raised during the development of the NCCP legislation that consumers might not be able to access state tribunals under the new laws (see below).

Jurisdiction and Procedure for Civil Matters

Chapter 4, Part 4-3 (ss 186-200) deals with the conduct of civil proceedings. Jurisdiction for civil proceedings will be conferred on the Federal Court; Federal Magistrates Court up to \$750,000 or other prescribed limit; and the state and territory courts subject to jurisdictional limits. This conferral of jurisdiction is considered to ensure continuity with current processes under the [UCCC](#); enables Queensland and other state courts to continue dealing with consumer credit matters; and allows lower cost court options to remain open to consumers.⁴⁸ Part 4-3 also covers issues such as transfer of matters between courts, so that matters are dealt with in the most appropriate jurisdiction, especially as the NCC is not confined (as the UCCC was) to the state or territory in which the contract is made. It might be, for instance, that the consumer is no longer in the jurisdiction in which the contract was made.⁴⁹ Other matters, including the making of costs awards, and cross-jurisdictional appeals are also dealt with.⁵⁰

4.3.6 Dispute Resolution

At present, some credit providers are voluntarily part of an EDR scheme and, as noted earlier, membership of an ASIC-approved EDR scheme is compulsory for

⁴⁸ See [Explanatory Memorandum](#), p 139. However, the civil jurisdiction of the Federal Court and Federal Magistrates Court is restricted in some circumstances (in relation to prosecution of an offence under the NCCP Act) (**s 188**).

⁴⁹ [Explanatory Memorandum](#), p 141.

⁵⁰ Note also that **ss 189-190** do not allow cross-jurisdictional appeals (e.g. Federal Court cannot appeal to a state court).

belonging to the MFAA and being a signatory to the Banking Code of Conduct. It is also a prerequisite to being a member of various other industry bodies or signatory to an industry code. In addition, state and territory government fair trading and consumer affairs agencies currently provide dispute resolution for lenders and consumers, and consumers can also apply to a court under the [UCCC](#) for assistance with a dispute. Once the new NCCP legislation commences, many of the foregoing court processes and dispute resolution services offered by fair trading agencies and some tribunals will no longer exist and will be replaced by new processes.

During consultation on the NCCP legislation, some concern had been expressed by consumer advocates and other representatives that the legislation might deprive affected consumers of redress by the various tribunals because of constitutional limitations, mentioned earlier.⁵¹

The new NCCP framework for dispute resolution between consumers and credit providers for consumer credit issues adopts a 3-tiered approach (see [Explanatory Memorandum](#), pp 124-125):

- consumers will, as a first point of redress, have access to the licensee's internal dispute resolution process;
- if a consumer is still not satisfied after going through the internal process, the consumer can access the licensee's ASIC-approved EDR scheme. EDR schemes give consumers an informal and inexpensive alternative to the court process; and
- consumers will also be able to continue to seek redress from the Federal Court, Federal Magistrates Court, and appropriate state and territory courts.

4.4 NATIONAL CREDIT CODE

The [UCCC](#), enacted in the *Consumer Credit (Queensland) Act 1994* (Qld), is the current state and territory regulatory framework for the provision of consumer credit.⁵² The UCCC is based on the principle of truth-in-lending to allow consumers to make informed choices when seeking credit and provides consumers with redress mechanisms against credit provider misconduct. It imposes a number of disclosure obligations on credit providers about matters such as advertising and marketing, changes to the credit contract, termination of contract provisions, and it

⁵¹ See, for example, [Australian Treasury Submission](#), p 22.

⁵² The *Consumer Credit (Queensland) Act 1994* (Qld) provided the 'template' for consistent legislation around the country and all states and territories then passed legislation adopting the template laws and applied them in their own jurisdictions.

sets out relevant penalties and remedies. The UCCC also regulates consumer leases. Despite the quest for uniformity, some jurisdictions have, over time, introduced further credit laws that are either inconsistent with provisions in other jurisdictions or are not found in the legislation of other jurisdictions.

The [NCCP Act](#) essentially incorporates the existing UCCC as the [National Credit Code](#) (which is **Schedule 1** of the Act) and its consumer protection objectives, but seeks to provide more flexible requirements and to enhance the provisions contained in the UCCC by:⁵³

- as the UCCC currently extends only to credit provided wholly or predominantly for personal, domestic or household purposes, the NCC seeks to extend its reach to cover the purchase, renovation, improvement, or refinancing of residential investment properties (s 5). This extension intends to help to protect ‘mum and dad’ property investors in properties used predominantly for residential purposes;
- increasing monetary thresholds so that, now, consumers can ask the credit provider for a variation of certain terms of the credit contract due to hardship where the amount of credit provided under the contract is up to \$500,000 (unless a higher amount is specified in the Regulations). The increased threshold also applies to requests for a postponement of enforcement proceedings (ss 72, 94). Credit providers will have to respond to the request within 21 days and will be required to give consumers reasons for rejecting applications for hardship variations and stays of enforcement (after consumer advocates had submitted to the Senate Committee Inquiry that the Bill did no more than just require the lender to receive the application);⁵⁴
- including a range of amendments agreed by the MCCA in relation to fringe lenders;
- banning credit providers from using essential household goods as security (s 50);
- requiring credit providers to give consumers information when the consumer defaults on repayments or dishonours a direct debit before the contract or mortgage can be enforced (s 87);
- limiting the potential for dubious lenders to avoid the application of the NCC by making business purposes declarations presumptive rather than conclusive (s 13). In the past, some unscrupulous credit providers have asked an often desperate consumer to sign a declaration that the credit to be provided was for business or investment purposes (to which the UCCC did not apply) rather than

⁵³ See [Explanatory Memorandum](#), pp 247-248 and following pages for detailed explanation.

⁵⁴ See [Senate Committee Report](#), pp 34-35.

predominantly for personal, domestic or household purposes (to which the UCCC did apply) to avoid having to comply with the UCCC.

States and territories will continue to enforce the existing [UCCC](#) until 30 June 2010 and ASIC will begin enforcement of the NCC from 1 July 2010.

Given the intention that the [NCC](#) will be as similar to the [UCCC](#) as possible, except where the Commonwealth has specifically decided to amend or extend its operation (see [Explanatory Memorandum](#), p 6), a [Comparison Table](#) has been provided to indicate what the new provision of the NCC is that corresponds with an existing UCCC provision.

4.5 COMPLIANCE AND ENFORCEMENT

Chapter 6 of the [NCCP Act](#) provides ASIC with powers to investigate and enforce the credit legislation package and these essentially mirror ASIC's powers under the [ASIC Act 2001](#) where relevant. The exercise by ASIC of its powers under the NCCP Act is subject to scrutiny by the Parliamentary Joint Committee on Corporations and Financial Services. Most compliance and enforcement decisions of ASIC are not subject to review by the Administrative Appeals Tribunal (see [s 327](#), as amended during the Senate debate on the [NCCP Bill](#)).

ASIC will have power to:

- gather information about credit activities and about persons engaged in such including through questioning people (**Part 6-2**), inspecting books and getting information about audits (**Part 6-3**);
- undertake investigations for effective administration of the credit legislation including investigating suspected contraventions of the credit legislation; or suspected contravention of laws about affairs of credit providers and others; or suspected contraventions of laws involving fraud and dishonesty ([ss 247-251](#)).

Chapter 6 also contains provisions regarding reports on ASIC investigations ([ss 249-251](#)); examination procedures (**Part 6-2, Div 2**, and [ss 290, 295-297](#)); procedures for production or seizure of books (**Part 6-3, Div 2**); criminal and civil prosecutions (**Part 6-4**); and rules and procedures for hearings (**Part 6-5**). Offences in relation to non-compliance, including rules about evidence, legal professional privilege, abrogation of the privilege of self-incrimination and defences such as reasonable excuse are also provided (see also **Part 6-6** regarding offences for giving false information; obstruction of hearings; concealing of information).⁵⁵

⁵⁵ See also **Ch 6, Part 6-7** (ASIC's powers to make orders to restrain certain dealings in a contract, mortgage or guarantee where there has been non-compliance with a provision of information requirement) and **Part 6-8** (use in evidence of information obtained by ASIC and reports on investigations); and **Part 6-9** (miscellaneous matters such as production of identity cards, service of notices etc.).

4.6 ADMINISTRATION MATTERS

Chapter 5 of the [NCCP Act](#) provides ASIC with the ability to perform its national regulator role and requires it to maintain registers related to credit activities and documents lodged with ASIC (including requirements about format of documents, approved forms etc.) under the NCCP Act. It also contains provisions to allow public inspection⁵⁶ and availability of registers; to set out offences relating to concealing or falsifying credit books or obstructing ASIC; and provisions relating to fees payable to the Commonwealth; and other administrative issues.

5 NATIONAL CONSUMER CREDIT PROTECTION (TRANSITIONAL AND CONSEQUENTIAL PROVISIONS) ACT 2009 (CTH)

The [National Consumer Credit Protection \(Transitional and Consequential Provisions\) Act 2009 \(Cth\) \(Transitional Act\)](#) seeks to facilitate the transition of state and territory regulation of consumer credit to the Commonwealth and ASIC. Its main features include:⁵⁷

- requiring persons currently engaging in consumer credit activities to register with ASIC prior to applying for an ACL (discussed earlier);
- replacing the existing rights and liabilities under the [UCCC](#) with the new rights and obligations under the NCCP legislation;
- replacing current UCCC court proceedings with the new ones under the NCCP legislation;
- providing that the NCCP will not apply to state or territory tribunal proceedings;
- providing functions and powers regarding appeal, review or enforcement proceedings;
- exempting contracts made prior to the commencement of the NCCP legislation from the [NCCP Act](#) but not from the NCC.

⁵⁶ The credit register of licensee and credit representatives and persons who are banned or disqualified is publicly accessible. The register of documents under s 219 is not publicly accessible.

⁵⁷ See also, A Galvin & M Anastas, p 7.

ASIC has been provided with more resources to enable it to proactively assist industry to comply with the new obligations through consultation and information provision to the credit industry.

6 CONSTITUTIONAL BASIS OF THE NCCP ACT AND THE TRANSITIONAL BILL

Chapter 1, Part 1-3, Div 1 of the [NCCP Act](#) establishes the constitutional basis for and geographical application of the NCCP Act and the [Transitional Act](#). The Commonwealth Parliament can make laws with respect to matters falling expressly or impliedly within the ambit of any one or more paragraphs of [s 51](#) of the [Commonwealth Constitution](#). However where a matter lies beyond the Commonwealth Parliament's reach but within the legislative power of the State Parliaments pursuant to their *Constitution Acts*, a referral of that power from the State Parliaments to the Commonwealth Parliament can be made. On that basis, the Commonwealth Parliament can make a law with respect to the referred matters pursuant to s 51(xxxvii) of the [Commonwealth Constitution](#).⁵⁸ The Commonwealth Government's s 51 powers, without referral of state power, are insufficient to enact comprehensive national consumer credit legislation.⁵⁹

In essence, for a 'referring state', such as Queensland, the application of the NCCP legislation package to the state is based on: the legislative powers that the Commonwealth Parliament has under [s 51](#) of the [Commonwealth Constitution](#) (other than under s 51(xxxvii)); and the legislative powers that the Commonwealth

⁵⁸ See also, definition of 'referring State' in [s 19\(1\)](#) of the [NCCP Act](#). Section 51(xxxvii) of the *Constitution* provides that the Commonwealth can make laws with respect to: '*matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law*'.

⁵⁹ The 'National Consumer Credit Protection Bill 2009', [Bills Digest](#), prepared by P Tan of the Australian Parliament's Parliamentary Library on 15 September 2009, pp 11-13, states that the referral method to achieve a national regulatory scheme has been used on various occasions, the most well-known example being for Commonwealth regulation of all corporations under the *Corporations Act*. The [Australian Treasury Submission](#), p 11 identifies the *Corporations Act* referral as the 'leading model' in relation to the creation of a formal agreement between all relevant jurisdictions stipulating what legislation the states can and cannot pass that may impact on the referral. That submission indicates that the NCCP package will be underpinned by an Intergovernmental Agreement of a similar type where states and territories agree not to legislate in the area of consumer credit after the transfer of state powers. See also, [Bills Digest](#), p 12.

Parliament has as a result of matters referred to it by the referring State Parliaments under s 51(xxxvii) of the *Commonwealth Constitution*.⁶⁰

The referral of powers has two parts. The first enables the initial enactment of the NCCP legislation (initial reference) and the second allows the Commonwealth Parliament to amend those Acts (amendment reference). A state will cease to be a ‘referring state’ if its initial reference or amendment reference terminates and the exception to the amendment reference termination does not apply to the termination.

The Acts are intended to operate concurrently with state and territory laws (e.g. conditions set by a state law on registering a mortgage would not be inconsistent with the NCCP Act).⁶¹ Further, the Acts or certain provisions therein, will not apply to certain matters that a state or territory law declares is an ‘excluded matter’. In addition, similarly to s 5G of the *Corporations Act*, a provision in any of the Acts prohibiting a certain act will not apply if a state or territory law specifically authorises that act (see ss 23-26 of the NCCP Act).

7 CREDIT (COMMONWEALTH POWERS) BILL 2009 (QLD)

The *Credit (Commonwealth Powers) Bill 2009 (Qld)* (the *Queensland Bill*), introduced into the Queensland Legislative Assembly on 10 November 2009 by the Hon PJ Lawlor MP, Minister for Tourism and Fair Trading, provides for a two-tiered approach to the referral of powers to the Commonwealth for credit matters.

The *Explanatory Notes* to the Bill state (p 1) that the objectives of the Bill are to refer constitutional power for credit matters (including finance broking) to the Commonwealth and to repeal a number of pieces of Queensland legislation. The main constitutional basis upon which the NCCP legislation will apply to Queensland will, thus, be s 51(xxxvii) of the *Commonwealth Constitution*.

⁶⁰ See **s 18**. For the ACT and NT and Jervis Bay Territory, application is based on s 122 of the *Commonwealth Constitution* enabling the Commonwealth Parliament to make laws for the government of the territories and on s 51 of the *Commonwealth Constitution*. Outside of Australia, application is based on the Commonwealth Parliament’s external affairs power under s 51(xxix) and other relevant s 51 legislative powers, and powers under s 122 for external territories. In relation to states not referring powers to the Commonwealth, application of the Acts seeks to rely on s 51 (other than s 51(xxxvii)) and s 122 of the *Commonwealth Constitution* and any other powers the Commonwealth Parliament has because matters have been referred to it by the referring States.

⁶¹ See *Explanatory Memorandum*, p 25.

7.1 REFERRAL OF MATTERS

The [Queensland Bill](#) makes two referrals of matters to the Commonwealth (**Part 2**, esp. **cl 4**):

- the first reference – the ‘initial reference’ refers to the tabled text (which means the text of the NCCP Act and the Transitional Act as tabled in the Tasmanian Parliament (see **cl 3**)).⁶² However, the Commonwealth will only be able to make laws with respect to those matters by enacting Acts (the NCCP Act and Transitional Act) more or less replicating the tabled text; and
- the second reference – the ‘amendment reference’ that allows the Commonwealth to amend any referred credit matter (i.e. credit covered by the [NCC](#), and consumer leases covered by Part 11 of the [NCC](#)). However, the referral is only to the extent of enabling the Commonwealth to make express amendments⁶³ to the NCCP legislation.

The Queensland Parliament intends that (**cl 4(4)**):

- the NCCP legislation can be expressly amended or have its operation affected by Commonwealth Acts that are based on other constitutional powers that the Commonwealth Parliament has apart from under the above references; and
- the NCCP legislation can have its operation affected, otherwise than by express amendment, by provisions of instruments made under the NCCP legislation.

7.2 TERMINATION OF REFERENCES

The Governor may, at any time by proclamation, fix a day on which the initial reference or the amendment reference terminates or can, also by proclamation, revoke that termination (**cl 5**). The termination of the amendment reference before the termination of the initial reference does not affect laws that were made under the amendment reference or the continued operation in Queensland of the NCCP legislation (**cl 6**). Thus, the amendment reference continues to have effect to support laws already in place unless the period of the initial reference is also terminated (see [Explanatory Notes](#) (p 9)).

⁶² Tasmania is the lead referring state.

⁶³ Clause 3 defines an ‘express amendment’ of the NCCP legislation as a direct amendment of the text of such by another Commonwealth Act or instrument thereunder but does not include the enactment by a Commonwealth Act of a provision that has or will have substantive effect otherwise than as part of the NCCP legislation text. The [Explanatory Notes](#) (p 7) state that this is to ensure that the matters covered by the amendment reference cannot be the source of power for other Commonwealth legislation.

As discussed earlier in this Research Brief, s 19 of the [NCCP Act](#) provides that a state will cease to be a referring state if its initial reference is terminated, meaning that if Queensland terminates its initial reference, the Commonwealth will have no power to legislate for Queensland in relation to credit.

7.3 REPEALS AND TRANSITIONAL PROVISIONS

The pieces of Queensland legislation that will be repealed are (**cl 8**): the *Consumer Credit (Queensland) Act 1994* and the [UCCC](#), the *Consumer Credit (Queensland) Special Provisions Regulation 2008* , the *Consumer Credit Regulation 1995* , the *Credit Act 1987*,⁶⁴ and the *Credit Regulation 1988*.⁶⁵

Clauses 13-17 of the [Queensland Bill](#) provide for the continuation of the Consumer Credit Fund under the *Consumer Credit (Queensland) Act 1994* as this fund will not be transferred to the Commonwealth. The Fund contains amounts including amounts paid by credit providers (e.g. by way of penalties), costs awarded to the administering department's chief executive in court proceedings, and interest and other income from investment of the Fund (see **cl 15(5)**). The Fund will be transferred to a general fund to allow payments to be made for purposes specified in **cl 16**, as approved by the chief executive. The proposed payments are similar to those currently found in the *Consumer Credit (Queensland) Act 1994* but the focus will be expanded beyond credit (e.g. for engaging with consumers; consumer policy research; consumer-related initiatives; legal fees incurred by the chief executive or costs awarded against the chief executive).⁶⁶

⁶⁴ Transitional provisions in cls 11 and 12 apply to continue the effect of the *Credit Act 1987* in relation to existing contracts under that Act (if any remain as the Act applies only to loans up to \$40,000 made before 1 November 1996): see [Explanatory Notes](#), p 10.

⁶⁵ However, the *Credit (Rural Finance) Act 1996* (Qld) will not be repealed at this stage because 'farming' is taken to be a business. Thus, credit for farming does not come under the [UCCC](#) (covering credit predominantly for personal, domestic or household use). The *Credit (Rural Finance) Act 1996* provides farmers with various protections regarding mortgages over equipment used for their farming business. If the Phase 2 of the implementation of national credit laws extends to business credit, the Act will be repealed then: [Explanatory Notes](#), p 1.

⁶⁶ **Clauses 18-22** save investigations, enforcement and proceedings commenced but not decided before the new NCCP laws commence. **Clause 24** provides transitional regulation making power.

7.4 CONTINUATION OF INTEREST RATE CAP

The issue of short term consumer credit ('payday loans') and the move to require a 48% limit or 'cap' on the amount of interest, fees and charges that can be imposed on a payday loan was examined in an earlier Queensland Parliamentary Library publication, '[Caps on Payday Loans](#)' (RBR No 2008/04).

Part 6 of the [Queensland Bill](#) continues the 48% annual interest rate cap applying to interest and other fees and charges which came into force in Queensland in July 2008. Thus, a credit provider must not enter into a credit contract if the annual percentage rate for the contract is more than 48% (including interest, fees and charges under the contract). A breach may attract a fine of up to \$10,000 as well as render the contract void to the extent it exceeds the 48% cap (**cl 29**). The annual percentage rate under a credit contract is calculated in accordance with the formula set out in **cl 31**.⁶⁷

As observed by the [Explanatory Notes](#) (p 13), because of the phased approach to the transition of the regulation of credit from the states and territories to the Commonwealth, the examination of state approaches to interest caps will not occur until Phase 2 of the implementation plan. The Minister for Fair Trading told Parliament that the interest rate cap will be maintained while the Commonwealth assesses Phase 1 of the national reforms in states and territories with and without such caps.⁶⁸ It appears that New South Wales is also retaining its 48% cap until 1 July 2011 so there is no gap in protection for NSW consumers.⁶⁹

7.5 ASIC PROVISIONS

Part 5 of the [Queensland Bill](#) deals with the handing over of information, powers and functions from the Queensland Government (OFT) to ASIC as the national regulator. **Clause 25** authorises the Minister to provide ASIC with documents and other information reasonably required by ASIC in connection with the performance or exercise of its functions or powers under the NCCP legislation. ASIC can also request assistance reasonably required by it. The foregoing can occur even before

⁶⁷ **Clause 19** of the [Queensland Bill](#) preserves the effect of provisions of consumer credit legislation in Queensland in relation to the maximum annual percentage rate under an existing credit contract.

⁶⁸ Hon PJ Lawlor MP, Second Reading Speech, p 3166.

⁶⁹ NSW Fair Trading, '[NSW consumers protected from rogue lenders](#)', *Media Release*, 27 October 2009.

the NCCP legislation commences. **Clause 26** provides for the State to confer functions or powers on ASIC as an agent of the State.

7.6 COMMENCEMENT

It is intended that the Part 2 referral of Queensland's powers in relation to credit matters will commence on assent, as will the Part 5 provisions relating to the transfer of information, powers and functions to ASIC. The remainder of the [Queensland Bill](#) will commence on a day fixed by proclamation and the repeals of the abovementioned pieces of legislation will occur with the coming into force of the Commonwealth's [NCCP Act](#) (cl 2).

8 STAKEHOLDER RESPONSES

The [Senate Committee Report](#) noted that there is broad support for a national licensing scheme but made a number of recommendations geared to addressing stakeholder concerns about aspects of the NCCP package. Many of these recommendations were adopted through Senate amendments to the NCCP legislation, some of which were noted in their relevant contexts above.

Other comments and issues that have been raised by stakeholders include those outlined under the headings which follow.

8.1 SUITABILITY ASSESSMENTS AND LOW-INCOME EARNERS

Griffith Law School academic and Australian Microfinance Chair, Therese Wilson, believes that the ‘upfront’ responsible lending obligations requiring an assessment of the consumer’s capacity to repay before entering into the contract constituted an improvement on the [UCCC](#) position. Under the UCCC, consumers can only, ‘after the fact’, ask the court to reopen a contract or grant relief on the basis that no such assessment was done. The very type of consumer in that position is one most likely to lack the means to pursue court action.⁷⁰

However, Ms Wilson expressed concern that the new assessment of unsuitability obligation might result in limiting access to ‘*safe and affordable credit for low-income Australians*’ given that low-income earners are less likely to obtain short-term, small amount credit from mainstream providers (who have always done credit assessments as part of the application process). Mainstream credit providers’ assessments tend to automatically exclude welfare recipients and other low-income

⁷⁰ Therese Wilson, ‘Credit industry crackdown’, *Courier Mail*, 17 June 2009, p 28.

earners as it seems to be presumed by those providers that such people will never have the capacity to repay the loan. Ms Wilson argues that the experience of various low-interest loan schemes, devised by community organisations in partnership with banks, have shown that low-income earners can, indeed, repay loans if they are structured appropriately through the assessment process. Thus, she believes that the ‘responsible lending’ concept needs to be rethought so that the upfront assessment is able to take into account individual circumstances, not just the income, of consumers, even those on low incomes who will be able to meet their repayments if the loan is tailored to enable them to do so. The assessment should not automatically exclude a consumer on the ground of income alone.⁷¹

8.2 ACCESS TO LOW COST FORUMS TO RESOLVE DISPUTES

Under the existing laws, if a credit provider takes action in a court against a consumer but the consumer has a related claim or counter claim, such as seeking changes to the contract on grounds of hardship, the consumer can apply to state tribunals, such as the NSW Consumer, Trader & Tenancy Tribunal or the Victorian Civil and Administrative Tribunal. However, as noted by consumer advocates, under the new NCCP legislation there will be no tribunals but there will be the ability to opt-in to small claims court processes for some matters, as discussed earlier. During the Senate Committee Inquiry, consumer bodies raised the concern that removing tribunals from the consumer credit area might place more pressure on EDR schemes which were already overloaded, causing matters to often be delayed.⁷² The Australian Treasury Submission to the Senate Committee Inquiry (pp 24-25) commented that other issues raised regarding access to justice for consumer credit issues in the federal jurisdiction may be further considered during Phase 2 of the implementation of the consumer credit reforms.

8.3 CRIMINAL PENALTIES

Australian Bankers’ Association (ABA) chief executive, David Bell, was supportive of the Government’s changes to the laws to ensure that there would not be a duplication of compliance obligations on business and said that industry was ‘*pleased with the reduction [in jail terms] from five to two years ... although we still*

⁷¹ Therese Wilson.

⁷² James Eyers, ‘Credit code may disadvantage consumers’, *Australian Financial Review*, 12 June 2006, referring to concerns raised by the NSW Consumer Credit Legal Centre.

believe criminal sanctions are not appropriate'.⁷³ The ABA's submission to the Senate Committee Inquiry argued that penalties, such as imprisoning employees, are disproportionate to the event and will cultivate a culture of over-caution and conservatism through a fear of noncompliance. The [Senate Committee Report](#) (p 31) commented that '*the criminal penalties regime ... will create an appropriate incentive for credit providers to undertake due diligence when assessing whether a credit contract is not unsuitable for the consumer, without overreaching in instances where a civil or criminal breach has occurred*'.

8.4 DEFERMENT OF TIMEFRAMES

During the Senate Committee Inquiry, industry representatives, including the Business Council of Australia, the ABA and leading credit providers, submitted that starting some aspects of the scheme in January 2010 gave too little time in which to make preparations for the new reforms.⁷⁴ Amendments were made to the NCCP legislation, following a recommendation by the [Senate Committee Report](#) (p 6), to defer implementation of the reforms to July 2010 to allow sufficient time for industry to prepare and ensure that states had made the necessary referrals of legislative power.

On the other hand, some consumer advocates and the MFAA were concerned about delaying some of the responsible lending obligations until January 2011 given that consumer groups have been pushing for national broker legislation since before 2003. Corresponding with a recommendation of the [Senate Committee Report](#) (p 6), it appears that state parliaments will ensure that the relevant state legislation regulating brokers will not 'turn off' until the national licensing scheme is in place, an example being NSW keeping its laws banning upfront fees and imposing disclosure requirements until the responsible lending obligations take effect.⁷⁵

8.5 GENERAL COMMENTS

Some credit industry representatives, such as Abacus which represents building societies and credit unions, have said that responsible lenders welcome the new laws if they protect consumers from irresponsible lenders. They considered that

⁷³ Fleur Anderson, 'Credit providers face tough rules', *Australian Financial Review*, 25 June 2009, quoting David Bell, chief executive of the Australian Bankers' Association.

⁷⁴ [Senate Committee Report](#), pp 3-4, referring to submissions from the Business Council of Australia (No 26); the ABA (No 48); GE Capital Finance (No 35).

⁷⁵ NSW Fair Trading, '[NSW consumers protected from rogue lenders](#)'.

the new legislation appears to strike the right balance between protecting consumers and avoiding placing unnecessary compliance burdens on responsible lenders.⁷⁶

⁷⁶ Fleur Anderson, ‘Credit providers face tough rules’, *Australian Financial Review*, 25 June 2009, p 5.

GLOSSARY

ACL	Australian Credit Licence
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investment Commission
ADI	Authorised Deposit-taking Institution
COAG	Coalition of Australian Governments
EDR scheme	External Dispute Resolution Scheme
MFFA	Mortgage Finance Association of Australia
NCC	National Credit Code (in Schedule 1 of the NCCP Act)
NCCP	National Consumer Credit Protection
NCCP Act	National Consumer Credit Protection Act 2009 (Cth)
OFT	Queensland Office of Fair Trading
Transitional Act	National Consumer Credit Protection (Transitional And Consequential Provisions) Act 2009 (Cth)
UCCC	Uniform Consumer Credit Code

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