

EXPOSURE-DRAFT

2010-2011-2012

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

EXPOSURE DRAFT

National Consumer Credit Protection Amendment (Credit Reform Phase 2) Bill 2012

No. , 2012

(Treasury)

**A Bill for an Act to amend the law relating to
consumer credit, and for related purposes**

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1 **A Bill for an Act to amend the law relating to**
2 **consumer credit, and for related purposes**

3 The Parliament of Australia enacts:

4 **1 Short title**

5 This Act may be cited as the *National Consumer Credit Protection*
6 *Amendment (Credit Reform Phase 2) Act 2012*.

7 **2 Commencement**

8 (1) Each provision of this Act specified in column 1 of the table
9 commences, or is taken to have commenced, in accordance with
10 column 2 of the table. Any other statement in column 2 has effect
11 according to its terms.
12

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Commencement information

Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	
2. Schedules 1 to 7	A single day to be fixed by Proclamation. However, if the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	

1 Note: This table relates only to the provisions of this Act as originally
2 enacted. It will not be amended to deal with any later amendments of
3 this Act.

4 (2) Any information in column 3 of the table is not part of this Act.
5 Information may be inserted in this column, or information in it
6 may be edited, in any published version of this Act.

7

Question

Stakeholders' views are sought on the length of the transitional period to be provided in respect of each Schedule (including whether it may be appropriate to provide different periods according to the nature and extent of the obligations, or as a result of the interaction with reforms in other areas).

8 **3 Schedule(s)**

9 Each Act that is specified in a Schedule to this Act is amended or
10 repealed as set out in the applicable items in the Schedule
11 concerned, and any other item in a Schedule to this Act has effect
12 according to its terms.
13

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Small business lending **Schedule 2**
Main amendments **Part 1**

1 **Schedule 2—Small business lending**

2

Comment

Schedule 1 will provide for matters relevant to a referral of legislative power to the Commonwealth by the States. It therefore has not been circulated for public comment with the other Schedules.

3 **Part 1—Main amendments**

4 ***National Consumer Credit Protection Act 2009***

5 **1 Subsection 5(1)**

6

Insert:

7

small business means a business that:

8

(a) has less than the following number of employees:

9

(i) if the business is or includes the manufacture of goods—100 people;

10

11

(ii) otherwise—20 people; or

12

(b) has no employees.

13

Questions

Stakeholders' views are sought on the practicality of this definition, noting that the definition of a credit contract with a small business is proposed to be further limited by reference to the amount of credit being provided (as discussed below).

Stakeholders' views are sought on whether there is a need to provide a defence or presumption similar to the approach in section 13 of the National Credit Code, so that a contract is not regulated if, on the basis of reasonable inquiries, a licensee believes the business had more than the specified number of employees.

14

2 After subsection 5(1) of the *National Credit Code*

15

Insert:

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Schedule 2 Small business lending

Part 1 Main amendments

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Small business credit contracts

(1A) This Code applies to the provision of credit (and to the credit contract and related matters) if, when the credit contract is entered into or (in the case of precontractual obligations) is proposed to be entered into:

- (a) the debtor is a person (whether or not a natural person or strata corporation); and
- (b) the credit is provided or intended to be provided predominantly for the purposes of a small business; and
- (c) a charge is or may be made for providing the credit; and
- (d) either or both of the following apply:
 - (i) the credit provider provides, or will provide, the credit in the course of, as part of, or incidentally to, a business carried on in this jurisdiction by the credit provider;
 - (ii) a person acts as an intermediary between the credit provider and the debtor in relation to the contract.

Question

It is intended that Chapter 2 (which imposes licensing obligations) of the National Consumer Credit Protection Act 2009 will be excluded from applying to persons engaging in credit activities in relation to small business credit contracts, and that the regulations will provide for a more limited 'credit permit' regime for those persons. A draft of these regulations has been circulated for comment with the Bill.

It is also proposed that contracts where the maximum amount of credit exceeds the sum of \$5 million will be excluded by regulations made under section 203B of the National Credit Code. The exemption is set out in regulation 58A in Item 15 of the regulations.

Stakeholders' views are sought on this approach.

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19
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21

3 At the end of section 5 of the *National Credit Code*

Add:

- (5) For the purposes of this Part, credit is provided predominantly for the purposes of a small business if:

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Small business lending **Schedule 2**
Main amendments **Part 1**

- 1 (a) more than half of the credit is intended to be used for those
2 purposes; or
3 (b) in the case where the credit is intended to be used to obtain
4 goods or services for use for different purposes—the goods
5 or services are intended to be most used for those purposes.

6 **4 Section 169 of the *National Credit Code***

7 Omit “a natural person or strata corporation under which that person or
8 corporation”, substitute “a person under which that person”.

9 **5 Before paragraph 170(1)(a) of the *National Credit Code***

10 Insert:

- 11 (aa) the lessee is a natural person or strata corporation; and

12 **6 After subsection 170(1) of the *National Credit Code***

13 Insert:

14 *Small business consumer leases*

15 (1A) This Part applies to a consumer lease if, when the lease is entered
16 into:

- 17 (a) the lessee is a person (whether or not a natural person or
18 strata corporation); and
19 (b) the goods are hired predominantly for the purposes of the
20 small business; and
21 (c) a charge is or may be made for hiring the goods; and
22 (d) any of the following apply:
23 (i) the charge for hiring the goods, together with any other
24 amount payable under the consumer lease, exceeds the
25 cash price of the goods;
26 (ii) the lease is a regulated fixed term lease;
27 (iii) the lease is a regulated indefinite lease;
28 (e) either or both of the following apply:
29 (i) the lessor hires the goods in the course of, as part of, or
30 incidentally to, a business carried on by the lessor in this
31 jurisdiction;
32 (ii) a person acts as an intermediary between the lessor and
33 the lessee in relation to the lease.
34

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Schedule 2 Small business lending

Part 1 Main amendments

Question

The regulations do not contain any exemption for small business leases where the cash value of the goods exceeds a maximum amount. Stakeholders' views are sought on whether there are any classes of small business consumer leases that should be exempted, whether by cash value of the goods or other characteristics.

1 **7 At the end of section 170 of the *National Credit Code***

2 Add:

3 (5) For the purposes of this Part, goods are hired predominantly for the
4 purposes of a small business if:

5 (a) more than half of the goods are intended to be used for those
6 purposes; or

7 (b) in the case where the same goods are intended to be used for
8 different purposes—the goods are intended to be most used
9 for those purposes.
10

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Small business lending **Schedule 2**
Other amendments **Part 2**

1 **Part 2—Other amendments**

2 *National Consumer Credit Protection Act 2009*

3 **8 Subsection 5(1) (definition of *consumer*)**

4 Repeal the definition, substitute:

5 *consumer* means:

6 (a) in relation to a credit contract (other than a small business
7 credit contract) or consumer lease (other than a small
8 business consumer lease)—a natural person or strata
9 corporation; and

10 (b) in relation to a small business credit contract or small
11 business consumer lease—a person (whether or not a natural
12 person or strata corporation).

13 **9 Subsection 5(1)**

14 Insert:

15 *protected small business credit contract*: see subsection 133FB(3).

16 **10 Subsection 5(1)**

17 Insert:

18 *small business consumer lease* has the same meaning as in
19 section 204 of the National Credit Code.

20 **11 Subsection 5(1)**

21 Insert:

22 *small business credit contract* has the same meaning as in
23 section 204 of the National Credit Code.

24 **12 At the end of section 112**

25 Add:

26 *Small business credit contracts*

27 (3) This Part does not apply in relation to credit assistance provided by
28 a licensee to a consumer in relation to a small business credit
29 contract.

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Schedule 2 Small business lending

Part 2 Other amendments

1 Note: Part 3-2F has special responsible lending rules that apply to those that
2 provide credit assistance to consumers in relation to small business
3 credit contracts.

4 **13 At the end of section 125A**

5 Add:

6 *Small business credit contracts*

7 (2) This Part does not apply in relation to a licensee that is a credit
8 provider under a small business credit contract.

9 Note: Part 3-2F has special responsible lending rules that apply to credit
10 providers under small business credit contracts.

11

Comment

The effect of the proposed amendments in sections 112A and 125A is that the current responsible lending obligations in Chapter 3 of the National Consumer Credit Protection Act 2009 would not apply to small business credit contracts.

Instead modified responsible lending obligations would apply as set out in proposed Part 3-2F. The operation of this part is discussed below.

12 **14 At the end of section 133AAA**

13 Add:

14 *Small business credit contracts*

15 (2) This Part does not apply in relation to a licensee that is a credit
16 provider under a small business credit contract.

17 Note: Part 3-2F has special responsible lending rules that apply to credit
18 providers under small business credit contracts.

19 **15 At the end of section 133BAA**

20 Add:

21 *Small business credit contracts*

22 (2) This Part does not apply in relation to a licensee that is a credit
23 provider under a small business credit contract.

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Small business lending **Schedule 2**
Other amendments **Part 2**

1 Note: Part 3-2F has special responsible lending rules that apply to credit
2 providers under small business credit contracts.

3 **16 At the end of section 133CAA**

4 Add:

5 *Small business credit contracts*

6 (2) This Part does not apply in relation to a licensee that is a credit
7 provider under a small business credit contract.

8 Note: Part 3-2F has special responsible lending rules that apply to credit
9 providers under small business credit contracts.

10 **17 At the end of section 133DAA**

11 Insert:

12 *Small business credit contracts*

13 (2) This Part does not apply in relation to a licensee that is a credit
14 provider under a small business credit contract.

15 Note: Part 3-2F has special responsible lending rules that apply to credit
16 providers under small business credit contracts.

17 **18 Before Part 3-3**

18 Insert:

19 **Part 3-2F—Small business credit contracts**

20 **Division 1—Introduction**

21 **133FA Guide to this Part**

22 This Part has rules that apply to those who provide credit
23 assistance for, or are credit providers under, small business credit
24 contracts. These rules are more limited than the responsible lending
25 rules in Parts 3-1, 3-2, 3-2A, 3-2B, 3-2C or 3-2D that apply to
26 other types of credit contracts.

27 Under these rules, it does not matter whether the credit assistance
28 provider or credit provider is a licensee.

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Schedule 2 Small business lending

Part 2 Other amendments

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Some of these rules only apply to certain types of small business credit contracts, called “protected small business credit contracts”.

All of these rules are aimed at better informing consumers and preventing them from being in unsuitable small business credit contracts.

Division 2 deals with those who provide credit assistance for small business credit contracts. It requires them to give the consumer a quote before providing credit assistance. If the contract is a protected small business credit contract, it also requires them to make inquiries and prohibits them from providing credit assistance if the contract will be unsuitable for the consumer.

Division 3 deals with credit providers under small business credit contracts. It requires them to give the consumer a disclosure document before entering into, or increasing the credit limit of, a small business credit contract with the consumer. If the contract is a protected small business credit contract, it also requires them to make inquiries and prohibits them from entering into, or increasing the credit limit of, the contract if the contract is unsuitable for the consumer.

20 **133FB Application of this Part**

21 *Application of this Part*

- 22 (1) This Part applies in relation to small business credit contracts.
- 23 (2) Subdivision B of Division 2 and Subdivision B of Division 3 only
24 apply in relation to small business credit contracts that are
25 protected small business credit contracts.

26 *Meaning of protected small business credit contract*

- 27 (3) A small business credit contract is a *protected small business*
28 *credit contract* if:
- 29 (a) the consumer’s obligations under the contract are or will be
30 secured by a mortgage over residential property of the
31 consumer or another person; and

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Small business lending **Schedule 2**
Other amendments **Part 2**

- 1 (b) when the contract is entered into, the credit is provided
2 predominantly for the purposes of enabling the consumer to
3 comply with the consumer's financial obligations under
4 another contract (the *defaulting contract*) between the
5 consumer and the credit provider or another person; and
6 (c) before the contract is entered into, the consumer had failed to
7 comply with the consumer's financial obligations under the
8 defaulting contract.
- 9 (4) For the purposes of paragraph (3)(b), credit is provided
10 predominantly for the purposes referred to in that paragraph if:
11 (a) more than half of the credit provided is intended to be used
12 for those purposes; or
13 (b) in the case where the credit is intended to be used to obtain
14 goods or services for use for different purposes—the goods
15 or services are intended to be most used for those purposes.
16

Question

Section 133FB introduces a definition of a protected small business credit contract. It is proposed to introduce specific responsible lending obligations in relation to this class of contracts to address equity stripping practices through the provision of credit to small businesses in financial distress.

A protected small business credit contract is defined as a credit contract that meets each of the following three criteria:

- *the predominant use of the credit is to refinance the liability under an existing small business credit contract;*
- *the borrower has defaulted in respect of the repayments due under that contract; and*
- *the contract is secured by a mortgage over residential property.*

Stakeholders' views are sought on this definition, including the extent to which a lender can readily determine whether the borrower is in default prior to refinancing (in situations where it is proposed to secure the loan over a residential property).

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Schedule 2 Small business lending

Part 2 Other amendments

1 **Division 2—Providers of credit assistance for small**
2 **business credit contracts**

3 **Subdivision A—Obligations that apply for all small business**
4 **credit contracts**

5 **133FC Obligation to give quote for providing credit assistance**

6 *Obligation to give quote*

- 7 (1) A person must not provide credit assistance to a consumer by:
- 8 (a) suggesting that the consumer apply, or assisting the consumer
9 to apply, for a particular small business credit contract with a
10 particular credit provider; or
- 11 (b) suggesting that the consumer apply, or assisting the consumer
12 to apply, for an increase to the credit limit of a particular
13 small business credit contract with a particular credit
14 provider; or
- 15 (c) suggesting that the consumer remain in a particular small
16 business credit contract with a particular credit provider;
- 17 unless:
- 18 (d) the person has given the consumer a quote in accordance
19 with subsection (2); and
- 20 (e) the consumer has signed and dated that quote or otherwise
21 indicated the consumer's acceptance of it (and the day that
22 happens) in the manner (if any) prescribed by the regulations;
23 and
- 24 (f) the person has given the consumer a copy of the accepted
25 quote.

26 Civil penalty: 2,000 penalty units.

- 27 (2) The quote must:
- 28 (a) be in writing; and
- 29 (b) give information about the credit assistance and other
30 services that the quote covers; and
- 31 (c) specify the maximum amount that will be payable by the
32 consumer to the person in relation to the person's credit
33 assistance and other services; and

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Small business lending **Schedule 2**
Other amendments **Part 2**

- 1 (d) give information about what that amount relates to,
2 including:
3 (i) the maximum amount of the person's fee for providing
4 the credit assistance and other services; and
5 (ii) the maximum amount of charges that will be incurred
6 by the person for matters associated with providing the
7 credit assistance and other services; and
8 (iii) the maximum amount of fees or charges that will be
9 payable by the person to another person on the
10 consumer's behalf; and
11 (e) state whether the maximum amount or any other amount will
12 be payable by the consumer to the person if a protected small
13 business credit contract is not entered into, or a credit limit is
14 not increased; and
15 (f) if the person intends to lodge a caveat in relation to land in
16 relation to an amount payable by the consumer for the
17 person's credit assistance or other services—inform the
18 consumer of the person's intention and specify any other
19 information that is prescribed by the regulations.

20 *Manner of giving quote*

- 21 (3) The person must give the quote to the consumer in the manner (if
22 any) prescribed by the regulations.

23 *No demanding payment of amount exceeding quoted amount*

- 24 (4) The person must not request or demand payment of an amount that
25 exceeds the maximum amount set out in the quote.

26 Civil penalty: 2,000 penalty units.

27 *No requirement to give quote*

- 28 (5) Subsections (1) and (4) do not apply if the person does not require
29 the consumer to pay a fee or charge to the person for providing the
30 credit assistance.

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Schedule 2 Small business lending

Part 2 Other amendments

- 1 *No demanding payment before credit assistance provided*
- 2 (6) The person must not request or demand payment of an amount for
- 3 the person's credit assistance before the person provides the
- 4 assistance.
- 5 Civil penalty: 2,000 penalty units.
- 6

Questions

Section 133FC is based on section 114 of the National Consumer Credit Protection Act 2009. It differs in that a provider of credit assistance is allowed to lodge a caveat in relation to their fees, but will have to disclose this in the quote (as set out in paragraph (2)(f) above).

Stakeholders' views are sought on the nature and extent of the disclosure requirements.

The obligation only applies to providers of credit assistance (as defined in section 8 of the Credit Act). Stakeholders' views are sought on whether it should apply to intermediaries as well.

7 **Subdivision B—Obligations or prohibitions that apply only for**

8 **protected small business credit contracts**

9

Questions

Subdivision B applies modified responsible lending obligations to persons providing credit assistance, but only in respect of protected small business credit contracts, to address equity stripping practices.

As the borrower is in default of an existing credit contract, the provider of credit assistance is to be under an onus, in respect of a proposed refinance, to make inquiries to ensure the credit contract is suitable. These inquiries are intended to ensure the borrower has an exit strategy in respect of discharging their liability under the protected small business credit contract.

As set out in section 133FE the provider of credit assistance is required to

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Small business lending **Schedule 2**
Other amendments **Part 2**

make inquiries in relation to:

- *the consumer's requirements and objectives (which would include their exit strategy);*
- *whether the consumer is prepared to risk losing the residence that is security for the debt (to address situations where the consumer's concern is to prevent enforcement action in respect of their existing loan, but where they do so without appreciating the implications in respect of the refinance); and*
- *whether the consumer seeks credit because they consider this will enable them to seek a higher price on the eventual sale of the property (to address situations where, for example, the consumer's concern is to arrange a sale on their own terms).*

The suitability of the contract is then tested against the results of these inquiries; the contract will therefore be suitable if it meets the exit strategy identified by the inquiries into the consumer's requirements and objectives (even where events subsequent to the entry into the contract mean the exit strategy does not crystallise).

This approach addresses equity stripping practices by imposing procedural requirements on persons to make inquiries, rather than by using other criteria, such as the outcome of the transaction. For example, a remedy could have been provided according to whether or not a defaulting borrower's equity was diminished because the borrower could not meet the repayments on the refinanced loan. This approach was considered to be too inflexible.

The provisions follow the model in the National Consumer Credit Protection Act 2009:

- *Obligation to make inquiries in section 133FD; cp section 115.*
- *Scope of inquiries defined in section 133FE; cp section 117.*
- *Prohibition on suggesting, or assisting with, unsuitable contracts in section 133FF; cp section 123.*
- *Prohibition on suggesting to consumers to remain in unsuitable*

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Schedule 2 Small business lending

Part 2 Other amendments

contracts in section 133FG; cp section 124.

Stakeholders' views are sought both on this approach and on the nature of the proposed inquiries. In particular views are sought on whether they are consistent with existing practices to address the position of small businesses in financial distress.

133FD Obligation to make inquiries

(1) A person must not provide credit assistance to a consumer on a day by:

(a) suggesting that the consumer apply, or assisting the consumer to apply, for a particular protected small business credit contract with a particular credit provider; or

(b) suggesting that the consumer apply, or assisting the consumer to apply, for an increase to the credit limit of a particular protected small business credit contract with a particular credit provider;

unless the person has, within 90 days (or other period prescribed by the regulations) before that day, made the inquiries in accordance with section 133FE.

Civil penalty: 2,000 penalty units.

(2) A person must not provide credit assistance to a consumer on a day by suggesting that the consumer remain in a particular protected small business credit contract with a particular credit provider unless the person has, within 90 days (or other period prescribed by the regulations) before that day, made the inquiries and verification in accordance with section 133FE.

Civil penalty: 2,000 penalty units.

133FE The inquiries that must be made

(1) For the purposes of subsection 133FD(1) or (2), the person must:

(a) make reasonable inquiries about the consumer's requirements and objectives in relation to the contract; and

(b) inquire whether the consumer or other person who owns the residential property that:

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Small business lending **Schedule 2**
Other amendments **Part 2**

- 1 (i) has a mortgage that secures the consumer’s financial
2 obligations under the contract; or
3 (ii) will have a mortgage that will secure the consumer’s
4 financial obligations under the contract;
5 is prepared to lose ownership of that property should the
6 consumer be unable to comply with those obligations; and
7 (c) if the consumer’s financial obligations under the defaulting
8 contract referred to in paragraph 133FB(3)(b) are secured by
9 a mortgage over residential property of the consumer or
10 another person—make reasonable inquiries about whether
11 the consumer thinks that entering into, or increasing the
12 credit limit of, the contract will enable the consumer or other
13 person to obtain a higher price from the sale of that property.

14 Civil penalty: 2,000 penalty units.

- 15 (2) The regulations may prescribe particular inquiries that must be
16 made or taken, or do not need to be made or taken, for the purposes
17 of paragraph (1)(a), (b) or (c).

18 **133FF Prohibition on suggesting, or assisting with, unsuitable**
19 **contracts**

20 *Prohibition on suggesting, or assisting with, unsuitable contracts*

- 21 (1) A person must not provide credit assistance to a consumer by:
22 (a) suggesting that the consumer apply, or assisting the consumer
23 to apply, for a particular protected small business credit
24 contract with a particular credit provider; or
25 (b) suggesting that the consumer apply, or assisting the consumer
26 to apply, for an increase to the credit limit of a particular
27 protected small business credit contract with a particular
28 credit provider;
29 if the contract will be unsuitable for the consumer under
30 subsection (2).

31 Civil penalty: 2,000 penalty units.

32 *When the contract will be unsuitable*

- 33 (2) The contract will be unsuitable for the consumer if, at the time the
34 person provides the credit assistance, it is likely that:

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Schedule 2 Small business lending

Part 2 Other amendments

- 1 (a) the contract will not meet the consumer's requirements or
2 objectives; or
3 (b) the consumer or other person who owns the residential
4 property that:
5 (i) has a mortgage that secures the consumer's financial
6 obligations under the contract; or
7 (ii) will have a mortgage that will secure the consumer's
8 financial obligations under the contract;
9 is not prepared to lose ownership of that property should the
10 consumer be unable to comply with those obligations; or
11 (c) if the consumer's financial obligations under the defaulting
12 contract referred to in paragraph 133FB(3)(b) are secured by
13 a mortgage over residential property of the consumer or
14 another person—the consumer does not think that entering
15 into, or increasing the credit limit of, the contract will enable
16 the consumer or other person to obtain a higher price from
17 the sale of that property;
18 if the contract is entered into in the period proposed for it to be
19 entered into, or the credit limit is increased in the period proposed
20 for it to be increased.

21 *Information to be used to determine if contract will be unsuitable*

- 22 (3) For the purposes of determining under subsection (2) whether the
23 contract will be unsuitable, only information that satisfies both of
24 the following paragraphs is to be taken into account:
25 (a) the information is about a matter that the person is required to
26 make inquiries about under section 133FE;
27 (b) at the time the person provides the credit assistance:
28 (i) the person had reason to believe that the information
29 was true; or
30 (ii) the person would have had reason to believe that the
31 information was true if the person had made the
32 inquiries that the person was required to make under
33 section 133FE.

34 *Contract not unsuitable under regulations*

- 35 (4) The regulations may prescribe particular situations in which a
36 protected small business credit contract is taken not to be
37 unsuitable for a consumer, despite subsection (2).
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Small business lending **Schedule 2**
Other amendments **Part 2**

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Offence

- (5) A person commits an offence if:
- (a) the person is subject to a requirement under subsection (1);
and
 - (b) the person engages in conduct; and
 - (c) the conduct contravenes the requirement.

Criminal penalty: 100 penalty units, or 2 years imprisonment, or both.

133FG Prohibition on suggesting to consumers to remain in unsuitable contract

Prohibition on suggesting to remain in unsuitable contract

- (1) A person must not provide credit assistance to a consumer by suggesting that the consumer remain in a particular protected small business credit contract with a particular credit provider if the contract is unsuitable for the consumer under subsection (2).

Civil penalty: 2,000 penalty units.

When the contract is unsuitable

- (2) The contract is unsuitable for the consumer if, at that time the person provides the credit assistance:
- (a) the contract does not meet the consumer's requirements or objectives; or
 - (b) the consumer or other person who owns the residential property that has a mortgage that secures the consumer's financial obligations under the contract is not prepared to lose ownership of that property should the consumer be unable to comply with those obligations; or
 - (c) if the consumer's financial obligations under the defaulting contract referred to in paragraph 133FB(3)(b) are secured by a mortgage over residential property of the consumer or another person—the consumer does not think that remaining in the contract will enable the consumer or other person to obtain a higher price from the sale of that property.

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Schedule 2 Small business lending

Part 2 Other amendments

1

Information to be used to determine if contract is unsuitable

2

- (3) For the purposes of determining under subsection (2) whether the contract is unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:

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- (a) the information is about a matter that the person is required to make inquiries about under section 133FE;

6

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- (b) at the time the person provides the credit assistance:

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9

- (i) the person had reason to believe that the information was true; or

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13

- (ii) the person would have had reason to believe that the information was true if the person had made the inquiries the person was required to make under section 133FE.

14

Contract not unsuitable under regulations

15

- (4) The regulations may prescribe particular situations in which a protected small business contract is taken not to be unsuitable for a consumer, despite subsection (2).

16

17

18

Offence

19

- (5) A person commits an offence if:

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23

- (a) the person is subject to a requirement under subsection (1);
and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

24

25

Criminal penalty: 100 penalty units, or 2 years imprisonment, or both.

26

Defence

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- (6) For the purposes of subsections (1) and (5), it is a defence if:

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34

- (a) the person suggested that the consumer remain in the protected small business credit contract because, after making reasonable inquiries, the person reasonably believed that there was no other small business credit contract that was appropriate for the consumer; and
(b) in the case where the defaulting contract referred to in paragraph 133FB(3)(b) is a credit contract—the person
-

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Small business lending **Schedule 2**
Other amendments **Part 2**

1 informed the consumer that there is a procedure under
2 sections 72 and 94 of the National Credit Code for consumers
3 in hardship.

4 Note: For the purposes of subsection (5), a defendant bears an evidential
5 burden in relation to the matters in subsection (6) (see subsection
6 13.3(3) of the *Criminal Code*).

- 7 (7) For the purposes of subsection (6), the regulations may prescribe:
8 (a) particular inquiries that must be made, or do not need to be
9 made; and
10 (b) particular circumstances in which a small business credit
11 contract is, or is not, appropriate for a consumer; and
12 (c) particular information that must be taken into account to
13 determine whether a small business credit contract is
14 appropriate for a consumer.

15 **Division 3—Credit providers under small business credit** 16 **contracts**

17 **Subdivision A—Obligations that apply for all small business** 18 **credit contracts**

19 **133FH Obligation to disclose**

- 20 (1) A credit provider must not:
21 (a) enter into a small business credit contract with a consumer
22 who will be the debtor under the contract; or
23 (b) increase the credit limit of a small business credit contract
24 with a consumer who is the debtor under the contract;
25 if the credit provider has not given the consumer a disclosure
26 document in accordance with subsection (2).
- 27 Civil penalty: 2,000 penalty units.
- 28 (2) The disclosure document must be in writing and set out the
29 following matters:
30 (a) if the amount of credit is ascertainable—that amount;
31 (b) the annual percentage rate or rates under the contract and, if
32 there is more than one rate, how each rate applies;

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Schedule 2 Small business lending

Part 2 Other amendments

- 1 (c) if the contract has a fixed interest rate or is a contract
2 prescribed by the regulations—the total amount of interest
3 charges payable under the contract;
- 4 (d) if more than one repayment is to be made under the contract
5 and the contract is not a continuing credit contract:
- 6 (i) the amount of the repayments or the method of
7 calculating the amount; and
- 8 (ii) the number of the repayments, if ascertainable; and
- 9 (iii) if the contract has a fixed interest rate or is a contract
10 prescribed by the regulations—the total amount of the
11 repayments, if ascertainable; and
- 12 (iv) when the first repayment is to be paid, if ascertainable,
13 and the frequency of payment of repayments;
- 14 (e) if the contract provides for a minimum repayment—the
15 amount of that repayment, if ascertainable, but, if not, the
16 method of calculation of the minimum repayment;
- 17 (f) a statement of the credit fees and charges that are, or may
18 become, payable under the contract, and when each such fee
19 or charge is payable, if ascertainable;
- 20 (g) the amount of any such fee or charge, if ascertainable, but, if
21 not, the method of calculation of the fee or charge, if
22 ascertainable;
- 23 (h) the total amount of credit fees and charges payable under the
24 contract to the extent that it is ascertainable.
- 25 (3) The disclosure document may be the proposed contract document
26 or be a separate document.
- 27

Question

This provision is based on the existing disclosure requirements in subsections 17(3), (4), (6) (7) and (8) of the National Credit Code.

Stakeholders' views are sought on the nature and extent of the proposed disclosure requirements.

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Small business lending **Schedule 2**
Other amendments **Part 2**

1 **Subdivision B—Obligations and prohibitions that apply only**
2 **for protected small business credit contracts**

3

Questions

Subdivision B applies modified responsible lending obligations to credit providers, but only in respect of protected small business credit contracts, to address equity stripping practices.

As the borrower is in default, the credit provider is to be under an onus, in respect of the proposed refinance, to make inquiries to ensure the credit contract is suitable. These inquiries are intended to ensure the borrower has an exit strategy in respect to discharging their liability under the protected small business credit contract.

As set out in section 133FJ the credit provider is required to make inquiries in relation to:

- the consumer's requirements and objectives (which would include their exit strategy);*
- whether the consumer is prepared to risk losing the residence that is security for the debt (to address situations where the consumer's concern is to prevent enforcement action in respect of their existing loan, but where they do so without appreciating the implications in respect of the refinance); and*
- either the consumer seeks credit because they consider this will enable them to seek a higher price on the eventual sale of the property (to address situations where, for example, the consumer's concern is to arrange a sale on their own terms).*

The suitability of the contract is then tested against the results of these inquiries; the contract will therefore be suitable if it meets the exit strategy identified by the inquiries into the consumer's requirements and objectives (even where events subsequent to the entry into the contract mean the exit strategy does not crystallise).

This approach addresses equity stripping practices by imposing procedural

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requirements on credit providers to make inquiries, rather than by, for example, using other criteria, such as the outcome of the transaction. For example, a remedy could have been provided according to whether or not a defaulting borrower's equity was diminished because the borrower could not meet the repayments on the refinanced loan. This approach was considered to be too inflexible.

The provisions follow the model in the National Consumer Credit Protection Act 2009:

- *Obligation to make inquiries in section 133FI; cp section 128.*
- *Scope of inquiries defined in section 133FJ; cp section 130.*
- *Prohibition on suggesting, or assisting with, unsuitable contracts in section 133FK; cp section 133.*

Stakeholders' views are sought both on this approach and on the nature of the proposed inquiries. In particular views are sought on whether they are consistent with existing lending practices to address the position of small businesses in financial distress.

1 **133FI Obligation to make inquiries**

- 2 A credit provider must not:
- 3 (a) enter into a protected small business credit contract with a
- 4 consumer who will be the debtor under the contract; or
- 5 (b) increase the credit limit of a protected small business credit
- 6 contract with a consumer who is the debtor under the
- 7 contract;
- 8 on a day unless the credit provider has, within 90 days (or other
- 9 period prescribed by the regulations) before that day, made the
- 10 inquiries in accordance with section 133FJ.

11 Civil penalty: 2,000 penalty units.

12 **133FJ The inquiries that must be made**

- 13 (1) For the purposes of section 133FI, the credit provider must:
- 14 (a) make reasonable inquiries about the consumer's requirements
- 15 and objectives in relation to the contract; and

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- 1 (b) inquire whether the consumer or other person who owns the
2 residential property that:
3 (i) has a mortgage that secures the consumer's financial
4 obligations under the contract; or
5 (ii) will have a mortgage that will secure the consumer's
6 financial obligations under the contract;
7 is prepared to lose ownership of that property should the
8 consumer be unable to comply with those obligations; and
9 (c) if the consumer's financial obligations under the defaulting
10 contract referred to in paragraph 133FB(3)(b) are secured by
11 a mortgage over residential property of the consumer or
12 another person—make reasonable inquiries about whether
13 the consumer thinks that entering into, or increasing the
14 credit limit of, the contract will enable the consumer or other
15 person to obtain a higher price from the sale of that property.
- 16 Civil penalty: 2,000 penalty units.
- 17 (2) The regulations may prescribe particular inquiries or steps that
18 must be made or taken, or do not need to be made or taken, for the
19 purposes of paragraph (1)(a), (b) or (c).

20 **133FK Prohibition on entering etc. unsuitable contracts**

21 *Prohibition on entering etc. unsuitable contracts*

- 22 (1) A credit provider must not:
23 (a) enter into a protected small business credit contract with a
24 consumer who will be the debtor under the contract; or
25 (b) increase the credit limit of a protected small business contract
26 with a consumer who is the debtor under the contract;
27 if the contract is unsuitable for the consumer under subsection (2).
- 28 Civil penalty: 2,000 penalty units.
- 29 *When the contract is unsuitable*
- 30 (2) The contract is unsuitable for the consumer if, at the time it is
31 entered into or the credit limit is increased:
32 (a) the contract does not meet the consumer's requirements or
33 objectives; or

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Schedule 2 Small business lending

Part 2 Other amendments

- 1 (b) the consumer or other person who owns the residential
2 property that:
3 (i) has a mortgage that secures the consumer's financial
4 obligations under the contract; or
5 (ii) will have a mortgage that will secure the consumer's
6 financial obligations under the contract;
7 is not prepared to lose ownership of that property should the
8 consumer be unable to comply with those obligations; or
9 (c) if the consumer's financial obligations under the defaulting
10 contract referred to in paragraph 133FB(3)(b) are secured by
11 a mortgage over residential property of the consumer or
12 another person—the consumer does not think that entering
13 into, or increasing the credit limit of, the contract will enable
14 the consumer or other person to obtain a higher price from
15 the sale of that property.

16 *Information to be used to determine if contract will be unsuitable*

- 17 (3) For the purposes of determining under subsection (2) whether the
18 contract will be unsuitable, only information that satisfies both of
19 the following paragraphs is to be taken into account:
20 (a) the information is about a matter that the person is required to
21 make inquiries about under section 133FJ;
22 (b) at the time of the contract is entered into or the credit limit is
23 increased:
24 (i) the credit provider had reason to believe that the
25 information was true; or
26 (ii) the credit provider would have had reason to believe
27 that the information was true if the credit provider had
28 made the inquiries that the person was required to make
29 under section 133FJ.

30 *Contract not unsuitable under regulations*

- 31 (4) The regulations may prescribe particular situations in which a
32 protected small business credit contract is taken not to be
33 unsuitable for a consumer, despite subsection (2).

34 *Offence*

- 35 (5) A person commits an offence if:
-

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Small business lending **Schedule 2**
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- 1 (a) the person is subject to a requirement under subsection (1);
2 and
3 (b) the person engages in conduct; and
4 (c) the conduct contravenes the requirement.

5 Criminal penalty: 100 penalty units, or 2 years imprisonment, or
6 both.

7 **19 Section 135 (heading)**

8 Repeal the heading, substitute:

9 **135 This Part does not apply to lessors who provide credit assistance**

10 **20 At the end of Division 1 of Part 3-3**

11 Add:

12 **135A This Part does not apply to small business consumer leases**

13 This Part does not apply in relation to credit assistance provided by
14 a licensee to a consumer in relation to a small business consumer
15 lease.

16 Note: Part 3-4A has special responsible lending rules that apply to those that
17 provide credit assistance to consumers in relation to small business
18 consumer leases.

19 **21 At the end of Division 1 of Part 3-4**

20 Add:

21 **148A This Part does not apply to small business consumer leases**

22 This Part does not apply in relation to a licensee that is a lessor
23 under a small business consumer lease.

24 Note: Part 3-4A has special responsible lending rules that apply to lessors
25 under small business consumer leases.

26 **22 After Part 3-4**

27 Insert:

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Schedule 2 Small business lending

Part 2 Other amendments

1 **Part 3-4A—Small business consumer leases**

2 **Division 1—Introduction**

3 **156AA Guide to this Part**

4 This Part has rules that apply to those who provide credit
5 assistance for, or are lessors under, small business consumer leases.
6 These rules are more limited than the responsible lending rules in
7 Parts 3-3 and 3-4 that apply to other types of consumer leases.

8 Under these rules, it does not matter whether the credit assistance
9 provider or the lessor is a licensee.

10 These rules are aimed at better informing consumers and
11 preventing them from being in unsuitable small business consumer
12 leases.

13 Division 2 deals with those who provide credit assistance for small
14 business consumer leases. It requires them to give the consumer a
15 quote before providing credit assistance.

16 Division 3 deals with lessors under small business consumer
17 leases. It requires them to give the consumer a disclosure document
18 before entering into a small business consumer lease with the
19 consumer.

20 ***Question***

Part 3-4A does not include a definition of protected small business consumer leases or any consequent responsible lending obligations (unlike the approach taken to protected small business credit contracts).

It is assumed that the same issues would not apply in respect of leases as, first, it would not be common for a small business consumer lease to be secured over a residential property, and, second, where the consumer is in default they would be likely to either terminate the contract by returning the leased goods, or seek a variation of the terms where they would receive a benefit through the continued use of the leased goods.

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Small business lending **Schedule 2**
Other amendments **Part 2**

Stakeholders' views are sought on whether there are any circumstances, including the possible development of avoidance strategies, where modified responsible lending obligations (similar to those applying to protected small business credit contracts) should apply to a class of small business consumer leases.

Division 2—Providers of credit assistance for small business consumer leases

156AB Obligation to give quote for providing credit assistance

Obligation to give quote

- (1) A person must not provide credit assistance to a consumer by:
- (a) suggesting that the consumer apply, or assisting the consumer to apply, for a particular small business consumer lease with a particular lessor; or
 - (b) suggesting that the consumer remain in a particular small business consumer lease with a particular lessor;

unless:

- (c) the person has given the consumer a quote in accordance with subsection (2); and
- (d) the consumer has signed and dated that quote or otherwise indicated the consumer's acceptance of it (and the day that happens) in the manner (if any) prescribed by the regulations; and
- (e) the person has given the consumer a copy of the accepted quote.

Civil penalty: 2,000 penalty units.

- (2) The quote must:
- (a) be in writing; and
 - (b) give information about the credit assistance and other services that the quote covers; and
 - (c) specify the maximum amount that will be payable by the consumer to the person in relation to the person's credit assistance and other services; and

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- 1 (d) give information about what that amount relates to,
2 including:
3 (i) the maximum amount of the person's fee for providing
4 the credit assistance and other services; and
5 (ii) the maximum amount of charges that will be incurred
6 by the person for matters associated with providing the
7 credit assistance and other services; and
8 (iii) the maximum amount of fees or charges that will be
9 payable by the person to another person on the
10 consumer's behalf; and
11 (e) state whether the maximum amount or any other amount will
12 be payable by the consumer to the person if a consumer lease
13 is not entered into; and
14 (f) if the person intends to lodge a caveat in relation to land in
15 relation to an amount payable by the consumer for the
16 person's credit assistance or other services—inform the
17 consumer of the person's intention and specify any other
18 information that is prescribed by the regulations.

19 *Manner of giving quote*

- 20 (3) The person must give the quote to the consumer in the manner (if
21 any) prescribed by the regulations.

22 *No demanding payment of amount exceeding quoted amount*

- 23 (4) The person must not request or demand payment of an amount that
24 exceeds the maximum amount set out in the quote.

25 Civil penalty: 2,000 penalty units.

26 *No demanding payment before credit assistance provided*

- 27 (5) The person must not request or demand payment of an amount for
28 the person's credit assistance before the person provides the
29 assistance.

30 Civil penalty: 2,000 penalty units.

31

32

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Small business lending **Schedule 2**
Other amendments **Part 2**

1

Questions

Section 156AB is based on section 137 of the National Consumer Credit Protection Act 2009. It differs in that it allows a caveat to be lodged by the person providing credit assistance, but introduces disclosure requirements where this is the case.

If the person providing credit assistance needs to charge the consumer more than the figure specified in the quote they can provide a second quote with an updated figure.

Stakeholders' views are sought on the nature and extent of the disclosure requirements.

It is noted that the draft Finance Brokers Bill prepared by the States in November 2007 included a modification to the disclosure requirements in that Bill in relation to small businesses, by allowing for initial oral disclosure of the proposed fees, and subsequent confirmation of this in writing. Stakeholders' views are sought on whether a similar exemption should be considered, and, if so, in what circumstances.

The obligation only applies to providers of credit assistance. Stakeholders' views are sought on whether it should apply to intermediaries as well.

2 **Division 3—Lessors under small business consumer leases**

3 **156AC Obligation to disclose**

4 (1) A lessor must not enter into a small business consumer lease with a
5 consumer who will be the lessee under the lease if the lessor has
6 not given the consumer a disclosure document in accordance with
7 subsection (2).

8 Civil penalty: 2,000 penalty units.

9 (2) The disclosure document must be in writing and set out the
10 following matters, if ascertainable:

11 (a) a description or identification of the goods hired under the
12 lease;

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- 1 (b) the amount or value of any consideration to be paid or
2 provided by the lessee before the delivery of the goods;
3 (c) the amount of any stamp duty or other government charge
4 (other than on receipts or withdrawals) payable by the lessee
5 in relation to the lease;
6 (d) the amount of any other charges not included in the rental
7 payable under the lease, and a description of those charges;
8 (e) the amount of each rental payment to be made under the
9 lease;
10 (f) the date the first rental payment is due and either:
11 (i) the dates subsequent rental payments are due; or
12 (ii) the interval between rental payments;
13 (g) if the lessee's obligations under the lease are or will be
14 secured by an interest in, or power over, property:
15 (i) a statement to that effect; and
16 (ii) a description of that property;
17 (h) the number of rental payments to be made by the lessee, and
18 the total amount of rental payable under the lease;
19 (i) a statement of the conditions on which the lessee may
20 terminate the lease;
21 (j) a statement of the liabilities (if any) of the lessee on
22 termination of the lease.
- 23 (3) The disclosure document may be the proposed lease document or
24 be a separate document.
- 25

Question

This provision is based on the existing disclosure requirements in section 174 of the National Credit Code.

Stakeholders' views are sought on the nature and extent of the disclosure requirements (including whether there are any small business consumer leases where the number or amount of the rental payments is not ascertainable at the time the contract is entered into).

23 Before subsection 5(1) of the *National Credit Code*

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Small business lending **Schedule 2**
Other amendments **Part 2**

1 Insert:

2 *Credit contracts (other than small business credit contracts)*

3 **24 Before subsection 170(1) of the *National Credit Code***

4 Insert:

5 *Consumer leases (other than small business consumer leases)*

6 **25 After subsection 171(3) of the *National Credit Code***

7 Insert:

8 (3A) Without limiting subsection (3), the regulations may exclude a
9 consumer lease from the application of this Part if:

- 10 (a) the amount payable under the lease, as referred to in
11 section 170, exceeds or may exceed a specified amount; or
12 (b) the lessor under the lease is of a specified class.

13 **26 At the end of Division 5 of Part 12 of the *National Credit***
14 ***Code***

15 Add:

16 **203D Exemptions for small business credit contracts and small**
17 **business consumer leases**

- 18 (1) Sections 14 to 168 do not apply in relation to small business credit
19 contracts.
- 20 (2) Sections 173 to 187 do not apply in relation to small business
21 consumer leases.

22

Comment

The effect of section 203D is to exclude the substantive obligations in the National Credit Code from applying to both small business credit contracts and small business consumer leases. The following provisions will still apply:

- *the definition provisions in respect of consumer leases in sections 169 to 172 (noting that these are to be amended by Schedule 5 of this Bill); and*

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Schedule 2 Small business lending

Part 2 Other amendments

- | |
|--|
| <ul style="list-style-type: none">• <i>the definition and machinery provisions in sections 188 to 218.</i> |
|--|

1 **27 Subsection 204(1) of the *National Credit Code***

2 Insert:

3 *small business consumer lease* means a consumer lease covered
4 by subsection 170(1A).

5 **28 Subsection 204(1) of the *National Credit Code***

6 Insert:

7 *small business credit contract* means a credit contract covered by
8 subsection 5(1A).
9

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Investment lending **Schedule 3**
Main amendments **Part 1**

1 **Schedule 3—Investment lending**

2 **Part 1—Main amendments**

3 *National Consumer Credit Protection Act 2009*

4 **1 Paragraph 5(1)(b) of the *National Credit Code***

5 Repeal the paragraph, substitute:

6 (b) the credit is provided or is intended to be provided
7 predominantly for one or more of the following purposes:

8 (i) personal purposes;

9 (ii) domestic purposes;

10 (iii) household purposes;

11 (iv) investment purposes; and

12 **2 Subsections 5(3) and (4) of the *National Credit Code***

13 Repeal the subsections, substitute:

14 *Purposes for which credit is provided*

15 (4) For the purposes of this Part, credit is provided predominantly for
16 personal, domestic, household or investment purposes if:

17 (a) more than half of the credit is intended to be used for one or
18 more of those purposes; or

19 (b) in the case where the credit is intended to be used to obtain
20 goods or services for use for different purposes—the goods
21 or services are intended to be most used for one or more of
22 those purposes.
23

Question

The effect of the proposed amendments to section 5 of the National Credit Code is that credit contracts will be regulated where the predominant use of the credit is for investment purposes.

It is proposed that the licensing and other provisions in Chapter 2 of the National Consumer Credit Protection Act 2009 would apply without modification to persons engaging in credit activities in relation to these

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Schedule 3 Investment lending

Part 1 Main amendments

contracts (noting that holders of an Australian financial service licence would be able to be streamlined under the regulation-making power in section 39 where they do not already hold an Australian credit licence).

Stakeholders' views are sought on this approach.

1 **3 Paragraphs 13(2)(a), (b) and (c) of the *National Credit Code***

2 Repeal the paragraphs, substitute:

- 3 (a) personal purposes;
4 (b) domestic purposes;
5 (c) household purposes;
6 (d) investment purposes;
7

Question

Schedule 3 does not amend the definition of consumer leases in paragraph 170(1)(a) to include consumer leases where the goods are hired for investment purposes, as the use of such contracts appears to be relatively uncommon.

*Stakeholders' views are sought on whether there any circumstances where consumer leases for investment purposes are or may be regularly provided, and should be subject to regulation. This could include their use in avoidance strategies or where the lessee has a right or obligation to purchase the goods (noting that currently the application of section 9 of the *National Credit Code* would not result in such leases being deemed to be credit contracts).*

8
9

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Investment lending **Schedule 3**
Other amendments **Part 2**

1 **Part 2—Other amendments**

2 *National Consumer Credit Protection Act 2009*

3 **4 Subsection 5(1)**

4 Insert:

5 *financial product* has the same meaning as in Division 3 of
6 Part 7.1 of Chapter 7 of the *Corporations Act 2001*.

7 **5 Subsection 5(1)**

8 Insert:

9 *investment credit contract*: see subsection 133EB(2).

10 **6 Subsection 5(1)**

11 Insert:

12 *product* means real or personal property of every description,
13 whether situated in Australia or anywhere else and whether
14 tangible or intangible, and includes an interest in any such real or
15 personal property.

16 **7 Subsection 5(1)**

17 Insert:

18 *protected investment credit contract*: see subsection 133EB(4).

19 **8 Subsection 5(1)**

20 Insert:

21 *regulated product (home-secured) investment credit contract*: see
22 subsection 133EB(6).

23 **9 Subsection 5(1)**

24 Insert:

25 *unregulated product investment credit contract*: see subsection
26 133EB(8).

27 **10 Section 111 (first paragraph)**

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Schedule 3 Investment lending

Part 2 Other amendments

1 Omit “to a licensee that will be the credit provider under the credit
2 contract”, substitute “in some circumstances (see section 112)”.

3 **11 Section 112 (heading)**

4 Repeal the section, substitute:

5 **112 When this Part does not apply**

6 *Credit assistance provided by credit provider*

7 (1) This Part does not apply in relation to credit assistance provided by
8 a licensee in relation to a credit contract if the licensee is or will be
9 the credit provider under the contract.

10 *Investment credit contracts*

11 (2) This Part does not apply in relation to credit assistance provided by
12 a licensee to a consumer in relation to an investment credit
13 contract.

14 Note: Part 3-2E has special responsible lending rules that apply to licensees
15 that provide credit assistance to consumers in relation to protected
16 investment credit contracts.

17 **12 Section 125 (at the end of the first paragraph)**

18 Add “However, these rules do not apply in some circumstances (see
19 section 125A).”.

20 **13 After section 125**

21 Insert:

22 **125A When this Part does not apply**

23 *Investment credit contracts*

24 (1) This Part does not apply in relation to a licensee that is a credit
25 provider under an investment credit contract.

26 Note: Part 3-2E has special responsible lending rules that apply to licensees
27 that are credit providers under protected investment credit contracts.

28

<i>Comment</i>

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Investment lending **Schedule 3**
Other amendments **Part 2**

The effect of the proposed amendments in sections 112A and 125A is that the current responsible lending obligations in Chapter 3 of the National Consumer Credit Protection Act 2009 would not apply to investment credit contracts.

Instead modified responsible lending obligations would apply as set out in proposed Part 3-2E. The operation of this part is discussed below.

1 **14 Paragraph 133(1)(b)**

2 Omit “wholly or”.

3 **15 Section 133A (at the end of the first paragraph)**

4 Add “However, it does not apply in some circumstances (see
5 section 133AAA).”.

6 **16 After section 133A**

7 Insert:

8 **133AAA When this Part does not apply**

9 *Protected investment credit contracts*

10 (1) This Part does not apply in relation to a licensee that is a credit
11 provider under a protected investment credit contract.

12 Note: Part 3-2E has special responsible lending rules that apply to credit
13 providers under protected investment credit contracts.

14 **17 Section 133B (at the end of the first paragraph)**

15 Add “However, it does not apply in some circumstances (see
16 section 133BAA).”.

17 **18 After section 133B**

18 Insert:

19 **133BAA When this Part does not apply**

20 *Protected investment credit contracts*

21 (1) This Part does not apply in relation to a licensee that is a credit
22 provider under a protected investment credit contract.

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Schedule 3 Investment lending

Part 2 Other amendments

1 Note: Part 3-2E has special responsible lending rules that apply to credit
2 providers under protected investment credit contracts.

3 **19 Section 133C (at the end of the first paragraph)**

4 Add “However, it does not apply in some circumstances (see
5 section 133CAA).”.

6 **20 After section 133C**

7 Insert:

8 **133CAA When this Part does not apply**

9 *Protected investment credit contracts*

10 (1) This Part does not apply in relation to a licensee that is a credit
11 provider under a protected investment credit contract.

12 Note: Part 3-2E has special responsible lending rules that apply to credit
13 providers under protected investment credit contracts.

14 **21 Section 133DA (at the end of the first paragraph)**

15 Add “However, these rules do not apply in some circumstances (see
16 section 133DAA).”.

17 **22 After section 133DA**

18 Insert:

19 **133DAA When this Part does not apply**

20 *Protected investment credit contracts*

21 (1) This Part does not apply in relation to a licensee that is a credit
22 provider under a protected investment credit contract.

23 Note: Part 3-2E has special responsible lending rules that apply to credit
24 providers under protected investment credit contracts.

25 **23 After Part 3-2D**

26 Insert:

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1 **Part 3-2E—Protected investment credit contracts**

2 **Division 1—Introduction**

3 **133EA Guide to this Part**

4 This Part has rules that apply to licensees that provide credit
5 assistance for, or are credit providers under, certain types of
6 investment credit contracts, called “protected investment credit
7 contracts”. These rules are more limited than the responsible
8 lending rules in Parts 3-1, 3-2, 3-2A, 3-2B, 3-2C or 3-2D that apply
9 to other types of credit contracts.

10 There are 2 types of protected investment credit contracts—
11 regulated product (home secured) investment credit contracts and
12 unregulated product investment credit contracts (see
13 section 133EB). Some of these rules only apply to unregulated
14 product investment credit contracts.

15 All of these rules are aimed at better informing consumers and
16 preventing them from being in unsuitable protected investment
17 credit contracts.

18 Division 2 deals with licensees that provide credit assistance for
19 protected investment credit contracts. It requires them to give the
20 consumer a quote before providing credit assistance. It also
21 requires them to make inquiries and it prohibits them from
22 providing credit assistance if the contract will be unsuitable for the
23 consumer.

24 Division 3 deals with licensees that are credit providers under
25 protected investment credit contracts. It requires them to make
26 inquiries and also prohibits them from entering into, or increasing
27 the credit limit of, a protected investment credit contract if the
28 contract is unsuitable for the consumer.

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1 **133EB Application of this Part to protected investment credit**
2 **contracts**

3 *Application of this Part*

- 4 (1) This Part only applies in relation to investment credit contracts that
5 are protected investment credit contracts.

6 *Meaning of investment credit contract*

- 7 (2) A credit contract is an *investment credit contract* if, when the
8 contract is entered into, the credit is provided or is intended to be
9 provided predominantly for investment purposes, other than:
10 (a) to purchase, renovate or improve residential property for
11 investment purposes; or
12 (b) to refinance credit that has been provided predominantly to
13 purchase, renovate or improve residential property for
14 investment purposes.
- 15 (3) For the purposes of subsection (2), credit is provided
16 predominantly for investment purposes (other than those referred
17 to in paragraph (2)(a) or (b)) if:
18 (a) more than half of the credit is intended to be used for those
19 investment purposes; or
20 (b) in the case where the credit is intended to be used to obtain
21 goods or services for use for different purposes—the goods
22 or services are intended to be most used for those investment
23 purposes.

24 *Meaning of protected investment credit contract*

- 25 (4) An investment credit contract is a *protected investment credit*
26 *contract* if:
27 (a) when the contract is entered into, the credit that is provided
28 for investment purposes is provided predominantly for one or
29 more of the following purposes:
30 (i) for the purposes of the consumer acquiring a financial
31 product from a person who is not prohibited from
32 providing that product under the *Corporations Act*
33 *2001*;

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- 1 (ii) for the purposes of the consumer acquiring a financial
2 product from a person who is prohibited from providing
3 that product under the *Corporations Act 2001*;
4 (iii) for the purposes of the consumer acquiring a product
5 that is not a financial product; and
6 (b) in the case where the credit that is provided for investment
7 purposes is provided predominantly or partly for the purposes
8 referred to in subparagraph (a)(i)—the consumer’s
9 obligations under the contract are or will be secured by a
10 mortgage over the consumer’s principal place of residence.

- 11 (5) For the purposes of paragraph (4)(a), credit is provided
12 predominantly for the purposes referred to in
13 subparagraph (4)(a)(i), (ii) or (iii) if:
14 (a) more than half of the credit provided for investment purposes
15 is intended to be used for one or more of those purposes; or
16 (b) in the case where the credit is intended to be used to obtain
17 goods or services for use for different purposes—the goods
18 or services are intended to be most used for one or more of
19 those purposes.

20 *Meaning of regulated product (home-secured) investment credit*
21 *contract*

- 22 (6) A protected investment credit contract is a ***regulated product***
23 ***(home-secured) investment credit contract*** if, when the contract is
24 entered into:
25 (a) the credit that is provided for the investment purposes
26 referred to in paragraph (4)(a) is provided predominantly for
27 the purposes referred to in subparagraph (4)(a)(i); and
28 (b) the consumer’s obligations under the contract are or will be
29 secured by a mortgage over the consumer’s principal place of
30 residence.

- 31 (7) For the purposes of paragraph (6)(a), credit is provided
32 predominantly for the purposes referred to in
33 subparagraph (4)(a)(i) if:
34 (a) more than half of the credit provided for investment purposes
35 is intended to be used for those purposes; or

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- 1 (b) in the case where the credit is intended to be used to obtain
2 goods or services for use for different purposes—the goods
3 or services are intended to be most used for those purposes.

4 *Meaning of unregulated product investment credit contract*

- 5 (8) A protected investment credit contract is an ***unregulated product***
6 ***investment credit contract*** if, when the contract is entered into:
7 (a) the credit that is provided for the investment purposes
8 referred to in paragraph (4)(a) is provided predominantly for
9 either or both of the purposes referred to in
10 subparagraph (4)(a)(ii) or (iii); and
11 (b) any requirements prescribed by the regulations in relation to
12 the contract are satisfied.
- 13 (9) For the purposes of paragraph (8)(a), credit is provided
14 predominantly for the purposes referred to in
15 subparagraph (4)(a)(ii) or (iii) if:
16 (a) more than half of the credit provided for investment purposes
17 is intended to be used for either or both of those purposes; or
18 (b) in the case where the credit is intended to be used to obtain
19 goods or services for use for different purposes—the goods
20 or services are intended to be most used for either or both of
21 those purposes.
22

Questions

Part 3-2E applies specific responsible lending obligations to protected investment credit contracts. These reforms are to address two particular classes of transactions that have particular risks for consumers:

- *Loans secured over the family home where the borrower does not appreciate that if the investment does not generate the expected returns, they will need to meet the repayments from other resources and may be at risk of losing their home, depending on their overall financial position.*
- *Loans to finance investments in products being offered illegally, by a person who does not hold an Australian Financial Services Licence (where there is a consequent risk the entire investment proceeds will be lost by the consumer).*

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The Bill addresses each situation through different responsible lending obligations, with the consequent introduction of two classes of protected contracts. The two classes are:

- *Regulated product (home-secured) investment credit contracts (see subsection 133EB(6)): defined as contracts:*
 - *where the predominant use of the credit is to invest in a financial product offered by a person who is the holder of an Australian Financial Services Licence (or otherwise authorised by the Corporations Act 2001) – see subparagraph 133EB(4)(a)(i); and*
 - *where the debt is secured by a mortgage over the consumer’s principal place of residence.*
- *Unregulated product investment credit contracts (see subsection 133EB(8)): defined as contracts where the predominant use of the credit is to acquire:*
 - *a financial product being offered illegally; or*
 - *a product that is not a financial product (such as artwork or a commercial property).*
 - *The definition in subparagraphs 133EB(4)(a)(ii) and (iii) covers all products offered by persons not authorised by the Corporations Act 2001 on the basis that credit providers and providers of credit services will not always be able to readily determine whether a product is being offered illegally.*

Stakeholders’ views are sought on these definitions

Paragraph 133EB(8)(b) provides that an unregulated product investment credit contract is a contract which satisfies any requirements prescribed by the regulations.

It is proposed to further restrict the definition of unregulated product investment credit contracts so that it only covers contracts where there were commission or other financial arrangements creating a risk of conflicted advice in the distribution chain between the provider of the financial product

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and the credit provider.

By way of example, it is proposed to include contracts where a person who does not hold an Australian Financial Services licence may pay higher commissions than other providers of investment products to obtain access to distribution networks. However, it is intended to exclude contracts where the consumer approaches the credit provider directly or independently.

The commission or financial arrangements could be between:

- the credit provider and the provider of the investment product; or*
- a provider of credit services and the provider of the investment products.*

Stakeholders' views are sought on the extent to which these practices can be readily identified by the parties to the transaction, and whether the criteria to identify linked credit transactions in Part 7 of the National Credit Code would provide a possible model for defining the relevant relationships.

1 **Division 2—Licensees that provide credit assistance for**
2 **protected investment credit contracts**

3

Comment

Division 2 applies responsible lending obligations to providers of credit assistance, but only in relation to protected investment credit contracts.

The provisions follow the model in the National Consumer Credit Protection Act 2009:

- Obligation to make inquiries (section 133ED); cp section 115.*
- Scope of inquiries defined (section 133EE); cp section 117.*
- Prohibition on suggesting, or assisting with, unsuitable contracts (section 133EF); cp section 123.*
- Prohibition on suggesting to consumers to remain in unsuitable*

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contracts (section 133EI); cp section 124.

The inquiries that need to be made are discussed in more detail below.

Subdivision A—Obligation to give quote for providing credit assistance

133EC Obligation to give quote for providing credit assistance

Requirement to give quote

- (1) A licensee must not provide credit assistance to a consumer by:
- (a) suggesting that the consumer apply, or assisting the consumer to apply, for a particular protected investment credit contract with a particular credit provider; or
 - (b) suggesting that the consumer apply, or assisting the consumer to apply, for an increase to the credit limit of a particular protected investment credit contract with a particular credit provider; or
 - (c) suggesting that the consumer remain in a particular protected investment credit contract with a particular credit provider;
- unless:
- (d) the licensee has given the consumer a quote in accordance with subsection (2); and
 - (e) the consumer has signed and dated that quote or otherwise indicated the consumer's acceptance of it (and the day that happens) in the manner (if any) prescribed by the regulations; and
 - (f) the licensee has given the consumer a copy of the accepted quote.

Civil penalty: 2,000 penalty units.

- (2) The quote must:
- (a) be in writing; and
 - (b) give information about the credit assistance and other services that the quote covers; and
 - (c) specify the maximum amount that will be payable by the consumer to the licensee in relation to the licensee's credit assistance and other services; and

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- 1 (d) give information about what that amount relates to,
2 including:
3 (i) the maximum amount of the licensee's fee for providing
4 the credit assistance and other services; and
5 (ii) the maximum amount of charges that will be incurred
6 by the licensee for matters associated with providing the
7 credit assistance and other services; and
8 (iii) the maximum amount of fees or charges that will be
9 payable by the licensee to another person on the
10 consumer's behalf; and
11 (e) state whether the maximum amount or any other amount will
12 be payable by the consumer to the licensee if a protected
13 investment credit contract is not entered into or a credit limit
14 is not increased; and
15 (f) give information about:
16 (i) any commissions that the licensee, or an employee,
17 director or credit representative of the licensee, is likely
18 to receive, directly or indirectly, in relation to the
19 protected investment credit contract; and
20 (ii) a reasonable estimate of the amounts of those
21 commissions or the range of those amounts; and
22 (iii) the method for working out those amounts; and
23 (g) comply with any other requirements prescribed by the
24 regulations.

25 *Manner of giving quote*

- 26 (3) The licensee must give the quote to the consumer in the manner (if
27 any) prescribed by the regulations.

28 *No demanding payment of amount exceeding quoted amount*

- 29 (4) The licensee must not request or demand payment of an amount
30 that exceeds the maximum amount set out in the quote.

31 Civil penalty: 2,000 penalty units.

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1 *No demanding payment before credit assistance provided*

2 (5) The licensee must not request or demand payment of an amount for
3 the licensee's credit assistance before the licensee provides the
4 assistance.

5 Civil penalty: 2,000 penalty units.

6 *Caveats*

7 (6) The licensee must not lodge, or threaten to lodge, a caveat in
8 relation to land to induce the consumer to pay an amount to the
9 licensee for the licensee's credit assistance or other services.

10 Civil penalty: 2,000 penalty units.

11

Questions

This provision is based on section 114 of the National Consumer Credit Protection Act 2009. Stakeholders' views are sought on the nature and extent of the disclosure requirements, including whether there are any particular practices in relation to intermediaries charging fees or receiving commissions in respect of investment products that warrant the introduction of additional disclosure obligations.

The obligation to provide a quote only applies to providers of credit assistance. Stakeholders' views are sought on whether it should apply to intermediaries as well.

12 **Subdivision B—Obligation to make inquiries and verify**

13

Questions

Section 133EE imposes a requirement to make inquiries as part of the responsible lending obligations that apply to protected investment credit contracts.

Different obligations apply according to the nature of the underlying investment and whether the credit contract is therefore a regulated product (home-secured) investment credit contract or an unregulated product

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investment credit contract. This distinction is drawn as financial products offered by persons authorised by the Corporations Act 2001 are already subject to significant regulation.

If the contract is an unregulated product investment credit contract then the obligation is to make inquiries into:

- *the consumer's requirements and objectives;*
- *whether the consumer is prepared to lose ownership of their residence where it is security for the debt should they be unable to meet the repayments under the contract;*
- *reasonable inquiries about the consumer's financial situation; and*
- *reasonable verification of the consumer's financial situation.*

If the contract is a regulated product (home-secured) investment then the obligation is to only make inquiries into:

- *the consumer's requirements and objectives; and*
- *whether the consumer is prepared to lose ownership of their (secured) residence should they be unable to meet the repayments under the contract.*

The provider of credit assistance is required to make inquiries into whether the consumer is prepared to lose ownership of their (secured) residence should they be unable to meet the repayments under the contract. The obligations has been framed in this way in order to allow borrowers to use their home as security where they aware of, and have acknowledged, the risk of losing their residence.

Stakeholders' views are sought on the nature of the proposed inquiries in respect of each class of investment contracts, including whether the obligation in relation to making inquiries in respect of the borrower's residence is appropriately framed.

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133ED Obligation to make inquiries and verify

- (1) A licensee must not provide credit assistance to a consumer on a day by:
- (a) suggesting that the consumer apply, or assisting the consumer to apply, for a particular protected investment credit contract with a particular credit provider; or
 - (b) suggesting that the consumer apply, or assisting the consumer to apply, for an increase to the credit limit of a particular protected investment credit contract with a particular credit provider;

unless the licensee has, within 90 days (or other period prescribed by the regulations) before that day, made the inquiries and verification in accordance with section 133EE.

Civil penalty: 2,000 penalty units.

- (2) A licensee must not provide credit assistance to a consumer on a day by suggesting that the consumer remain in a particular protected investment credit contract with a particular credit provider unless the licensee has, within 90 days (or other period prescribed by the regulations) before that day, made the inquiries and verification in accordance with section 133EE.

Civil penalty: 2,000 penalty units.

133EE The inquiries and verification that must be made

- (1) For the purposes of subsection 133ED(1) or (2), the licensee must:
- (a) make reasonable inquiries about the consumer's requirements and objectives in relation to the contract; and
 - (b) if the consumer's obligations under the contract are or will be secured by a mortgage over the consumer's principal place of residence—inquire whether the consumer is prepared to lose ownership of that residence should the consumer be unable to comply with the consumer's financial obligations under the contract; and
 - (c) make reasonable inquiries about the consumer's financial situation; and
 - (d) take reasonable steps to verify the consumer's financial situation; and

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1 (e) make any inquiries prescribed by the regulations about any
2 matter prescribed by the regulations; and

3 (f) take any steps prescribed by the regulations to verify any
4 matter prescribed by the regulations.

5 Civil penalty: 2,000 penalty units.

6 (2) The regulations may prescribe particular inquiries or steps that
7 must be made or taken, or do not need to be made or taken, for the
8 purposes of paragraph (1)(a), (b), (c) or (d).

9 *Modification for particular contracts*

10 (3) If the contract is a regulated product (home-secured) investment
11 credit contract, then disregard paragraphs (1)(c), (d), (e) and (f).

12 **Subdivision C—Obligation to disclose fees, commissions etc.**

13 **133EF Fees, commissions etc.**

14 *Requirement for disclosure*

15 (1) A licensee must, at the same time as providing credit assistance to
16 a consumer by:

17 (a) suggesting that the consumer apply, or assisting the consumer
18 to apply, for a particular protected investment credit contract
19 with a particular credit provider; or

20 (b) suggesting that the consumer apply, or assisting the consumer
21 to apply, for an increase to the credit limit of a particular
22 protected investment credit contract with a particular credit
23 provider; or

24 (c) suggesting that the consumer remain in a particular protected
25 investment credit contract with a particular credit provider;

26 give the consumer a credit proposal disclosure document in
27 accordance with subsection (2).

28 Civil penalty: 2,000 penalty units.

29 (2) The credit proposal disclosure document must contain the
30 following:

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- 1 (a) the total amount of any fees or charges that the consumer is
2 liable to pay to the licensee in relation to the contract and the
3 method used for working out that amount;
- 4 (b) a reasonable estimate of the total amount of any commissions
5 that the licensee, or an employee, director or credit
6 representative of the licensee, is likely to receive in relation
7 to the contract and the method used for working out that
8 amount;
- 9 (c) a reasonable estimate of the total amount of any fees or
10 charges that the consumer is likely to be liable to pay to the
11 credit provider in relation to applying for the contract;
- 12 (d) a reasonable estimate of the total amount of any fees or
13 charges that the consumer is likely to be liable to pay to any
14 other person in relation to applying for the contract;
- 15 (e) if the credit is to be used to pay any of the amounts in the
16 above paragraphs—a reasonable estimate of the likely
17 amount of credit that will be available to the consumer after
18 payments under paragraphs (a), (c) and (d) are made.
- 19 (3) For the purposes of paragraph (2)(b), the regulations may
20 prescribe:
- 21 (a) the method for working out amounts of commissions; and
22 (b) how amounts of commissions must be described.

23 *Manner of giving credit proposal disclosure document*

- 24 (4) The licensee must give the credit proposal disclosure document to
25 the consumer in the manner (if any) prescribed by the regulations.

26 **133EG No profiting from fees etc. paid to third parties**

27 *Requirement not to profit*

- 28 (1) If, in the course of providing credit assistance to a consumer in
29 relation to a protected investment credit contract, a licensee pays
30 an amount (the *third party amount*) to another person on behalf of
31 the consumer, the licensee must not request or demand payment of
32 an amount, as reimbursement for the third party amount, that
33 exceeds the third party amount.

34 Civil penalty: 2,000 penalty units.

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1 *Offence*

- 2 (2) A person commits an offence if:
- 3 (a) the person is subject to a requirement under subsection (1);
- 4 and
- 5 (b) the person engages in conduct; and
- 6 (c) the conduct contravenes the requirement.

7 Criminal penalty: 25 penalty units, or 6 months imprisonment,

8 or both.

9 **Subdivision D—Prohibition on suggesting, or assisting with,**

10 **unsuitable protected investment credit contracts**

11 **133EH Prohibition on suggesting, or assisting with, unsuitable**

12 **contracts**

13 *Prohibition on suggesting, or assisting with, unsuitable contracts*

- 14 (1) A licensee must not provide credit assistance to a consumer by:
- 15 (a) suggesting that the consumer apply, or assisting the consumer
- 16 to apply, for a particular protected investment credit contract
- 17 with a particular credit provider; or
- 18 (b) suggesting that the consumer apply, or assisting the consumer
- 19 to apply, for an increase to the credit limit of a particular
- 20 protected investment credit contract with a particular credit
- 21 provider;
- 22 if the contract will be unsuitable for the consumer under
- 23 subsection (2).

24 Civil penalty: 2,000 penalty units.

25 *When the contract will be unsuitable*

- 26 (2) The contract will be unsuitable for the consumer if, at the time the
- 27 licensee provides the credit assistance, it is likely that:
- 28 (a) the consumer will be unable to comply with the consumer's
- 29 financial obligations under the contract, or could only comply
- 30 with substantial hardship; or
- 31 (b) the contract will not meet the consumer's requirements or
- 32 objectives; or

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- 1 (c) if the consumer's obligations under the contract are or will be
2 secured by a mortgage over the consumer's principal place of
3 residence—the consumer is not prepared to lose ownership of
4 that residence should the consumer be unable to comply with
5 the consumer's financial obligations under the contract; or
6 (d) if the regulations prescribe circumstances in which a
7 protected investment credit contract is unsuitable—those
8 circumstances will apply to the contract;
9 if the contract is entered into in the period proposed for it to be
10 entered into, or the credit limit is increased in the period proposed
11 for it to be increased.

12 *Information to be used to determine if contract will be unsuitable*

- 13 (3) For the purposes of determining under subsection (2) whether the
14 contract will be unsuitable, only information that satisfies both of
15 the following paragraphs is to be taken into account:
16 (a) the information is about a matter that the licensee is required
17 to make inquiries about or verify under section 133EE;
18 (b) at the time the licensee provides the credit assistance:
19 (i) the licensee had reason to believe that the information
20 was true; or
21 (ii) the licensee would have had reason to believe that the
22 information was true if the licensee had made the
23 inquiries or verification that the licensee was required to
24 make under section 133EE.

25 *Modification for particular contracts*

- 26 (4) If the credit contract is a regulated product (home-secured)
27 investment credit contract, then, for the purposes of determining
28 under subsection (2) whether the contract will be unsuitable,
29 disregard paragraphs (2)(a) and (d).

30 *Contract not unsuitable under regulations*

- 31 (5) The regulations may prescribe particular situations in which a
32 protected investment credit contract is taken not to be unsuitable
33 for a consumer, despite subsection (2).

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1

Offence

2

(6) A person commits an offence if:

3

(a) the person is subject to a requirement under subsection (1);

4

and

5

(b) the person engages in conduct; and

6

(c) the conduct contravenes the requirement.

7

Criminal penalty: 100 penalty units, or 2 years imprisonment, or
8 both.

9

133EI Prohibition on suggesting to consumers to remain in unsuitable contracts

10

11

Prohibition on suggesting to remain in unsuitable contracts

12

(1) A licensee must not provide credit assistance to a consumer by suggesting that the consumer remain in a particular protected investment credit contract with a particular credit provider if the contract is unsuitable for the consumer under subsection (2).

13

14

15

16

Civil penalty: 2,000 penalty units.

17

When the contract is unsuitable

18

(2) The contract is unsuitable for the consumer if, at that time the licensee provides the credit assistance:

19

20

(a) the consumer is, or is likely to be, unable to comply with the consumer's financial obligations under the contract, or only able to comply with substantial hardship; or

21

22

23

(b) the contract does not meet the consumer's requirements or objectives; or

24

25

(c) if the consumer's obligations under the contract are secured by a mortgage over the consumer's principal place of residence—the consumer is not prepared to lose ownership of that residence should the consumer be unable to comply with the consumer's financial obligations under the contract; or

26

27

28

29

30

(d) if the regulations prescribe circumstances in which a protected investment credit contract is unsuitable—those circumstances apply to the contract.

31

32

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1

Information to be used to determine if contract is unsuitable

2

- (3) For the purposes of determining under subsection (2) whether the contract is unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:

3

4

5

- (a) the information is about a matter that the licensee is required to make inquiries about or verify under section 133EE;

6

7

- (b) at the time the licensee provides the credit assistance:

8

9

- (i) the licensee had reason to believe that the information was true; or

10

11

12

13

- (ii) the licensee would have had reason to believe that the information was true if the licensee had made the inquiries or verification that the licensee was required to make under section 133EE.

14

Modification for particular contracts

15

- (4) If the credit contract is a regulated product (home-secured) investment credit contract, then, for the purposes of determining under subsection (2) whether the contract is unsuitable, disregard paragraphs (2)(a) and (d).

16

17

18

19

Contract not unsuitable under regulations

20

- (5) The regulations may prescribe particular situations in which a protected investment credit contract is taken not to be unsuitable for a consumer, despite subsection (2).

21

22

23

Offence

24

- (6) A person commits an offence if:

25

26

27

28

- (a) the person is subject to a requirement under subsection (1);
and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

29

30

Criminal penalty: 100 penalty units, or 2 years imprisonment, or both.

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1

Defence

2

- (7) For the purposes of subsections (1) and (6), it is a defence if the licensee suggested that the consumer remain in the protected investment credit contract because, after making reasonable inquiries, the licensee reasonably believed that there was no other protected investment credit contract that was not unsuitable for the consumer.

3

4

5

6

7

8

Note: For the purposes of subsection (6), a defendant bears an evidential burden in relation to the matter in subsection (7) (see subsection 13.3(3) of the *Criminal Code*).

9

10

11

- (8) For the purposes of subsection (7), the regulations may prescribe particular inquiries that must be made, or do not need to be made.

12

13

Division 3—Licensees that are credit providers under protected investment credit contracts

14

15

Comment

Division 3 applies responsible lending obligations to credit providers, but only in relation to protected investment credit contracts.

The provisions follow the model in the National Consumer Credit Protection Act 2009:

- *Obligation to make inquiries (section 133EJ); cp section 128.*
- *Scope of inquiries defined (section 133EK); cp section 130.*
- *Prohibition on entering into or increasing the credit limit of unsuitable contracts (section 133EL); cp section 133.*

The inquiries that need to be made are discussed in more detail below.

16

133EJ Obligation to make inquiries and verify

17

A licensee that is a credit provider must not:

18

- (a) enter into a protected investment credit contract with a consumer who will be the debtor under the contract; or

19

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- 1 (b) increase the credit limit of a protected investment credit
2 contract with a consumer who is the debtor under the
3 contract;
4 on a day unless the licensee has, within 90 days (or other period
5 prescribed by the regulations) before that day, made the inquiries
6 and verification in accordance with section 133EK.
7 Civil penalty: 2,000 penalty units.

8 **133EK The inquiries and verification that must be made**

9 *Requirement to make inquiries*

- 10 (1) For the purposes of section 133EJ, the licensee must:
11 (a) make reasonable inquiries about the consumer's requirements
12 and objectives in relation to the contract; and
13 (b) if the consumer's obligations under the contract are or will be
14 secured by a mortgage over the consumer's principal place of
15 residence—inquire whether the consumer is prepared to lose
16 ownership of that residence should the consumer be unable to
17 comply with the consumer's financial obligations under the
18 contract; and
19 (c) make reasonable inquiries about the consumer's financial
20 situation; and
21 (d) take reasonable steps to verify the consumer's financial
22 situation; and
23 (e) make any inquiries prescribed by the regulations about any
24 matter prescribed by the regulations; and
25 (f) take any steps prescribed by the regulations to verify any
26 matter prescribed by the regulations.

27 Civil penalty: 2,000 penalty units.

- 28 (2) The regulations may prescribe particular inquiries or steps that
29 must be made or taken, or do not need to be made or taken, for the
30 purposes of paragraph (1)(a), (b), (c) or (d).

31 *Modification for particular contracts*

- 32 (3) If the contract is a regulated product (home-secured) investment
33 credit contract, then disregard paragraphs (1)(c), (d), (e) and (f).

EXPOSURE-DRAFT

Schedule 3 Investment lending

Part 2 Other amendments

1

Question

Section 133EK imposes a requirement to make inquiries as part of the responsible lending obligations that apply to protected investment credit contracts.

Different obligations apply according to the nature of the underlying investment and whether the credit contract is therefore a regulated product (home-secured) investment credit contract or an unregulated product investment credit contract. This distinction is drawn as financial products offered by persons authorised by the Corporations Act 2001 are already subject to significant regulation.

If the contract is an unregulated product investment credit contract then the obligation is to make inquiries into:

- the consumer's requirements and objectives;*
- whether the consumer is prepared to lose ownership of their residence where it is security for the debt should they be unable to meet the repayments under the contract;*
- reasonable inquiries about the consumer's financial situation; and*
- reasonable verification of the consumer's financial situation.*

If the contract is a regulated product (home-secured) investment then the obligation is to only make inquiries into:

- the consumer's requirements and objectives; and*
- whether the consumer is prepared to lose ownership of their (secured) residence should they be unable to meet the repayments under the contract.*

The provider of credit assistance is required to make inquiries into whether the consumer is prepared to lose ownership of their (secured) residence should they be unable to meet the repayments under the contract. The obligations has been framed in this way in order to allow borrowers to use

EXPOSURE-DRAFT

Investment lending **Schedule 3**
Other amendments **Part 2**

their home as security where they are aware of, and have acknowledged, the risk of losing their residence.

Stakeholders' views are sought on the nature of the proposed inquiries in respect of each class of investment contracts, including whether the obligation in relation to making inquiries in respect of the borrower's residence is appropriately framed.

1 **133EL Prohibition on entering, or increasing the credit limit of,**
2 **unsuitable contracts**

3 *Prohibition on entering etc. unsuitable contracts*

4 (1) A licensee that is a credit provider must not:

- 5 (a) enter into a protected investment credit contract with a
6 consumer who will be the debtor under the contract; or
7 (b) increase the credit limit of a protected investment credit
8 contract with a consumer who is the debtor under the
9 contract;

10 if the contract is unsuitable for the consumer under subsection (2).

11 Civil penalty: 2,000 penalty units.

12 *When the contract is unsuitable*

13 (2) The contract is unsuitable for the consumer if, at the time it is
14 entered into or the credit limit is increased:

- 15 (a) it is likely that the consumer will be unable to comply with
16 the consumer's financial obligations under the contract, or
17 could only comply with substantial hardship; or
18 (b) the contract does not meet the consumer's requirements or
19 objectives; or
20 (c) if the consumer's obligations under the contract are or will be
21 secured by a mortgage over the consumer's principal place of
22 residence—the consumer is not prepared to lose ownership of
23 that residence should the consumer be unable to comply with
24 the consumer's financial obligations under the contract; or
25 (d) if the regulations prescribe circumstances in which a credit
26 contract is unsuitable—those circumstances apply to the
27 contract.

EXPOSURE-DRAFT

Schedule 3 Investment lending

Part 2 Other amendments

1 *Information to be used to determine if contract will be unsuitable*

- 2 (3) For the purposes of determining under subsection (2) whether the
3 contract will be unsuitable, only information that satisfies both of
4 the following paragraphs is to be taken into account:
- 5 (a) the information is about a matter that the licensee is
6 required to make inquiries about or verify under
7 section 133EK;
 - 8 (b) at the time of the contract is entered into or the credit limit is
9 increased:
 - 10 (i) the licensee had reason to believe that the information
11 was true; or
 - 12 (ii) the licensee would have had reason to believe that the
13 information was true if the licensee had made the
14 inquiries or verification that the licensee was required to
15 make under section 133EK.

16 *Modification for particular contracts*

- 17 (4) If the credit contract is a regulated product (home-secured)
18 investment credit contract, then, for the purposes of determining
19 under subsection (2) whether the contract will be unsuitable,
20 disregard paragraphs (2)(a) and (d).

21 *Contract not unsuitable under regulations*

- 22 (5) The regulations may prescribe particular situations in which a
23 protected investment credit contract is taken not to be unsuitable
24 for a consumer, despite subsection (2).

25 *Offence*

- 26 (6) A person commits an offence if:
- 27 (a) the person is subject to a requirement under subsection (1);
 - 28 and
 - 29 (b) the person engages in conduct; and
 - 30 (c) the conduct contravenes the requirement.

31 Criminal penalty: 100 penalty units, or 2 years imprisonment, or
32 both.

EXPOSURE-DRAFT

Investment lending **Schedule 3**
Other amendments **Part 2**

133EM Involvement in contraventions of the Corporations Act

If:

- (a) a licensee that is a credit provider either:
 - (i) enters into a protected investment credit contract with a consumer who will be the debtor under the contract; or
 - (ii) increases the credit limit of a protected investment credit contract with a consumer who is the debtor under the contract; and
- (b) the consumer's obligations under the contract are or will be secured by a mortgage over the consumer's principal place of residence; and
- (c) the consumer uses the credit provided under the contract wholly or partly to acquire a financial product from a person; and
- (d) the person contravenes section 911A or 911B of the *Corporations Act 2001* (requirement to hold an Australian financial services licence) in relation to providing the financial product to the consumer;

then the licensee must not be involved in that contravention.

Civil penalty: 2,000 penalty units.

24 At the end of section 179

Add:

(8) If:

- (a) the defendant is a credit provider who has contravened section 133EM; and
- (b) the plaintiff, or ASIC on behalf of the plaintiff, applies for an order under this section to let the plaintiff reside in the plaintiff's place of residence to prevent or reduce loss or damage suffered, or likely to be suffered, by the plaintiff vacating the place;

then, without limiting the powers of the court under this section, the court must consider the order appropriate to prevent or reduce the loss or damage and make the order unless the court is satisfied that the order would adversely affect a person other than the debtor and the defendant.

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Schedule 3 Investment lending

Part 2 Other amendments

Comment

The effect of section 133EM and the amendment to section 179 is to introduce a presumption that a court should make an order against a credit provider enabling a consumer to remain in their place of residence where:

- credit is used to acquire a financial product from a person; and*
- the credit provider is knowingly involved in a contravention of section 911A or section 911B of the Corporations Act (that is, the requirement to hold an Australian financial services licence).*

Section 133EM refers to a contravention of section 911A or section 911B of the Corporations Act. This approach provides, in practice, for a specific remedy in the National Consumer Credit Protection Act where a person contravenes section 911A or 911B of the Corporations Act, but does not alter the substantive elements of the offence between the different provisions in each Act.

1 **25 Subsection 13(2)**

2 Omit “wholly or” (wherever occurring).

3 **26 Subsection 13(3)**

4 Omit “wholly or”.

5 **27 Paragraph 170(1)(a) of the *National Credit Code***

6 Repeal the paragraph, substitute:

7 (a) the goods are hired predominantly for one or more of the
8 following purposes:

- 9 (i) personal purposes;
10 (ii) domestic purposes;
11 (iii) household purposes; and

12 **28 Subsection 170(4) of the *National Credit Code***

13 Repeal the subsection, substitute:

EXPOSURE-DRAFT

Investment lending **Schedule 3**
Other amendments **Part 2**

1 *Purposes for which goods are hired*

- 2 (4) For the purposes of this Part, goods are hired predominantly for
3 personal, domestic or household purposes if:
4 (a) more than half of the goods are intended to be used for one or
5 more of those purposes; or
6 (b) in the case where the same goods are intended to be used for
7 different purposes—the goods are intended to be most used
8 for one or more of those purposes.

9 **29 After section 203B of the *National Credit Code***

10 Insert:

11 **203C Exemptions for investment credit contracts**

12 The following provisions do not apply in relation to investment
13 credit contracts:

- 14 (a) sections 14 to 75;
15 (b) section 82 to 168.

16

Comment

The effect of this provision is that the unjust contract provisions in sections 76 to 81 of the National Credit Code apply to all investment credit contracts. The remaining provisions in the Code will not apply to investment credit contracts (other than definitions and machinery provisions).

17 **30 Subsection 204(1) of the *National Credit Code***

18 Insert:

19 *investment credit contract* has the same meaning as in subsection
20 133EB(2) of the National Credit Act.

21

EXPOSURE-DRAFT

Schedule 4 Private lending

Part 1 Main amendments

1 **Schedule 4—Private lending**

2 **Part 1—Main amendments**

3 *National Consumer Credit Protection Act 2009*

4 **1 Paragraph 5(1)(d) of the *National Credit Code***

5 Repeal the paragraph, substitute:

6 (d) either or both of the following apply:

- 7 (i) the credit provider provides, or will provide, the credit
8 in the course of, as part of or incidentally to, a business
9 carried on in this jurisdiction by the credit provider;
- 10 (ii) a person acts as an intermediary between the credit
11 provider and the debtor in relation to the contract.

12 **2 Subsection 5(2) of the *National Credit Code***

13 Repeal the subsection.

14 **3 Paragraph 170(1)(c) of the *National Credit Code***

15 Repeal the paragraph, substitute:

16 (c) either or both of the following apply:

- 17 (i) the lessor hires the goods in the course of, as part of or
18 incidentally to, a business carried on by the lessor in this
19 jurisdiction;
- 20 (ii) a person acts as an intermediary between the lessor and
21 the lessee in relation to the lease.
- 22

Comment

The amendments to sections 5 and 170 of the Code extend the definition of regulated contracts to include respectively credit contracts and consumer leases where the credit provider or lessor:

- *is a private individual who is not in the business of providing credit or consumer leases;*
 - *where the contract is arranged by an intermediary (rather than directly between the credit provider or lessor and the consumer).*
-

EXPOSURE-DRAFT

Private lending **Schedule 4**
Main amendments **Part 1**

It is proposed that regulations will modify the licensing obligations for private credit provider similar to the model already in place in respect of special purpose funding entities (see Credit Regulations 23B and 23C, and Schedule 3 – Modifications - special purpose funding entity).

A draft of these regulations has been circulated for comment with this Bill. In general terms items 16 and 17 in the regulations implement this proposal by:

- Amending the definition of special purpose funding entity to include a ‘credit activity investor’.*
- Introducing a definition of credit activity investor as an individual (or other small entity) who only engages in credit activities as a credit provider or lessor in accordance with a servicing agreement with an intermediary.*

Under this model a credit activity investor would be exempt from the need to hold an Australian credit licence provided:

- They are a member of an ASIC-approved External Dispute Resolution scheme (so that they will be contractually obliged to comply with decisions of the scheme).*
- The intermediary is the holder of an Australian credit licence.*
- There is an agreement between the intermediary and the private credit providers and private lessors.*

A credit contract will therefore still be unregulated where, for example, a private individual who is not in the business of providing credit arranges a credit contract directly with the borrower.

1 **4 Subsection 170(2) of the *National Credit Code***

2 Repeal the subsection.

3

EXPOSURE-DRAFT

Schedule 4 Private lending

Part 2 Other amendments

1 **Part 2—Other amendments**

2 ***National Consumer Credit Protection Act 2009***

3 **5 Paragraphs 9(a) and (b)**

4 Repeal the paragraphs, substitute:

5 (a) acts as an intermediary (whether directly or indirectly)
6 between a credit provider and a consumer wholly or partly
7 for the purposes of:

8 (i) securing a contract between the credit provider and the
9 consumer, being a contract that, if paragraph 5(1)(d) of
10 the National Credit Code were disregarded, would be a
11 credit contract; or

12 (ii) increasing the credit limit of credit contract between the
13 credit provider and the consumer; or

14 (b) acts as an intermediary (whether directly or indirectly)
15 between a lessor and a consumer wholly or partly for the
16 purposes of:

17 (i) securing a lease between the lessor and the consumer,
18 being a lease that, if paragraph 170(1)(c) of the National
19 Credit Code were disregarded, would be a consumer
20 lease; or

21 (ii) extending the term of a consumer lease between the
22 lessor and the consumer.

23 **6 Subsection 204(1) of the *National Credit Code***

24 Insert:

25 ***acts as an intermediary*** has the same meaning as in section 9 of
26 the National Credit Act.
27

EXPOSURE-DRAFT

Consumer leases **Schedule 5**
Main amendments **Part 1**

1 **Schedule 5—Consumer leases**

2 **Part 1—Main amendments**

3 *National Consumer Credit Protection Act 2009*

4 **1 Paragraph 170(1)(b) of the *National Credit Code***

5 Repeal the paragraph, substitute:

6 (b) a charge is or may be made for hiring the goods; and

7 (ba) any of the following apply:

8 (i) the charge for hiring the goods, together with any other
9 amount payable under the consumer lease, exceeds the
10 cash price of the goods;

11 (ii) the lease is a regulated fixed term lease;

12 (iii) the lease is a regulated indefinite lease; and

13 **2 After section 170 of the *National Credit Code***

14 Insert:

15 **170A Regulated fixed term leases and regulated indefinite leases**

16 (1) A consumer lease is a *regulated fixed term lease* if it satisfies the
17 following:

18 (a) the term of the lease is for a fixed period;

19 (b) at the time of entering into the lease, the lessor or a
20 prescribed person has the requisite belief that the lessee
21 wants to use the goods (whether while those goods are hired
22 under the lease or otherwise) for a fixed, minimum or
23 approximate period (the *use period*) that is longer than the
24 term of the lease;

25 (c) if the term of the lease had instead been for the use period,
26 the charge for hiring the goods, together with any other
27 amount payable under the lease, would have exceeded the
28 cash price of the goods.

29 (2) A consumer lease is a *regulated indefinite lease* if it satisfies the
30 following:

31 (a) the term of the lease is for an indefinite period;

EXPOSURE-DRAFT

Schedule 5 Consumer leases

Part 1 Main amendments

- 1 (b) at the time of entering into the lease, the lessor or a
2 prescribed person has the requisite belief that the lessee
3 wants to use the goods (whether while those goods are hired
4 under the lease or otherwise) for a fixed, minimum or
5 approximate period (the *use period*);
- 6 (c) if the term of the lease had instead been for the use period,
7 the charge for hiring the goods, together with any other
8 amount payable under the lease, would have exceeded the
9 cash price of the goods.
- 10 (3) If, at the time of entering into a consumer lease, the lessor or a
11 prescribed person has the requisite belief that the lessee wants to
12 use the goods (whether while those goods are hired under the lease
13 or otherwise) for an indefinite period, then:
- 14 (a) if the term of the lease is for a fixed period—the lease is a
15 *regulated fixed term lease*; and
- 16 (b) if the term of the lease is for an indefinite period—the lease
17 is a *regulated indefinite lease*.
- 18 (4) If:
- 19 (a) a lessee enters into a regulated fixed term lease (the *relevant*
20 *lease*) with the lessor; and
- 21 (b) at the time of entering into the relevant lease, the lessor or a
22 prescribed person has the requisite belief that the lessee
23 wants to use the goods (whether while those goods are hired
24 under the relevant lease or otherwise) for a fixed, minimum
25 or approximate period (the *use period*) that is longer than the
26 term of the relevant lease; and
- 27 (c) during the use period, the lessee enters into one or more
28 consumer leases (the *later lease*) with the lessor; and
- 29 (d) the later lease is:
- 30 (i) for the same goods, or for goods of the same kind, as the
31 relevant lease; and
- 32 (ii) on the same or similar terms as the relevant lease;
- 33 then:
- 34 (e) if the term of the later lease is for a fixed period—the later
35 lease is a *regulated fixed term lease*; and
- 36 (f) if the term of the later lease is for an indefinite period—the
37 later lease is a *regulated indefinite lease*.
- 38
-

EXPOSURE-DRAFT

Consumer leases **Schedule 5**
Main amendments **Part 1**

Questions

Section 170A extends the definition of consumer leases to include short-term leases and indefinite term leases that are currently exempt under subsection 171(2).

Both these classes of consumer leases will be regulated where the following criteria are met:

- at the time of entering into the lease, the lessor knew, or could have established through reasonable inquiries, that the consumer wanted the use of the goods for a longer or different period of time (the anticipated period of use); and*
- the consumer would pay more than the cash price of the goods if they made rental payments for the anticipated period of use (rather than for the term of the lease).*

This approach therefore retains the requirement that, in order to be regulated, the total of the rental payments must exceed the cash price of the goods, based on the anticipated period of use.

The drafting of the definition in this way requires a lessor to make reasonable inquiries into the lessee's intended period of use, and to test the amount payable against this term rather than that provided for in the contract. The policy objective is that the lessor should not be in a better position (by being a party to an unregulated lease) through making fewer inquiries into where the lessor has failed to make such inquiries.

The approach is consistent with that in section 13 of the National Credit Code, which has operated since 1 July 2010 in relation to the presumption as to the purpose of a credit contract.

Stakeholders' views are sought on the effectiveness of this approach. In particular views are requested in relation to:

- whether the Bill should include a definition of the cash price of the goods (given that the existing definition in section 204 of the Code only applies in relation to credit contracts); and*

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Schedule 5 Consumer leases

Part 1 Main amendments

- *whether there is a need to exempt genuine short-term consumer leases (for example, by exempting contracts where the bulk of the repayments are made on receipt of the goods).*

1 **3 Subsection 171(1) of the *National Credit Code***

2 Repeal the subsection.

3

EXPOSURE-DRAFT

Consumer leases **Schedule 5**
Other amendments **Part 2**

1 **Part 2—Other amendments**

2 ***National Consumer Credit Protection Act 2009***

3 **4 Subparagraph 199(3)(b)(iv)**

4 Omit “paragraph 170(1)(b)”, substitute “section 170”.

5 **5 Subsection 13(3) of the *National Credit Code***

6 Repeal the subsection, substitute:

7 (3) However, the declaration is ineffective if, when the declaration was
8 made, the credit provider or a prescribed person had the requisite
9 belief that the credit was in fact to be applied wholly or
10 predominantly for a Code purpose.

11 **6 Before subsection 170(3)**

12 Insert:

13 *Amount payable under consumer lease*

14 **7 Subsection 170(3) of the *National Credit Code***

15 Omit “this section”, substitute “this Part”.

16 **8 Subsection 172(3) of the *National Credit Code***

17 Repeal the subsection, substitute:

18 (3) However, the declaration is ineffective if, when the declaration was
19 made, the lessor or a prescribed person had the requisite belief that
20 the goods were in fact hired wholly or predominantly for personal,
21 domestic or household purposes.

22 **9 Subsection 204(1) of the *National Credit Code***

23 Insert:

24 *regulated fixed term lease*: see subsection 170A(1) and paragraphs
25 170A(3)(a) and (4)(e).

26 **10 Subsection 204(1) of the *National Credit Code***

27 Insert:

EXPOSURE-DRAFT

Schedule 5 Consumer leases

Part 2 Other amendments

1 *regulated indefinite lease*: see subsection 170A(2) and paragraphs
2 170A(3)(b) and (4)(f).

3 **11 Subsection 204(1) of the *National Credit Code***

4 Insert:

5 *requisite belief*: a person has a *requisite belief* that a matter exists
6 if the person:

- 7 (a) knows, or has reason to believe, that the matter exists; or
8 (b) would have known, or had reason to believe, that the matter
9 exists if the person had made reasonable inquiries about the
10 matter.

11

Comment

This amendment provides a definition of ‘requisite belief’ relevant to the determination of the anticipated period of use (of the leased goods) in section 170A. As discussed in more detail above, the effect is that whether or not a short-term lease or an indefinite term lease is regulated by the National Credit Code will depend on whether at the time of entering into the lease, the lessor knew, or could have established through reasonable inquiries, that the consumer wanted the use of the goods for a longer or different term than that in the contract.

The amendment would change the wording of sections 13 and 172 by introducing a cross-reference to the definition of requisite belief to be inserted into subsection 204(1); however, the amendment does not alter the effect or operation of these provisions.

12

EXPOSURE-DRAFT

Anti-avoidance **Schedule 6**
Main amendments **Part 1**

1 **Schedule 6—Anti-avoidance**

2 **Part 1—Main amendments**

3 *National Consumer Credit Protection Act 2009*

4 **1 After Division 1 of Part 7-1**

5 Insert:

6 **Division 1A—Avoidance schemes**

7 **323A Prohibition on avoiding this Act or the Transitional Act**

8 *Prohibition on avoidance*

9 (1) A person must not, either alone or with others, engage in any of the
10 following conduct:

- 11 (a) enter into a scheme;
- 12 (b) begin to carry out a scheme;
- 13 (c) carry out a scheme;

14 if, having regard to the matters referred to in subsection (3), it
15 would be reasonable to conclude that the purpose, or one of the
16 purposes, of the person engaging in that conduct was to avoid the
17 application of a provision of this Act or the Transitional Act in
18 relation to:

- 19 (d) the person; or
- 20 (e) any other person (a *connected person*) who has, or has had,
21 any connection (whether of a business, family or other
22 nature) with the person.

23 Civil penalty: 2,000 penalty units.

24 *Meaning of scheme*

25 (2) A *scheme* is:

- 26 (a) any agreement, arrangement, understanding, promise or
27 undertaking, whether express or implied; or
- 28 (b) any scheme, plan, proposal, action, course of action or course
29 of conduct, whether unilateral or otherwise.

EXPOSURE-DRAFT

Schedule 6 Anti-avoidance

Part 1 Main amendments

1

Matters to have regard to

2

(3) For the purposes of subsection (1), the matters are as follows:

3

(a) the manner in which the scheme was entered into or carried out;

4

5

(b) the form and substance of the scheme;

6

(c) the time the scheme was entered into and the length of the period during which the scheme was carried out;

7

8

(d) the result in relation to the operation of this Act or the Transitional Act that, but for this Part, would be achieved by the scheme;

9

10

11

(e) any change in the financial position of the person, or a connected person, that has resulted, will result, or may reasonably be expected to result, from the scheme;

12

13

(f) any other consequence for the person, or a connected person, of the scheme having been entered into or carried out;

14

15

(g) the nature of any connection (whether of a business, family or other nature) between the person and a connected person;

16

17

(h) any similarities between a credit contract, mortgage, guarantee or consumer lease and a contract that:

18

19

(i) is between a consumer and the person or a connected person; and

20

21

(ii) is connected with the scheme;

22

(i) any representation connected with the scheme made by the person, or a connected person, to a consumer;

23

24

(j) whether the person, or a connected person, before beginning to carry out the scheme, carried on a business of providing credit to which the Code applies or consumer leases;

25

26

(k) whether the person, or a connected person, before entering a contract with a consumer connected with the scheme, considered the consumer's ability to comply with the consumer's financial obligations under the contract;

27

28

(l) any change in the conduct of a person, or a connected person, following amendments to this Act or the Transitional Act;

29

30

(m) any other matter prescribed by the regulations;

31

32

(n) any other relevant matter.

33

34

Offence

35

(4) A person commits an offence if:

36

EXPOSURE-DRAFT

Anti-avoidance **Schedule 6**
Main amendments **Part 1**

- 1 (a) the person is subject to a requirement under subsection (1);
2 and
3 (b) the person engages in conduct; and
4 (c) the conduct contravenes the requirement.

5 Criminal penalty: 200 penalty units, or 2 years imprisonment, or
6 both.

7 *Presumption of avoidance for certain schemes*

- 8 (5) For the purposes of subsection (1) (but not for the purposes of
9 subsection (4)), if:
10 (a) the person engages in conduct of the kind referred to in
11 paragraph (1)(a), (b) or (c) in relation to a scheme; and
12 (b) the scheme is of a kind prescribed by the regulations or
13 determined by ASIC under subsection (7);
14 then it is presumed that it would be reasonable to conclude that the
15 purpose, or one of the purposes, of the person engaging in that
16 conduct was to avoid the application of a provision of this Act or
17 the Transitional Act.
- 18 (6) Subsection (5) does not apply if the person proves that, having
19 regard to the matters referred to in subsection (3), it would not be
20 reasonable to conclude that the purpose, or one of the purposes, of
21 the person engaging in that conduct was to avoid the application of
22 a provision of this Act or the Transitional Act.
- 23 (7) ASIC may, by legislative instrument, determine a scheme for the
24 purposes of subsection (5).
- 25

Question

This Schedule introduces amendments intended to provide a systematic response to avoidance practices, rather than individual responses being developed that address a specific practice after it has come into use in the credit market.,

In summary, the amendments operate as follows:

- *a person is prohibited from beginning or carrying out a scheme for the purpose of avoiding the application of a provision of the Credit Act;*

EXPOSURE-DRAFT

Schedule 6 Anti-avoidance

Part 1 Main amendments

- *purpose is to be determined on the basis of objective factors, rather than the subjective intentions of the person engaged in the scheme;*
- *a number of factors are listed as being relevant to the assessment of purpose, including:*
 - *any representations made to consumers (paragraph (i)), which would include whether products are advertised as credit or loans; and*
 - *any change in the conduct of a person following amendments to this Act (paragraph (l)), which would include changes in practices or structures to mitigate or avoid the effect of amendments;*
- *a scheme is presumed, other than for criminal proceedings, to be for the purposes of avoidance where it is a scheme of a type prescribed by regulations or ASIC by a legislative instrument (with this approach taken to provide greater regulatory consistency in respect of particular avoidance techniques, by allowing for the onus to be placed on the providers of the scheme, rather than ASIC positively having to establish the purpose in respect of each provider for similarly structured schemes).*

Stakeholders' views are sought on this approach.

1

EXPOSURE-DRAFT

Anti-avoidance **Schedule 6**
Other amendments **Part 2**

1 **Part 2—Other amendments**

2 *National Consumer Credit Protection Act 2009*

3 **2 Subsection 5(1)**

4 Insert:

5 *scheme*: see subsection 323A(2).

6 **3 Section 180 (heading)**

7 Omit “**unlawful credit activities**”, substitute “**particular**
8 **contraventions**”

9 **4 Paragraph 180(1)(a)**

10 Omit “a credit activity”, substitute “conduct”.

11 **5 Paragraph 180(1)(b)**

12 Omit “activity”, substitute “conduct”.

13 **6 At the end of paragraph 180(1)(b)**

14 Add:

15 (iv) section 323A (which is about avoiding the application
16 of this Act or the Transitional Act);

17 **7 Section 323 (after the first paragraph)**

18 Insert:

19

Division 1A has rules that prohibit schemes that are designed to 20 avoid the application of this Act or the Transitional Act.

21 **8 Subsection 334(1)**

22 Repeal the subsection.

23 **9 Paragraph 334(3)(c)**

24 Omit “(1) or”.

25 **10 Subsection 191(1) of the *National Credit Code***

26 Repeal the subsection.

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Schedule 6 Anti-avoidance

Part 2 Other amendments

1

EXPOSURE-DRAFT

Miscellaneous amendments **Schedule 7**

1
2

Schedule 7—Miscellaneous amendments

3

National Consumer Credit Protection Act 2009

4

1 At the end of Division 4 of Part 1-2

5

Add:

6

16A Things being done predominantly for particular purposes

7

A reference in this Act to a thing being done predominantly for particular purposes includes a reference to the thing being done wholly for those purposes.

8

9

10

EXPOSURE-DRAFT

Schedule 8 Application provisions

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2

Schedule 8—Application provisions

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National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009

[To be drafted.]