

Credit (Commonwealth Powers) Bill 2009

Explanatory Notes

Short Title

The short title of the Bill is the *Credit (Commonwealth Powers) Bill 2009*.

Objectives of the Bill

The objectives of the *Credit (Commonwealth Powers) Bill 2009* are to refer constitutional power for credit (including finance broking) to the Commonwealth and repeal the *Credit Act 1987*, the *Consumer Credit (Queensland) Act 1994*, the appended template *Consumer Credit Code*, the *Consumer Credit (Queensland) Special Provisions Regulation 2008* and the *Consumer Credit Regulation 1995*.

It is not proposed to repeal the *Credit (Rural Finance) Act 1996* at this time. The *Credit (Rural Finance) Act 1996* was commenced at the same time as the Consumer Credit Code. As farming is seen as a business, credit for farming purposes does not come within the ambit of the Consumer Credit Code (which is credit predominantly for personal, domestic and household use). It was recognised at the time the Consumer Credit Code was introduced in Queensland that farmers also needed protection in place regarding the enforcement of mortgages over equipment they use to carry out their farming business.

As the Commonwealth is not examining the extension of the national credit laws to business credit until phase two, Queensland will continue to administer the *Credit (Rural Finance) Act 1996* in the meantime. There will not be any inconsistency until the Commonwealth regime is extended to cover credit for business purposes. Should the Commonwealth regime be expanded in phase two to cover business credit, it is likely Queensland would repeal the *Credit (Rural Finance) Act 1996* at that time.

Reasons for the Bill

In March 2008, the Council of Australian Governments (COAG) committed to a comprehensive microeconomic reform program including a

regulatory reform agenda to help deliver significant improvements in Australia's competition, productivity and international competitiveness.

As part of these reforms, COAG agreed on 3 July 2008 that responsibility for the regulation of credit and finance broking should be transferred from the states and territories to the Commonwealth. The Australian Securities and Investments Commission (ASIC) will be given extra powers to police the scheme. The Commonwealth will then be the sole regulator and enforcer of credit and finance broking.

Achievement of the Objectives

To enable the Commonwealth to commence its new national credit laws, the states must first pass legislation referring power for the regulation of credit to the Commonwealth. It is anticipated the Commonwealth's low-level registration provisions, which require industry to provide contact details to ASIC, will commence on 1 April 2010.

The Commonwealth Government's legislative powers in the absence of a referral of powers from the States are not sufficient to enact a comprehensive regulatory framework for consumer credit to operate nationally. As such, a specific referral of powers from the States for consumer credit is required.

The referral of powers is based on section 51(xxxvii) of the Commonwealth Constitution '*matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law*'.

The Bill makes two references of matters to the Commonwealth:

(a) The first reference refers the tabled text of the proposed National Consumer Credit Protection Bill 2009 and the proposed National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009.

(b) The second reference (the amendment reference) provides a limited amendment reference to allow the Commonwealth to amend the referred credit matters. State and Territory governments will continue to explore the development of a subject matter amending reference that will facilitate future amendment of the scheme to ensure the Commonwealth has sufficient scope to regulate for new and emerging issues that arise in the credit and finance broking area.

A matter is not referred to the Commonwealth from a particular State until the State referral commences under the referral Bill. It is expected that each State will enact a referral Bill. It is possible that in one or more States, this may follow the original enactment of the proposed National Consumer Credit Protection Bill 2009 and the proposed National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009 by the Commonwealth Parliament.

The referral approach has been previously used with the transition of the State and Territory corporations legislation to the Commonwealth (as set out in Chapter 10 Part 10.1 Division 6 of the *Corporations Act 2001*). The validity of this approach has been upheld by the High Court in *Forge v ASIC* [2006] HCA 44. Given this precedent, it would appear there are no substantive legal impediments to a complete transfer of responsibility for existing credit contracts to the Commonwealth.

The Bill will be underpinned by an intergovernmental agreement (the National Credit Law Agreement 2009), to which the Commonwealth and the States and Territories will be parties. The intergovernmental agreement operates similarly to the *Corporations Agreement 2002*.

Consequential amendments are made to a range of Queensland Acts to update references to the legislation that will be repealed.

Estimated Cost for Government Implementation

Queensland has signed the National Partnership Agreement to Deliver a Seamless National Economy. Under this National Partnership Agreement, Queensland is eligible for National Partnership payments of up to \$112.7 million over five years to 2012-13, including a potential payment of up to \$20.1 million in 2008-09. National Partnership payments are contingent on Queensland achieving the milestones for all 38 reform priorities as set out in the National Partnership Agreement Implementation Plan. Progress against these milestones will be independently assessed by the COAG Reform Council on an annual basis. Passage of the referral of powers legislation by states and territories is one of the milestones under the National Partnership Agreement Implementation Plan.

The regulation of credit in Queensland does not provide a revenue stream for the Government. Accordingly, the complete transition of credit to the Commonwealth is set to deliver savings for Queensland as the Government would not have to continue paying for the administration of the laws. However, currently administration costs of approximately \$1.5 million per

year will remain as the Bill provides savings provisions for the continuation of an interest rate cap in Queensland.

Consistency with Fundamental Legislative Principles

Section 4(1) of the *Legislative Standards Act 1992* requires legislation to have accord with the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.

While the Commonwealth Constitution does not confer on the States a power of referral, the power to refer a matter must fall within the general legislative power of the States to make laws for the peace, welfare and good government of the State. Referral must occur by way of enactment of a State Parliament.

It is noted the ability for a State to actually terminate a referral in accordance with the standard provisions contained in the Bill was raised by the Scrutiny of Legislation Committee in relation to the *Water (Commonwealth Powers) Act 2008*. The Committee questioned whether a State can revoke its referral of power at any time, by enactment, irrespective of the period of the referral, and the effect of that revocation on the Commonwealth enactment made pursuant to the referral.

It is arguable that the States can revoke the referral, given their incapacity to abdicate legislative power. It is also arguable that the effect of a revocation is not only to terminate the referral of power to the Commonwealth, but it also terminates the operation of any Commonwealth law enacted in reliance on that referral. It is acknowledged that an alternative argument is that State legislation revoking the reference would be rendered ineffective by section 109 for being inconsistent with the Commonwealth legislation enacted pursuant to the original reference.

As outlined in relation to the *Water (Commonwealth Powers) Act 2008*, the use of revocation provisions is extremely common in State referral of power legislation. The approach taken in the Bill, enabling the Governor to fix a day by proclamation to terminate the reference, accords with the vast majority of precedent State referrals of power to the Commonwealth since 1952.

This may be considered a “Henry VIII” clause by allowing the revocation of a State referral by subordinate legislation. The only circumstances where it is envisaged a reference would be terminated would be of such an extraordinary kind (for example, passing of oppressive Commonwealth amendments that have not been agreed to by the jurisdictions). In such

circumstances, it is submitted that permitting rapid Executive action would be warranted.

The Bill makes provision for Queensland to terminate both the initial reference and the amendment reference or just the amendment reference at any time.

Clause 19 of the National Consumer Credit Protection Bill 2009 adequately protects the State's interests in the event that the State no longer wishes the Commonwealth to continue to have power to legislate for Queensland in relation to the referred matters.

The National Consumer Credit Protection Bill 2009 makes it clear that the termination of the initial reference has the effect of revoking in its entirety the referral of powers (including both initial and amendment) on behalf of Queensland to the Commonwealth, resulting in Queensland ceasing to be a referring State, and consequently terminating the Commonwealth's power to legislate for Queensland in relation to the referred matters. This does not however, affect the status of other referring States or the Commonwealth's power to legislate for them.

Part 5 of the Bill provides for the transfer of information held by the Queensland Minister responsible for the administration and enforcement of the *Credit Act 1987*, the *Consumer Credit (Queensland) Act 1994*, the appended template Consumer Credit Code, the *Consumer Credit (Queensland) Special Provisions Regulation 2008* and the *Consumer Credit Regulation 1995* to ASIC.

Enabling the supply of information held by Queensland to the Commonwealth may impact on requirements under the *Legislative Standards Act 1992* that legislation shall have sufficient regard to the rights and liberties of individuals, including privacy. However, any potential breach of such a fundamental legislation principle is considered reasonable and necessary. The only information provided will be that information obtained in the lawful administration of the repealed credit laws. As administration of credit will be transferred to the Commonwealth, this information will be necessary to ensure the ongoing efficient administration and enforcement of credit.

Consultation

The Department of the Premier and Cabinet, the Office of Queensland Parliamentary Counsel, Queensland Treasury, Queensland Health, the Department of Environment and Resource Management, Queensland

Police Service, the Department of Mines and Energy and the Department of Justice and Attorney-General have been consulted.

Consistency of Bill with legislation of other jurisdictions

The Bill, to the extent it relates to the referral of powers, is uniform with all other referring jurisdictions and was prepared through the Parliamentary Counsel's Committee in consultation between the Commonwealth and the States and Territories.

Notes on Provisions

Part 1 Preliminary

1 Short title

Clause 1 states that this Act may be cited as the *Credit (Commonwealth Powers) Act 2009*.

2 Commencement

Clause 2 provides for the commencement of the proposed Act. It is intended to commence the referral of power provisions (part 2) on assent. Part 5, will also commence on assent to allow the smooth transition of information to ASIC that has been acquired through the regulation and supervision of credit providers in Queensland. The remaining provisions will commence by proclamation. The repeal of the *Credit Act 1987*, the *Consumer Credit (Queensland) Act 1994*, the appended template *Consumer Credit Code*, *Consumer Credit (Queensland) Special Provisions Regulation 2008* and the *Consumer Credit Regulation 1995* will coincide with the commencement of the *National Consumer Credit Protection Act 2009* (Cwth).

Part 2 Reference of matters

Clause 3 defines certain terms and expressions in the Act. The following is an explanation of certain terms and expressions used in the referral provisions of the Act, including the following.

The expression ‘**express amendment**’ is defined to mean the direct amendment of the text of the National Credit legislation (whether by insertion, omission, repeal, substitution or relocation of words or matter) by another Commonwealth Act or by an instrument under a Commonwealth Act, but does not include the enactment by a Commonwealth Act of a provision that has or will have substantive effect otherwise than as part of the text of the National Credit legislation. This ensures that the matters covered by the amendment reference cannot be the source of power for other Commonwealth legislation.

There are various definitions dealing with the mechanism of the referral. The expression ‘**initial referred provisions**’ means the tabled text to the extent to which that text deals with matters that are included in the legislative powers of the Parliament of the State; and the expression ‘**tabled text**’ means:

- the text of the National Consumer Credit Protection Bill 2009; and
- the text of the National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009, as tabled by the Minister introducing the Bill in the State Parliament which is the lead jurisdiction.

The term ‘**initial National Credit Code**’ means the text of Schedule 1 to the National Consumer Credit Protection Bill 2009 under paragraph (a) of the definition of ‘**tabled text**’.

‘**National Credit legislation**’ is defined to mean the Commonwealth Acts enacted in the terms, or substantially in the terms, of the tabled text set out as:

- the National Consumer Credit Protection Bill 2009; and
- the National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009.

The term ‘**reference**’ is defined to mean ‘**the initial reference**’ or the ‘**amendment reference**’.

The reference of matters uses the expression **‘referred credit matter’** which means a matter relating to either of the following:

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

This definition of **‘referred credit matter’** ensures that the reference of constitutional power by the States is tied to the content of the **‘initial National Credit Code’**.

Clause 4 deals with the references described in the Act. The referral of matters to the Commonwealth is achieved by two mechanisms:

- the matters to which the initial referred provisions relate, but only to the extent of the making of laws with respect to those matters by including the initial referred provisions in Acts enacted in the terms, or substantially in the terms, of the tabled text (**defined as the ‘initial reference’**); and
- any referred credit matter, but only to the extent of the making of laws with respect to such a matter by making express amendments of the National Credit legislation (**defined as the ‘amendment reference’**).

Clause 4(2) provides that the reference of a matter has effect only in situations where a State has power to make laws on that matter and the Commonwealth will not otherwise have power to do so unless the State refers the matter to the Commonwealth.

Clause 4(3) removes a possible contention that one of the references might be limited by the other.

Clause 4(4) provides that the State Parliament envisages that the National Credit legislation can be amended or affected by Commonwealth legislation enacted in reliance on other powers and that instruments under the National Credit legislation may affect the operation of that legislation otherwise than by express amendment.

Clause 4(5) specifies the period during which a reference under this Act has effect.

Clause 5(1) provides for the termination of the references or the amendment reference in the Act and this enables the Governor, by

proclamation, to fix a day on which the references or amendment reference shall terminate.

Clause 5(2) provides that a proclamation may be revoked by the Governor and in which case it is taken never to have been published.

Clause 5(3) provides that a revoking proclamation will be effective if published before the proclamation date.

Clause 5(4) provides that the revocation of a proclamation does not stop the publication of further proclamations.

Clause 5(5) states that in the event that the amendment reference is terminated, the effect is that the references refer only to the amendment reference.

Clause 6 provides that the separate termination of the period of an amendment reference does not affect laws already in place. Accordingly, the amendment reference continues to have effect to support those laws unless the period of the initial reference is also terminated.

Clause 7 provides for the accuracy of a copy of the tabled text containing the national Credit legislation to be certified by the Clerk of the House of Assembly of Tasmania. Such a certificate is evidence of the accuracy of the tabled text was in fact tabled as contemplated by the Referral Bill.

Part 3 Repeals

8 Repeals

Clause 8 provides for the repeal of the *Credit Act 1987*, the *Consumer Credit (Queensland) Act 1994*, the appended template *Consumer Credit Code*, the *Consumer Credit (Queensland) Special Provisions Regulation 2008* and the *Consumer Credit Regulation 1995*.

Part 4 Transitional provisions

Division 1 Preliminary

9 Definitions for part

Clause 9 defines the use of words in Part 4.

10 Acts Interpretation Act, s 20 not limited

Clause 10 is inserted as an aid to statutory interpretation.

Division 2 Transitional provisions for the repeal of the Credit Act 1987

11 Definition for division

Clause 11 defines the “repealed Act” for this division to mean the *Credit Act 1987*.

12 Continuation of effect of the repealed *Credit Act 1987*

Clause 12 provides a savings provision to ensure that any remaining contracts existing under the *Credit Act 1987* continue to be of full force and effect as if this Bill had not been passed.

The *Credit Act 1987* regulates personal loans up to \$40,000. The *Credit Regulation 1988* contains extensive provisions about credit contracts (including prescribed forms). On 1 November 1996, the Consumer Credit Code commenced regulating most consumer credit in Australia. The *Credit Act 1987* now only regulates loans up to \$40,000 entered into before 1 November 1996. The Act no longer regulates continuing credit contracts.

It is not known whether any contracts still exist under the *Credit Act 1987*. If there are outstanding contracts, there would only be a very small number.

Division 3 Transitional and other provisions for the repeal of the Consumer Credit (Queensland) Act 1994

Subdivision 1 Preliminary

13 Definition for division

Clause 13 defines “repealed Act” for Division 3 to mean the *Consumer Credit (Queensland) Act 1994*.

Subdivision 2 Consumer Credit Fund

Clauses 14 to 17 provide savings and transitional provisions for the continuation of the Consumer Credit Fund as this will not transition to the Commonwealth.

The Consumer Credit Fund was originally established under the repealed *Credit Act 1987* and continued under the *Consumer Credit (Queensland) Act 1994*. The Consumer Credit Fund consists of amounts paid by credit providers (for example, court ordered and/or agreed penalties under Conduct Deeds), costs awarded to the Chief Executive by a court in a proceeding under the *Consumer Credit (Queensland) Act 1994*, and interest and other income derived from the investment of the Consumer Credit Fund.

The Consumer Credit Fund will be transferred into a general Fund and will continue to be administered by the Department of Employment, Economic Development and Innovation. This will allow the continuation of payments to the Consumer Credit Fund for any credit enforcement matters not yet finalised and for the chief executive to approve payments from the Fund.

Clause 16 outlines what payments can be made from the new Fund (similar to those currently in the *Consumer Credit (Queensland) Act 1994* but with a focus other than credit):

- consumer stakeholder engagement;
- research for consumer policy;

- general consumer education campaigns;
- consumer surveys;
- other consumer-related initiatives;
- legal fees incurred by the chief executive, or costs awarded by a court against the chief executive, in a proceeding under the repealed *Consumer Credit (Queensland) Act 1994*; and
- legal fees incurred by the registrar, or costs awarded by a court against the registrar, in a proceeding under the repealed *Credit Act 1987*.

Clause 17 retains the annual reporting requirements of the Fund up until the year the funds are eventually depleted and the account closed.

Division 4 General provisions

Clauses 18 to 22 provide savings provisions for the continuation of investigations and enforcement of offences against the repealed Act prior to commencement of the national credit laws.

23 References to superseded legislation and subordinate legislation

Clause 23 is inserted as an aid to statutory interpretation.

24 Transitional regulation-making power

Clause 24 provides a transitional regulation making power for the Bill.

Division 5 Provisions relating to ASIC

25 Provision of information and assistance to ASIC

Clause 25 enables the conferral of powers and functions through the transfer of information, documents, assets or liabilities to ASIC. The aim of this provision is to provide a smooth transition of information between the regulators.

26 ASIC has particular functions and powers

Clause 26 confers functions and powers to ASIC in relation to appeals, review and enforcement proceedings for the purposes of giving effect to the *National Consumer Credit Protection Bill 2009*.

Part 6 Maximum annual percentage rate for credit contracts

Clause 27 provides meaning for words used by the Consumer Credit Queensland Code before it was repealed.

Clauses 28 to 31 provide savings provisions for the continuation of the interest rate cap in Queensland. Queensland introduced an interest rate cap of 48% applying to both interest and other credit fees and charges, on 31 July 2008.

The transition of credit to the Commonwealth will be implemented in a phased approach. The majority of provisions will commence on 1 July 2010, although the low-level registration requirements, which require industry to provide ASIC with contact details, will commence on 1 April 2010. Phase two of implementation will include, among other things, an examination of State approaches to interest rate caps.

Part 7 Amendment of other Acts

Clause 32 amends the Acts contained in the Schedule.

Schedule – Consequential amendments of other Acts

The Schedule replaces references to the *Consumer Credit (Queensland) Act 1994* and the *Consumer Credit Code* to the name of the new national credit law the “*National Consumer Credit Protection Act 2009*”, or repeals unnecessary sections in the following Acts:

1. *Bills of Sale And Other Instruments Act 1955*, sections 6, 19(1A), 19A(3), 20(1), 21(4), 45(3) and Schedule 5.
2. *Credit (Rural Finance) Act 1996*, sections 5(3)(a), 5(3)(b) and Schedule.
3. *Forestry Act 1959*, section 61E(12) and Schedule.
4. *Hire-Purchase Act 1959*, section 2.
5. *Legal Aid Queensland Act 1997*, section 36(4).
6. *Mineral Resources Act 1989*, Schedule Dictionary.
7. *Police Powers and Responsibilities Act 2000*, sections 73 and 753, Schedule 6.
8. *Property Agents and Motor Dealers Act 2000*, sections 347(4) and 347(5).