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### Submission on the National Consumer Protection Bill 2009

The Australian Compliance Institute (**the Institute**) would like to take the opportunity to thank the Treasury for providing an opportunity for the Institute to respond to your request for public comment on the above.

The Institute is the peak industry body for the practice of compliance in Australasia. Our members are compliance, risk and governance professionals actively engaged in the private, professional services and Government sectors within Australia, New Zealand, Singapore, Thailand and Hong Kong.

Unfortunately, due to the tight time frame imposed for the making of Submissions, the Institute has not had the opportunity to canvas all of its members for their views and as such this Submission must be read accordingly.

#### GENERAL COMMENTS

##### 1. Brief consultation period

At the outset the Institute notes that of course it is a matter for the government to stipulate a period for public consultation on draft package. With respect, we observe that the exceptionally brief period in this case has meant that we have not been able to put together extensive comment on the significant impacts that the package is likely to have and to consider exhaustively any unintended consequences or drafting irregularities.

We must also note that whilst the brief consultation period has precluded us from being able to undertake an exhaustive review of the exposure draft, our members have noted a number of matters which are contained in the specific comments below.

#### Principal Members



ZURICH





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## 2. Licensing obligations and timing

Given that “issues concerning fringe credit providers” was stated to be dealt with under phase two of the Credit Reform process, the Institute is surprised to note the extensive licensing and registering obligations that will be attached to credit providers under the exposure draft. We note that the Institute anticipates that credit providers would need to undertake a significant degree of procedural, documentation, computer and other changes in order to achieve compliance by the relevant dates and some members have indicated that this in fact may not be practicable within the stated timeframe.

No doubt industry groups will be able to provide further comments on the time necessary to achieve compliance and we query whether it would be appropriate to confirm with them that sufficient time is provided during both the consultation process and transitioning provisions to ensure that diligent credit providers will have sufficient time to ensure that adequate compliance arrangements are put in place.

The Institute notes that many groups previously raised concerns along these lines with the FSR and UCCC legislation prior to their introduction and it subsequently proved necessary for significant amendments to be made in order to make the relevant regimes workable. In the latter case, this process was aided by emergency transitional regulations drafted by key stakeholders some months before the commencement of the legislation. We would suggest that this process be again considered.

In the event this is not possible, as an alternative, we suggest that there be a post implementation review undertaken of phase one at the same time as work was being undertaken under phase two of the UCCC change program and the Institute would be happy to be involved in a facilitation of this consultation concerning the post implementation review.

## 3. Licensing obligations - philosophy

The Institute notes that there is a significant change of philosophy regarding the regulation of credit between that contained under the licensing provisions of the package and the provisions of the Consumer Credit Code. For example, under the Code a breach of a key requirement need not be disclosed to ASIC and the maximum penalty is \$500,000 whilst under the licensing provisions there is an obligation to disclose significant breaches of the Code and penalties of up to \$1.1 million.

The Institute queries whether these two philosophical approaches can easily mutually co-exist. As a practical matter it may be that the licensing provisions would themselves bear the weight of the day-to-day practical regulation credit rendering the Code provisions of significantly less meaning than they currently have.

Another practical example of this is that under the provisions of the licensing obligations it is possible for the license to be revoked or suspended, which arguably means that the credit provider is stopped from performing its contractual obligations under its existing contracts (for example, continuing credit contracts) and has no ability to preserve its loan book by enforcing or even merely receiving repayments.

The Institute queries whether this is the intention of the package as a whole and if it is, administratively what steps could be taken in the circumstances where an extension or revocation were contemplated.



#### **4. Debtors jurisdiction**

The Institute notes the decoupling of State and Territory jurisdictions given the passage of national legislation. The Institute remains concerned that this may result in relevant credit litigation in jurisdictions which are remote from the place of residence of debtors.

It is also noted that from a consumer perspective it is unclear how they can access the courts for resolution of complaints and that the Federal court will be prohibitively expensive and is not designed to accommodate self-represented litigants. Additionally, the expertise of the existing bodies such as VCAT may be lost in the process unless staff are planned to be redeployed.

The Institute regards this as a loss of protection for consumers and an unintended detriment directly as a consequence of transferring credit to the Commonwealth.

The Institute suggests that an additional provision be added to Section 80 of the Code such that any credit proceedings be instituted in a registry nearest to where the debtor resides as at the date last known to the credit provider.

In the event that credit providers incorrectly issue process that the costs of transfer or reissuing should be borne by the credit provider.

#### **5. Criminal Penalties**

The Institute's members have expressed concern that criminal penalties seem disproportionate and in practical terms difficult to enforce, especially against the larger ADIs.

#### **6. Overlap and additional costs for compliance**

ACI's members also express concern at the overlap between the Consumer Credit Protection Bill and the Unfair Contract Terms legislation, which may add costs to organisations for their compliance as well as confusion and inconsistency.

It is also suggested that not only will organisational compliance costs increase but that regulatory costs will also be impacted by the proposals.

### **SPECIFIC COMMENTS**

1. ^LIC257 relates to a corporate credit representative sub-authorising individuals. There is a further requirement for individual appointments to be notified to ASIC. We struck this when FSR was introduced and discovered that it unintentionally captured a large number of clerks, cashiers and other workers who were not actually performing financial services. To improve the practical application of the sub-authorisation and ASIC notification requirements, the Institute suggests that the regulations clarify that staff of a credit representative who provides factual information or refers consumers to other sources of information and advice be deemed not to be providing credit assistance.
2. ^R130 and ^R230 deal with licensees providing credit guides. The exposure draft is silent on whether the same guide may be produced to cover both the credit assistance situation (^R130) and the credit provision (^R230). It would assist licensees if it were made clear that disclosure documents, giving all required information, may be combined. This would also reduce the volume of literature given to the consumer and reduce repetition.



3. ^R330 deals with credit guides for credit representatives. The exposure draft is silent on whether the same document may be produced to cover both the requirement to give the licensee's (or licensees') credit guide(s) and the credit representative's guide. Authority to combine these documents would reduce the volume of literature given to the consumer and reduce repetition.
4. ^R430 requires debt collectors to give credit guides and permits the regulations to prescribe the manner in which the guide is given. Collection agents routinely deal with consumers who make contact difficult. The Institute suggests that the regulations provide for the giving to include delivery to the consumer's last known or believed address.
5. The Institute notes the extension of the proposed regime to include "credit provided to individuals for the purchase or renovation of residential property, for investment purposes". While the Institute supports the intent of this extension to protect 'mum and dad' residential property investors, it may capture some commercial lending activity as well, purely because of the way a particular transaction is structured. While borrowing for business purposes is exempt, there are occasional cases where the test would be met and certain mortgage transactions caught, that are in effect, commercial loans. For example, borrowing by a high net worth individual for purchase of an apartment tower, or multi-townhouse complex. These types of transactions occur on occasion in some mortgage trusts which are designed to lend for commercial transactions. It would have the effect of capturing mortgage trust responsible entities in this regime, based on only a small fraction of their loan books.

The Institute queries whether regulating transactions of this type are intended. The Institute would recommend implementing a Corporations Act style 'sophisticated investor' test so that the consumer protection aims of the regime would be met but would not unnecessarily extend the regime to large transactions of a commercial or sophisticated nature. A capped loan size of \$1 million would seem appropriate to protect consumers, while avoiding any unintended consequences. If a monetary cap is thought not to be adequate, perhaps it would be preferable to adopt the 'sophisticated investor' test of FSR, to release credit providers from these requirements to provide disclosure etc.

## Conclusion

Once again the Institute would like to thank the Treasury for providing an opportunity of making submissions on this important topic and would be keen to develop these concepts further with you as required.

Yours sincerely

**Martin Tolar**  
Chief Executive Officer