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Dear Sir/Madam

Submission on the *Exposure Draft: National Consumer Credit Regime*

We welcome the opportunity to make a submission in relation to the Exposure Draft of the *National Consumer Credit Protection Bill 2009* and associated material released on 27 April 2009 (**Exposure Draft**).

The attachment sets out some of the issues we have identified in relation to the Exposure Draft and in discussions with clients and industry associations.

In addition to the specific issues raised in the attachment, we wish to make the following observations which relate to the approach proposed by the Government in the Exposure Draft:

1. We believe that given the significant overlap and similarity between the provisions and obligations of the Exposure Draft and Chapter 7 of the *Corporations Act 2001* as it applies to the provision of financial services that it would be simpler to include credit as a financial product for licensing purposes. Credit could be excluded from the product disclosure regime in Part 7.9 and the *National Credit Code* could be enacted as separate legislation in much the same way that other financial products are also regulated by other legislation (for example, the *Insurance Contracts Act 1984* regulates insurance products that are regulated under the *Corporations Act*).

The advantage of this approach is that any deviations between the requirements that should apply to credit and those that apply to financial products would be much clearer. It would also mean that there should be a clear explanation for any such differences. Finally, it would mean that some of the awkward mechanical provisions in the Exposure Draft would not be required (for example, those requiring the same ACL and AFSL numbers for licensees holding both).

We also note that this approach would be consistent with the original justification for the Financial Services Reform Act 2001, to have a single licensing and conduct regime for all

financial services. It would also be consistent with the proposed inclusion of margin lending as a financial product under the *Corporations Act*.

2. We note that the legislation is proposed to commence from 1 January 2010. While there are transitional provisions for the commencement of the licensing regime, the responsible lending obligations will essentially commence immediately. We submit that in the current circumstances there is no need to implement the legislation so quickly. The new obligations are likely to result in loan applications taking significantly longer to process at least initially. They may also mean that lenders are less willing to provide credit whether or not it is 'unsuitable'. These outcomes do not seem consistent with the imperatives of dealing with the global financial crisis and the associated significant economic dislocation, particularly when there is no identified problem in the provision of credit in the current market conditions. The problem is if anything the reverse, the difficulty of obtaining credit.

The new requirements will also impose significant costs on businesses, including many small businesses in suburban and regional Australia. Given the current economic conditions, it does not seem sensible to be rushing to impose these costs on Australian businesses.

We also have particular concerns about the application of training obligations. There will need to be a significant transition period to enable businesses to train representatives not only to any standard that ASIC may set but also to ensure that they have the knowledge to comply with the new obligations. This transition period is likely to need to be at least two to three years in length – this would be consistent (or possibly shorter) than the transition period for the introduction of RG146 training requirements for financial advisers.

We would be very happy to discuss any of our submissions in further detail. Please direct any questions to Richard Batten, Partner, Financial Services Group on (02) 9921 4712.

Yours faithfully

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ISSUES LIST National Consumer Credit Bill (exposure draft)

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1. Definition of 'carrying on a business'	DEF86	14	The Bill uses the same concept for determining whether a person carries on a business in Australia as used in the Corporations Act.	<p>1.1 While the Corporations Act test is well understood, it does give rise to significant uncertainty where conduct is undertaken infrequently.</p> <p>1.2 We submit that there should be a clear exemption for infrequent activity and that a profit motive should be required for either the person engaging in the activity or their associates. For example, we suggest that the Bill should provide that a person does not carry on a business if the activity occurs no more than once a year.</p>
2. Equitable assignment	DEF9 R232	12-13 107-108	First and subsequent assignees of the rights of a credit provider, lessor, mortgagee or beneficiary of a guarantee under a credit contract, consumer lease, mortgage or guarantee are regulated as credit providers.	<p>2.1 Securitisation programs can involve the equitable assignment of a loan to a securitisation trustee. The consumer would not be aware of this assignment and does not need to be given they retain their legal rights against the lender.</p> <p>2.2 We therefore submit that only legal assignees should be caught by the Bill. Equitable assignees should not require a licence or be subject to licence obligations before title is perfected, ie. before the borrower is notified of the assignment. It is also imperative that equitable assignees should not be required to provide a Credit Guide as this would risk perfecting the assignment and thereby shifting the legal obligations from the lender to the assignee which is contrary to the commercial arrangement between the parties.</p>
3. Concurrent operation of Commonwealth and State laws	DP5	21	The Commonwealth credit legislation is not intended to exclude or limit the concurrent operation of any law of a State or Territory.	3.1 We are concerned that this provision could result in credit providers effectively being subject to double regulation at the State and Commonwealth level, should a State or Territory wish to further regulate this area. This could adversely impact efficiency and lenders' costs and thereby defeats the main purpose of the legislation.
4. Opt out for states	DP10	21	States can carve themselves out of the regime.	4.1 The same comment applies to this provision.
5. Product manufacturer exemption	LIC75	27	No licensing exemptions for credit providers.	5.1 Under FSR, a product manufacturer is exempt from the obligation to hold an AFSL if a financial service is provided pursuant to an arrangement (an intermediary authorisation) between the product provider and an AFSL holder (s911A(2)(b) of the <i>Corporations Act</i>) and there are related obligations for product issuers (s911A(2)(c))

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				and reg 7.6.01(1)(o) and (q).
				5.2 A person is also in effect exempt from the requirement to hold an AFSL if it delegates the activity to a licensee (s911B(3)).
				5.3 We submit that it would be appropriate for equivalent exemptions to apply under the Bill. The product manufacturer and delegation exemptions would be particularly helpful in the securitisation context.
6. Referrer exemption	regs 6.2 - 6.3	17-20	The referral exemption only applies when the activity is limited to informing a person that a licensee or their representative is able to provide a credit activity.	6.1 While this exemption is consistent with that found in the <i>Corporations Act</i> , we are concerned that it may not be adequate. By referring a person to a lender, the person may be seen to be suggesting a particular loan. We submit that the exemption should be expressed more broadly.
7. Exemptions v Defences	LIC75(3)	27	The Credit Bill provides 'defences' from the prohibition on engaging in credit activities without a licence.	7.1 While the practical effect may the same, we do not understand why the terminology of 'defence' has been used. It is not consistent with Chapter 7 of the <i>Corporations Act</i> which refers to exemptions not defences. By making it a defence, it suggests that a person is prima facie guilty of an offence subject to being able to make out a defence. 7.2 We submit that the exemptions from licensing should be referred to that way in the Bill.
8. Prohibition on conducting business with unlicensed persons	LIC92	30	An ACL holder must not: <ul style="list-style-type: none"> ▪ engage in a credit activity; and ▪ in the course of engaging in that credit activity, conduct business with another person who is engaging in a credit activity; ▪ if by engaging in the credit activity the other person contravenes section ^LIC75 (which deals with the requirement to be licensed). 	8.1 We submit that this prohibition is unduly onerous. It should be up to each organisation to determine whether it requires a licence. Licensees should not be required to form their own view whether other organisations require a licence. Otherwise, each licensee is in effect required to undertake a due diligence of the licensing status of each person they deal with. This will unduly increase transaction and compliance costs which will ultimately be borne by consumers. 8.2 We note that there is no equivalent prohibition under FSR.
9. Streamlining to ACL	LIC156 - LIC157	3 -37	Streamlining is limited to ADIs and certain licensed WA finance brokers.	9.1 The Credit Bill dose not include a process for streamlining AFSL holders. As AFSL holders would have appropriate compliance arrangements and procedures in place to meet the general obligations in LIC170, they should be streamlined into the ACL regime. This could be done through a regulation under LIC157 or through administrative arrangements by ASIC.
10. General conduct	LIC170(g)	42 Credit Bill	ACL holders must: <ul style="list-style-type: none"> (b) have in place adequate arrangements to 	10.1 We do not understand why the general obligations of licensees will differ from those applying to AFSL holders. Both of the obligations

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obligations			ensure that clients ... are not disadvantaged by any conflict of interest ... (k) have adequate arrangements ... to ensure compliance ... and a written plan that documents [them]	noted have counterparts in the AFS regime. However, they are both more onerous under the proposed ACL regime. 10.2 By requiring arrangements that ensure that clients are not disadvantaged , the Bill imposes too high a threshold. Any disadvantage will in effect be prohibited whatever the reason and whatever measures are taken to prevent it. While we appreciate the concerns of the Government to make sure that conflicts are appropriately managed, this prescriptive requirement means that licensees are bound to fail. We submit that the obligation imposed under s912A(1)(aa) is more suitable. 10.3 We note that the standard licence conditions in ASIC Pro Forma 209 require AFSL holders to have compliance measures that ensure as far as practicable that the licensee complies with financial services laws. There is no prescriptive requirement that the arrangements be documented in a written plan and there is a recognition that no compliance plan or procedure can prevent all breaches. Compliance arrangements seek to prevent breaches where possible and to manage them and learn from them when not. Again, the prescriptive nature of the proposed obligation means that ACL holders will not be able to comply giving rise to potential liability for even the best run licensees.
11. Licence numbers	LIC195(1) reg 2.6	49-50 14-15	An ACL holder must cite its licence number in among other things advertisements.	11.1 It is unclear why an ACL holder is required to cite its licence number when: (a) they have an obligation to provide a credit guide, which contains an obligation to provide its ACL number; and (b) an AFSL holder is not required to cite AFSL number in advertisements. 11.2 The obligation applies to any advertisements, which would include TV, radio, billboards etc. This obligation is not practical for radio advertisements in particular. 11.3 We are also concerned that a broker may have to cite the ACL number for each lender named in the broker's advertisements. 11.4 Will credit representative numbers be the same as AR numbers?
12. Credit representative numbers				12.1 We note that ACL numbers will be required to be the same as AFSL numbers for licensees holding both. 12.2 Although credit representatives are not required to cite the number assigned to them by ASIC when they register, it is common practice

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				for authorised representatives of AFSL holders to cite their authorised representative number in appropriate documents, such as FSGs and SOAs.
				12.3 We therefore submit that ASIC should ensure that where a credit representative is also an authorised representative the same number should be allocated to them.
13. Exemption and modification powers	LIC400-LIC410	88-89	ASIC's exemption and modification powers are limited to the ACL provisions in Chapter 2 of the Bill.	13.1 ASIC does not have a modification or exemption in relation to the obligations regarding responsible lending and regulations may only be made in limited circumstances. Given the prescriptive nature of the responsible lending provisions and the time needed to pass amending legislation, we submit that there should be a clear power to make regulations and for ASIC to make exemptions and modifications in relation to Chapter 3 of the Bill.
14. Giving a Credit Guide	R130(4) R230(4) R232(4) R330(4) R430(4)	92 107 108 118 120	Credit Guides must be given.	14.1 It should be possible for Credit Guides to be made available to consumers without being 'given' to them individually. 14.2 We submit that it should be possible for licensees and representatives to make Credit Guides available - for example on their website or on request. It may be appropriate for the person dealing with the consumer directly to state that their Credit Guides are available or for that to be stated in other documents received by the consumer relating to the provision of credit. 14.3 Even if the Electronic Transactions Act 1999 applies, it only permits electronic communication with consent. We submit that where it is not appropriate to merely make information available, the disclosure requirements should be able to be met by sending an email where the consumer provides an email address without requiring specific consent. 14.4 This is particularly relevant for the Credit Guide relating to the credit provider, which does not provide any particularly material information. We submit that it should be possible for a credit provider to include such information in the relevant credit related documents without having to publish a separate Credit Guide.
15. Timing of providing Credit Guide	R130(1) R230(1) R232(1) R330(1) R430(1)	91 106 107 117 120	There are no circumstances in which a Credit Guide can be given later.	15.1 The Bill should permit Credit Guides to be provided later when it is not reasonably practical to provide them at the time otherwise required. 15.2 The Corporations Act permits FSGs to be provided later if it is not reasonably practical to provide it when it first becomes apparent that a financial service will be provided (section 941D(2)). Examples of

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				when this can occur include dealing with consumers over the telephone. We submit that this type of exception is also appropriate for Credit Guides, although we recommend that greater flexibility be introduced. For example, the Corporations Act requirement for an express instruction that the service is required immediately, imposes artificiality to dealings with consumers. It should be sufficient that the Guide cannot easily be provided at the relevant time, for example because the provider is dealing with the consumer over the telephone.
				15.3 There may be other FSG exemptions which should also apply to Credit Guides.
16. Multiple Credit Guides	R130 R230 R232 R330 R430	91-93 106-107 107-108 117-118 120-121	The Bill sets out separate Credit Guide requirements for: <ul style="list-style-type: none"> ▪ credit assistance providers; ▪ credit providers; ▪ credit providers who are assignees; ▪ credit representatives; and ▪ debt collectors. 	<p>16.1 It should be possible for Credit Guides for multiple parties to be combined into one document and for a Credit Guide to be combined with one or more Financial Services Guides (FSGs).</p> <p>16.2 The number of different parties that can be involved in the provision of credit means that a consumer could receive four, five or even more Credit Guides for the same transaction – one for the credit representative; one for their licensee; one for the originator; one for the loan servicer; and, one for the credit provider. While the parties may not be able to combine all of these documents into one Credit Guide in all circumstances, it should be possible for them to do so and the Bill should expressly permit this. We submit that the Bill should make it clear that a licensee is only liable for the part of the Credit Guide that relates to them to encourage the combining of Credit Guides into one document wherever feasible.</p> <p>16.3 We also note that credit representatives are required to provide a separate Credit Guide from their responsible licensee. This differs from FSGs under the Corporations Act which requires an authorised representative's FSG to cover the material that would need to be included in their licensee's FSG and there is therefore no separate requirement for the licensee to provide an FSG. We submit that this approach should also be followed in the Bill.</p>
17. Credit provider responsible lending requirements	R130 – R180 R230 R250 – R290	91-101 106-107 109-115	A number of different and overlapping obligations seem to apply when a person both suggests credit and provides it	<p>17.1 A credit provider may also provide credit assistance because it includes suggesting that a person may apply for or retain credit: DEF7.</p> <p>17.2 Consequently, it seems that a credit provider who suggests that a customer obtain credit will need to: <ul style="list-style-type: none"> ▪ provide a credit assistance Credit Guide before providing credit </p>

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				<p>assistance</p> <ul style="list-style-type: none"> ▪ provide a quote for providing credit assistance before providing credit assistance – presumably if there is no fee payable for credit assistance then no quote is required although this is not stated ▪ undertake reasonable inquiries before making a preliminary assessment of suitability ▪ undertake a preliminary assessment of unsuitability – there is some suggestion in the Commentary that there is a difference between the preliminary assessment and the credit provider's assessment (paragraph 3.45) but this is not reflected in the requirements ▪ provide a credit proposal disclosure document ▪ provide a credit provider Credit Guide before entering into a credit contract –different requirements apply to this Credit Guide, which suggests that a credit provider who suggests credit might have to supply two different Credit Guides ▪ undertake reasonable enquiries before making a further assessment of suitability unless within 30 days of the date a credit contract is proposed to be entered into – there may be uncertainty regarding this date and we therefore suggest that the 30 day period end on the date of the credit provider's assessment ▪ undertake a further assessment of unsuitability – it appears that both a preliminary assessment and a credit provider's assessment is required if the credit provider also provides credit assistance ▪ disclose commissions that will be received before a credit contract is entered into – presumably providing the credit proposal disclosure document will meet this requirement although the requirements do differ. <p>17.3 We submit that where a credit provider suggests that a consumer obtain credit from the credit provider, only the credit provider obligations should apply. It should not be necessary to provide two different Credit Guides or to undertake two different suitability assessments. We also submit that there should not be any need to disclose commissions except to the extent required by R280. It will be apparent to a consumer receiving credit assistance from the</p>

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				credit provider what the interests of the credit provider and its representatives interests are when suggesting credit. There is therefore no need for the credit provider to either state commissions in the Credit Guide or provide a credit proposal disclosure document.
18. Agency and reliance – 'reasonable belief' reliance			There are no provisions in that allow a person to rely on another person to give a credit guide.	<p>18.1 Under FSR, a person is only required to have a 'reasonable belief' that the customer has received a PDS. In addition, an AFSL holder is not required to provide an FSG where there is an arrangement for another party to provide the FSG (s912C(8) and reg 7.7.02(7).</p> <p>18.2 We submit that similar provisions should be included in the Credit Bill.</p>
19. Quote for providing credit assistance	R135	94-95	A credit assistance provider must, before suggesting or assisting, give the consumer a quote for the credit assistance.	19.1 It appears that the quote is only intended to relate to fees separately charged by a licensee for credit assistance and is not intended to relate to commissions, etc. For clarity, we submit that this should be expressly stated in the explanatory material.
20. Obligation to verify	R160(1)(c) R260(1)(c)	97 109	A credit provider and credit assistance provider is required to take reasonable steps to verify the consumer's financial situation.	20.1 We submit that at least a credit assistance provider should be entitled to rely on the information provided by the consumer, particularly as the credit assistance provider is only required to undertake a 'preliminary' unsuitability assessment.
21. Assessment of unsuitability – what is unsuitability?	R165 R265	97-98 109-110	A credit provider and credit assistance provider is required to assess that: a credit contract is not unsuitable for the consumer.	<p>21.1 We note that the term 'unsuitability' has been used but we are unsure whether this is intended to mean something different to assessing whether the credit is suitable. It would seem unfortunate if licensees and representatives were required to or decide to use the term 'unsuitability' in their dealings with consumers as a result of its usage in the legislation as it is not a particularly consumer friendly term.</p> <p>21.2 We are concerned about the ability of lenders to conduct this assessment for individual applicants and submit that the suitability assessment should be confined to those providing credit assistance.</p>
22. Civil penalties and infringement notices	REM30 M510	123		22.1 We are concerned that the penalty and enforcement regime proposed in the Bill is unduly harsh. In particular, we note that there are no civil penalties under the Corporations Act and ASIC does not have an infringement notice power for equivalent obligations. We are concerned that the lower standard of proof applying to civil penalties will mean that regulated entities will become risk averse, thereby stifling innovation for consumer product innovation and increasing compliance costs both for ASIC and, ultimately,

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23. Indemnity	167A NCC	283	The Code provides that indemnities for liability for breach of the Code are enforceable.	consumers. 23.1 We submit that this provision, which is particularly important in the credit market given the roles undertaken by third parties in originating and servicing loans, should also apply to obligations of licensees under the Bill itself.