

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

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## COMMENTARY AND QUESTIONS FOR STAKEHOLDERS

The exposure draft of the National Consumer Credit Protection Amendment (Credit Reform Phase 2) Bill 2012 (Phase 2 Bill) includes boxes, located adjacent to the relevant provisions, with commentary setting out a summary of key provisions, and some questions which stakeholders are particularly asked to address in their submissions on the Bill.

A list of the inserts with commentary and questions is set out below.

In general terms the Phase 2 Bill introduces the following reforms:

- A person will be prohibited from engaging in credit activities in relation to a small business credit contract or a small business consumer lease unless they hold a permit (with the permit regime set out in the draft Credit Regulations).
- A person will be prohibited from engaging in credit activities in relation to an investment credit contract unless they hold an Australian credit licence.
- Responsible lending obligations do not apply to small business credit contracts or to investment credit contracts generally, but only to specific classes of these contracts.
- The substantive obligations in the National Credit Code do not apply to small business credit contracts and to small business consumer leases. Other than the unjust contract provisions, these provisions also do not apply to investment credit contracts.
- The definition of regulated credit contracts is to be expanded to include contracts where the credit provider or lessor is a private individual who is not in the business of providing credit or consumer leases, but where the contract is arranged by an intermediary.
- Short-term leases and indefinite term leases that are currently exempt under subsection 171(2) of the National Credit Code are to be regulated.
- A prohibition on anti-avoidance conduct is to be introduced, providing a systematic response to avoidance practices.

## Enactment Provisions

Section 2 – Commencement provision	Question about the length of the transitional period to be provided for each Schedule of the Bill.
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## Schedule 2 – Small business lending

Schedule 2	Comment explaining that Schedule 1 has not been circulated for public comment with the other Schedules, as it provides for matters relevant to a referral of legislative power to the Commonwealth by the States.
Item 1, subsection 5(1)	Question about use of a definition of 'small business' based on the number of its employees.
Item 2, subsection 5(1A)	Question about the exemption, in draft Credit Regulation 58A (released with the draft of the Bill) to exclude small business credit contracts where the maximum amount of credit exceeds \$5 million.
Item 6, subsection 170(1)	Question about whether there are any classes of small business consumer leases that should be exempted, whether on the basis of the cash value of the leased goods or other characteristics.
Items 12 and 13, sections 112B and 125B	Commentary explaining that responsible lending obligations do not apply to small business credit contracts generally, but only to protected small business credit contracts.
Item 18, section 133FB	Question about the definition of a 'protected small business credit contract' (a class of contracts to which modified responsible lending obligations would apply).
Item 18, section 133FC	Questions in relation to the requirement for a provider of credit assistance to provide a quote, in relation to small business credit contracts.
Item 18, Part 2, Division 2, Subdivision B	Questions about, first, the inquiries that a provider of credit assistance would be required to make, to ensure that a protected small business credit contract is suitable, including that the borrower has an exit strategy, and, second, the consequences of such a contract being unsuitable.
Item 18, section 133FH	Question in respect of the disclosure requirements to apply to credit providers in respect of small business credit contracts.
Item 18, Part 2, Division 3, Subdivision B	Questions about, first, the inquiries that a credit provider would be required to make, to ensure that a protected small business credit contract is suitable, including that the borrower has an exit strategy, and, second, the consequences of such a contract being unsuitable.
Item 22, Part 3-4A, Division 1	Question about whether there is a class of small business consumer leases where providers of credit services or lessors should be subject to responsible lending obligations (similar to those proposed to apply to protected small business credit contracts).
Item 22, Division 2, section	Questions in relation to the requirement for a provider of credit

156AB	assistance to provide a quote, in relation to small business consumer leases.
Item 22, Division 3, section 156AC	Question about the disclosure requirements for lessors in respect of small business consumer leases.
Item 24, Division 5, section 203D	Commentary explaining operation of the provision that excludes the substantive obligations in the National Credit Code from applying to both small business credit contracts and small business consumer leases.

## Schedule 3 – Investment Lending

Item 2, subsections 5(3) and (4)	Question about applying licensing obligations under Chapter 2 of the <i>National Consumer Credit Protection Act 2009</i> to credit contracts that will be regulated as a result of the predominant use of the credit being for investment purposes.
Item 3, paragraphs 13(2)(a), (b), (c) and (d).	Question about whether there are any classes of consumer leases for investment purposes that should be regulated.
Items 12 and 13, sections 112A and 125A	<p>Commentary explaining that responsible lending obligations do not apply to investment credit contracts generally, but only to two classes of such contracts (known collectively as protected investment credit contracts).</p> <p>These classes of contracts are:</p> <ul style="list-style-type: none"> <li>• regulated product (home-secured) investment contracts; and</li> <li>• unregulated product investment credit contracts.</li> </ul>
Item 18, Part 3-2E, section 133EB	Questions about the definitions of regulated product (home-secured) investment contracts and unregulated product investment credit contracts, including how the latter category of contracts can be further refined to address conduct where the payment of commissions or other financial arrangements creates a risk of conflicted advice.
Item 18, Division 2	Commentary explaining that the responsible lending obligations introduced in Division 2, in relation to protected investment credit contracts, follow the existing model in the Credit Act.
Item 18, Division 2, Subdivision A, section 133EC	Questions in relation to the requirement for a provider of credit assistance to provide a quote, in relation to protected investment credit contracts.
Item 18, Division 2, Subdivision B	Questions about the inquiries that a provider of credit assistance would be required to make, to ensure that a protected investment credit contract is suitable, including, where the

	contract is secured by a mortgage over their home, that the borrower appreciates the consequent risks.
Item 18, Division 3	Commentary explaining that the responsible lending obligations introduced in Division 3, in relation to protected investment credit contracts, follow the existing model in the Credit Act.
Item 18, Division 3, section 133EK	Questions about the inquiries that a credit provider would be required to make, to ensure that a protected investment credit contract is suitable, including, where the contract is secured by a mortgage over their home, that the borrower appreciates the consequent risks.
Item 19, section 179	Commentary explaining the operation of a presumption that a court should make an order enabling a consumer to remain in their place of residence where 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).
Item 22, section 203C	Commentary explaining the operation of the provision that applies the unjust contract provisions in the National Credit Code to investment credit contracts, but otherwise excludes the substantive provisions in the Code from applying to these contracts.

## Schedule 4 – Private lending

Items 1, 2 and 3, sections 5 and 170	<p>Commentary explaining how the definition of regulated credit contracts is to be expanded to include contracts where:</p> <ul style="list-style-type: none"> <li>the credit provider or lessor is a private individual who is not in the business of providing credit or consumer leases; and</li> <li>the contract is arranged by an intermediary.</li> </ul> <p>The commentary also discusses the circumstances in which such persons are excluded from the requirement to hold an Australian credit licence (as set out in the regulations).</p>
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## Schedule 5 – Consumer leases

Item 2, section 170A	Questions in relation to the approach taken to regulating short-term leases and indefinite term leases that are currently exempt under subsection 171(2), by requiring lessors to make reasonable inquiries into the lessee’s intended period of use.
Item 10, subsection 204(1)	Commentary explaining how the definition of ‘requisite belief’,

	relevant to the inquiries to be made into the lessee's intended period of use, is based on the wording in section 13 of the National Credit Code.
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## **Schedule 6 – Anti-avoidance**

Item 5, section 323A	Question about adopting a systematic response to avoidance practices, rather than individual responses being developed as a particular practice emerges.
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