CREDIT (COMMONWEALTH POWERS) BILL 2010

Receipt and First Reading

Bill received from the Assembly; and, on motion by **Hon Helen Morton (Parliamentary Secretary)**, read a first time.

Second Reading

HON HELEN MORTON (East Metropolitan — Parliamentary Secretary) [5.59 pm]: I move —

That the bill be now read a second time.

The Credit (Commonwealth Powers) Bill 2010, once enacted, will adopt relevant commonwealth credit laws and refer the power to the commonwealth Parliament to amend those laws pursuant to section 51(xxxvii) of the Constitution, giving effect to the first phase of a two-phase implementation plan endorsed by the Council of Australian Governments on 2 October 2008 to transfer credit regulation to the commonwealth. The bill is one of two bills being introduced to establish the new national regulation of credit. The second bill is the Credit (Commonwealth Powers) (Transitional and Consequential Provisions) Bill 2010, which I will refer to separately.

Currently, consumer credit in Australia is regulated in accordance with the uniform Consumer Credit Code. The UCCC is a law of Queensland applied in each other Australian jurisdiction. Western Australia has had a positive licensing regime in place for finance brokers and credit providers for a number of years. It is the only state that has had such a regulatory scheme in place. The current regulatory regime in Western Australia has played a significant role in returning public confidence to an industry that was severely tarnished by a series of managed investment scheme scandals in the late 1990s. It is pleasing to note that COAG has recognised the success enjoyed in WA, and chosen to model the national regime on Western Australia's proven system. Further, because this model has been in place in WA, I believe our local industry is well positioned to transfer into the national regime with a minimum of disruption.

In December 2006, the then commonwealth Treasurer, Hon Peter Costello, MP, requested the Productivity Commission to review the Australian consumer policy framework. In April 2008, the Productivity Commission published its final report on this review. Recommendation 5.2 of that report called for, amongst other things, the transfer of responsibility for regulating credit providers and intermediaries, including finance brokers, to the commonwealth, with the Australian Securities and Investments Commission administering a licensing scheme for finance brokers and a registration or licensing scheme for credit providers.

The majority of credit transactions in Australia are through nationally operating lenders. Additionally, most finance brokers operate through national franchises or aggregators. A single regulatory regime for credit and finance brokers offers clear efficiencies for industry and governments. The global credit crisis has added further weight to the case for a single regulatory regime.

At its meeting of 26 March 2008, the Council of Australian Governments agreed to a broad regulatory reform agenda consisting of 27 regulatory reform areas, including a reform area described as the "seamless national economy". At its meeting of 3 July 2008, COAG formally agreed to the commonwealth taking over responsibility for credit and finance brokers, and to the introduction of a new national regulatory regime consisting of licensing, with conduct, advice and disclosure requirements. A national partnership agreement implementation plan was signed by all jurisdictions in December 2008. The commonwealth committed at COAG to provide $550 million over five years to facilitate the implementation, and reward the delivery, of seamless national economy reforms.

The funding is to be made available in three tranches, being a $100 million implementation payment in 2008–09 and reward payments of $200 million in 2011–12 and $250 million in 2012–13. Western Australia's total possible receipts under this funding arrangement are $10 million—received by the WA Department of Treasury and Finance in 2009—$20 million and $25 million respectively. At its meeting of 7 December 2009, COAG signed the Intergovernmental Agreement for the National Credit Law. The NPA implementation plan sets out two phases for national consumer credit regulation.

The first phase of implementation has involved the enactment of commonwealth law to allow the commonwealth to assume responsibility for an enhanced uniform Consumer Credit Code. The amended UCCC—now referred to as the National Consumer Credit Code—will extend the definition of "consumer credit" to include mortgages for residential investment properties. The new regime will provide consumers with increased protection by including responsible lending provisions and a national requirement for finance brokers and lenders to be licensed. All industry participants will also have to be members of an external dispute resolution scheme. Legislation to give the commonwealth responsibility for phase 1, regulation of consumer credit, was passed by the Senate on

26 October 2009, and received royal assent on 15 December 2009. This bill was based on the referral of power by the Tasmanian Parliament.

Phase 2 of the national credit regulation will involve a review by the commonwealth of a number of outstanding issues, such as a review of unsolicited credit card limit extension offers, examination of state and territory approaches to interest rate caps, and consideration of the regulation of reverse mortgages. The introduction of legislation to enact any agreed reforms under phase 2 of the national consumer credit action plan is planned for 2011.

It is important to note it is intended that Western Australia, together with all other states and territories, will have referred power, or adopted the commonwealth legislation to regulate credit, to the commonwealth prior to the consideration of phase 2 matters. Consideration of these reviews will, pursuant to the intergovernmental agreement, be a matter for the Ministerial Council for Corporations—MINCO—on which Western Australia is represented by the Attorney General, to whom I will provide policy advice regarding credit.

Under the National Consumer Credit Protection Act 2009, phase 1 will commence in several stages. The first is the registration stage whereby anyone who currently engages in certain credit activities will need to register with the Australian Securities and Investments Commission between 1 April and 30 June 2010. Registered credit participants will then have six months to apply for an Australian credit licence, between 1 July 2010 and 31 December 2010, while new entrants to the credit market from 1 July 2010 will be required to apply for an Australian credit licence prior to commencing business. To qualify for an Australian credit licence, lenders and brokers must meet minimum training and experience requirements and be a member of an external dispute resolution service. Licensees must have adequate financial and human resources to meet their obligations and meet minimum standards of conduct, including the requirement to act honestly, efficiently and fairly.

Because of the rigour of the current licensing scheme in Western Australia, the commonwealth regulations have provided the ability for finance brokers who hold a Western Australian A-class licence, that is, people authorised to arrange loans of single private investor moneys, or a B-class licence, that is, people authorised to arrange loans of money from lending institutions without supervision, to take advantage of a streamlined application process. Finance broker licensees who do not have two years' experience can have an Australian credit licensee appoint them as an authorised representative, which is not dissimilar to the current situation in Western Australia whereby C-class licensees are required to be supervised, and then either remain a representative or apply to ASIC for their own Australian credit licence when they satisfy the minimum experience requirement.

The commonwealth legislation will give ASIC the power to cancel or suspend a licence, or to ban people from engaging in credit activities, to protect consumers from the risk of financial harm. A national licensing scheme will mean that a person who is banned will be unable to legally engage in credit activities anywhere in Australia. Currently, there is nothing to prevent a person banned in one state or territory from continuing to operate as a broker or a lender in a different jurisdiction.

The third stage involves the commencement of the National Consumer Credit Code on 1 July 2010 when changes or additions to the UCCC requirements will commence in relation to credit for residential investment properties, business purpose declarations, default notices, and new notices in response to application for hardship variations and postponements.

The new national responsible lending obligations not to arrange or provide credit that is unsuitable will apply to credit providers, other than authorised deposit-taking institutions and registered finance companies, and intermediaries, including mortgage brokers, from 1 July 2010; and to authorised deposit-taking institutions and registered finance companies from 1 January 2011. Other responsible lending obligations, including disclosure requirements such as upfront disclosure of broker fees and charges, will come into effect on 1 January 2011.

The National Consumer Credit Protection Act 2009 also temporarily exempts certain sections of the industry. Point-of-sale retailers such as car dealerships, stores or retail outlets are exempted from licensing when they engage in credit activities by arranging credit or acting as an intermediary through an arrangement with a lender. However, there will be situations where the exemption for point-of-sale retailers may not be applicable—for example, door-to-door sales—to minimise the risk of abuse by persons who would otherwise not be regulated by the National Consumer Credit Protection Act 2009. The commonwealth government has committed to examine the issue of regulatory oversight of point-of-sale credit within the next 12 months.

Debt collectors will also be exempt from national licensing for 12 months. In Western Australia, debt collectors must be licensed under the Debt Collectors Licensing Act 1964. The National Consumer Credit Protection Regulations 2010 were made on 10 March 2010. These regulations set out an exemption for debt collectors for the first 12 months of the national credit laws from the need to be licensed under the national law when they are collecting debts on behalf of another person. Importantly, debt collectors who purchase debts will be treated as credit providers and will need to be licensed under the national credit laws. The consultation period for the

commonwealth credit regulations closed on 11 December 2009 but subsequent versions have not been released. Review of this exemption and consideration of the national regulation of debt collectors is being considered as part of phase 2 of the national credit reform, during the course of this exemption. As debt collectors are exempt from the national consumer credit regulation for the first 12 months, debt collector legislation, including state licensing, will remain in place and continue to be administered by the Department of Commerce.

The commonwealth Parliament, as part of the federal division of legislative power between the commonwealth and states, is given a number of specific subject matter grants of legislative power. When the commonwealth Parliament does not have legislative power over a subject matter, activity or person, section 51(xxxvii) of the Australian Constitution enables the commonwealth Parliament to exercise a legislative power referred to it by a state Parliament and also allows a state Parliament to adopt commonwealth legislation that has been enacted by relying on a power referred by another state Parliament. In both cases, referral and adoption, the law that ultimately applies in the state is commonwealth law.

The commonwealth Parliament does not have sufficient legislative authority under the Australian Constitution to completely regulate credit and finance brokers. On 30 March 2009, cabinet approved the drafting of a bill to provide a text-based referral of power to the commonwealth Parliament to regulate credit and finance brokers. Subsequent negotiations between the states and the commonwealth have resulted in a text-based referral not being acceptable to the commonwealth due to concerns over constitutional uncertainty and the commonwealth's desire to have a subject-based power to amend the national legislation if and when it becomes necessary. The Tasmanian Parliament has enacted referral legislation, which does two things: firstly, it refers to the commonwealth Parliament for enactment of the text of the above commonwealth bills; and, secondly, it refers to the commonwealth Parliament a power to make amendments to the commonwealth legislation. As previously stated, the National Consumer Credit Protection Act 2009 has been enacted. The commonwealth view is that state Parliaments can still refer power in respect of this act to the commonwealth Parliament. However, the states prefer to take a more legally cautious approach and consider that the state Parliament should adopt this commonwealth act. Previous Western Australian governments and Parliaments have preferred to use the adoption method rather than referring state powers to the commonwealth Parliament; for example, WA has adopted commonwealth laws relating to mutual recognition and child support.

The bill tabled today has two major components: firstly, a provision that adopts the existing commonwealth credit legislation; and, secondly, a provision that refers power to the commonwealth Parliament to amend that credit legislation. It should be noted that the referred power to amend is narrow and not unlimited. It is to some extent based on referred power to amend in other Western Australian legislation referring power to commonwealth Parliament; for example, in Corporations Law and the proposed personal property securities legislation.

Four specific "carve outs" to the referral of power to the commonwealth to amend the national act have been agreed to by all jurisdictions, which clearly delineate the scope of the referred power, ensuring that commonwealth amendments cannot, over time, broaden the scope of the original intention of the amendment power. The excluded matters relate to state taxes, duties, charges or other imposts; the general system for the recording of estates or interests in land; priority of interests in real property; and state statutory rights.

The commonwealth Parliament has passed a bill to amend the national act to accommodate the excluded matters from the scope of the referral and recognise those states that adopt the commonwealth legislation with the referral of power to amend the commonwealth law. Adoption of commonwealth credit legislation and referral of an amendment power to the commonwealth Parliament will mean that the Western Australian Parliament and government will lose the capacity to legislate to regulate credit and finance brokers in Western Australia and will lose the capacity to directly influence the way in which regulation of these market sectors is administered. The Credit (Commonwealth Powers) Bill 2010 includes the capacity of the Western Australian government to withdraw the adoption and revoke the referral, should that prove warranted.

Western Australia will need to refer power to the commonwealth Parliament and adopt the commonwealth credit legislation in order to implement the national credit reform. To meet the time frame in the implementation plan, this should occur prior to the commencement of the National Consumer Credit Protection Act 2009 and related commonwealth acts on 1 July 2010. The registration stage of the national credit law occurs between 1 April and 30 June 2010. The bills will not be able to be passed prior to 30 March 2010 due to the requirement for the bills to be referred to the Legislative Council's Standing Committee on Uniform Legislation and Statutes Review for review.

If the WA Parliament has not passed the Credit (Commonwealth Powers) Bill 2010 prior to the commencement of the National Consumer Credit Protection Act 2009, it will create uncertainty for finance brokers and credit providers in WA and delay the additional consumer protections the new legislation delivers. Additionally, the

state will be in breach of the intergovernmental agreement relating to credit law, which may endanger national partnership payments to the state.

The transfer of responsibility for regulation of consumer credit and finance broking to the commonwealth is scheduled for 1 July 2010. Failure to participate in the national credit law from its 1 July 2010 commencement date would breach the IGA, which could endanger WA's national partnership payments; create dual regulation for credit industry participants who operate in Western Australia and another jurisdiction, requiring them to retain their state licence as well as apply for a national licence, which will negate the benefits of streamlining Western Australian licensees for those multi-jurisdictional businesses; and, finally, result in Western Australian consumers being denied the benefits of the enhanced consumer credit protection—for example, coverage of residential investments under the national code—that the rest of Australian consumers are afforded.

I commend the bill to the house.

Debate adjourned and bill referred to the Standing Committee on Uniform Legislation and Statutes Review, pursuant to standing orders.