1992

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

LAW AND JUSTICE LEGISLATION AMENDMENT BILL (NO. 4) 1992

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Attorney-General,
the Honourable Michael Duffy, M.P.)

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE HOUSE OF REPRESENTATIVES TO THE BILL AS INTRODUCED

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SCHEDULE

LAW AND JUSTICE LEGISLATION AMENDMENT BILL (NO. 4) 1992

GENERAL OUTLINE

This Bill makes amendments of a minor policy nature to legislation within the Attorney-General's portfolio, makes minor amendments to a related Act, and also makes some minor technical amendments to legislation.

The Bill will

(i) amend the *Bankruptcy Act 1966* to

- require registered trustees to notify the Official Receiver of the trustee's opinion whether a bankruptcy is eligible for early discharge from bankruptcy
- alter references to provisions repealed by the *Bankruptcy Amendment Act 1991*, to conform with new provisions inserted by that Act

(ii) amend the *Complaints (Australian Federal Police) Act 1981* to

- alter references to the Act, the *Freedom of Information Act 1982* and the *Ombudsman Act 1976* to conform with amendments previously made to the *Freedom of Information Act 1982*

(iii) amend the *Family Law Act 1975* to

- provide the day on which a resignation in writing to the Governor-General is to take effect
- ensure the continuity of appointment of Judges who are reappointed to age 70
- require a Registrar to take an oath or affirmation of office before the Chief Justice or a Judge of the Family Court of Australia before commencing duty as a Registrar

(iv) amend the *Federal Court of Australia Act 1976* to

- require a Registrar to take an oath or affirmation of office before the Chief Justice or a Judge of the Federal Court of Australia before commencing duty as a Registrar make it clear that, except in special circumstances, costs cannot be awarded against a person represented in a representative proceeding under Part IVA of the Act or in a proceeding of a representative character authorised by another Act

(v) amend the *Freedom of Information Act 1982* to

- continue the exemption for documents of the National Companies and Securities Commission after the abolition of the Commission

- remove the requirement that the Administrative Appeals Tribunal first receive a request from the appellant before exercising its discretion to extend a hearing to a review of the decision actually made where the decision has been delayed

- alter the provisions setting out the powers of the Administrative Appeals Tribunal to review decisions and those requiring the Tribunal to hold all or part of certain proceedings in private to reflect amendments made to the Act in 1991

(vi) amend the *Judges (Long Leave Payments) Act 1979* to preserve judges' long leave payment entitlements upon resignation or retirement and reappointment in circumstances such as those under the amended provisions of the *Family Law Act 1975*

(vii) amend the *Judges' Pensions Act 1968* to preserve judges' pension entitlements upon resignation or retirement and reappointment in circumstances such as those under the amended provisions of the *Family Law Act 1975*

(viii) amend the *Privacy Act 1988* to

- ensure financial arrangements known as securitisation arrangements may operate in conformity with the Privacy Act

- permit mortgage insurers to obtain credit related information about guarantors in order to assess the risk of insuring a loan

- clarify that a credit report relating to an individual provided for the purpose of assessing an application for commercial credit may be used where the applicant for commercial credit is a corporation or another individual

- permit credit providers to *use* credit reports for the purpose of the collection of overdue payments relating to commercial credit permit persons who are permitted to use another person's account to have access to some information concerning the status of that account

permit credit providers to provide information about borrowers to guarantors with the consent of the borrower

- permit credit providers to disclose to collection agencies (debt collectors) some publicly available information (court orders and bankruptcy information)
- permit first and second mortgagees to exchange information where the borrower is 60 days overdue in making payments under one at least of the mortgages
- remove some unintended restrictions on the use of certain types of credit information
- make some consequential amendments to permit records of disclosures made under the amended provisions to be recorded on credit information files.

FINANCIAL IMPACT STATEMENT

The proposed amendments will not have any significant financial impact. The amendments to the *Privacy Act 1988* will have limited impact on Government expenditure. Any additional expenditure incurred by the Human Rights and Equal Opportunity Commission will be absorbed within the Commission's present budget. There will be minimum direct cost impact on consumer credit reporting agencies and credit providers as the industry is already operating under the Privacy Act, and the amendments will not significantly require industry to change the way it operates.

NOTES ON CLAUSES

Clause 1 - Short title

1. This clause provides for the Act to be cited as the *Law and Justice Legislation Amendment Bill (No. 4) 1992*.

Clause 2 - Commencement

2. This clause provides for the commencement of the Act. By subclause 2(1), where not otherwise provided, the Act will commence on the date of Royal Assent.

3. Subclause 2(2) provides that the amendment of section 19 of the *Bankruptcy Act 1966* will commence 28 days from the date of Royal Assent. This is because the amendment will impose an obligation on private registered trustees to provide documentary information about the eligibility of bankrupts for early discharge to the Official Receiver.

4. Subclause 2(3) provides that the amendments to the *Family Law Act 1975* other than that inserting new section 37C, the *Judges (Long Leave Payments) Act 1979* and the *Judges' Pensions Act 1968* will be taken to have commenced on 1 November 1991. These amendments are ancillary to the amendments to the Family Law Act made by the *Family Law Amendment Act (No. 2) 1991*. That Act extended the maximum retiring age of Family Court Judges from 65 to 70 years of age. It is intended that new commissions will be offered to those Judges whose current terms of office are stated to end at age 65. The retrospective provision ensures that the amendments of the Acts has effect in relation to the appointment of the Honourable Justice Ian McCall, who was reappointed at age 65 on 6 November 1991.

Clause 3 - Amendments of Acts

5. Clause 3 provides that the Acts specified in the Schedule are to be amended as set out in the Schedule.

SCHEDULE

BANKRUPTCY ACT 1966

Duties of Trustees

The *Bankruptcy Amendment Act 1991* introduced a new system of early discharge from bankruptcy whereby a bankrupt who meets specified eligibility criteria is entitled to apply for early discharge 6 months after filing his or her statement of affairs provided specified disqualifying criteria do not apply. As soon as practicable after a person has become a bankrupt, the trustee must send a notice to the creditors advising them of the trustee's opinion as to whether the bankrupt is eligible for, and not disqualified from early discharge, and inviting the creditors to furnish any information that they have about the bankrupt's eligibility within 6 months. When a bankrupt applies for early discharge, a copy of the application must be given to the Official Receiver. Decisions in relation to early discharge are reviewable by the Inspector-General in Bankruptcy and the Administrative Appeals Tribunal.

Proposed new subsection 19(1D) will facilitate the administration of the review processes in relation to early discharge by requiring a trustee to also notify the Official Receiver of his opinion as to whether the bankrupt is eligible to apply for early discharge from bankruptcy. This is to ensure that trustees promptly advise creditors about whether the bankrupt will be entitled to early discharge and to allow monitoring of the correct application of the eligibility and disqualification criteria.

Jurisdiction of the Court

In addition to the early discharge regime mentioned above, the *Bankruptcy Amendment Act 1991* provided for bankruptcies to be annulled by operation of law where the bankrupt's debts have been paid in full or where creditors accept a composition or scheme of arrangement, and for the removal of the ability of creditors to seek leave of the Court to enter an objection to the discharge of a bankrupt. However, the Court's discretion to annul a bankruptcy where the Court is satisfied that the bankruptcy ought not to have been made was retained.

The amendments to section 31 will require the Court to hear proceedings relating to the annulment of a bankruptcy where it ought not to have been made, and remove the requirement to hear objections in open court, as the court no longer has specific jurisdiction to deal with such a matter.

Discharge from, or Annulment of Bankruptcy

The amendments to sections 43, 55, 56 and 57 will make changes consequential to the enactment of the *Bankruptcy Amendment Act 1991* omitted to be made in that Act. When a person becomes a bankrupt, they remain so until they are discharged from bankruptcy, or the bankruptcy is annulled. Before the commencement of the *Bankruptcy Amendment Act 1991*, a bankruptcy could be annulled only by order of the Court, and a Court could order the early discharge of a bankrupt. Now, a bankruptcy is annulled by operation of law where the bankrupt's debts are paid in full, where the bankrupt's creditors accept a composition or a scheme of arrangement, as well as by court order, and a bankrupt may obtain early discharge by administrative process where he or she meets the statutory eligibility criteria provided specified disqualifying criteria do not apply. The amendments to sections 43, 55, 56 and 57 will substitute references to the relevant new provisions of the Act for those references to provisions replaced by the *Bankruptcy Amendment Act 1991*.

Assessment and Collection of Income Contributions

The *Bankruptcy Act 1966* provided for a court to order a bankrupt to make contributions from his or her income to the estate under section 131. Section 131 was replaced by a new Division 4B of Part VI providing for administrative assessment and collection of income contributions by the *Bankruptcy Amendment Act 1991*. The amendments to section 59 and section 116 will repeal the reference to orders under section 131, which references are now spent because of the repeal of that section.

Notice of Discharge from, or Annulment of Bankruptcy

Section 310 of the *Bankruptcy Act 1966* provides that the Registrar in Bankruptcy must publish notification of the date on which a person is discharged from bankruptcy, or the person's bankruptcy is annulled in the *Gazette*. The amendment to section 310 will ensure that the publication requirement extends to situations where the bankrupt obtains early discharge under the new administrative discharge arrangements and where the bankruptcy is annulled by operation of law, because of the payment in full of the bankrupt's debts or the acceptance by the creditors of a composition or a scheme of arrangement. The amendment is consequential to the enactment of the *Bankruptcy Amendment Act 1991*. The Schedule will also repeal subsection 310(3A) which contains transitional provisions relating to publication of notices about discharge and annulment under the former *Bankruptcy Act 1924* and in relation to persons who were discharged from bankruptcy before 1981. The section is now spent.

COMPLAINTS (AUSTRALIAN FEDERAL POLICE) ACT 1981

Complaints to Ombudsman

The Schedule will make amendments to subsection 22(8) which requires that complaints to the Ombudsman concerning action taken by the Australian Federal Police in relation to the *Freedom of Information Act 1982* shall be dealt with under the *Complaints (Australian Federal Police) Act 1981* and not the *Ombudsman Act 1976*.

References in subsection 22(8) of the *Complaints (Australian Federal Police) Act 1981* to the three Acts require amendment because of 1991 amendments to the *Freedom of Information Act 1982* which revised the provisions in that Act in relation to complaints to the Ombudsman. This revision included the deletion of the reference to subsection 6(3) of the *Ombudsman Act 1976* in section 57 of the *Freedom of Information Act 1982* which provides for complaints to be made to the Ombudsman.

Subsection 22(8) of the *Complaints (Australian Federal Police) Act 1981* will be amended to substitute references to the current provisions of the *Freedom of Information Act 1982* for the previous provisions and to delete references to subsection 6(3) of the *Ombudsman Act 1976* and its equivalent subsection in the *Complaints (Australian Federal Police) Act 1981*, subsection 24(2A).

FAMILY LAW ACT 1975

Appointment, Removal and Registration on Judges

The Schedule will add two new subsections to section 22 of the Act. New subsection 22(3) will provide that a Judge may resign his or her office by writing to the Governor-General. New subsection 22(4) will provide that the resignation will take effect on

- the day on which the resignation is received by the Governor-General; or
- a later day specified in the resignation.

The proposed amendments are similar to the former subsection 22(3) which was repealed by the *Family Law Amendment Act 1977*, when the Act was amended to fix the maximum age of Judges of the Family Court at 65 after the Constitution had been amended to include provision for notification of resignation of judicial office. The amendments will put beyond doubt the method of resigning a judicial commission and the date of effect of the resignation.

Seniority of Judges

The Schedule will add two new subsections to section 23. New subsection 23(10) will provide that where a person's appointment as a Judge terminates and the person is immediately thereafter appointed to a similar judicial office, the later appointment is deemed to have commenced from the date of commencement of the earlier appointment. New subsection 23(11) will provide that subsection 23(10) applies whether the termination of the appointment occurs due to resignation or retirement.

These amendments are ancillary to the amendments to the Act made by the *Family Law Amendment Act (No. 2) 1991*. That Act extended the maximum retiring age of Family Court Judges from 65 to 70 years of age. It is intended that new commissions will be offered to those Judges whose current terms of office are stated to end at age 65. The amendment will avoid any doubt about the continuity of the two consecutive terms of office, and preserve the current seniority of Judges of the Court.

Resignation of Judicial Registrars

The Schedule will replace section 26K of the Act. New subsection 26K(1) will provide that a Judicial Registrar may resign his or her office by writing to the Governor-General. New subsection 26K(2) will provide that the resignation will take effect on

- the day on which the resignation is received by the Governor-General; or

- a later day specified in the resignation.

Section 26K is being replaced so that the provisions relating to the method of resignation of Judicial Registrars will be the same as those applying to Judges.

Oath or Affirmation of Office for Registrars

The Schedule will insert new subsection 37C which provides that a Principal Registrar, Registrar or Deputy Registrar shall take an oath or affirmation of office before the Chief Judge (the Chief Justice) or a Judge of the Family Court of Australia before commencing duty. The form of oath or affirmation is included in the amendment.

FEDERAL COURT OF AUSTRALIA ACT 1976

Oath or Affirmation of Office for Registrars

A new subsection 18Y is to be inserted to provide that a Registrar shall take an oath or affirmation of office before the Chief Judge (the Chief Justice) or a Judge of the Federal Court of Australia before commencing duty as a Registrar. The form of oath or affirmation is included in the amendment.

Costs

The Schedule will amend section 43 of the Act which confers power on the Federal Court to award costs in proceedings. The amendment will make it clear that the Court cannot award costs against a person represented in a representative proceeding brought under Part IVA (Representative Proceedings) of the Act or in a representative proceeding brought under any other Act (such as the *Trade Practices Act 1974*) which authorises such a proceeding.

An exception will be made in the special circumstances dealt with in sections 33Q and 33R in Part IVA of the Act and, in the case of a proceeding of a representative character commenced under another Act, in respect of any provision in that Act to the contrary. Sections 33Q and 33R of the Act relate to situations where a person represented (group member) is responsible for conducting a part of the proceedings.

The amendment will not affect the operation of the ordinary costs rules as regards the representative party or the Court's powers to order security for costs.

FREEDOM OF INFORMATION ACT 1982

Documents of the National Companies and Securities Commission

The Schedule will add a new subsection 47(2) which will continue the exemption for documents that were furnished by a State to the National Companies and Securities Commission before its abolition on 31 July 1992 and which related solely to the functions of the Commission in relation to State law (paragraph 47(1)(c)).

The new subsection (2) will also amend section 47 to continue the exemption for documents which were in the possession of the Commission before 31 July 1992 and which related solely to the exercise of the functions of the Commission under State law (paragraph 47(1)(d)).

Application to Tribunal when Decision Delayed

An application may be made to the Administrative Appeals Tribunal under section 56 where the time limit for granting or refusing access to a document or amending or annotating a record of personal information has passed. In that situation the agency is deemed to have made a decision to refuse the request for access, amendment or annotation.

Where an application is made to the Tribunal for review of a deemed decision and before the Tribunal finally deals with that matter the agency makes a decision but does not grant the request in full and in the manner requested, the Tribunal may extend the proceedings to review the decision actually made by the agency. Presently this can only occur at the request of the applicant for review.

The Schedule will amend subsection 56(5) so that the Tribunal will have the discretion to extend the proceedings without receiving a request by the person who has sought review.

Tribunal Proceedings in Relation to 'Conclusive Certificates' - Whether Issue Reasonable

The Schedule will amend section 58 to clarify the extent of the Administrative Appeals Tribunal's power in relation to applications for review where exemptions are claimed for documents under section 33 (documents affecting national security, defence or international relationships) or section 33A (documents affecting relations with the States and Territories).

Section 33 was amended in 1991 to delete references to 'the public interest'. Section 33A was amended to provide that the issuing of a certificate under subsection 33A(2) specifying that the disclosure of a document is not in the public interest conclusively establishes that fact. The amendment also provided that the issue of a certificate under subsection 33A(4) conclusively establishes that if information is included in a document stating whether another document exists the issue of the first document would not be in the public interest.

Section 58 will be amended to reflect those changes so that the grounds for review will be consistent with the grounds for exemption for documents as now set out in sections 33 and 33A.

Tribunal Proceedings Held in Private

To correct anomalies in section 58C the Schedule will amend section 58C which requires certain proceedings of the Tribunal to be in private. Review proceedings are required to be held in private where certificates have been given under subsections 33(4) and 33A(4) by a Minister because the Minister is satisfied that information as to the existence or non-existence of a document would, if contained in another document, cause that other document to be an exempt document under sections 33 or 33A respectively.

Sections 33 and 33A have previously been amended as indicated above.

It is therefore necessary to amend section 58C to re-establish consistency between sections 33 and 33A, which establish the exemptions, and section 58C, which is a procedural section.

JUDGES (LONG LEAVE PAYMENTS) ACT 1979

The Schedule will amend section 3 of the Act by inserting in the definition of 'retirement' a pointer to new section 3A which provides for the situation in which a Judge is immediately reappointed after retirement or resignation.

The Schedule will add new section 3A which will provide that where a person's appointment as a Judge terminates and a new appointment of that person as a Judge takes effect immediately, the Judge is taken not to have retired for the purposes of the Act. New subsection 3A(2) will provide that subsection 3A(1) applies whether the termination occurs on resignation or retirement.

These amendments will state the law clearly so that no question can be raised about the effect of termination of a judicial commission followed immediately by reappointment to a greater maximum age. The maximum age of Family Court Judges was increased in October 1991 by the *Family Law Amendment Act (No. 2) 1991*, and these amendments will facilitate the extension, by reappointment, of the commissions of the current Judges of the Family Court.

JUDGES' PENSIONS ACT 1968

The Schedule will amend subsection 4(1) of the Judges' Pensions Act by inserting in the definition of 'retires' a pointer to new section 4B which provides for the situation in which a Judge is immediately reappointed after retirement or resignation, and current section 5 which refers to service in more than one judicial office.

The Schedule will add new section 4B which will provide that where a person's appointment as a Judge terminates and a new appointment of that person as a Judge takes effect immediately, the Judge is taken not to have retired for the purposes of the Act. New subsection 4B(2) will provide that subsection 4B(1) applies whether the termination occurs on resignation or retirement.

These amendments will state the law clearly so that no question can be raised about the effect of termination of a judicial commission followed immediately by reappointment to a greater maximum age. The maximum age of Family Court Judges was increased in October 1991 by the *Family Law Amendment Act (No. 2) 1991*, and these amendments will facilitate the extension, by reappointment, of the commissions of the current Judges of the Family Court.

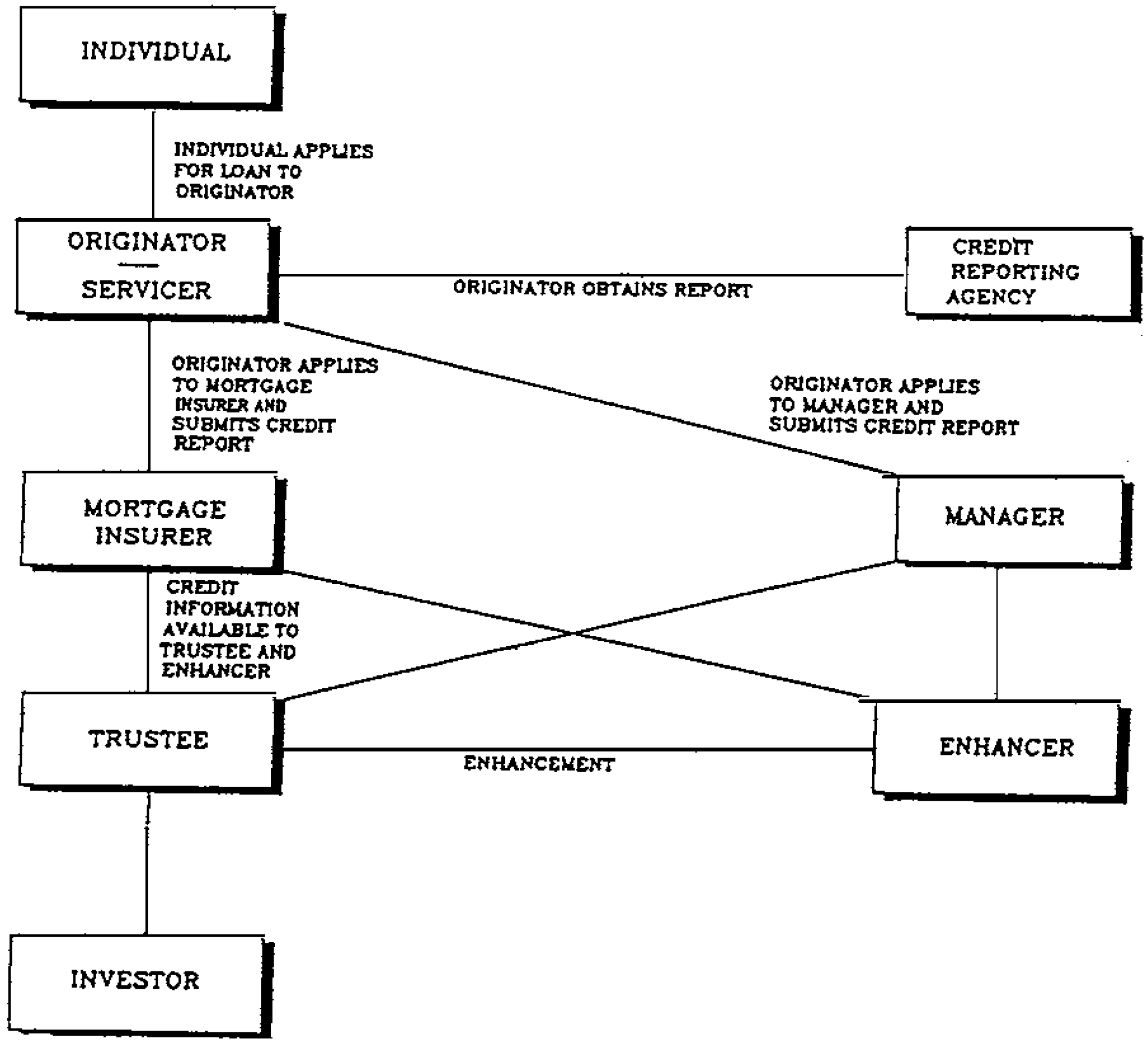
PRIVACY ACT 1988

General Explanation of Changes Relating to Securitisation

Securitisation, also known as 'asset backed securitisation', 'mortgage securitisation' or the 'secondary mortgage market', represents a relatively new development in the financial sector. Essentially, it refers to a complex and involved method of financing which is commonly used in domestic mortgages but is also used in asset-backed financing schemes.

A mortgage financed *ostensibly* by a credit provider such as a credit union or building society may be *ultimately* financed under mortgage securitisation by using funds invested by investors in a trust. There is a formal legal 'trustee' of the trust fund, but the fund is actually managed on a day-to-day basis by a 'trust manager' who deals with so-called 'credit enhancers' who actually take the financial risk by underwriting the securitisation scheme. The mortgagor makes repayments to the trust fund via the originating credit provider which is usually referred to in the scheme as the 'originator' or 'manager'. Enhancers perform a task which is essentially similar to that performed in other contexts by mortgage insurers.

The diagram on the following page describes pictorially the structure of a typical mortgage securitisation arrangement.


INDIVIDUAL
INDIVIDUAL APPLIES FOR LOAN TO ORIGINATOR
ORIGINATOR — SERVICER
ORIGINATOR OBTAINS REPORT
CREDIT REPORTING AGENCY
ORIGINATOR APPLIES TO MORTGAGE INSURER AND SUBMITS CREDIT REPORT
ORIGINATOR APPLIES TO MANAGER AND SUBMITS CREDIT REPORT
MORTGAGE INSURER
MANAGER
CREDIT INFORMATION AVAILABLE TO TRUSTEE AND ENHANCER
TRUSTEE
ENHANCEMENT
ENHANCER
INVESTOR

Although the Privacy Act makes some provision for securitisation, it is necessary, owing to the complexity of the industry, to substitute these provisions with the following amendments

- a definition of 'securitisation arrangement' to cover both mortgage and asset backed securitisation in relation to consumer credit, and a definition of 'credit enhancement' (amendments to subsection 6(1))

- provisions deeming organisations involved in securitisation schemes to be 'credit providers' while they are performing tasks for the purposes of those schemes (new subsections 11B(4A) and (4B))

- a provision permitting bodies involved in a securitisation scheme to share credit related information for the purposes of that scheme (new subsection 11B(4C))

- a provision permitting credit reporting agencies to disclose a credit report to a body involved in a securitisation scheme for the purpose of assessing the risk of purchasing a loan by means of securitisation (new paragraph 18 K(1)(ab)

- a provision permitting credit reporting agencies to disclose a credit report to a body involved in credit enhancement activities in relation to a securitisation scheme (new paragraph 18K(1)(ac))

- a provision permitting bodies involved in
  - assessing the risk in purchasing a loan by means of a securitisation arrangement
  - credit enhancement activities in relation to securitisation schemes

  to use reports given to them by credit reporting agencies (new subparagraphs 18L(1)(aa) and 18L(1)(ab)

- a provision restricting the use and disclosure of credit information provided to bodies deemed to be credit providers because they are involved in securitisation schemes after they have ceased to be credit providers (new subsection 18Q(6)).

Definition of Credit Enhancement

A definition of 'credit enhancement' is necessary to ensure that bodies performing a range of functions in 'securitisation arrangements' similar to that performed by mortgage insurers can be identified and given the same access to credit information as are other persons involved in securitisation arrangements. A new access provision is proposed for credit enhancers, as the Act does not presently permit access in the circumstances in which they need it. This term is used in proposed subsections 11B(4D), 18E(1)(b)(i) and 18K(1)(ac).

Definition of Securitisation Arrangement

'Securitisation arrangement' is to be defined as an arrangement involving the funding, or proposed funding of loans that are to be or have been provided by a credit provider, or the funding of the purchase of loans, by a credit provider, by issuing instruments or entitlements to investors, and in which payment to investors in respect of such instruments are principally derived from the loans. The definition includes securitisation arrangements securitising existing loans, as well as possible future loans.

Under the wording of this definition, the identification of a securitisation arrangement for the purposes of the Act will depend on the identification of a credit provider who has issued a loan which is being securitised under the arrangement. For some securitisation arrangements it may not be possible with certainty to identify a credit provider (within the meaning of the definition of that term in section 11B of the Act) who has provided the loan. In such cases it may be necessary to obtain a determination from the Privacy Commissioner under paragraph 11B(1)(b)(v) that a person is a credit provider for the purposes of that particular securitisation scheme.

The words 'instruments and entitlements' is a broad term expected to encompass a wide variety of methods of raising funds from investors (corporate or individual), entitling them to income from their investment.

Purchase of Loans

Proposed subsection 6(5D) will extend the meaning of references to 'the purchase of loans' to include the purchase of rights to receive payments under the loan, and is particularly relevant to the definition of "securitisation arrangement".

Deemed Credit Providers

Proposed subsection 11B(4A) should be read together with subsection 11B(4B). Subsection 11B(4B) will deem certain persons involved in securitisation schemes to be credit providers for the purposes of the Act, and subsection 11B(4A) will apply an additional condition that such bodies must carry on a business involved in either a securitisation arrangement or managing securitised loans, before they can be deemed to be credit providers.

Proposed subsection 11B(4B) will deem persons set out in subsection 11B(4A), while they are performing a task reasonably necessary for the purchase, funding or management of a loan, or processing an application for a loan by means of a securitisation arrangement (the loan having been sought from or made by a credit provider), to be credit providers under the Act. Subsection 11B(4B) will apply to originators, trustees, trustee managers, and credit enhancers (explicitly in relation to the latter by virtue of proposed new subsection 11B(4D)). While they continue to be deemed credit providers because they continue to satisfy the conditions of subsections 11B(4A) and (4B), they will be under the same obligations as other credit providers, and have the same rights as other credit providers under the Act, except in one important respect set out in subsection 11B(4C). As to their obligations after they cease to be credit providers, see proposed subsections 18Q(6), (7) and (7A).

In this context it should be noted that, by virtue of proposed subparagraph 11B(4B)(b), deemed credit providers will also be deemed to be persons to whom applications for loans were made. Therefore provisions such as those permitting access to credit reports by credit providers to whom the applications for loans were made (subsection 18K(1)(a)) will also apply to deemed credit providers, even though in fact they may not be the persons to whom the applications were actually made.

Sharing of Information by Deemed Credit Providers

Proposed subsection 11B(4C) will permit persons involved in a securitisation scheme to disclose credit information to other persons in the securitisation scheme if the disclosure is reasonably necessary for the purchase, funding or management of a loan or processing an application for a loan by means of a securitisation arrangement. Effectively this will remove from deemed credit providers the requirement that credit providers obtain the consent of the borrower to disclose credit information to another credit provider (see paragraph 18N(1)(b)). The removal of this consent requirement is necessary as securitisation schemes could not operate effectively if each transfer of information between bodies involved in the scheme was dependant on the consent of the borrower.

Credit Enhancers - 'Deemed Credit Providers'

To ensure that bodies engaged in credit enhancement are deemed to be credit providers under subsection 11B(4B) and can have access to credit information under subsection 11B(4C), proposed subsection 11B(4D) will expressly apply those subsections to credit enhancement.

Loan Management - Collection of Overdue Payments

Proposed subsection 11B(4E) will provide that where a person is involved in the management of securitised loans they are not on that account credit providers if their primary function in relation to the management of the loan relates to the collection of overdue payments. This provision is consistent with existing subsection 11B(7), and reflects the Act's policy concerning access by debt collectors to credit information. It ensures that debt collectors cannot have access to credit information under this provision, and their access remains as permitted elsewhere in the Act (for example, under paragraph 18N(1)(c) and proposed paragraph 18N(1)(ca)).

Credit Information Files - Records of Disclosures to Credit Enhancers Etc

Proposed subparagraph 18E(1)(b)(ia) will permit credit reporting agencies to include on an individual's credit information file a record of a disclosure of that file to a credit enhancer or other deemed credit providers involved in a securitisation scheme who have had access in accordance with the Act. Provision for such a notation must be made to ensure that individuals may know who has had access to their files. It is important also that an entry of such a disclosure cannot be confused with an entry relating to a credit report drawn for the purpose of collecting overdue payments. It reflects the new provisions for access to be provided for by amendment to section 18K.

Deemed credit providers will on some occasions also have access under existing provisions of section 18K of the Act, and provision for the recording of these disclosures has already been made in subsection 18E(1). In this context, it should be noted that deemed credit providers will have access to credit files under existing provisions of the Act (eg paragraph 18K(1)(a)) because they will be taken, by virtue of proposed subsection 11B(4B)(b), to also be the credit provider to whom the application for the loan was made.

Credit Information Files - Records of Disclosures of Guarantor's Information to Mortgage Insurers

Proposed subparagraph 18E(1)(b)(ii) is necessary to permit a record of disclosure to be recorded on an individual's credit information file where a disclosure has been made under the circumstances set out in proposed subsection 18K(1)(d)(iii). This is where a mortgage insurer obtains a credit report in respect of a person who is, or is going to be, a guarantor for a loan which the mortgage insurer is considering insuring.

Time Limit for Retention of Records of Disclosures

The proposed amendment to subparagraph 18F(2)(a) is a consequential amendment to ensure that a record made on a person's credit reference file under proposed paragraph 18E(1)(b)(ia) (record of a disclosure to a credit enhancer) is deleted after 5 years. This is consistent with the Act's policy of ensuring that credit files are up to date, complete and not misleading, and is consistent with the existing disclosure rules for similar information.

Disclosure of Credit Reports to Persons who are Deemed to be Credit Providers

Proposed paragraph 18K(1)(ab) will permit a credit reporting agency to disclose a credit file to a credit provider who is deemed to be a credit provider because of its involvement in a securitisation scheme for the purpose of assessing a risk involved in purchasing loans by means of securitisation arrangements. Current provisions for access to credit reports would not permit access for this purpose.

Disclosure of Credit Reports to Credit Enhancers

Proposed paragraph 18K(1)(ac) will permit a credit reporting agency to disclose a credit report to a person who is deemed to be a credit provider under new subsection 11B(4B), who requested the report for the purposes of assessing the risk in undertaking credit enhancement of a loan.

Disclosure of Credit Reports to Mortgage Insurers for Assessing Guarantors

Proposed subparagraph 18K(1)(d)(iii) will prescribe an additional circumstance in which a credit reporting agency could disclose a credit report to a mortgage insurer. The amendment will permit disclosure for the purpose of a mortgage insurer assessing the risk that a guarantor may not be able to meet liabilities under the guarantee where the mortgage insurer is considering insuring the credit provider in respect of the loan the subject of the guarantee (see also proposed subparagraph 18E(1)(b)(ii)).

Use of Credit Reports by Deemed Credit Providers

Proposed paragraph 18L(1)(aa) will permit use of a credit report obtained by a person who is a deemed credit provider because of their involvement in securitisation schemes for the purpose of assessing the risk in purchasing loans. This makes specific provision for the the use of credit reports obtained under proposed subsection 18K(1)(ab).

Use of Credit Reports by Credit Enhancers

Proposed paragraph 18L(1)(ab) will permit credit providers who have received a credit report under paragraphs 18K(1)(a) or (ac) in relation to an application for a loan by an individual, to *use* the report for the purposes of assessing the risk of undertaking credit enhancement of the loan where the loan is funded or purchased or proposed to be funded or purchased by means of a securitisation arrangement.

Use of Credit Reports in Assessing Commercial Credit Applications

The proposed amendment to paragraph 18L(1)(a) will omit 'the individual' and substitutes 'a person' in paragraph 18L(1)(a). The amendment will give effect to the original intention of the Act by making it clear that a credit report in relation to an individual obtained under paragraph 18K(1)(b) (that is, drawn for the purpose of assessing an application for commercial credit) may be used to assess the application for commercial credit whether it is made by either that individual, another individual or a corporation.

Use of Credit Reports for Collecting Overdue Payments for Commercial Credit

Proposed paragraph 18L(1)(da) will fill a gap in the Act by permitting the use of a credit report for the purposes of collection of payments that are overdue in respect of commercial credit . The Act permits a drawing of a credit report in some circumstances for this purpose (see paragraph 18K(1)(h)), but without this amendment would not permit its *use*.

Disclosure to Borrower of Information about a Guarantor

Proposed subsection 18M(3) will permit credit providers to disclose to a borrower, where the loan has been rejected because of the proposed guarantor's poor credit rating as provided by a credit reporting agency, that that is the reason for the rejection of the application. No details of the guarantor's credit history would be disclosed, however.

Disclosure of Information by Credit Providers to Guarantors

The current paragraph 18N(1)(bg) which relates to securitisation is redundant given the amendments relating to securitisation outlined above. It will be omitted.

Proposed paragraph 18N(1)(bg) will permit credit providers to disclose to guarantors or persons who have provided security for a borrower, credit information relating to the borrower, where the borrower has consented to the disclosure of this information. This provision will apply to all guarantees, whether they were entered into before or after commencement. However, it is also necessary to make separate provision for disclosure of information in respect of guarantees existing at the time of the commencement of the amendments. In the case of such guarantees it is not practical to make disclosure dependant on the borrower's consent. Here consent will not be required, but the information that may be disclosed will be limited to information relevant to the the amount or possible amount of the person's liability under the contract of guarantee. Also, the credit provider will be required, prior to the disclosure, to inform the borrower that disclosures of this type of information may take place.

Proposed paragraph 18N(1)(bh) will deal with disclosure of borrower's information to persons who are considering becoming a guarantor for a person, or offer property as security for an existing or possible future loan. In these circumstances the disclosure of any information will be permitted with the consent of the borrower.

Both of these provisions will operate in addition to any common law duty of disclosure that may apply to credit providers in these circumstances, as disclosures pursuant to such duties will continue to be permitted by paragraph 18N(1)(g).

<u>Disclosure of Publicly Available Information to Debt Collectors - Consumer Credit</u>

New paragraph 18N(1)(c)(iii)(C) will permit credit providers to disclose to debt collectors some publicly available information held on regulated credit files for the purposes of collection of overdue consumer credit payments. The information prescribed is information of court judgments and bankruptcy orders only.

<u>Disclosure of Publicly Available Information to Debt Collectors - Commercial Credit</u>

Proposed paragraph 18N(1)(ca) will permit the disclosure of identifier information, and court judgments and bankruptcy orders (which are publicly available information), by credit providers to debt collectors for the purposes of the collection of overdue *commercial* credit payments.

<u>Sharing of Credit Worthiness Information between Mortgagees</u>

Proposed paragraph 18N(1)(fa) will apply where there are two or more credit providers who have provided mortgage credit to the same individual and the same property is the whole or part of the security for the mortgages. Where that individual is at least 60 days overdue in making a payment to one of the credit providers, that credit provider may disclose to another of the credit providers credit information relating to that individual. The other credit provider, now being aware that the individual is more than 60 days overdue in making a payment, may also disclose credit reports concerning the individual under this provision to the other credit provider, so long as the disclosures are for the purpose of deciding what action to take in relation to the default.

The provision will not permit a credit provider whose borrower is less than 60 days overdue in making a payment to approach another credit provider to ascertain whether the 60 day threshold has passed on that credit provider's loan. The initiating credit provider must always wait 60 days, while the responding credit provider may disclose on the basis of the initiating credit provider's 60 day default, irrespective of whether the borrower is in default to them or not.

Style Change to Paragraph 18N(1)(ga)

The proposed amendment to paragraph 18N(1)(ga) will alter the wording of this provision so that it conforms with the wording used for similar purposes elsewhere in the Act. There is no change in the meaning or operation of the provision.

Access to Account Information by Authorised Persons

Proposed paragraph 18N(1)(gb) will correct an anomaly in the Act by permitting persons who have permission to operate another person's account to have access to certain classes of information concerning the status of that account. The information permitted to be disclosed will be that which would be disclosed as a result of the method of use permitted by the account holder. In particular it is intended to permit disclosures of credit worthiness information which result automatically from the normal operation of the account.

The provision will also permit the disclosure of a limited class of information ('basic transaction information' - defined in proposed subsection 18N(1D)) relating to basic details about the account, the disclosure of which would not intrude unduly into the account holder's privacy, but which are necessary for the operation of the account by the person authorised by the account holder.

It should be noted what while this provision will permit disclosure of this information, it does not require it. It would not preclude the account holder from contracting with a credit provider for more limited access to be given in particular cases.

Giving Consent under Paragraphs 18N(1)(bg) and (bh)

Current subsection 18N(1B) is redundant as it provides for the manner of giving consent for current paragraph 18N(1)(bg) which is to be repealed.

The new subsection 18N(1B) will provide for the manner of giving consent under proposed new paragraphs 18N(1)(bg) and (bh) which deal with the disclosure of information concerning borrowers to guarantors with the consent of the individual. It will provide that the consent must be in writing, unless the application for the loan has not been reduced to writing.

Basic Transaction Information

Proposed subsection 18N(1D) will define 'basic transaction information' for the purposes of subsection 18N(1)(gb) as the account balance, the amount of available credit in relation to the account, the minimum payment, if any, due, and information relating to transactions on the account by the person who is authorised to operate it.

Use of Credit Reports by Mortgage Insurers to Assess Guarantors

Proposed paragraph 18P(1)(ba) is a consequential amendment which will provide for the *use* by mortgage insurers of credit reports obtained under proposed 18K(1)(d)(iii) (disclosure of credit reports to mortgage insurers for the purpose of assessing guarantors).

Correction of an Anomaly in Paragraph 18P(7)

This amendment will remove an unintended consequence of the current wording of paragraph 18P(7). Paragraph 18P(7), when read in conjunction with paragraph 18P(3), would prevent mortgage insurers using some credit information which they are permitted to obtain elsewhere under the Act (see paragraph 18N(1)(bb)). This was not intended, and therefore paragraph 18P(7) will be amended so that subsection 18P(3) does not apply to credit reports referred to in paragraph 18P(7).

Omission of Subsection 18Q(1A)

The proposed omission of this subsection is a consequence of the omission of the subsection to which it relates, current paragraph 18N(1)(bg).

Consequential Amendment to Paragraph 18Q(5)

The omission of the reference to current paragraph 18N(1)(bg) is consequential on the omission of that paragraph.

Replacement of Subsections 18Q(6) and (7) - Restrictions on Persons who are no Longer 'Deemed Credit Providers'

The current subsections 18Q(6) and (7) were intended to require certain classes of organisations who had received reports under section 18N to remove from them information that could not be included in credit information files by a credit reporting agency. It was intended that use of the information in credit reports obtained prior to the commencement of the credit reporting provisions would be limited to the type of information that could be disclosed to credit providers after the commencement of the provisions. However, such a provision is unnecessary as reports obtained in the circumstances addressed by subsection 18Q(6) will already have been limited to this type of information by subsection 18N(3).

The proposed new subsections 18Q(6) and (7) are part of the securitisation arrangements. They will provide that where a person has received as a deemed credit provider under subsection 11B(4B) a credit report or credit information, then after they have ceased to be a deemed credit provider that person will only be allowed to disclose or use the information in the circumstances which a credit provider would be permitted to use the report under section 18L or disclose credit information under section 18N.

Proposed subsection 18Q(7A) is a constitutional provision which will ensure that proposed subsection 18Q(7) will only apply to individuals where the information in question has been obtained from a corporation. This reflects the constitutional position that the Commonwealth does not have power to regulate the disclosure of information held by individuals unless the information was obtained from a corporation.

Consequential Amendment to Subsection 18Q(8)

The omission of the reference to paragraph 18N(1)(bg) is consequential on the omission of the current version of that paragraph.

Style Change to Subsection 18Q(9)

This amendment will alter the wording of the subsection to remove the references to the individual subsections breach of which would constitute an offence and replace them with a general reference to the section as a whole. This change will not affect the meaning of the provision, but will make subsection 18Q(9) easier to understand.

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