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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

[HOUSE OF REPRESENTATIVES/SENATE]

TREASURY LAWS AMENDMENT (MEASURES FOR CONSULTATION) BILL
2022: RATIONALISATION OF ENDING ASIC INSTRUMENTS

EXPOSURE DRAFT EXPLANATORY MATERIALS

Table of Contents

Glossary.....	iii
Chapter 1: Rationalisation of ending ASIC instruments.....	5

Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

Abbreviation	Definition
ASIC	Australian Securities and Investments Commission
National Credit Code	Schedule 1 to the <i>National Consumer Credit Protection Act 2009</i>
PDS	Product Disclosure Statement

Chapter 1: Rationalisation of ending ASIC instruments

Outline of chapter	5
Context of amendments.....	6
<i>ASIC Class Order [CO 12/340] Proposed licensed trustee companies</i> .	6
<i>ASIC Corporations (Financial Services Guide Given in a Time Critical Situation) Instrument 2022/498</i>	9
<i>ASIC Corporations (PDS Requirements for General Insurance Quotes) Instrument 2022/66</i>	11
<i>ASIC Corporations (Describing Debentures—Secured Notes) Instrument 2022/61</i>	13
<i>ASIC Class Order [CO 14/41] Extension of transitional credit hardship provisions</i>	15

Outline of chapter

- 1.1 Schedules 1 to 5 make amendments to laws in the Treasury portfolio to move matters currently in ASIC legislative instruments into the primary law. Amendments to the *Corporations Act 2001* incorporate the following instruments:
- *ASIC Class Order [CO 12/340] Proposed licensed trustee companies* (Schedule 1)
 - *ASIC Corporations (Financial Services Guide Given in a Time Critical Situation) Instrument 2022/498* (Schedule 2)
 - *ASIC Corporations (PDS Requirements for General Insurance Quotes) Instrument 2022/66* (Schedule 3)
 - *ASIC Corporations (Describing Debentures—Secured Notes) Instrument 2022/61* (Schedule 4)
- 1.2 Amendments to the *National Consumer Credit Protection Act 2009* incorporate matters currently found in *ASIC Class Order [CO 14/41]* (Schedule 5).

Context of amendments

- 1.3 These amendments form part of a program of legislative amendments intended to simplify and improve the navigability of Treasury legislation.
- 1.4 The amendments incorporate longstanding and accepted matters currently contained in ASIC-made legislation into the primary law (alongside a package of regulation amendments). This is part of the care and maintenance of Treasury portfolio legislation and will provide industry and consumers with greater certainty and clarity when interacting with Treasury laws.
- 1.5 As the Australian Law Reform Commission has identified in its Review of the Legislative Framework for Corporations and Financial Services Regulation, the existence of class orders and other instruments that notionally amend the primary law or regulations causes complexity in the law, which undermines accessibility. Moving notional amendments and other matters out of ASIC-made legislation through this package goes towards addressing these concerns.
- 1.6 Between around 15 and 65 ASIC legislative instruments will sunset or cease each year until 2027. As these instruments end, Treasury and ASIC intend to review the instruments to determine whether the structure and navigability of the law would be improved if the matters in the instruments were instead contained in the primary law or regulations.

ASIC Class Order [CO 12/340] Proposed licensed trustee companies

Context of amendments

- 1.7 Part 5D.1 of the *Corporations Act 2001* establishes the conditions and mechanism for a company to be approved to be listed as a trustee company, which includes a requirement that the company is listed in the *Corporations Regulations 2001*. Before the Governor-General makes a regulation doing so, the company must satisfy the Minister of a number of conditions, including that an unacceptable control situation (as defined by section 601VAA) does not exist.
- 1.8 Part 5D.5 of the *Corporations Act 2001* sets limits on voting control in licensed trustee companies, including a 15 per cent voting control limit per person, and a framework to obtain approval from the Minister to exceed that limit, where the Minister believes that would be in the interests of that company and its clients.
- 1.9 The interaction between Part 5D.5 and Part 5D.1 of the *Corporations Act 2001* prevents a company that wishes to be listed as a trustee company but has an unacceptable control situation (that is, a person has greater than 15 per cent voting control), from applying to the Minister to exceed that voting control

limit. This would prevent them from becoming a listed trustee company for circumstances that may be deemed acceptable if they were already a licensed trustee company.

Comparison of key features of new law and current law

Table 1.1 Comparison of new law and current law

New law	Current law
<p>Part 5D.1 of the <i>Corporations Act 2001</i> includes a definition of ‘proposed licensed trustee company’, to allow companies that propose to become a licensed trustee company but have an unacceptable voting control situation, to apply to exceed the voting control limits and be listed as a trustee company.</p>	<p>Part 5D.1 of the <i>Corporations Act 2001</i>, establishes the conditions and mechanism for a company to be approved to be listed as a trustee company, which includes a requirement that the company is listed in the <i>Corporation Regulations 2001</i>. Before the Governor-General makes a regulation doing so, the company must satisfy the Minister of a number of conditions, including that an unacceptable control situation (as defined by section 601VAA) does not exist.</p> <p>This part is modified by <i>ASIC Class Order [CO 12/340]</i> to insert definitions of proposed trustee company and proposed licensed trustee company into section 601RAA.</p>
<p>Part 5D.5 of the <i>Corporations Act 2001</i>, with the exception of sections 601VAB, 601VAC, 601VAD and 601VCC, includes references to proposed licensed trustee companies where a reference to a licensed trustee company exists, as well as amending references to ‘trustee companies’ to ‘companies’ where appropriate.</p> <p>Part 5D.5 provides that in order for the Minister to exercise their powers to approve exceeding the voting control limit, or to amend or revoke that approval, they must be satisfied that doing so is in the interests of the company and their clients were they a licensed trustee company.</p>	<p>Part 5D.5 of the <i>Corporations Act 2001</i> sets limits on voting control in licensed trustee companies, including a 15 per cent voting control limit per person, and a framework to obtain approval from the Minister to exceed that limit, where the Minister believes that would be in the interests of that company and its clients.</p> <p>This part is modified by <i>ASIC Class Order [CO 12/340]</i> so that references to licensed trustee company include references to a proposed licensed trustee company. That reference does not extend to sections 601VAB, 601VAC, 601VAD and 601VCC.</p> <p>This part is also modified so that where a Minister is exercising their powers, for a proposed licensed trustee company the Minister must be satisfied that doing so is in the interests of the company and its clients were they a licensed trustee company.</p>

Detailed explanation of new law

- 1.10 The amendments amend Part 5D.1 and Part 5D.5 of the *Corporations Act 2001* to allow a proposed licensed trustee company to apply to the Minister for approval to exceed the 15 per cent voting control limit, for the purposes of satisfying the condition to be listed as a trustee company in the *Corporations Regulations 2001*.
- 1.11 Item 2 of Schedule 1 inserts a definition of proposed licensed trustee company into section 601RAA to ensure that the corresponding amendments correctly apply to the intended company types, which are companies that would other than the identified voting control issue:
- meet the conditions for being a trustee company;
 - propose to become a trustee company; and
 - propose to apply for an Australian financial services licence for the provision of one or more traditional trustee company services.
- 1.12** This definition allows for the relevant provisions to apply to proposed licensed trustee companies, while also ensuring that the overall framework continues to apply as intended to licensed trustee companies.
[Schedule 1, item 2, section 601RAA of the Corporations Act 2001]
- 1.13 Item 3 of Schedule 1 amends section 601VAA of the *Corporations Act 2001* to apply the meaning of an ‘unacceptable control situation’ to proposed licensed trustee companies, so that any approval of a higher percentage voting control limit is considered when determining if an ‘unacceptable control situation’ does not exist in relation to a proposed licensed trustee company.
[Schedule 1, item 3, section 601VAA of the Corporations Act 2001]
- 1.14 Items 4, 5, 7, 9 to 11, 14, 15, and 17 to 23 of Schedule 1 amend the provisions within Part 5D.5 so that they apply to proposed licensed trustee companies in addition to licensed trustee companies. This ensures that a person may apply for approval to have voting power in a proposed licensed trustee companies that exceeds the 15 per cent voting power limit, and also allows for the Minister to alter the approved limit, duration of the approval, or revoke the approval.
[Schedule 1, items 4, 5, 7, 9-11, 14, 17-23, sections 601VBA, 601VBB, 601VBC, 601VBE, 601VBF, 601VBH, 601VBI and 601VCB of the Corporations Act 2001]
- 1.15 Sections 601VAB, 601VAC, 601VAD and 601VCC do not apply to proposed licensed trustee companies. These provisions deal with offences and the power of courts to make remedial orders or injunctions where an unacceptable control situation exists and intended to enforce the voting control limits for licensed trustee companies.
- 1.16 Items 6, 8, 12, 13, and 16 of Schedule 1 amend the sections relating to a Minister’s power to approve an application to exceed the voting control limit, approve an application to extend the duration of an approval to exceed the voting control limit, alter the percentage specified in the approval (either by

application or by the Minister's own initiative), or revoke an approval, to ensure that, where the power is being exercised in relation to a proposed licensed trustee company, the Minister exercises that power when it would be in the interests of that company and its clients were that company a licensed trustee company.

[Schedule 1, item 6, 8, 12, 13 and 16, sections 601VBB, 601VBC, 601VBE and 601VBF of the Corporations Act 2001]

Consequential amendments

- 1.17 Item 24 of Schedule 1 repeals *ASIC Class Order [CO 12/340]* which is rendered redundant by the amendments to the *Corporations Act 2001*.

Commencement, application, and transitional provisions

- 1.18 The amendments commence on the day after Royal Assent.

ASIC Corporations (Financial Services Guide Given in a Time Critical Situation) Instrument 2022/498

Context of amendments

- 1.19 Section 941E of the *Corporations Act 2001* requires the information in a Financial Services Guide to be up to date as at the time it is given to the client, which will generally be at the same time as the financial service is provided. However, in a time critical situation, a statement of key information can be given, with the Financial Services Guide to be provided up to five days after the financial service was provided.
- 1.20 As a result, if changes have been made to the Financial Services Guide in the time between the provision of the financial service and the provision of the Financial Services Guide, the Financial Services Guide provided would not reflect the guide in place at the time the service was provided.

Comparison of key features of new law and current law

Table 1.2 Comparison of new law and current law

New law	Current law
<p>Section 941E requires the information in a Financial Services Guide to be up to date as at the time it is given to the client, or in the case of a time critical case, up to date as at the time a subsection 941D(3) statement is given to the client.</p>	<p><i>ASIC Corporations (Financial Services Guide Given in a Time Critical Situation) Instrument 2022/498</i> modifies section 941E of the <i>Corporations Act 2001</i> to require that the information in a Financial Services Guide be up to date as at the time it is given to the client, or in the case of a time critical case, up to date as at the time a subsection 941D(3) statement is given to the client.</p>

Detailed explanation of new law

- 1.21 Section 941E is amended so that for services provided in a time critical case, as outlined by section 941D, the information may be up to date either as at the time the Financial Services Guide is given to the client or as at the time the statement, required to be given under subsection 941D(3), and which contains defined elements of the required Financial Services Guide content, is given to the client.

[Schedule 2, item 1, section 941E of the Corporations Act 2001]

Consequential amendments

- 1.22 *ASIC Corporations (Financial Services Guide Given in a Time Critical Situation) Instrument 2022/498* is repealed as it is no longer required. As the instrument will remain in force until the commencement of the amendments, there will be continuity of law for entities relying on the modification in the instrument. *[Schedule 2, item 2]*

Commencement, application, and transitional provisions

- 1.23 The amendments commence on the day after Royal Assent.

ASIC Corporations (PDS Requirements for General Insurance Quotes) Instrument 2022/66

Context of amendments

- 1.24 A regulated person must generally give a PDS to a retail client if the regulated person offers to issue the retail client with a financial product (subparagraph 1012B(3)(a)(i)).
- 1.25 General insurance products are a kind of financial product that includes many kinds of domestic insurance, such as car insurance, or home and contents insurance (paragraph 764A(1)(d) of the *Corporations Act 2001*). Generally, a PDS must be provided to a retail client in relation to the issue of a general insurance product, including when a regulated person offers to issue a general insurance product.
- 1.26 The *Corporations Act 2001* does not include an exception from the requirement to provide a PDS where a quote is provided to a retail client and the person does not make an immediate decision to accept or decline the offer. It is common for consumers to seek quotes for general insurance products by telephone, but there are practical difficulties in providing a PDS to the consumer as part of that process.

Comparison of key features of new law and current law

Table 1.3 Comparison of new law and current law

New law	Current law
Section 1012GA of the <i>Corporations Act 2001</i> sets out the circumstances in which a PDS for a quote for a general insurance product is not required to be given to a client.	A regulated person does not have to provide a PDS to a client when a quote for a general insurance product is given that would otherwise constitute an “offer to issue” the product, as long as the criteria in the <i>ASIC Corporations (PDS Requirements for General Insurance Quotes) Instrument 2022/66</i> are met.

Detailed explanation of new law

- 1.27 New section 1012GA sets out the circumstances when a regulated person does not have to provide a PDS to a retail client in relation to an offer to issue, or arrange the issue of, a general insurance product.
[Schedule 3, item 4, section 1012GA of the Corporations Act 2001]
- 1.28 To take advantage of the exemption in new section 1012GA a regulated person must meet conditions associated with the issuing of the quote and provide the retail client with specified information. However, a retail client may request a PDS in relation to the quote and if they do so the regulated person must provide them with the PDS.
[Schedule 3, item 4, paragraph 1012GA(2)(a) of the Corporations Act 2001]
- 1.29 For the purposes of new section 1012GA, “quote” means a statement of the actual cost of the general insurance product based on specific information provided by the client.
[Schedule 3, item 4, subsection 1012GA(3) of the Corporations Act 2001]
- 1.30 The exemption in new section 1012GA applies only when a regulated person offers to issue a general insurance product to a client and:
- the offer is made during or because of a telephone call;
 - if applicable, the client is told that there are exclusions or limitations that apply to the product, and that details of the exclusions or limitations can be found in the PDS;
 - that the insurance cover provided may be different to other general insurance products; and
 - the client is asked if they would like a PDS.
- [Schedule 3, item 4, subsection 1012GA(1) of the Corporations Act 2001]***
- 1.31 These criteria ensure that the client understands that more information about the insurance product is available in the PDS and that they have a right to request a PDS, but also enables a simplified process for providing quotes to potential customers without the provision of a PDS.
- 1.32 The telephone call in which the client requests a quote must also not be unsolicited conduct, as defined in section 992A of the *Corporations Act 2001*. This means that the client must have genuinely and voluntarily consented to the telephone call for the purposes of the regulated person making an offer for the general insurance product no more than six weeks before the call.
[Schedule 3, item 4, paragraph 1012GA(1)(a) of the Corporations Act 2001]
- 1.33 If the client requests a PDS during the course of the telephone call (whether in response to being asked or not), then a PDS must be provided to them.
[Schedule 3, item 4, subsection 1012GA(2) of the Corporations Act 2001]
- 1.34 Existing requirements relating to the provision of a PDS when a general insurance product is issued are unchanged. This means that when a client chooses to purchase insurance as a result of the quote, the regulated person will

generally be required to provide a PDS in line with section 1012B of the *Corporations Act 2001*.

Consequential amendments

- 1.35 The *ASIC Corporations (PDS Requirements for General Insurance Quotes) Instrument 2022/66* is repealed as it is no longer required. As the instrument will remain in force until the commencement of the amendments, there will be continuity of law for regulated persons relying on the exemption.
[Schedule 3, item 5]
- 1.36 Consequential amendments are also made to sections 1012A, 1012B, and 1012C. These amendments update the drafting to clarify the interaction between the requirement for a regulated person to provide a PDS and the potential exemptions or conditions that could apply. These amendments are made to enhance the readability of the sections.
[Schedule 3, items 1, 2 and 3, sections 1012A(4), 1012B(5) and 1012C(10) of the Corporations Act 2001]

Commencement, application, and transitional provisions

- 1.37 The amendments commence on the day after Royal Assent.

ASIC Corporations (Describing Debentures—Secured Notes) Instrument 2022/61

Context of amendments

- 1.38 A debenture is defined in section 9 of the *Corporations Act 2001*. A debenture involves a body providing a chose in action that includes an undertaking by the body to repay as a debt money deposited with or lent to the body.
- 1.39 There are three permitted categories for describing debentures – ‘mortgage debenture’, ‘debenture’ and ‘unsecured note’ (sometimes called an ‘unsecured deposit note’). Under existing law, only tangible property is considered when determining whether a debenture is secured. As such, an issuer of a debenture is not able to delineate between an unsecured deposit note that is truly unsecured or a similar deposit note that is secured by intangible property, such as loans receivable.
- 1.40 This measure assists issuers of debentures to avoid a label implying that their product is unsecured where there is sufficient security in place, while ensuring that investors understand the nature of the underlying security. The

Corporations Act 2001 requires debentures that are secured by intangible property, such as loans receivable, to be referred to as ‘unsecured notes’.

Comparison of new law and current law

Table 1.4 Comparison of new law and current law

New law	Current law
A borrower may refer to a debenture as a ‘secured note’ where they meet the circumstances set out in subsection 284BH(4) and the requirements set out in subsections 283BHA(1), (2) or (3) of the <i>Corporations Act 2001</i> .	A borrower may refer to a debenture as a ‘secured note’ where they meet the circumstances set out in the <i>ASIC Corporations (Describing Debentures – Secured Notes) Instrument 2022/61</i> .

Detailed explanation of new law

- 1.41 The *ASIC Corporations (Describing Debentures – Secured Notes) Instrument 2022/61* created a new category of debenture called a ‘secured note’, which applies to debentures with sufficient first ranking security that do not satisfy the higher ‘debenture’ or ‘mortgage debenture’ tests.
- 1.42 Section 283BH of the *Corporations Act 2001* sets out rules on how debentures may be described in a document relating to an offer. Subsection 283BH(1) includes a table that lists the categories for describing a debenture. Item 1 of Schedule 4 introduces the new category of a ‘secured note’ to this table.
- 1.43 Item 2 of Schedule 4 amends section 283BH of the *Corporations Act 2001* by adding subsection 283BH(4) which details the circumstances in which a debenture may be described as a secured note. To be a secured note, a debenture must include a first ranking security interest over intangible property of the borrower or of any of the guarantors.
[Schedule 4, item 2, subsection 283BH(4) of the Corporations Act 2001]
- 1.44 Paragraph 283BH(4)(b) requires that the security interest be sufficient (and likely to be sufficient) to repay the whole of the borrowing, as well as all other liabilities that have been or may be incurred that rank in priority with that liability. This ensures that an investor knows that the intangible property has sufficient value to serve as a full collateral against the debt.
[Schedule 4, item 2, subsection 283BH(4) of the Corporations Act 2001]
- 1.45 Advertisements and publications that describe or refer to debentures as secured notes must include a statement that a secured note is not a bank deposit and has a risk that investors could lose some or all of their money.
[Schedule 4, item 2, subsection 283BHA(1) of the Corporations Act 2001]
- 1.46 Additional information must also be included when an issuer refers to a debenture as a secured note in advertisements, publications, disclosure

documents, quarterly reports prepared under s283BF, or websites.

[Schedule 4, item 2, subsection 283BHA(1) of the Corporations Act 2001]

- 1.47 Disclosure documents and quarterly reports must explain details of the security interest relevant to how the security is secured, as well as statements that in the borrower's assessment, the property that constitutes the security is sufficient and is reasonably likely to sufficient to meet the liabilities referred to in paragraph 283BH(4)(b).

[Schedule 4, item 2, subsection 283BHA(2) of the Corporations Act 2001]

- 1.48 Additionally, disclosure documents and quarterly reports by the borrower must include a statement that the value of any property secured by the security interest may be affected by the financial position or performance of a related body corporate or related party of the borrower, if that is the case.

[Schedule 4, item 2, subsection 283BHA(2) of the Corporations Act 2001]

- 1.49 Where a borrower's website refers to the secured notes, the website must include their most recent quarterly report, offer document and continuous disclosure notices that are required by ASIC on their website.

[Schedule 4, item 2, subsection 283BHA(3) of the Corporations Act 2001]

Consequential amendments

- 1.50 The *ASIC Corporations (Describing Debentures – Secured Notes) Instrument 2022/61* is repealed as it is no longer required. As the instrument will remain in force until the commencement of the amendments, there will be continuity of law. ***[Schedule 4, item 3]***

Commencement, application, and transitional provisions

- 1.51 The amendments commence on the day after Royal Assent.

ASIC Class Order [CO 14/41] Extension of transitional credit hardship provisions

Context of amendments

- 1.52 The National Credit Code sets out the notice requirements in relation to the process of making changes to credit obligations on the grounds of hardship in relation to:
- credit contracts in Division 3, Part 4; and

- consumer lease contracts in Division 7, Part 11.
- 1.53 Sections 72 and 177B of the National Credit Code require a credit provider or consumer lease provider to advise a consumer that they have either:
- agreed to change the contract in response to a hardship notice; or
 - not agreed to change the contract in response to a hardship notice and the reasons why they have not agreed.
- 1.54 If a change to a contract is agreed to, sections 73 and 177C of the National Credit Code provide that the debtor or lessee must be provided with a written notice setting out the details of the change in the terms of the credit contract. A failure to provide this notice is a strict liability offence.

Comparison of key features of new law and current law

Table 1.5 Comparison of new law and current law

New law	Current law
No change.	Sections 72, 73, 177B and 177C of the National Credit Code set out the notice requirements in relation to the process of making changes to credit obligations on the grounds of hardship.
Sections 72, 73, 177B and 177C of the National Credit Code include exemptions to the notice requirements for arrangements of under 90 days.	Credit providers or consumer lease providers are not required to comply with the notice requirements in sections 72, 73, 177B and 177C of the National Credit Code for arrangements of under 90 days if they comply with the conditions in <i>ASIC Class Order [CO 14/41]</i> .
No exemption is provided from the notice requirements in sections 72 and 177B of the National Credit Code for arrangements of over 90 days.	<i>ASIC Class Order [CO 14/41]</i> provides an exemption for credit providers or consumer lease providers to not provide a written notice that a change to a credit contract or consumer lease had been agreed to regardless of the duration of the change.

Detailed explanation of new law

- 1.55 The amendments exempt credit providers and consumer lease providers from providing either:
- a notice agreeing to change a contract in response to a hardship notice; or
 - a notice setting out the particulars of the change in circumstances

where the parties have agreed to a change to the credit contract or consumer lease that defers or reduces the obligations of the debtor or lessee for a period not exceeding 90 days. These exemptions from the notice requirements are currently in *ASIC Class Order [14/41]*.

[Schedule 5, items 1-4, sections 72, 73, 177B and 177C of the National Credit Code]

- 1.56 *ASIC Class Order [CO 14/41]* provided a broader exemption for credit providers or consumer lease providers to not provide a written notice that a change to a credit contract or consumer lease had been agreed to under subsection 72(4) or 177B(4) of the National Credit Code regardless of the duration of the change. Treasury understands that *ASIC Class Order [CO 14/41]* is only used by entities where the period of an agreement is less than 90 days. As such, the amendments apply only to agreements of less than 90 days.
- 1.57 As a failure to provide a notice setting out the details of a change of contract terms is an offence, the amendments reverse the evidential burden of proof in relation to whether a relevant contract variation was for not more than 90 days. As a result, the credit provider or consumer lease provider will be required to raise evidence that suggests that the contract variation was for a period of less than 90 days. Subsection 13.3(3) of the Criminal Code provides that if a defendant wishes to rely on any exemption provided by the law creating an offence then they will bear an evidential burden in relation to that matter. **[Schedule 5, items 2 and 4, sections 73 and 177C of the National Credit Code]**
- 1.58 The Attorney-General's Department's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides that a matter should only be included in an offence-specific defence where it is peculiarly within the knowledge of the defendant, and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.
- 1.59 The reversals of the evidential burden of proof are appropriate in this instance as the matter will be peculiarly within the knowledge of the credit provider or consumer lease provider and it would also be significantly more difficult and costly for the prosecution to disprove the matter. In most circumstances, the credit provider or consumer lease provider would have records of any variation of a credit contract or consumer lease, including whether the period of any variation was for under 90 days. As no notice is required to be sent to the debtor or lessor in circumstances where the period of an agreement is less than 90 days, it would be significantly more difficult for the prosecution to disprove the matter.
- 1.60 The *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* is also amended to provide the same exemption from the notice requirements as outlined above in relation to credit contracts or consumer leases entered into prior to 1 March 2013.

[Schedule 5, item 5, section 5A of the National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009]

Consequential amendments

- 1.61 *ASIC Class Order [CO 14/41]* is repealed as it is no longer required. As the Class Order will remain in force until the commencement of the amendments, there will be continuity of law for credit providers or consumer lease providers relying on the exemption. ***[Schedule 5, item 6]***

Commencement, application, and transitional provisions

- 1.62 The amendments commence on the day after Royal Assent.