THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY

FAIR TRADING AMENDMENT BILL 2002

EXPLANATORY MEMORANDUM

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Outline

The intention of the Bill is to put a stop to the practice of some financial institutions, of offering and granting increases of consumer credit limits, frequently on credit cards, without undertaking an adequate assessment of the debtor's capacity to pay.

The Bill's key amendment is to insert a new section 28A into the *Fair Trading Act 1992,* requiring a satisfactory assessment process of a debtor's credit-worthiness to be carried out, and an application in writing from the debtor, before their credit limit may be extended.

These provisions are based in part on the uniform national Consumer Credit Code ('the Code'). Specifically, the intent of this amendment is drawn from section 70 which provides that credit contracts may be 'reopened' by a court if the credit provider failed to take a number of steps before activating the contract. These steps include undertaking reasonable inquiries as to the debtor's capacity to repay on the terms provided without incurring substantial hardship. A prudent and diligent credit provider would therefore ensure that any credit contract they are a party to was made on the basis of due assessment of the debtor's capacity to repay without substantial hardship.

This Amending Bill would make it clear that creditors are obliged to diligently assess each debtor's or potential debtor's situation before approving credit or extension of credit limits. This would avoid the current situation where debtors caught in this trap have to initiate a court process in order to have the spirit and intent of the Consumer Credit Code applied to their credit contract. Lending institutions should be meeting the requirements of the Code in the first place.

Clauses

Clauses 1, 2 and 3
are formal requirements which set out the name of the Act, commencement provisions and the name of the Act amended.

Clause 4
rewords the definition of **credit card** in the principal Act. This definition expresses in a clearer form the existing definition of 'credit card'.

Clause 5
is a consequential renumbering, due to the insertion of a new section by clause 6.

Clause 6
inserts new section 28A relating to unsolicited credit contracts and increases in credit limits.

The new section provides that credit providers must not enter into credit contracts, nor increase the amount of credit available unless the credit provider has carried out a satisfactory assessment process. The section also adds the requirement that such an extension must be agreed to in writing.

A **'satisfactory assessment process'** is defined in this section as that which would satisfy a 'diligent and prudent credit provider'.

A diligent and prudent credit provider would be aware that subsection 70 (2)(*l*) of the Consumer Credit Code provides that among the matters to be considered by the court in deciding whether to reopen a credit contract, is the question

> whether at the time the contract, mortgage or guarantee was entered into or changed, the credit provider knew, or could have ascertained by reasonable inquiry of the debtor at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship.

A diligent and prudent credit provider would therefore ensure that their assessment of a debtor included ascertaining whether the debtor would incur substantial hardship if they were to repay the amount owing on the terms provided in the contract.

'Credit contract' is defined by reference to the definition of this term in the Consumer Credit Code. This indicates that the new section applies to credit covered by the Consumer Credit Code, which means it applies only to consumer credit, and not to credit primarily intended for business uses.

The definitions of '**credit provide**r' and '**debtor**' make it clear that these requirements would apply to a prospective credit provider and debtor, as well as to current credit providers or debtors.