

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2011 No. 40**

#### **Issued by authority of the Treasurer**

*National Consumer Credit Protection Act 2009*  
*National Consumer Credit Protection Amendment Regulations 2011 (No. 2)*

The *National Consumer Credit Protection Act 2009* (the Act) applies to the provision of credit for personal use. Schedule 1 to the Act contains the National Credit Code (the Code). The Code provides a consumer protection framework for consumer credit and related transactions.

Section 329 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 31 of the Code provides that the regulations may specify credit fees or charges or classes of credit fees or charges that are prohibited for the purposes of the Code.

On 12 December 2010, the Government announced that it would ban exit fees for new home loans from 1 July 2011.

The Regulations amend the *National Consumer Credit Protection Regulations 2010* to prohibit these exit fees.

The prohibition does not apply, however, if the fee or charge is a discharge fee, a break fee for a fixed rate loan, or if it is incurred before the termination of a credit contract that is terminated before any credit has been provided under the contract.

Discharge fees cover administrative costs that are incurred as a result of terminating a loan. Break fees on fixed rate loans are not banned by the Regulations as this would risk eliminating these products, which provide flexibility to consumers. Fees for terminating a loan before it is drawn are also not be banned by the Regulations as they allow lenders to recover legitimate costs.

Details of the Regulations are set out in the Attachment.

A draft of the Regulations and explanatory statement was released for public consultation between 15 February 2011 and 1 March 2011.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commence on 1 July 2011.

**Details of the National Consumer Credit Protection Amendment Regulations 2011 (No. 2)**

**Regulation 1 – Name of the Regulations**

This regulation provides that the title of the Regulations is the *National Consumer Credit Protection Amendment Regulations 2011 (No. 2)*.

**Regulation 2 – Commencement**

This regulation provides that the Regulations commence on 1 July 2011.

**Regulation 3 – Amendment of the National Consumer Credit Protection Regulations 2010**

This regulation provides that the *National Consumer Credit Protection Regulations 2010* (the Principal Regulations) are amended as set out in Schedule 1.

**Schedule 1 – Amendment**

**Item [1] – After Part 7-2**

Item [1] inserts a new Part 7-2A (Prohibited credit fees and charges), including a new regulation 79A (Termination fees for certain credit contracts), into the Principal Regulations.

Regulation 79A provides for a prohibition on termination fees for certain credit contracts entered into on or after 1 July 2011.

Subregulation 79A(1) prohibits a credit fee or charge if:

- it is provided for in a credit contract entered into on or after 1 July 2011;
- it is to be paid on or in relation to the termination of the credit contract, whether the liability to make the payment is incurred at that time or at an earlier time; and
- any of the amount of credit provided under the credit contract is secured over residential property.

The prohibition applies to any such credit contract to which the Code applies. This includes credit contracts under which credit is provided for investment in residential property. However, regulation 65C of the Principal Regulations currently provides that the Code does not apply to the provision of credit if: the credit is provided for the purpose of investment in residential property; the credit is not provided for purpose of investment in a single residence; and, the total amount of credit provided, or to be provided, is more than \$5 million.

The meaning of *credit fees and charges* and *termination* is defined in section 204 (Principal definitions) of the Code. That section provides that:

- credit fees and charges means fees and charges payable in connection with a credit contract or mortgage with certain exceptions. These exceptions include: interest charges; government charges, or duties, on receipts or withdraws; and enforcement expenses.

- termination of a credit contract includes the discharge or rescission of the contract.

Subregulation 79A(2) provides that the prohibition in subregulation 79A(1) does not apply to certain credit fees and charges to which the prohibition would otherwise apply. These credit fees or charges are break fees, discharge fees, and credit fees or charges incurred before the termination of a credit contract that is terminated before any credit has been provided under the contract.

Subregulation 79A(3) defines the meaning of break fee, discharge fee, and fixed rate loan for the purposes of regulation 79A. The terms are defined as:

- *break fee* means a credit fee or charge that: relates only to the early repayment of an amount provided under a credit contract for a fixed rate loan; relates only to the portion of the loan that is fixed; and relates to the difference between the fixed interest rate and the prevailing rate at which credit is provided by the credit provider under that class of credit contract.
- *discharge fee* means a credit fee or charge that only reimburses a credit provider for the reasonable administrative cost of terminating the credit contract. Administrative costs of terminating a credit contract may include, for example, the cost of calculating the payout figure on termination, the cost of processing the termination, the cost of discharging a related mortgage, and third party costs that arise because of the termination.
- *Fixed rate loan* means a credit contract under which the annual percentage rate is fixed for an agreed term, for the whole or part of the amount due under the credit contract.

Subregulation 79A(4) provides that for the definition of discharge fee, a cost is a reasonable administrative cost only if it does not exceed a reasonable estimate of the average reasonable administrative cost to the credit provider of terminating that class of credit contract.

The prohibition contained in regulation 79A assists consumers to switch home loan credit providers by banning certain termination fees. These fees include those fees commonly referred to as deferred establishment fees. It also includes other fees that do not reflect costs borne by a credit provider as a result of terminating a loan or that seek to penalise a debtor for terminating a loan early.