

EXPLANATORY STATEMENT

Select Legislative Instrument 2006 No. 245

Issued by the Authority of the Minister for Communications, Information Technology and the Arts

Telecommunications (Consumer Protection and Service Standards) Act 1999

Telecommunications (Consumer Protection and Service Standards) (Communications Fund) Amendment Regulations 2006 (No. 1)

Subsection 160(1) of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (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 the carrying out or giving effect to the Act.

The purpose of the Regulations is to amend the *Telecommunications (Consumer Protection and Service Standards) (Communications Fund) Regulations 2005* (the Principal Regulations) to specify additional financial assets in which money credited to the Communications Fund Special Account can be invested.

Part 9C of the Act establishes the Communications Fund. The purpose of the Communications Fund is to provide an income stream to fund the Government's response to recommendations, regarding regional telecommunications related matters, of the Regional Telecommunications Independent Review Committee under section 158Q of the Act.

Section 158ZG of the Act provides that the Communications Fund consists of the Communications Fund Special Account established by section 158ZH and investments of the Communications Fund. The sum of \$2 billion is currently credited to the Communications Fund Special Account and is invested in term deposits with the Reserve Bank of Australia in the short term, while machinery is put in place to manage broader investments.

Section 158ZO of the Act provides that the responsible Ministers, being the Minister for Finance and Administration and the Minister for Communications, Information Technology and the Arts, may authorise the investment of money standing to the credit of the Communications Fund Special Account in any 'financial asset'. The term 'financial asset' is defined in section 158ZF of the Act and includes shares, debentures, interests in a managed investment scheme, units of such shares, debentures or interests, or derivatives such as futures contracts. It also includes an asset, other than tangible property, specified in the regulations. The Principal Regulations currently specify financial assets that are authorised investments.

The Regulations amend the Principal Regulations to ensure that the following are included in the definition of 'financial asset' in section 158ZF of the Act:

- (a) an Australian dollar denominated debt instrument with an investment grade credit rating; and
- (b) an electronic equivalent of an asset covered by the definition of 'financial asset' in section 158ZF of the Act.

The ability to invest in Australian dollar denominated debt instruments with an investment grade credit rating will provide increased flexibility and improve the ability of the Australian Office of Financial Management, as the manager of the Communications Fund, to meet performance benchmarks. The ability to invest in an electronic equivalent of an asset covered by the definition of 'financial asset' will ensure that authorised investments do not need to exist in paper form.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (LIA) (see paragraph 6(a) of the LIA). The Australian Office of Financial Management and the Department of Finance and Administration were consulted about the Regulations. Wider consultation was considered unnecessary due to the minor and machinery nature of the accompanying Regulations (see paragraph 18(2)(a) of the LIA).

Details of the accompanying Regulations are set out in the Attachment.

The regulations commenced on the day after they were registered on the Federal Register of Legislative Instruments.

ATTACHMENT**Details of the *Telecommunications (Consumer Protection and Service Standards) (Communications Fund) Amendment Regulations 2006 (No. 1)*****Regulation 1 – Name of Regulations**

This regulation provides that the title of the Regulations is the *Telecommunications (Consumer Protection and Service Standards) (Communications Fund) Amendment Regulations 2006 (No. 1)*.

Regulation 2 – Commencement

This regulation provides for the Regulations to commence on the day after they are registered on the Federal Register of Legislative Instruments.

Regulation 3 – Amendment of *Telecommunications (Consumer Protection and Service Standards) (Communications Fund) Regulations 2005*

This regulation provides that the *Telecommunications (Consumer Protection and Service Standards) (Communications Fund) Regulations 2005* (the Principal Regulations) are amended as set out in Schedule 1.

Schedule 1 Amendment**Item 1 – Schedule 1, after item 6**

This item amends Schedule 1 to the Principal Regulations to specify additional assets for the purposes of paragraph (f) of the definition of ‘financial asset’ in section 158ZF of the Act in new items 7, 8 and 9 of Schedule 1 to the Principal Regulations.

Item 7 of Schedule 1 to the Principal Regulations

The definition of ‘financial asset’ in section 158ZF of the Act does not currently allow money credited to the Communications Fund Special Account to be invested in an Australian dollar denominated debt instrument with an investment grade credit rating.

Paragraph (b) of the definition of ‘financial asset’ includes a debenture of a body. The term ‘debenture’ is defined in section 158ZF of the Act to have the same meaning as in the *Corporations Act 2001*. The Corporations Act definition of ‘debenture’ excludes a range of banking and other commercial dealings from its ambit that would otherwise be regarded as debt instruments. The exclusions include, among other things:

- an undertaking by an Australian bank or authorised deposit-taking institution to repay money deposited with it, or lent to it, in the ordinary course of its banking business;

- an undertaking to pay money under a cheque, an order for the payment of money or a bill of exchange; or
- an undertaking to pay money under a promissory note that has a face value of at least \$50,000.

In addition, as the Corporations Act draws a distinction between bonds and debentures, it is not clear whether the Corporations Act definition of ‘debenture’ covers bonds issued by banks or other corporations.

Having regard to the limitations of the Corporations Act definition of ‘debenture’, item 1 of Schedule 1 to the Regulations adds a new item 7 to Schedule 1 to the Principal Regulations to enable such an investment, if authorised by the responsible Ministers. The term ‘Australian dollar denominated debt instrument’ covers promissory notes, bonds issued by banks and other corporations and securitised debt (asset backed and mortgage backed).

A Note makes it clear that the term ‘investment grade credit rating’ is a well-recognised term in the finance industry and refers to securities with a credit rating from an internationally recognised rating agency like Standard and Poors of at least BBB- or equivalent for long-term investments and at least A3 or equivalent for short-term investments.

Items 8 and 9 of Schedule 1 to the Principal Regulations

Items 3 and 5 of Schedule 1 to the Principal Regulations specify the following as falling within the definition of ‘financial asset’ in section 158ZF of the Act:

3. A deposit with a bank, including a deposit evidenced by a certificate of deposit.
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5. A bill of exchange accepted or endorsed only by a bank.

The Australian Government Solicitor has advised that item 5 of Schedule 1 to the Principal Regulations does not cover a bill of exchange accepted or endorsed only by a bank that exists only in electronic form (an electronic bank bill). A bill of exchange, within the meaning of the *Bills of Exchange Act 1909*, refers to a paper instrument. While the *Electronic Transactions Act 1999* enables transactions for the purposes of Commonwealth law to be done electronically, the regulations made under that Act specifically exempt the Bills of Exchange Act from the operative provisions of that Act (see item 19 of Schedule 1 to those regulations). No other item in Schedule 1 to the Principal Regulations is apt to cover electronic bank bills.

The Australian Government Solicitor also doubted whether item 3 of Schedule 1 to the Principal Regulations would include a deposit evidenced by an electronic certificate of deposit. While deposits without a certificate are permissible investments, the Australian Government Solicitor considered there may be room for an argument that investments in transferable securities issued by banks are limited to securities in paper form.

Having regard to the advice of the Australian Government Solicitor, item 1 of Schedule 1 to the Regulations adds new items 8 and 9 to Schedule 1 to the Principal Regulations to enable investment in electronic equivalents of assets covered by the definition of 'financial asset', if authorised by the responsible Ministers.

Item 8 specifies as a financial asset, an electronic equivalent of a document which provides evidence of the holding of, or investment in, any of the following assets:

- (a) a debenture, stock or bond issued by a government (cf. paragraph (a) of the definition of 'financial asset' in section 158ZF of the Act);
- (b) a share in, or debenture of, a body (cf. paragraph (b) of the definition of 'financial asset' in section 158ZF of the Act);
- (c) an interest in a managed investment scheme (cf. paragraph (c) of the definition of 'financial asset' in section 158ZF of the Act);
- (d) a unit of a debenture, share or interest covered by paragraph (a), (b) or (c) (cf. paragraph (d) of the definition of 'financial asset' in section 158ZF of the Act);
- (e) a derivative (cf. paragraph (e) of the definition of 'financial asset' in section 158ZF of the Act);
- (f) securities of the Commonwealth, or of a State or Territory to which paragraph (a) of the definition of 'financial asset' in section 158ZF of the Act does not apply (cf. item 1 of Schedule 1 to the Principal Regulations);
- (g) securities guaranteed by the Commonwealth, a State or a Territory (cf. item 2 of Schedule 1 to the Principal Regulations); and
- (h) a professionally managed money market trust of the kind mentioned in item 6 of Schedule 1 to the Principal Regulations.

Item 9 specifies as a financial asset, an electronic equivalent of any of the following instruments:

- (a) a certificate of deposit from a bank (cf. item 3 of Schedule 1 to the Principal Regulations);
- (b) a debt instrument mentioned in item 4 of Schedule 1 to the Principal Regulations;
- (c) a bill of exchange accepted or endorsed only by a bank (cf. item 5 of Schedule 1 to the Principal Regulations);
- (d) an Australian dollar denominated debt instrument mentioned in item 7 of Schedule 1 to the Principal Regulations; and
- (e) a promissory note.