

EXPLANATORY STATEMENT

Select Legislative Instrument 2010 No. 139

Subject - *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*

National Consumer Credit Protection (Transitional and Consequential Provisions) Amendment Regulations 2010 (No. 3)

The *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Transitional Act) sets out the transitional and consequential arrangements to support the transfer of the regulation of credit from the states and territories to the Commonwealth.

Section 6 of the Transitional Act provides, in part, that the Governor-General may make regulations prescribing matters required or permitted by the Transitional Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Transitional Act.

The Regulations make amendments to the *National Consumer Credit Protection (Transitional and Consumer Protection) Regulations 2010* (Principal Regulations), which are related to the transition from the current state-based regulatory framework for consumer credit to the new national consumer credit protection regime.

Specifically, the Regulations:

- make corrections to the existing regulations in relation to carried over instruments (COIs) and apply responsible lending conduct obligations to persons in relation to COIs;
- make a number of minor amendments to the exemptions for suppliers of goods and services to improve the practical application and effect of these exemptions; and
- exempt special purpose funding entities from the requirement to be registered only if they engage a registered person or licensee to act on their behalf; and consequently amend other regulations and modify the effect of the Transitional Act on the registered person.

Details of the Regulations are included in the [Attachment](#).

The Transitional Act does not specify any conditions that need to be satisfied before the power to make the Regulations may be exercised.

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

The Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

The amendments to the exemptions for suppliers of goods and services in current regulations 14 and 14A have been developed to address concerns identified through stakeholder feedback on the current regulations.

An earlier version of the exemption for special purpose funding entities was included as draft Credit Regulation 24, included in the package of draft materials released for public comment on 20 November 2009 by the Hon Chris Bowen, MP, Minister for Financial Services, Superannuation and Corporate Law. Since the exposure version was released there have been

extensive consultations with stakeholders, including industry bodies, external dispute resolution scheme providers, consumer representatives and individual entities. Further draft regulations have been circulated for comment and revisions made in response to those comments.

Authority: Section 6 of the
*National Consumer Credit
Protection (Transitional and
Consequential Provisions)
Act 2009*

Details of the *National Consumer Credit Protection (Transitional and Consequential Provisions) Amendment Regulations 2010 (No. 3)*

Part 1 Preliminary

Regulation 1 – Name of Regulations

This regulation provides that the name of the Regulations is the *National Consumer Credit Protection (Transitional and Consequential Provisions) Amendment Regulations 2010 (No. 3)*.

Regulation 2 – Commencement

This regulation provides for the Regulations to commence on the day after they are registered.

Regulation 3 – Amendment of *National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010*

This regulation inserts Schedule 1, which amends the *National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010* (Principal Regulations).

Schedule 1 Amendments

Item 1 omits the definition of *authorised contact* from subregulation 3(1). It is not necessary to include a definition of this term as it is referred to in the definition of *unsolicited contact*.

Items 2, 3 and 4 insert definitions in subregulation 3(1) of the following terms: *exempt special purpose funding entity*, *inappropriate person*, *servicing agreement* and *special purpose funding entity*. The definitions ensure consistency between the Regulations and the *National Consumer Credit Protection Regulations 2010* by referring to the definitions as used in those Regulations.

Item 5 inserts a new regulation 10A, which has the effect of including additional standard conditions applying to any registered person who is a party to a servicing agreement with a special purpose funding entity. The additional conditions require this class of registered persons to notify ASIC of the following matters:

- the special purpose funding entities that they have a servicing agreement with;
- when they cease to be a party to such a servicing agreement; and
- any attempt by a person who is in a position to control or influence a special purpose funding entity to direct the registered person to act inconsistently with either the conditions on their registration or the credit legislation.

Items 6 to 9, 11, 14 and 17 to 25 amend a number of exemptions in the Principal Regulations consequent on the introduction of an exemption for special purpose funding entities. The structure of some of the exemptions in the Principal Regulations is that they only apply where a person is engaging in credit activities in relation to or on behalf of a licensee or registered person. The effect of these items is that the exemption applies where the third party is a licensee, a registered person or a special purpose funding entity. The nature of each amendment is set out below.

Item 6 amends the exemption in the Principal Regulations in subregulation 11(11) for organisations engaging in credit activities as an incidental aspect of providing services to members, so that the exemption applies where the organisation engages in conduct in relation to a licensee, registered person or a special purpose funding entity.

Item 7 amends the exemption in the Principal Regulations in subregulation 11(12) for charitable bodies engaging in credit activities, so that the exemption applies where the body engages in conduct in relation to a licensee, registered person or a special purpose funding entity.

Item 8 amends the exemption in the Principal Regulations in regulation 12 for debt collectors engaging in credit activities, so that the exemption applies where they engage in conduct on behalf of a licensee, registered person or a special purpose funding entity.

Item 9 amends the exemption in the Principal Regulations in regulation 13 for third parties who send out notices or repossess goods, so that the exemption applies where they engage in that conduct on behalf of a licensee, registered person or a special purpose funding entity.

Items 10 and 12 amend the headings for regulations 14 and 14A. This ensures consistency between the heading and the effect of the regulations, as these exemptions are not restricted to persons who only provide credit services and also cover, in each case, persons who engage in credit activities on behalf of a licensee or registered person.

The headings are changed as follows:

- Regulation 14: from **Persons exempt from requiring registration — providers of point of sale credit services** to **Persons exempt from requiring registration — suppliers of goods or services**; and
- Regulation 14A: from **Persons exempt from requiring registration — providers of point of sale credit services for a credit card** to **Persons exempt from requiring registration — suppliers of goods or services with branded or co-branded credit card**.

Item 11 amends the exemption in the Principal Regulations for suppliers of goods and services in regulation 14(3B), so that the exemption applies where they engage in credit activities in relation to a credit contract, consumer lease, mortgage or guarantee offered or provided by a licensee, registered person or a special purpose funding entity.

Items 13 and 15 amend regulation 14A to reflect the different context in which the exemption operates (relative to the exemption in regulation 14).

Regulation 14A applies where a person is being provided with a branded or co-branded credit card and where that credit card may not necessarily be used for the supply of goods or services from the supplier. Accordingly, it is not appropriate to limit the circumstances in which the exemption applies according to whether or not the supply of goods or services is the result of unsolicited contact. The following amendments are:

- substitute a new subregulation 14A(6) so that the exemption only applies where a person engages in credit activities on the premises of the supplier; and
- substitute a new paragraph 14A(3)(iii), so that there is internal consistency within the regulation (as current paragraph 14A(3)(iii) refers to a person who is engaging in a credit activity primarily on the premises of a supplier, rather than exclusively so).

Item 14 amends regulation 14A, so that the exemption applies where a supplier of goods or services engages in credit activities in relation to a credit contract offered or provided by a licensee, registered person or a special purpose funding entity.

Item 16 substitutes a new regulation 14B **Persons exempt from requiring registration –fund raising special purpose entity**, and introduce a new regulation 14C **Persons exempt from requiring registration – securitisation entity**. These regulations provide exemptions for the two categories of special purpose funding entities.

In general terms, the purpose of the exemptions is to exempt funding vehicles which are established to raise or receive funds from investors and are acting as either credit providers or lessors. (including by way of a legal assignment of rights from a credit provider or lessor).

The effect of regulations 14B and 14C is similar; they operate to exempt entities as follows.

A fund raising special purpose entity or a securitisation entity is exempt where it satisfies the following requirements:

- it is a party to a servicing agreement with a licensee or registered person who acts on behalf of the entity in relation to the credit contracts or consumer leases it is a party to; and
- a relevant person who has a key role is not an *inappropriate person*, with a relevant person being:
 - if the entity is a body corporate – each of its directors or secretaries; and
 - if the entity is a trust – each trustee; and
- it is a member of an approved external dispute resolution scheme:
 - if it is a fund raising special purpose entity – from 1 July 2010; and
 - if it is a securitisation entity – from 1 October 2010.

Items 17 to 20 amend the exemption in the Principal Regulations in subregulation 15(6) for persons passing on documents so that the exemption applies:

- where the person passes on documents provided or approved by a licensee, registered person or a special purpose funding entity; and
- where the person needs to provide the ACL number of a licensee this requirement can be satisfied by providing the ACL number of the licensee who is a party to a servicing agreement with an exempt special purpose funding entity.

Items 21 to 24 amend the exemption in the Principal Regulations in subregulation 15(7) for persons who allow a third party to use their business name logo or trademark in relation to, in general terms, passing on a document or engaging in a credit activity so that the exemption applies:

- where the person passes on documents provided or approved by a licensee, registered person or a special purpose funding entity; and

- where the person needs to provide the ACL number of a licensee this requirement can be satisfied by providing the ACL number of the licensee who is a party to a servicing agreement with an exempt special purpose funding entity.

Item 25 amends the exemption in the Principal Regulations in subregulation 15(8) for persons passing on factual information, so that the exemption applies where they engage in that conduct in relation to a licensee, registered person or a special purpose funding entity.

Item 26 inserts new regulations 16BA and 16BB. These regulations modify Schedule 2 to the Transitional Act in its application to registered persons who are a party to a servicing agreement with a special purpose funding entity.

Regulations 16BA and 16BB modifies item 4 and item 6 of Schedule 2 respectively to the Transitional Act by, in each case, deleting subitem (4). Subitem (4) provided a defence to the prohibition on engaging in credit activities for a person who is a representative of an exempt principal, including therefore a representative of a special purpose funding entity. Where a registered person appoints a person to act on their behalf under the servicing agreement that person will be a representative of both the registered person and the special purpose funding entity. Without the modification, that person would not need to be appointed as a credit representative and the registered person who appoints them would not need to comply with the requirements in Part 2-3 of Chapter 2 of the Credit Act (extended to registered persons by item 33 of Schedule 2 of the Transitional Act).

The modification means that a person who is a representative of a special purpose funding entity cannot rely on the defence of being the representative of an exempt person in subitems 4(4) and 6(4) and can only rely on the defences in subitems 4(3) and 6(3).

Item 27 omits Subdivision 2.2, which was included in the *Transitional Amendment Regulations 2010 (No. 2)*. The intended (but not the actual) effect of item 39A in the Subdivision was to impose a notification obligation on persons who are only parties to credit contracts or consumer leases entered into before 1 July 2010, where they have made a decision not to apply for an Australian credit licence (ACL); these persons are referred to in this Explanatory Statement as unlicensed carried over instrument lenders (UCOILs). Subdivision 2.2 can be deleted rather than amended, as the requirement has subsequently been implemented through Class Order 10/381 issued by ASIC.

Items 28 and 29 correct minor typographical errors.

Items 30, 32, 34 and 36 correct typographical errors by replacing references to ‘mortgagor’ with references to ‘mortgagee’. The mortgagee is the holder of the security.

Items 31 and 35 make minor consequential changes to allow for the insertion of new defences by items 33 and 37.

Items 33 and 37 insert additional defences against the offences in sections 29 in the Credit Act and items 4 and 6 in Schedule 2 of the Transitional Act respectively for persons acting on behalf on UCOILs who have notified ASIC. These defences are similar in structure and operation to the existing defences in those provisions for persons acting on behalf of exempt persons.

Item 38 corrects a drafting error by replacing the reference to ‘credit provider, lessor, mortgagor (sic) or beneficiary of a guarantee’ with a reference to ‘credit provider or lessor’.

Item 39 inserts new regulations 37 and 38, which apply some of the responsible lending conduct obligations in Chapter 3 to persons engaging in credit activities in relation to carried over instruments (COIs), that is, credit contracts or consumer leases entered into before 1 July 2010 and still on foot on 1 July 2010. The commencement of these responsible lending conduct obligations is staggered as per item 19 in Schedule 1 and item 36 in Schedule 2 of the Transitional Act.

Regulation 37 applies Chapter 3 of the Credit Act to licensees and registered persons in relation to COIs. This includes persons who are assigned COIs after 1 July 2010, credit providers or lessors who have chosen to register and obtain a licence to cover their credit activities in relation to the COIs they are a party to, and persons providing credit assistance in relation to COIs.

Regulation 38 applies Parts 3-2 and 3-7 of the Credit Act to UCOILs only in relation to COIs which are credit contracts. There are no responsible lending conduct obligations applicable to UCOILs in relation to COIs that are leases as only pre-entry conduct is regulated. All references to licensees are replaced with references to UCOILs.

Some provisions in Part 3-2 are not applicable so that, for example, a UCOIL will not have to give their debtors a Credit Guide under section 126 of the Credit Act as this obligation only arises when a credit provider is likely to enter into a credit contract, and, by definition a UCOIL will not be in this position after 1 July 2010. A person who is assigned a COI after 1 July 2010 cannot be a UCOIL and will need to be a holder of an ACL, or, during the transitional period, registered.

As all COIs were entered into prior to 1 July 2010, UCOILs were not required to undertake an assessment of the contract's suitability. However, before increasing a credit limit after 1 July 2010 for non-ADIs and non-RFCs, or after 1 January 2011 for ADIs and RFCs, UCOILs will be required to make an assessment that the increased limit under the contract will not be unsuitable under section 128 of the Credit Act.

Part 3-7 allows for exemptions and modifications to be made by ASIC or regulations.