

EXPLANATORY STATEMENT

Select Legislative Instrument 2010 No. 185

Subject - *National Consumer Credit Protection Act 2009*
National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009
National Consumer Credit Protection Legislation Amendment Regulations 2010 (No. 1)

The *National Consumer Credit Protection Act 2009* (Credit Act) applies to the provision of credit for personal use, and to related matters, including the establishment of a licensing regime for persons engaging in credit activities.

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

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 *National Consumer Credit Protection Legislation Amendment Regulations 2010 (No. 1)* (the Regulations) make amendments to the *National Consumer Credit Protection Regulations 2010* and the *National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010* (Principal Credit Regulations and Principal Transitional Regulations, respectively) related to the transition from the current state-based regulatory framework for consumer credit to the national consumer credit protection regime. The Regulations address concerns raised by industry and identified by Treasury and the Australian Securities and Investments Commission (ASIC) since the Principal Credit Regulations and Principal Transitional Regulations were made.

Specifically, the Regulations:

- exempt credit, which is intended predominantly for residential investment property, from the pre-contractual requirements (principally disclosure and responsible lending) under the Credit Act, where the offer of credit is made before 1 July 2010 and is accepted on or after that date;
- remove the requirement to act on behalf of a licensee or registered person in applying the incidental membership benefits exemption to organisations;
- modify the existing exemption for persons who pass on the contact details of a licensee or registered person to a consumer (referrers) to ensure that the exemption covers referrers who facilitate contact via a website link between a consumer and a licensee, registered person or representative;

- make amendments to clarify or correct a number of provisions relating to carried over instruments (COIs);
- correct a drafting error to ensure the regime to regulate unlicensed COI lenders as established in the Credit Regulations (as amended) applies as intended; and
- provide that the commencement of the responsible lending conduct obligations in relation to COIs coincides with the staggered timeframe set for new contracts.

Details of the Regulations are set out in the Attachment.

The Credit and Transitional Acts do 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 1 July 2010.

Consultation

The amendments address industry concerns in relation to the Principal Credit Regulations and Principal Transitional Regulations. Targeted consultation with industry has been undertaken to ensure these regulations align with standard industry practice.

Authority: Section 329 of the
*National Consumer Credit
Protection Act 2009*

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

Details of the *National Consumer Credit Protection Legislation Amendment Regulations 2010 (No. 1)*

Chapter 1 Preliminary

Regulation 1 – Name of Regulations

This regulation provides that the name of the Regulations is the *National Consumer Credit Protection Legislation Amendment Regulations 2010 (No. 1)*.

Regulation 2 – Commencement

This regulation provides for the Regulations to commence on 1 July 2010.

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

This regulation provides that Schedule 1 amends the Principal Credit Regulations.

Regulation 4 – Amendment of *National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010*

This regulation provides that Schedule 2 amends the Principal Transitional Regulations.

Schedule 1 – Amendment of *National Consumer Credit Protection Regulations 2010*

Item 1 substitutes the heading ***Regulation 9A - The conditions on the licence — special purpose funding entity*** with ***Regulation 9AA - The conditions on the licence — special purpose funding entity***.

Item 2 amends the incidental membership benefits exemption in regulation 20 to exclude the requirement to ‘act on behalf of a licensee or registered person’ to better align with standard business practices.

Item 3 inserts a new regulation 24C to exempt credit providers from pre-contractual requirements (principally National Credit Code disclosure requirements and responsible lending conduct obligations under the Credit Act), where the offer of credit is made before 1 July 2010 and is accepted on or after that date (and prior to 1 October 2010), and where the predominant use of the credit would be in relation to a residential investment property.

Contracts under which credit is provided in relation to residential investment properties:

- will be unregulated where the contract is made before 1 July 2010; and
- will be regulated by the Credit Act where the contract is made after that date.

Where the contract is formed by the credit provider making an offer prior to 1 July 2010, the credit provider will not know whether the contract is regulated by the Credit Act as this depends on whether the offer is accepted before or after 1 July 2010.

The amendment addresses this situation by exempting lenders from the pre-contractual disclosure requirements in section 16 of the Code and the pre-contractual responsible lending conduct requirements in paragraphs 128(a) and 133(1)(a) of the Act where the offer was made prior to 1 July 2010. Credit providers stills need to comply with the Credit Act in relation to

post-contract requirements (for example, providing hardship variations and requirements in relation to enforcement activity), and consumers would still have remedies under the Credit Act and the Code (for example, being able to seek the reopening of the contract as unjust).

The regulation ceases to have effect from 1 October 2010. Any credit contracts formed after this date would not be exempt from the pre-contractual requirements under the Act and the Code.

Item 4 inserts a new subregulation 25(2A) to exempt persons who only engage in credit activities in a limited way as referrers from the requirement to hold an Australian credit licence (ACL). The effect of the change is to create a new category of exempt referrer where that person only engages in credit activities by:

- acting as an intermediary only by having a link from their website to the website of a registered person or licensee; and
- providing disclosure of any commissions or financial benefits that may be received by the referrer or their associates.

Items 5 to 15 relate to the regime for regulating COIs as established by Schedule 2 to the Principal Credit Regulations (as amended). Schedule 2 modifies Chapter 2 of the Credit Act.

Items 5 and 7 substitutes revised modified subsections 74(2) and 75A(1) of the Credit Act to clarify that a prescribed unlicensed carried over instrument lender (UCOIL) is not prohibited from continuing to be the credit provider or lessor. They are however, required to appoint a licensee or registered person to engage in other credit activities (including interacting with consumers) on their behalf.

Items 6, 8 and 9 corrects drafting errors in modified section 75A of the Credit Act by removing references to UCOIL.

Item 10 substitutes a revised modified subsection 75A(3) of the Credit Act to impose a requirement on a prescribed UCOI lender to appoint another licensee or registered person in accordance with modified section 74 within 15 business days of an earlier appointment ceasing.

Item 11 omits modified subsections 75A(4), (5) and (6) which unnecessarily replicate offences contained in modified sections 74 and 75.

Item 12 clarifies that UCOILs who cease to be prescribed must notify ASIC of their changed status in the approved form under modified section 75B.

Item 13 amends modified paragraph 75B(1)(b) of the Credit Act to provide that the notification is due within 15 business (not calendar) days.

Item 14 attaches a civil penalty of 2,000 penalty units to breaches of modified section 75B, consistent with the penalties available for breaches of modified sections 74, 75 and 76.

Item 15 amends the requirement under modified section 104 of the Credit Act so that the audit report must cover contraventions of the general conduct obligations imposed by modified section 47, rather than conditions imposed by modified section 45 as these are more relevant to determining a UCOIL's compliance with their obligations.

Item 16 deletes the definition of *securitisation transaction* from Schedule 3 (which modifies the application of the Credit Act in relation to special purpose funding entities). This means that a securitisation entity is able to satisfy the criteria in the exemption in regulation 24C in the

Principal Credit Regulations and Regulation 14C in the Principal Transitional Regulations where it was a party to a credit contract or consumer lease in any circumstances (whether as an assignee or from the commencement of the contract).

Schedule 2 Amendment of *National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010*

Item 1 amends the incidental membership benefits exemption in regulation 11 to exclude the requirement to ‘act on behalf of a licensee or registered person’ to better align with standard business practices.

Item 2 inserts a new subregulation 16(2A) to exempt persons who only engage in credit activities in a limited way as referrers from the requirement to hold an ACL. The effect of the proposed change is to create a new category of exempt referrer where that person only engages in credit activities by:

- acting as an intermediary only by having a link from their website to the website of a registered person or licensee; and
- providing disclosure of any commissions or financial benefits that may be received by the referrer or their associates.

Items 3 to 5 amends regulation 36 to correct a technical drafting error to ensure the application of the regime to regulate UCOILs as established in Schedule 2 to the Principal Credit Regulations (as amended).

Items 6 and 7 insert new subregulations 37(3) and 38(4) respectively into the Principal Transitional Regulations to ensure the correct commencement of the responsible lending conduct obligations in relation to COIs by aligning their application with the staggered timetable as set out in the Transitional Act. Specifically, the high level responsible lending conduct obligations commence on 1 July 2010 for non-Authorised Deposit-taking Institutions (ADIs) and non-Registered Finance Corporations (RFCs), and on 1 January 2011 for ADIs and RFCs. The remaining responsible lending conduct obligations, primarily additional disclosure requirements, commence for all lenders on 1 January 2011.