

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2011 No. 67**

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

##### *National Consumer Credit Protection Act 2009* *National Consumer Credit Protection Amendment Regulations 2011 (No.3)*

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.

The Regulations make a minor amendment to the *National Consumer Credit Protection Regulations 2010* (the Principal Regulations) relating to certain fees on fixed rate loans.

On 23 March 2011, the Governor-General made the *National Consumer Credit Protection Amendment Regulations 2011 (No.2)* (the 2011 Regulations). The 2011 Regulations amended the Principal Regulations to ban exit fees on new home loans from 1 July 2011. However, the ban does not apply to break fees on fixed rate loans.

Break fees recover a loss incurred (whether realised or not) by credit providers from the early repayment of a fixed rate loan.

Following the making of the 2011 Regulations, it has been suggested that paragraph (c) of the definition of 'break fee' could be ambiguous. That paragraph presently requires that a break fee relate to the difference between the fixed interest rate under the fixed rate loan and the prevailing rate at which credit is provided by the credit provider under the relevant class of credit contract.

The ambiguity relates to whether paragraph (c) requires break fees to be calculated by reference to the interest rate that credit providers charge customers for home loans (commonly referred to as the retail rate) or enables calculations based on other interest rates. Many credit providers currently calculate break fees with reference to their funding costs or wholesale interest rates known as "swap rates". Such calculations are consistent with guidelines issued by the Financial Ombudsman Service. It was not the intent of the 2011 Regulations to change these practices.

The Regulations substitute a new paragraph (c) into the definition of 'break fee' in the Principal Regulations to remove the possible ambiguity. The substituted paragraph requires break fees to relate to the part of the credit provider's loss, arising from the early repayment of the fixed rate loan, that results from differences in interest rates.

The amendment ensures that credit providers and borrowers can contract to calculate break fees in a variety of ways for the purposes of the Principal Regulations, including by reference to retail or wholesale interest rates or the credit provider's costs of funds. Break fees, however, remain subject to existing provisions of the law such as section 78 of the Code which relates to unconscionable fees and charges.

The Regulations are made after targeted industry consultation.

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

The Regulations commence on 1 July 2011.