# EXPLANATORY STATEMENT

**Select Legislative Instrument 2013 No. 43**

## Issued by authority of the Minister for Financial Services and Superannuation

*National Consumer Credit Protection Act 2009*

*National Consumer Credit Protection Amendment Regulation 2013 (No. 1)*

Section 329 of the *National Consumer Credit Protection Act 2009* (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.

Section 203B of the *National Credit Code* (Code) provides that the regulations may exempt a (class of) persons, contracts, mortgages, guarantees or consumer leases from all or specified provisions of the Code.

The *Consumer Credit Legislation Amendment (Enhancements) Act 2012* (Enhancements Act) amended the Credit Act, including the Code, to introduce a number of reforms to the regulation of hardship variations. Where a consumer is experiencing financial difficulties in repaying their loan, a consumer may ask their credit provider to vary or change their loan repayments under the hardship provisions of the Act.

The reforms to hardship variations introduced changes to the existing hardship application processes which will apply from 1 March 2013. Contracts that were entered into prior to 1 March 2013 will remain subject to the existing hardship variation provisions. This has the effect of creating two hardship systems.

Existing obligations under the Code and the *National Consumer Credit Protection Regulations 2010* (Principal Credit Regulations) require credit providers and lessors to provide a consumer with a notice when the consumer has dishonoured their arrangement to pay by direct debit, and to provide information to a debtor when they are in default of their contract.

The Regulation amends the Principal Credit Regulations to support these reforms.

First, the Regulation provides a transitional exemption for credit providers and lessors from the obligation of recording the fact that the credit provider and debtor have agreed to change the contract in a hardship variation. This exemption would last until 1 March 2014 to allow the Australian Securities and Investments Commission adequate time to consult with stakeholders to develop a permanent solution.

The procedures for processing hardship variation applications require credit providers and lessors to record any changes to the contract and provide written notice to the debtor or lessee, even where a credit provider or lessor and the debtor come to an agreement for a simple arrangement (that is, any agreement that defers or reduces the obligations of a debtor for a period of no more than 90 days). To minimise the administrative burden on industry, the Regulation exempts a credit provider or lessor from the obligation of providing written notice setting out the particulars of the change in the term of the contract where it is a simple arrangement.

Item 1 and section 69C in Item 2 amend existing provisions in relation to the requirements on credit providers and lessors to provide notice to debtors and lessees (consumers) where a consumer has arranged to make a payment under a contract by direct debit and there has been a default in payment. The intention is to inform the consumer of this failure so that they have the opportunity to remedy the default as early as possible, before incurring additional fees from the credit provider or lessor and from the provider of the savings account from which payments are debited from.

The provision in Item 1 and section 69C in Item 2 provide an exemption from the obligation to give the consumer notice where the consumer has rectified the default in the period allowed before the notice has to be given. In these circumstances it is presumed that as the consumer has remedied the default they are aware the direct debit request by the credit provider or lessor was dishonoured, and, therefore, no notice is necessary. The redrafting does not affect the existing substantive requirements.

The Regulation also updates the forms that credit providers and lessors are required to provide where a consumer’s arrangements to pay by direct debit have been dishonoured, and where a debtor is in default of their contract.

The notices are inserted into Schedule 1 to the Principal Credit Regulations by Items 7 and 9 of the Regulation.

Details of the Regulation are set out in the Attachment.

The content of the Regulation, in relation to allowing the modifications necessary to allow credit providers to operate the same procedures in relation to both existing credit contracts and those entered into on or after 1 March 2013, was the subject of extensive consultation, principally with individual credit providers and industry bodies for credit providers and lessors. The nature of the changes was developed through a number of different models, tested by these bodies against current practices.

The balance of the Regulation was also the subject of consultation with individual credit providers and lessors, industry bodies, ASIC and consumer groups. Drafts of the Notices were circulated to these stakeholders in early 2013, with comments resulting in changes so that they were clearer and had more impact on debtors and lessees.

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

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (Cth).

The Regulation commenced on the day after it is registered.

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**ATTACHMENT**

**Details of the *National Consumer Credit Protection Amendment Regulation 2013 (No. 1)***

Section 1 – Name of Regulation

This section provides that the name of the Regulation is the *National Consumer Credit Protection Amendment Regulation 2013 (No. 1)*.

Section 2 – Commencement

This section provides that the Regulation commences on the day after it is registered.

Section 3 – Authority

This section provides that the Regulation is made under the *National Consumer Credit Protection Act 2009*.

Section 4 – Schedules

This section provides that each instrument that is specified in Schedule 1 is amended or repealed as set out.

**Schedule 1 – Amendments**

Item 1 substitutes a new Section 69(2) in in respect of an exemption for credit providers from the requirement to give a notice where there has been a default in relation to payment by a direct debit. This change provides for consistency in drafting in the provisions applying to credit providers (in Section 69) and to lessors (in Section 69C).

Item 2 inserts several exemptions for credit providers and lessors from their statutory obligations to provide notice where a change to the contract is agreed to by the credit provider or lessor. The exemptions are provided on the basis that the fact of agreement avoids the need to stipulate the form of notice, and allows flexibility as to how this is done.

The exemptions set out in sections 69A and 69B refer to requirements under the existing hardship regime (for contracts entered into before 1 March 2013) and under the new hardship regime (for contracts entered into on or after 1 March 2013).

The exemption only applies until 1 March 2013, in order to allow consideration of the need for any changes consequent to the finalisation of the reforms in the *Privacy Amendment Act 2012*.

Sections 69A and 69B exempt credit providers and lessors from the requirement to give notice:

* where they have decided to agree to a change under the contract; and
* where the change is a simple arrangement – of the changes to the contract.

A simple arrangement is defined as an agreement between the credit provider or lessor and the debtor or lessor that defers or reduces the amount owed by a debtor for no more than 90 days.

The effect of the exemptions is that:

* Where the change is a simple arrangement – there is no statutory obligation to give notice of the changes, but that the consumer would necessarily be aware of the changes as they are the result of agreement between themselves and the credit provider or lessor.
* Where the change is not a simple arrangement – there is no statutory obligation to give notice of the fact of agreement, but the requirement to give written notice of the changes remains.

Section 69C provides an exemption for lessors from the requirement to give a notice where there has been a default in relation to payment by a direct debit. It effectively results in the renumbering of Section 105H as Section 69C.

Section 69D effectively results in the renumbering of Section 111A as Section 69D. Section 111A relates to the notice requirements on a person who is not a member of an approved external dispute resolution scheme, and is either an unlicensed carried over instrument lender, or is exempt from holding an Australian credit licence. The renumbering places the provision in Part 7-1 of the Principal Credit Regulations, which is consistent with its effect.

Item 3 updates the requirements for credit providers to provide notice, following the reforms in the Enhancements Act that provide for changes to the existing hardship processes which apply to credit contracts entered into on or after 1 March 2013. Credit providers are required to give notices in two different circumstances:

* Under subsection 87(3) of the Credit Act where a consumer has arranged to make a payment under a contract by direct debit and there has been a default in payment (as discussed above in relation to Item 1 and section 69C in Item 2).
* Under subsection 88(3) of the Credit Act where a debtor has defaulted in respect of their obligations under the contract (and, in practice, enforcement action is contemplated by the credit provider).

The reforms in the Enhancements Act mean that the content of the notices to be sent by credit providers has to be changed.

Item 3 results in substituted regulations 85 and 86, which allow credit providers to send default notices as follows:

* If the credit contract was entered into before 1 March 2013, and the notice is given on or after 1 March 2013 – the credit provider can send either the existing notices (Forms 11 and 12) or the new notices (Forms 11A and 12A).
* If the credit contract was entered into on or after 1 March 2013, and the notice is given before 1 December 2013 – the credit provider can also send either the existing notices (Forms 11 and 12) or the new notices (Forms 11A and 12A).
* If the credit contract was entered into on or after 1 March 2013, and the notice is given on or after 1 December 2013 – the credit provider can only send the new notices (Forms 11A and 12A).

Item 4 repeals Section 105H. Section 105H has been substantially replicated as Section 69C (included in Item 2).

Item 5 inserts Section 105K in the Principal Credit Regulations. Section 105K provides for a lessor to provide notice as set out in Form 18A where there has been a default by a lessee in respect of their obligations under the contract (and, in practice, enforcement action is contemplated by the credit provider).

Item 6 repeals Section 111A. Section 111A has been substantially replicated as Section 69D (included in Item 2).

Items 7, 8 and 9 insert new forms into Schedule 1 of the Principal Credit Regulations. These forms are intended to provide consumers with information about their rights on default, and to encourage them to actively address their default, initially by contacting their credit provider or lessor. Negotiations between the parties to the contract may result in resolutions which avoid the need for court action.

The new forms are:

* Form 11A – to be provided by a credit provider where a consumer has arranged to make a payment under a contract by direct debit and there has been a default in payment.
* Form 12A – to be provided by a credit provider where a debtor has defaulted in respect of their obligations under the contract.
* Form 18 – to be provided by a lessor where a consumer has arranged to make a payment under a contract by direct debit and there has been a default in payment.
* Form 18A – to be provided by a lessor where a lessee has defaulted in respect of their obligations under the contract.

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

**National Consumer Credit Protection Amendment Regulation 2013 (No. 1)**

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### Overview of the Legislative Instrument

The purpose of the Legislative Instrument is to:

* Provide transitional arrangements to reduce the costs for credit providers and lessors in complying with the new hardship procedures introduced in the *Consumer Credit Legislation Amendment (Enhancements) Act 2012*.
* Introduce an exemption from the requirement to give notice in writing where the credit provider or lessor has agreed to a ***simple change*** to a contract (or example, deferring up to 3 months payments).
* Specify new forms to be sent to consumers by credit providers and lessors following default by a consumer.

#### Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

#### Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.