

EXPLANATORY STATEMENT

Select Legislative Instrument 2010 No. 107

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

National Consumer Credit Protection (Transitional and Consequential Provisions) Amendment Regulations 2010 (No. 2)

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:

- amend the exemption from registration in the Principal Regulations for organisations that provide incidental benefits to their members (in relation to a credit contract or consumer lease) to remove the obligation to provide the licensee or registered person with information relevant to deciding whether or not to enter the credit contract or consumer lease;
- provide an exemption in the Principal Regulations from registration for persons engaging in credit services at the point of sale in relation to a continuing credit contract under which a branded or co-branded credit card and amend the existing exemption for point of sale credit services;
- amend the exemptions in the Principal Regulations from registration for tax agents and lawyers; and
- implement transitional arrangements for regulating credit providers and lessors with carried over instruments (COIs). COIs are credit contracts, consumer leases, mortgages and guarantees that are regulated by the states and territories under the Uniform Consumer Credit Code (UCCC) and that will still be in effect as at 1 July 2010. From 1 July 2010, COIs will be regulated by the National Credit Code.

Those credit providers, lessors, mortgagees or beneficiaries of guarantees who intend to enter new credit contracts or leases, or take securities after 1 July 2010 alongside their COIs are required to register with the Australian Securities and Investments Commission (ASIC) prior to that date, and must apply for an Australian credit licence (ACL) to cover both their old and new contracts.

Those credit providers and lessors who only have a closed book as at 1 July 2010 and will not offer new credit contracts or leases (COI lenders) need to make an election to determine the way in which the credit legislation will apply to them:

- COI lenders may elect to register with ASIC between 1 April and 30 June 2010 and apply for an ACL after 1 July 2010. Under this option, the *National Consumer Credit Protection Act 2009* (Credit Act) will apply to them unmodified, so that, for example, they will need to meet the same entry standards to obtain a licence and ASIC will be able to impose conditions on their licence.
- COI lenders who elect not to register or apply for an ACL will automatically be subject to the regime set out in the regulations. They will need to notify ASIC by 30 June 2010 of their intention to be regulated under this regime, which is designed to enable ASIC to effectively monitor the conduct of these lenders outside the licensing framework.

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 will commence on 24 May 2010.

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. 2)*

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. 2)*.

Regulation 2 – Commencement

This regulation provides for the Regulations to commence on 24 May 2010.

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 makes a minor drafting amendment to regulation 3 to accommodate additional subsections inserted by items 2 to 4.

Items 2 and 3 insert definitions of terms used in the Regulations. Some of these terms are discussed in more detail in the commentary at the relevant amendment.

Item 2 inserts a definition of *authorised contact*, as having the same meaning given by subregulation 3(1) of the *National Consumer Credit Protection Regulations 2010* (Credit Regulations). This definition interacts with the definition of *unsolicited contact* in item 4, with the two definitions determining the scope of the exemption from registration under regulations 14 and 14A. The effect of the definitions is discussed under items 13, 14 and 15.

Item 2 also inserts a definition of *credit card* as having the same meaning given by subregulation 3(1) of the Credit Regulations. The definition is relevant to determining whether or not a person can rely on the exemption under regulation 14A (introduced by item 16).

Item 3 inserts a definition of *licensee*, which is the same as the definition of the term in subsection 5(1) of the *National Consumer Credit Protection Act 2009* (Credit Act).

Item 3 also inserts a definition of *National Credit Regulations*, which means the Credit Regulations.

Item 4 inserts a definition of *unlicensed carried over instrument lender*, which is the definition given by section 5 of the Credit Act as mentioned in item 2.4 of Schedule 2 to the Credit Regulations.

Item 4 also inserts a definition of *unsolicited contact*, as having the same meaning given by subregulation 3(1) of the Credit Regulations. The definition of unsolicited contact is relevant to determining whether or not a person can rely on the exemptions under regulations 14 and 14A and is discussed under items 13, 14 and 15.

Item 5 introduces a definition so that a reference to a modified provision of the Credit Act is to that provision as modified in accordance with Division 2 of Part 2-4 of the Credit Regulations and a reference to a modified provision of the Transitional Act is a reference to that provision as modified in accordance with Division 2 of Part 4 of the Principal Regulations.

Items 6 and 7 inserts new headings, as Part 4 of the Principal Regulations now covers modifications as well as exemptions. The Part is divided into two Divisions, covering each topic separately. The amendment also creates two subdivisions in Division 1, dividing the exemptions into two categories: Subdivision 1.1 defines the exemption by the persons engaging in credit activities, and Subdivision 1.2 defines the exemption by the type of activities being engaged in (irrespective of the person who is doing it).

Item 8 removes paragraph 11(11)(c) of the Principal Regulations.

Principal subregulation 11(11) provides an exemption from registration for an organisation that provides services and makes benefits available to its members, and an incidental benefit is that members are eligible to apply to enter into a particular credit contract or consumer lease.

Principal paragraph 11(11)(c) required the organisation using the exemption to take reasonable steps to provide the licensee or registered person with information relevant to deciding whether or not to enter the credit contract or consumer lease. This requirement is not consistent with industry practice and is not required if the organisation acts as a representative of the licensee or registered person.

Item 9 amends paragraph 11(11)(d) to ensure organisations using the exemption under subregulation 11(11) do so on behalf of a licensee or registered person under a contract or agreement. This ensures that the organisation is a representative of the licensee or registered person.

Item 10 introduces a specific reference to the supplier at the end of subparagraph 14(3)(a)(i), so that other references to the phrase in the regulation refer back to this person.

Items 11 and 12 inserts subparagraph 14(3)(a)(iii) into the Principal Regulations, and makes a consequential grammatical change to the conjunction at the end of subparagraph 14(3)(a)(ii). The effect of the change is discussed in more detail under items 13, 14 and 15.

Items 13, 14 and 15 amends regulation 14, which exempts providers of point of sale credit services from needing to be registered. Item 13 introduces replacement paragraphs 14(3)(b) to (e), item 14 introduces subregulations 14(3A) to (3B), and item 15 deletes subregulations 14(6) and (7). The regulation applies:

- to *particular persons*, as defined in paragraph 14(3)(a), in general terms, where they are acting as a supplier of goods or services, or a related body corporate, or a third party operating primarily on the premises of the supplier with the agreement of the supplier;
- where they are engaging in *specified credit activities*, as defined in paragraph 14(3)(b);
- where they are engaging in those credit activities in relation to a person who is a licensed or registered *linked credit provider or lessor*;
- where the *purpose of the credit* meets specified criteria, in general terms, that it is used for the purchase of goods or services from the supplier of goods or services; and
- where the consumer is not approached as a result of *unsolicited contact*.

The changes to the regulation are as follows.

- The categories of persons who are exempt in paragraph 14(3)(a) has been expanded to include, in subparagraph 14(3)(a)(iii) persons ‘engaging in a credit activity primarily on the premises of the supplier of goods and services with the agreement of the supplier’.
- There has been a minor change to the structure of paragraph 14(3)(b) to include a new subregulation 14(3B) including definitions of phrases referred to in subparagraphs 14(3)(b)(i) and (v) (*relevant credit provider*), subparagraphs 23(3)(b)(ii) and (v) (*relevant lessor*), subparagraph 23(3)(b)(iii) (*relevant credit provider*) and subparagraph 23(3)(b)(iv) (relevant beneficiary of a guarantee). These provisions do not change the substantive operation of the regulation but clarify that the supplier must be engaging in credit activities in relation to a credit contract or consumer lease (including a proposed credit contract or consumer lease) that is, or will be provided by a person who is:
 - either licensed or registered; and
 - a linked credit provider or lessor of the supplier.
- Paragraph 14(3)(d) has been replaced by paragraphs 14(3)(d) to (e). The ‘predominant use’ test that applies to all types of regulated contracts in the Principal Regulations has been modified to include a separate test in respect of each type of contract: loan contracts (paragraph 14(3)(c)), continuing credit contracts (paragraph 14(3)(d)) and consumer leases (paragraph 14(3)(e)).

Subregulations 14(6) and (7) have been deleted by item 15 but substantially reproduced through subregulation 3(1), which inserts definitions of *authorised contact* and *unsolicited contact*. The definitions clarify the effect of the exemption where a point of sale transaction is the result of either authorised or unsolicited contact.

The definitions provide that a point of sale transaction is the result of unsolicited contact and not exempt where it follows from contact between a consumer approached from business premises that are not physically separate from premises used by consumers for purposes other than being contacted in relation to the supply of goods or services. This provision is intended to limit the scope of the exemption so it cannot be relied upon where a person is operating from business premises that are not physically separate (including by the absence of a wall) and directly approaching consumers who are passing by on premises, such as passageways or areas used by consumers to walk from one place to another.

An example of this type of business premises would be a temporary or open booth or stall that has been set up in or around a shopping centre or retail precinct (including, for example, in airports) that allows the supplier to directly approach consumers as they are passing by.

The definitions also clarify the scope of the exemption by specifically providing that contact is authorised where it is the result of:

- posting to, or leaving at a residential address, written promotional material about goods or services;
- contact in relation to the possible return of goods supplied to the consumer or the provision of goods to replace returned goods to the consumer; and
- contact that results from a consumer providing their contact details for the sole purpose of being contacted about the supply of goods or services. The provision has been amended so

that contact must occur within three months of the consumer providing their contact details (rather than after a reasonable period). A time period has been quantified so as to provide certainty as to the scope of the exemption.

Item 16 inserts regulation 14A ***Persons exempt from requiring a licence – providers of point of sale credit services for a credit card*** which provides an exemption for providers of point of sale credit services in limited circumstances where they are engaging in credit activities. The structure of the regulation is similar to regulation 14 and it applies:

- to *particular persons*, as defined in paragraph 14A(3)(a), in general terms, where they are acting as a supplier of goods or services, or a related body corporate, or a third party operating primarily on the premises of the supplier with the agreement of the supplier;
- where they are engaging in *specified credit activities*, which are restricted to the following activities, either acting on behalf of a credit provider (subregulation 14A(4)) or providing credit services (subregulation 14A(5));
- where they are only engaging in these credit activities in respect of a *particular credit product*, that is, a continuing credit contract under which a credit card is provided, and that credit card is either branded or co-branded with the name or some other characteristic of the supplier of goods or services (or of a related body corporate);
- where the *person offering the credit product* is both a linked credit provider of the supplier, and either licensed or registered; and
- where the consumer is not approached as a result of *unsolicited contact*.

The intention is that the exemption operates where a person is being provided with a branded or co-branded credit card and where there may be a delay between the consumer entering into the contract and their initial use of the card. In these circumstances the supplier is prevented from relying on the exemption provided in regulation 14 as the initial use of the card may not be known or may not necessarily be for the supply of goods or services from the supplier.

Item 17 inserts a new heading. The amendment inserts a heading for Subdivision 1.2, defining the exemptions in the Subdivision by the type of activities being engaged in (irrespective of the person who is doing it).

Item 18 clarifies that regulation 15 has been amended in accordance with the exemption and modification powers in paragraphs 42(b) and (c) of Schedule 2 to the Act.

Item 19 amends the exemption from registration for a person if they are a registered tax agent by updating the reference to refer to the *Tax Agent Services Act 2009*, which, amongst other things, provides for the registration scheme for tax agents.

Item 20 modifies the definition of *lawyer* for the purposes of the exemption from registration in Principal regulation 15 to align it with the definition of the same term in the *Corporations Act 2001* in order to narrow the scope of the exemption to practising solicitors.

Item 21 inserts Division 2 **Modifications of Schedule 2 of the Act — carried over instrument lender** and regulation 16A. Regulation 16A applies Schedule 2 of the Act as modified by inserting Part 4A. Part 4A inserts item 39A into Schedule 2 of the Transitional Act, which imposes notification obligations on a COI lender who chooses to not to register or apply for a licence to notify ASIC before 1 July 2010. They must advise ASIC of the number and value of COIs outstanding and provide an estimate of when their last contract will be finalised (based on

when payments under the contract are due, without making assumptions about early repayments or extensions). This will assist ASIC in determining the level of oversight and the scalability of the general conduct requirements which should be applied to unlicensed COI lenders (UCOILs).

A UCOIL must also tell ASIC if they will be a prescribed person under modified section 74 of the Credit Act in the Credit Amendment Regulations. A UCOIL will be prescribed where they fail to meet certain probity requirements as specified in modified section 5A of the Credit Act in the Credit Amendment Regulations. Under modified section 75 of the Credit Act in the Credit Amendment Regulations, a person who is prescribed as at 1 July 2010 must advise ASIC of the name and contact details of the person appointed to act on their behalf by 15 July 2010.

A UCOIL will commit an offence by failing to notify ASIC, but will still be regulated by the regime as set out in these regulations. Failure to comply with this provision may carry a criminal penalty and may be treated as a strict liability offence.

Item 22 inserts **Part 6 – Carried over instruments**, including regulations 30 to 36, into the Principal regulations.

Regulations 30 and 31 provides context for the amendments by setting out the purpose and application of Part 6.

Regulation 32 provides that a credit provider, lessor, mortgagee or beneficiary of guarantee with a COI **prior** to 1 July 2010 who chooses to apply for a licence will be subject to Chapter 2 of the Credit Act (other than the prohibition on engaging in credit activities in section 29). This option is available to both those with COIs who intend to engage in credit activities after 1 July 2010 and those with a closed book.

Credit Amendment regulation 7A provides that ASIC must not grant a licence to a non-ADI COI lender who intends to offer new contracts after 1 July 2010 unless they apply for a licence to cover activities in relation to both their COIs and new contracts. Credit Amendment regulation 25F modifies section 38 of the Credit Act to impose the same requirement on ADIs who are COI lenders. This means that if a person with COIs intends to offer new contracts after 1 July 2010, they will have to apply for a licence that will cover all of their contracts uniformly. That is, they cannot choose to have the modified regime apply to their COIs and the licensing regime apply to their new contracts.

Regulation 33 applies Chapter 2 of the Credit Act to persons engaging in credit activities in relation to COIs who are not the credit provider, lessor, mortgagee or beneficiary of guarantee with a COI **prior** to 1 July 2010. That is, a credit provider, lessor, mortgagee, or beneficiary of guarantee who is assigned a COI and people providing credit services in relation to a COI **after** 1 July 2010 will be required to be registered and subsequently apply for a licence. Unlike credit providers or lessors with COIs prior to 1 July 2010, these people will not have an option about how they will be regulated. That is, they will be required to be registered and to apply for a licence by 31 December 2010 and obtain a licence by 30 June 2011 in order to engage in credit activities without committing an offence.

They must hold a licence as long as they are engaging in credit activities. If their licence is cancelled (voluntarily or as a result of ASIC action) they will revert to being regulated under *modified* Chapter 2 of the Credit Act.

Regulation 34 provides that a credit provider, lessor, mortgagee or beneficiary of guarantee with a COI **prior** to 1 July 2010 who chooses to apply to be registered is subject to Schedule 2 of the Transitional Act (other than the prohibitions on engaging in credit activities in items 4 and 6).

This option is available to both those with COIs who intend to engage in credit activities after 1 July 2010 and those with a closed book.

Regulation 35 applies Schedule 2 of the Transitional Act to persons engaging in credit activities in relation to COIs who were not the credit provider, lessor, mortgagee or beneficiary of guarantee with a COI **prior** to 1 July 2010. That is a credit provider, lessor, mortgagee or beneficiary of guarantee who is assigned a COI and people providing credit services in relation to a COI **after** 1 July 2010 is required to register with ASIC. Unlike credit providers or lessors with COIs prior to 1 July 2010, these people do not have an option about how they are regulated. That is, they are required to be registered by 30 June 2010 in order to engage in credit activities after that date without committing an offence.

They must be registered (or subsequently licensed) as long as they are engaging in credit activities. If their registration is cancelled (voluntarily or as a result of ASIC action) they will revert to being regulated under *modified* Chapter 2 of the Credit Act.

Regulation 36 provides that a credit provider or lessor with a COI **prior** to 1 July 2010 who **chooses not** to register or obtain for a licence and is not exempt from the Credit and Transitional Acts (including by regulation) is subject to *modified* Chapter 2 and *modified* section 213 of the Credit Act. This option is only available to COI lenders with a closed book.

Modified Chapter 2 and *modified* section 213 of the Credit Act are contained in the *National Consumer Credit Protection Amendment Regulations 2010 (No.)*.

The modified regime is not being extended to persons who are **only** mortgagees or beneficiaries of guarantees with COIs at this time. Normally, these persons will also be credit providers or lessors, so they will need to be licensed or be regulated by modified **Chapter 2**. However, Treasury and ASIC will continue to monitor the situation with the understanding that regulation can extend to these people in the future if there are demonstrated problems.