

ASIC CLASS ORDER [CO 10/381]

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

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

The Australian Securities and Investments Commission (*ASIC*) makes ASIC Class Order [CO 10/381] under item 41 of Schedule 2 to the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (the *Act*).

Item 41 of Schedule 2 to the Act provides that ASIC may declare that provisions contained in Part 3 of Schedule 2 to the Act apply in relation to a class of persons as if the provisions were omitted, modified or varied in a specified way.

1. Background

Item 39A of Schedule 2 to the Act purports to impose an obligation on an unlicensed carried over instrument lender to give ASIC certain information in the period starting 24 May 2010 and ending 30 June 2010.

An “unlicensed carried over instrument lender” means a credit provider or lessor who:

- (a) was a credit provider or lessor in relation to a carried over instrument (ie an existing credit contract or consumer lease) immediately before 1 July 2010; and
- (b) on and after 1 July 2010 has been the credit provider or lessor in relation to the carried over instrument on a continuous basis; and
- (c) is not any of the following persons:
 - (i) a licensee;
 - (ii) a registered person;
 - (iii) a person exempt from the requirement to hold a licence under the *National Consumer Credit Protection Act 2009* or to be a registered person under the Act.

Paragraph (b) of the definition of “unlicensed carried over instrument lender” has the effect that no person will fall within the definition until on or after 1 July 2010.

As a consequence, item 39A of Schedule 2 to the Act has no operation because it purports to impose an obligation before 1 July 2010 on a person as an “unlicensed carried over instrument lender”.

The intention of item 39A of Schedule 2 to the Act was to impose on persons who will be unlicensed carried over instrument lenders on and after 1 July 2010 an obligation to notify ASIC that this is the case.

Further, the obligation did not apply to lenders who become unlicensed carried over instrument lenders after 1 July 2010. This was unintended. This circumstance would arise, for example, if a person became a licensee after 1 July 2010 but subsequently ceased to be a licensee.

2. Purpose of the class order

The purpose of the class order is to give effect to the intention of item 39A of Schedule 2 to the Act.

3. Operation of the class order

The declaration in the class order substantially produces the effect that item 39A of Schedule 2 to the Act would have had but for some drafting anomalies. As a result of those anomalies, that item does not have any operation.

The declaration has the effect that a person (*lender*) who is a credit provider or lessor in relation to a carried over instrument immediately before 1 July 2010 must lodge a notice with ASIC containing certain information where the lender:

- (d) is, or will be, a credit provider or lessor in relation to the carried over instrument at any time after 30 June 2010;
- (e) is not, or will not be, a licensee, registered person, or a person exempt from the requirement to hold a licence or be a registered person.

The requirement to lodge the notice with ASIC arises as soon as paragraph (a) and (b) both apply. The information required to be contained in the notice must be current as at the date the notice is lodged. A lender may satisfy the requirement to lodge the notice by the required time by lodging the notice with ASIC up to 6 weeks before it must otherwise be lodged. A failure to lodge the notice will be an offence.

The effect of the declaration is that:

- (a) A lender that is a credit provider or lessor in relation to a carried over instrument after 30 June 2010 and will not be a registered person or licensee on 1 July 2010 is obliged to lodge the notice with ASIC on 1 July 2010. However, if the lender had already lodged the notice with ASIC up to 6 weeks before the obligation arises the lender will have satisfied the obligation.
- (b) A lender that is a credit provider in relation to a carried over instrument after 30 June 2010 and is a registered person or licensee on or after 1 July 2010 but subsequently ceases to be a registered person or licensee, is obliged to lodge the notice with ASIC on the day that the lender ceases to be a registered person or licensee. However, if the lender had already lodged the notice with

ASIC up to 6 weeks before the obligation arises the lender will have satisfied the obligation.

4. Consultation

ASIC consulted with the Department of the Treasury to ensure that the declaration made by the class order gives effect to the intent of item 39A of Schedule 2 to the Act.