

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2010 No. 303**

Subject - *National Consumer Credit Protection Act 2009*

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

*National Consumer Credit Protection (Fees) Act 2009*

*National Consumer Credit Protection Legislation Amendment Regulations 2010 (No. 3)*

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 (the states) 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 (Fees) Act 2009* (Fees Act) allows for the imposition of fees for things done under the Credit Act and the Transitional Act.

Section 10 of the Fees Act provides that the Governor-General may make regulations for the purposes of sections 5, 6, 7 and 8 of the Fees Act, which set out certain details about the fees imposed.

The Regulations make amendments to the *National Consumer Credit Protection Regulations 2010*, the *National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010*, and the *National Consumer Credit Protection (Fees) Regulations 2010* (Principal Credit Regulations, Principal Transitional Regulations, and Principal Fees 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 stakeholders and identified by the Department of the Treasury and the Australian Securities and Investments Commission (ASIC) since the Principal Credit Regulations and Principal Transitional Regulations were made in March 2010.

Specifically, the Regulations:

- modify the limited exemption for authorised deposit-taking institutions (ADIs) who provide credit assistance for a credit card product of another ADI (otherwise known as a ‘white label’ arrangement) to facilitate industry practice;
- provide temporary transitional relief from some responsible lending obligations for loan applications that have been submitted and loan offers made before 1 January 2011;
- allow credit cards to be distributed within the 90 day period from when an assessment is made instead of when the contract is entered into;
- clarify that audit companies may be an auditor for the purposes of preparing audit reports under the Credit Act;
- extend the exemption for special purpose funding entities to cover both providers of credit contracts and lessors;
- exclude from the definition of credit activity, residential investment property loans of more than \$5 million where the loan is for more than one residential property;
- expand the exemption for insolvency practitioners to cover activities which are incidental and preparatory to their appointment; and
- make other minor and technical changes.

Details of the Regulations are set out in the Attachment.

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

### Consultation

The amendments address stakeholder concerns in relation to the Principal Credit Regulations, Principal Transitional Regulations and Principal Fees Regulations. Targeted and detailed consultation with stakeholders has been undertaken to ensure these regulations are based on or operate consistently with 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*

Section 10 of the  
*National Consumer Credit  
Protection (Fees) Act 2009*

**Details of the *National Consumer Credit Protection Legislation Amendment Regulations 2010 (No. 3)***

**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. 3)*.

**Regulation 2 – Commencement**

The Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

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

This regulation provides that Schedule 1 amends the *National Consumer Credit Protection Regulations 2010* (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 *National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010* (Principal Transitional Regulations).

**Regulation 5 – Amendment of *National Consumer Credit Protection (Fees) Regulations 2010***

This regulation provides that Schedule 3 amends the *National Consumer Credit Protection (Fees) Regulations 2010* (Principal Fees Regulations).

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

Item 1 makes changes to subregulation 3(1) to alter the definition of ‘exempt special purpose funding entity’ to include a securitisation entity under 23C. This corrects an oversight in the original drafting of the definition.

Items 2 to 7, 9, 10, and 25 to 35 amend regulation 9AA, paragraphs 19(3)(b) and 19(5)(b), inserted subsection 49(3A), 49(10), 52(1), 75(1), 75B(1), and 76(1) and inserted sections 52, 75 and 76 to make minor technical changes to reword instances where a person must ‘notify’ ASIC of an event, ‘give’ ASIC a report, or ‘provide’ to ASIC with ‘lodge’ with ASIC of those items. This provides consistency with the wording used in the Fees Act.

Item 8 amends paragraph 19(2)(a) to allow audit companies to be appointed as an auditor for the purposes of preparing audit reports under the Credit Act. The existing regulation only allows a registered company auditor to be appointed as an auditor. This may imply that the auditor must be a natural person. The amendment clarifies that authorised audit companies may be appointed as an auditor.

Item 11 corrects the heading of Part 2-4, Subdivision 1.1 to Persons exempt from being licensed.

Item 12 replaces existing subregulation 20(3) with a new subregulation 20(3) to expand the existing exemption for insolvency practitioners to cover activities which are incidental and preparatory to the appointment of the insolvency practitioners. It also makes minor technical changes to that subregulation.

Item 13 and 15 correct references in sub-subparagraph 21(3)(c)(i)(B) to be sub-subparagraph (A) and in paragraph 24(1)(a) to be Part 2-6 of the Act.

Item 14 amends regulation 23C(3) to refer to the securitisation entity, rather than the fund raising special purpose entity, consistent with industry practice.

Item 16 inserts a new Subdivision 1.3 in Part 2-4 to provide a temporary exemption from responsible lending conduct obligations for loan applications received by authorised deposit-taking institutions or registerable financial corporations before 1 January 2011 (when the responsible lending conduct obligations commence for ADIs and registered financial corporations (RFC)) but which may be accepted by the customer after 1 January 2011. The exemption ceases on 1 April 2011. This amendment allows ADIs and RFCs to complete loan applications which have commenced before responsible lending obligations applied.

Item 17 amends subregulation 25(5)(c)(ii) to allow upstream referrers to pass on the consumer's name and contact details as intended.

Item 18 inserts a new regulation 25K to allow lenders who issue credit cards to meet their obligations under section 128 of the Credit Act. Section 128 of the Credit Act requires credit providers to enter into a credit contract within 90 days of making an assessment of the unsuitability of a credit contract. The new regulation allows for the provision of the credit card within that time if the credit contract is formed or entered by use by the consumer of the credit card or activation by the consumer of the credit card.

Item 18 also inserts a new regulation 25L to include a specific qualification to the definition of assignees under section 10 of the Credit Act so that it does not include a credit provider, lessor, mortgagee or beneficiary of a guarantee where the original credit provider, lessor, mortgagee or beneficiary of a guarantee that continues to receive payments from the debtor, or would continue to do so if the debtor complied with the credit contract, consumer lease, mortgage or guarantee.

This clarifies that, until the debtor has notice of a new credit provider and is therefore obliged to make payment to that new credit provider, the person who the customer considers to be the credit provider will be continued to be treated as such for the purposes of the Code. It also ensures consistency with the exemption in section 188 of the Code relating to assignment by a credit provider.

Items 19 to 23 amend regulation 28A to modify the existing exemption for "white labelling" credit card arrangements to correspond with current industry practices and processes. A white label arrangement is an arrangement in which one ADI is the credit provider but the credit is typically labelled with the logo or name of the other ADI who will primarily be responsible for any interaction with the borrower.

Specifically, the amendments:

- enable the exemption to apply to Australian credit licence (ACL) holders and persons that have applied for a licence during the transitional period (items 19 and 20) which will allow the exemption to be used in the transitional period where the credit provider or credit assistance provider may have applied for but not received their ACL.

- allow the credit provider to use the credit assistance provider's name, phrases, initials or logo on letters or other marketing material (item 21) to allow the use of those items not only in credit contracts as permitted under the previous Principal Credit Regulations;
- allow the credit assistance provider to provide assistance in relation to a credit contract connected with the agreement between the credit provider and the provider of credit assistance (item 22) to expand the number of activities the credit assistance provider can provide;
- relieve the credit assistance provider from Division 6 responsible lending obligations (item 23), but impose a statutory requirement for the credit assistance provider to be jointly and severally liable for the credit product so that the credit assistance provider does not need to conduct their own responsible lending assessments but remains jointly liable for placing consumers into unsuitable credit products.

Item 24 inserts regulation 65C to remove the application of the National Credit Code from residential investment property loans of more than \$5 million to a private individual, and therefore from all obligations under the Credit Act. Lenders have identified instances of individuals (property developers) applying for credit of these amounts or more. It was considered that the borrower in these cases would be a company rather than an individual, but it has transpired this is not the case. Exempting these loans is consistent with the policy of the National Credit Code, to only apply to lending for personal use rather than business use.

Items 36 and 37 amend inserted section 112 and inserted paragraph 112(a) of the Act to correct minor technical errors in the Principal Credit Regulations.

Item 38 and 39 amend inserted paragraph 159A of the Act to extend the existing securitisation exemption in 23B of the Principal Credit Regulations (which exempts special purpose funding entities from being licensed only if they engage a licensee to act on their behalf) in a minor respect to cover both providers of credit contracts and lessors.

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

Items 1 to 6 amend subregulation 10A(2), paragraphs 10A(3)(b), 10A(4)(a), 10A(4)(b), 10A(5)(a) and 10A(5)(b) to make minor technical changes to reword instances where a person must ‘notify’ ASIC of an event, ‘give’ ASIC a report, or ‘provide’ to ASIC with ‘lodge’ with ASIC of those items. These amendments provide consistency with the wording used in the Fees Act.

Item 7 amends subregulation 11(3) to expand the existing exemption for insolvency practitioners in subregulation 11(3) to cover activities which are incidental and preparatory to the appointment of the insolvency practitioners. It also makes minor technical changes to that subregulation.

### **Schedule 3 – Amendment of National Consumer Credit Protection (Fees) Regulations 2010**

Item 1 amends Schedule 1, table 1 to make a minor technical change to Schedule 1 to the Principal Fees Regulations to clarify that the method to work out the fee for an Australian credit licence also applies to licensees lodging an annual compliance certificate.

Items 2 and 3 amend the wording in Table 1, column 3 of Schedule 1 to the Principal Fees Regulations to clarify the method includes the assignment of consumer leases, and applies to the provision of credit rather than a loan being made. This clarification applies to credit such as for credit cards where credit is approved but a loan may not be specifically made.

Item 4 amends item 2.2 of Schedule 1 to the Principal Fees Regulations to make a minor grammatical amendment.

Item 5 removes items 2.4 and 2.5 of Schedule 1 to the Principal Fees Regulations as they are no longer necessary since they do not require lodgement of an item and are therefore not chargeable matters under the Fees Act.

Items 6, 8, 9 and 11 insert items 2.9A, 2.23A, 2.23AA, 2.23AB, 2.23F and 2.23L to specify that no fee is payable for the provision of information useful to ASIC's records which persons should be encouraged to provide. This includes:

- the lodgment of notifications under section 104 of the Credit Act relating to an auditor lodging a written report with ASIC about certain things of which the auditor becomes aware (item 6);
- the lodgment of information under a provision of the Principal Credit Regulations or modified Credit Act that relates to an unlicensed carried over instrument lender (item 8);
- the lodgment of notification of appointments of an auditor under subregulation 19(3) and 19(5) of the Principal Credit Regulations (item 8); and
- the lodgment of information under a provision of the Principal Credit Regulations or Principal Transitional Regulations that relates to special purpose funding entities (items 9 and 11).

Item 7 inserts items 2.14A, 2.14B, 2.14C, and 2.14D to insert a fee of \$100 for applications to ASIC for relief under subsections 171(4) and 171(6) of the Credit Act relating to consumer leases, and subsections 203A(1) and 203A(3) of the Code relating to ASIC's powers to grant exemptions as these require ASIC to consider more complex policy issues to provide a response.

Item 10 amends 2.23K of Schedule 1 to clarify that this item relates to the unlicensed carried over instrument lender rather than the carried over instrument.

Item 12 replaces paragraph (c) of item 1 of Schedule 2 to specify that fees are payable for making available information from registers. Currently fees are limited to extracts of particulars in relation to a licensee, credit representative or registered person. The amendment allows fees to be applicable to any person or entity whose details are included in any other register ASIC is required to keep under the Credit Act or Transitional Act.

Item 13 amends item 1 of Schedule 2 to clarify that it relates to a separate fee applying to each person or entity rather than for each licensee, credit representative or registered person.