

EXPLANATORY STATEMENT

Select Legislative Instrument 2010 No. 333

Issued by the Authority of the Assistant Treasurer, Minister for Financial Services and Superannuation

National Consumer Credit Protection Act 2009

National Consumer Credit Protection Amendment Regulations 2010 (No. 4)

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 Regulations make amendments to Chapter 3 of the *National Consumer Credit Protection Regulations 2010* (Principal Regulations) to address concerns raised by stakeholders and identified by the Department of the Treasury and the Australian Securities and Investments Commission (ASIC).

The Regulations ensure that the Principal Regulations provide flexibility for licensees and credit providers in meeting disclosure requirements under the Credit Act while still delivering appropriate levels of protection to consumers.

Specifically, the Regulations:

- provide temporary and conditional transitional relief between 1 January 2011 and 1 April 2011 to persons who are otherwise required to provide a document disclosing information about their activities to consumers under a provision of the Credit Act;
- exempt persons from the requirement to provide a disclosure document known as a credit guide in a number of specific situations where this results in duplication or is otherwise unnecessary (for example, because the consumer has previously been given one and the information has not changed);
- provide a transitional period in which a person can update their credit guide, and still provide the earlier version of their credit guide;
- exempt persons who provide credit assistance from having to give a quote where they will not be charging the consumer a fee;
- provide greater clarity about the methods in which a consumer can be given a disclosure documents; and
- specify that two or more disclosure documents can be combined (provided that they otherwise meet the requirements of the Credit Act).

Details of the Regulations are set out in the Attachment.

The Credit 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 commence on 1 January 2011.

Consultation

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

Details of the National Consumer Credit Protection Amendment Regulations 2010 (No. 4)

Regulation 1 – Name of Regulations

This regulation provides that the name of the Regulations is the *National Consumer Credit Protection Amendment Regulations 2010 (No. 4)*.

Regulation 2 – Commencement

This regulation provides for the Regulations to commence on 1 January 2011.

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 Regulations).

Schedule 1 – Amendments

Item 1 substitutes Chapter 3 of the Principal Regulations with a new **Chapter 3 Responsible lending conduct**, including new regulations 26 to 28N, to provide specific exemptions and modifications to the disclosure document obligations. The new Chapter includes some new provisions as well as making numbering changes to some existing regulations.

Regulation 26 provides definitions for the terms ‘disclosure document’ and ‘relevant provisions of the Act’. Chapter 3 of the Credit Act requires persons (licensees, persons still awaiting decisions from ASIC on license applications and credit representatives) engaging in credit activities to provide consumers with documents that disclose information relevant to decisions they make in respect of credit contracts or consumer leases. These documents are collectively referred to as disclosure documents in this definition.

The definition of ‘relevant provisions of the Act’ refers to the provision of the Credit Act which imposes an obligation on a person to provide a disclosure document.

Regulation 28 is an existing regulation that is not be amended by the Regulations.

Regulation 28A sets out three situations where a person is exempted from the requirement to provide a credit guide.

Subregulation 28A(1) provides an exemption for credit representatives (both natural persons and corporate credit representatives) operating in a franchise structure from having to provide their own credit guide, provided they are conforming to policies stipulated by the licensee. In this situation, the level of scrutiny and oversight by the licensee is such that it is only necessary for the consumer to be provided with the credit guide of the licensee, and that requiring individual credit representatives to also provide credit guides results in significant and in some cases onerous levels of duplication.

Subregulation 28A(2) relieves licensees and credit representatives from having to provide a second credit guide where the consumer has already received a credit guide in the previous 12 month period, if it has already been provided in the past year and the changes are limited to changes in membership of the External Dispute Resolution scheme (EDR scheme) of which the person is a member. A new credit guide only needs to be provided if the person has changed the

EDR scheme to which they belong, resulting in a change in the information required to be provided under subsections 113(2), 126(2), 136(2), 149(2), 158(2) or 160(3) of the Credit Act.

Regulation 28A(3) avoids duplication where a person has provided a credit guide in their capacity as a person providing credit assistance, and is also authorised by the credit provider or lessor to receive payments on their behalf.

Regulation 28B allows a person who is required to provide a credit guide to continue to provide, for a limited period, a credit guide that contains outdated information, while they are in the process of making changes to it. This regulation provides that the licensee is given 93 days to update the information in their credit guide, if it was correct at the time of publication. The only exception to this is in relation to changes in the EDR scheme to which the person belongs. In this situation the person must have in place appropriate procedures to ensure the credit guide is updated to reflect this change, so that this information is always accurate. The 93 days is used to reflect the fact industry normally undertake quarterly reviews of documents.

Regulation 28C creates an exemption from the requirement in the Credit Act for a person providing credit assistance to provide a quote, specifying the fees and charges the consumer has to pay that person if they engage their services. The exemption operates in the following circumstances:

- the person never charges consumers a fee, as stated in its credit guide; and
- the person decides, before providing credit assistance, that they will not charge the borrower a fee and includes a statement to this effect in the credit proposal document.

Regulation 28J is an existing regulation that is not amended by the Regulations.

Regulation 28K is an existing regulation that is not amended by the Regulations (other than being renumbered).

Regulation 28L allows persons required to provide disclosure documents under the Credit Act flexibility in the way in which this is done, and allows them to satisfy the requirement in the Credit Act, according to the method most suitable to their business structure.

Regulation 28L allows a consumer to obtain a document by accessing it through a link to their website or other information system (subregulation 28L(3)), or by agreeing to have it sent by email or other electronic communication, provided that other requirements are met, including that the consumer is advised to check their emails and that they can print off the document (subregulations 28L(4) and (5)).

Subregulations 28L(6) to (8) allow a person to be reasonably satisfied that the consumer has received a document, and therefore that they can engage or further engage in credit activities where provision of the document is a condition precedent to so engaging.

Subregulation 28L(9) allows a person to combine two or more disclosure documents in a single document (provided that doing so conforms with requirements in the Credit Act as to the content or provision of the documents).

The use of the words 'told' in subregulation 28L(4) and 'tells' in subregulation 28L(8) does not mean an oral discussion, and encompasses other forms of communication.

Regulation 28M is an existing regulation that is not amended by the Regulations.

Regulation 28N introduces transitional arrangements for persons who are otherwise required to provide a disclosure document under a relevant provision of the Credit Act in the period between 1 January 2011 and 1 April 2011. The regulation creates two different exemptions.

First, under subregulations 28N(1) to (3), a person who is required to provide a credit guide is only required to provide the consumer with written information setting out the contact details of the EDR scheme of which they are a member.

Secondly, a person who provides credit assistance and who is required to provide a quote or credit proposal document (setting out detailed information in respect of the fees and charges the consumer is liable to pay them) is exempt if either:

- where they charge the consumer a fee, they enter into a written agreement with the consumer, specifying their fees in that contract (paragraph 28N(4)(a)); or
- they do not charge the consumer a fee (paragraph 28N(4)(b)).

Item 2 inserts a new Schedule 4, 'Modifications – responsible lending conduct' into the Principal Regulations.

This item introduces amendments to the Credit Act itself, consequential on the introduction of regulation 28C and the creation of an exemption from the requirement in the Credit Act for a person providing credit assistance to provide a quote where they will not charge the consumer a sum for providing their services.

Clause 4.1 modifies the definition of licensee in the Credit Act to refer to both a person who holds an Australian credit licence (ACL), and a person who has applied for an ACL by 31 December 2010 where ASIC has not yet determined their application. The effect of this change is to enable a person who falls into the latter category to rely on the conditional transitional arrangements and exemptions to be introduced by other provisions in these regulations.

The effect of clauses 4.2, 4.3, 4.5, 4.6, 4.7, 4.8, 4.9, 4.11, 4.12 and 4.13 is to modify the requirement in the Credit Act so as to enable regulation 28C to have effect, in relation to both credit contracts and consumer leases.

The effect of clauses 4.4 and 4.10 is to create offences with a civil liability where the person has not provided a quote and has then requested or demanded payment of a sum from the consumer. These offences are consistent with the existing offences in subsections 114(4) and 137(4) of the Credit Act, and achieve the same policy outcome, namely that persons providing credit assistance should only be able to demand a fee where this fee was disclosed to the consumer prior to deciding whether or not to use their services.