

EXPLANATORY STATEMENT

Select Legislative Instrument 2011 No. 157

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

National Consumer Credit Protection (Transitional and Consequential Provisions) Amendment Regulations 2011 (No. 1)

The *National Consumer Credit Protection Act 2009* (the Credit Act) implements a new National Credit Code replacing the previous state-based regulatory framework known as the Uniform Consumer Credit Code (UCCC).

Subsection 6(1) of the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (the Transitional Credit Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Transitional Credit Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Transitional Credit Act.

Subsections 6(2) and 6(3) of the Transitional Credit Act provide that the regulations may prescribe matters of a transitional nature and may provide that certain provisions of the Transitional Credit Act are taken to be modified as set out in the regulations. Subsection 6(4) expressly provides that such regulations may have retrospective application.

The Transitional Credit Act disapplies the Credit Act to contracts made before 1 July 2010, and reapplies some but not all of the provisions of the Credit Act in relation to a carried over instruments (COIs). COIs are credit contracts, consumer leases and other instruments that were previously regulated by the UCCC but which were still in effect as at 1 July 2010. From 1 July 2010, COIs became subject to the National Credit Code.

The Regulations amend the Transitional Credit Act to address concerns over whether the Australian Securities and Investments Commission (ASIC) can exercise certain powers under certain provisions of the Credit Act in relation to a COI.

Sub item 18(1) of Schedule 1 to the Transitional Credit Act provides that the Credit Act (other than Chapter 3 and the new Credit Code) does not apply in relation to a contract or other instrument that was made before commencement. However, sub item 18(2) of Schedule 1 provides that regulations may provide for the application of all or specified provisions of the Credit Act in relation to a COI.

Sub item 18(1) of Schedule 1 suggests that Chapter 6 of the Credit Act (Compliance and Enforcement) does not apply to contracts made before 1 July 2010, with the effect that ASIC may not have enforcement powers in relation to such contracts. Additionally, there are no other regulations made under sub item 18(2) of Schedule 1 to apply Chapter 6 of the Act in relation to COIs.

There is similar doubt as to the Court's powers to make orders under Chapter 4 of the Credit Act. Whereas sub item 18(3) of Schedule 1 to the Transitional Credit Act reapplies Part 4-3 of the Credit Act (covering the courts' jurisdiction and procedure in relation to carried over instruments), there is no equivalent provision in relation to Part 4-2 of the Credit Act (which gives the courts powers). This suggests that Part 4-2 of the Credit Act does not apply to contracts made before 1 July 2010, with the effect that the courts may not have power to make orders in relation to such contracts.

There are substantive obligations in relation to COIs (contained in Chapter 3 of the Credit Act and the National Credit Code, both of which are expressly said to apply to COIs in sub item 18(1) of Schedule 1 to the Transitional Credit Act). It could not have been intended that these obligations would exist in relation to COIs but that neither ASIC nor the courts would have enforcement powers in relation to them. The current drafting of the Transitional Credit Act seems to have produced this unintended result.

The Regulations:

- apply Chapter 4 (other than Part 4-3) of the Credit Act to COIs, to give courts the power to make orders in relation to carried over instruments;
- apply Chapters 5 to 7 of the Credit Act to COIs, to give ASIC enforcement powers in relation to carried over instruments; and
- ensure that ASIC and the courts can bring a procedure, proceeding or remedy under the Credit Act and other laws of the Commonwealth (for example, the *Crimes Act 1914* and the *Federal Court of Australia Act 1976*) in relation to the rights and liabilities applying to COIs by virtue of the Transitional Credit Act.

Details of the Regulations are set out in the Attachment.

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

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

The Regulations would be taken to have commenced on 1 July 2010.

The Minute recommends that Regulations be made in the form proposed.

Consultation

Public consultation has not been undertaken as these Regulations are of a technical nature and to not impose additional obligations on credit licensees.

Authority: Section 6 of the
*National Consumer
Credit Protection
(Transitional and
Consequential
Provisions) Act 2009*

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 2011 (No. 1)*

Regulation 2 – Commencement

The Regulations would be taken to have commenced on 1 July 2010. Subsection 6(4) of the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Transitional Credit Act) expressly provides that regulations may be expressed to take effect retrospectively.

Regulation 3 - Amendment of *National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010*

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

Schedule 1 - Amendments

Item 1

Item 1 modifies item 18 of Schedule 1 to the Transitional Credit Act to extend the provisions of the *National Credit Protection Act 2009* (Credit Act) which apply in relation to a contract or other instrument that was made before commencement of the Credit Act.

More specifically, it provides:

- that Chapter 4 (other than Part 4-3) of the Credit Act applies to carried over instruments, with the effect that the courts have and always had power to make orders in relation to carried over instruments; and
- that Chapters 5 to 7 of the Credit Act apply to carried over instruments, with the effect that ASIC has and always had power to exercise its enforcement powers in relation to carried over instruments.

Item 1 also modifies item 20 of Schedule 1 to the Transitional Credit Act to extend the provisions of Schedule 2 of the Transitional Credit Act that apply to a contract or other instrument that was made before commencement.

This means that Division 3 of Part 3 (the Obligations of registered persons) and Part 5 (Exemptions and modifications to Schedule 2 made by ASIC or the regulations) apply to carried over instruments. These changes ensure that the Transitional Credit Act will be consistent with ASIC's powers.

Item 1 also modifies item 11 of Schedule 1 to the Transitional Credit Act and item 12 of Schedule 1 to the Transitional Credit Act to provide that ASIC and the courts can bring a procedure, proceeding or remedy under the Credit Act and other laws of the Commonwealth

(for example, the *Crimes Act 1914* and the *Federal Court of Australia Act 1976*) in relation to the rights and liabilities applying to COIs.

This is necessary because the powers that ASIC and the courts will need to exercise in relation to the rights and liabilities applying to COIs by virtue of the Transitional Credit Act will largely arise under the Credit Act and other laws of the Commonwealth.