

EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 313

Issued by authority of the Minister for Financial Services and Superannuation

National Consumer Credit Protection Act 2009

National Consumer Credit Protection Amendment Regulation 2012 (No. 3)

Section 329 of the *National Consumer Credit Protection Act 2009* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Consumer Credit Legislation Amendment (Enhancements) Act 2012* (Credit Enhancements Act) amended the Credit Act (including the National Credit Code) to introduce a number of reforms to the regulation of reverse mortgages and consumer leases. The Regulation amends the *National Consumer Credit Protection Regulations 2010* (Principal Credit Regulations) to support the reforms introduced by the Credit Enhancements Act.

A reverse mortgage is a credit product offered to seniors allowing them to access the equity in their home. The debt does not usually need to be repaid until the home is sold (usually when the borrower dies or voluntarily vacates the home), with interest compounded until this time.

Section 86A of the Credit Enhancements Act amends the National Credit Code to provide a protection against negative equity for reverse mortgage borrowers. This protection provides that a borrower will not have to pay more than the market value of their home as repayment for a reverse mortgage (even if the amount of interest that has accrued would result in the balance of the debt exceeding that value).

The amendment to the Principal Regulations prescribes the method for calculating the market value of a reverse mortgaged property, when a property either has or has not been sold.

The amendment provides that if the property has been sold, the market value is its sale price. However, if the property has not been sold, or has been sold and circumstances exist which have reduced its market value (as specified in the regulation), the market value must be determined by an authorised valuer. The purpose of the amendment is to:

- provide certainty for borrowers regarding the maximum amount they will need to repay; and
- provide that lenders will not bear the risk of negative equity in situations in which the borrower's conduct has reduced the value of the property.

The reforms introduced by the Credit Enhancements Act include additional disclosure requirements of lessors and requirements on lessors to obtain consent before taking possession of rental goods.

A consumer lease is defined as a contract for the hire of goods by a natural person or strata corporation under which that person or corporation does not have a right or

obligation to purchase the goods but where they would pay an amount in excess of the cash value of the goods. An example is a lease for a refrigerator over several years where the total repayments exceed the cash value of the goods.

The amendment to the Principal Credit Regulations specifies the content of disclosure requirements for lessors in the Credit Act, as follows:

- Periodic statements of account – setting out that the lessee will not own the goods at the end of the consumer lease, the lessee will not have an obligation or a right to purchase the goods at the end of the lease, of amounts owing and particulars of any payments;
- End of lease statements – setting out the date the lease ends, the total amount paid by the consumer under the lease, when and how the goods may be returned or collected by the lessor, the amounts the lessee is liable to pay if the goods are not returned and whether the lessor is prepared to sell the rental goods, and if so, an estimate of the sale price and contact details for the person whom the sale of goods can be negotiated;
- Written notices about a change by agreement to the consumer lease – setting out the date and particulars of any changes, repayment details, amount(s) payable to third parties, the period of time the lease is increased by and the proposed new expiry date of the lease;
- Statements of amount payable on termination of the lease – setting out the total amount to be paid to terminate the lease, the amount to be paid of the rental goods are not returned, whether the lessor is prepared to sell the rental goods, and if so, an estimate of the sale price and contact details for the person whom the sale of goods can be negotiated;
- Notices about direct debit defaults; and
- The consent to enter residential property to take possession of rental goods.

The intention behind the disclosure requirements is, in general terms, to improve consumer awareness of costs associated with leases of consumer items and assist them with making well informed decisions.

Details of the Regulation are set out in the Attachment.

The Regulation is a legislative instrument for the purposes of the Legislative Instruments Act 2003.

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

The regulation on reverse mortgages, given its narrow scope, was subject to targeted consultation in August 2012 through the Equity Release Consultation Working Group, convened by the Department of the Treasury. The members of the group include nearly all reverse mortgage lenders, representatives from groups representing reverse mortgage lenders, senior citizens and consumer advocate groups. Submissions were received from lenders and consumer groups.

The regulations on consumer leases were publicly released for comment in August 2012. The regulations were also subject to targeted consultation with stakeholder

groups. Submissions were received from industry bodies, ASIC and consumer groups.

The Regulations commenced on the day after it was registered for sections 1 to 4 and Schedule 1 and on 1 March 2013 for Schedule 2. This staggered start reflects different start dates for the obligations in the Credit Enhancements Act in respect of reverse mortgages and those in respect of consumer leases.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

National Consumer Credit Protection Amendment Regulation 2012 (No. 3)

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of the Legislative Instrument is to support the reforms to reverse mortgages and consumer leases introduced by the *Consumer Credit Legislation Amendment (Enhancements) Act 2012*.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

Details of the National Consumer Credit Protection Amendment Regulation 2012 (No. 3)

Section 1 – Name of Regulation

This section provides that the name of the Regulation would be the *National Consumer Credit Protection Amendment Regulation 2012 (No. 3)*.

Section 2 – Commencement

This section provides that the Regulation commences on the day after it is registered for sections 1 to 4 and Schedule 1 and on 1 March 2013 for Schedule 2.

Section 3 – Amendment of National Consumer Credit Protection Regulations 2010

This section provides that Schedule 1 and Schedule 2 amend the *National Consumer Credit Protection Regulations 2010* (Principal Credit Regulations).

Schedule 1 – Amendment commencing on day after registration

Item 1 prescribes how the market value of a reverse mortgaged property is calculated for the purposes of the protection against negative equity.

The *Consumer Credit Legislation Amendment (Enhancements) Act 2012* inserted section 86A into the National Credit Code. Subsection 86A(1) provides that a debtor's obligations under a reverse mortgage contract and the mortgage securing those obligations are discharged if the credit provider receives an amount from the debtor at least equal to the adjusted market value of the property. Subsection 86A(2) defines the adjusted market value as the amount worked out by calculating the market value of the property and adjusting that value in accordance with the regulations.

Subsection 84A(2) of the Regulation provides that the adjusted market value should be calculated as below:

- If the reverse mortgaged property has not been sold the adjusted market value is the property's market value as determined by an accredited valuer within three months before the credit provider receives an amount from the debtor to discharge the reverse mortgage; or
- If the property has been sold the adjusted market value is the property's sale price.

However, subsection 84A(3) of the Regulation would provide that if the reverse mortgage property has been sold and the market value is reduced because of the prescribed circumstances, the market value of the property is its market value at the time of sale as determined by an accredited valuer.

The first prescribed circumstance is that the property was deliberately damaged either by the debtor, or a person who occupied the property with the debtor's consent.

The second prescribed circumstance is that the sale of the property was not conducted in good faith. This may occur if for example the property is sold without due consideration given to the interests of the mortgagee.

The third prescribed circumstance is that the sale was not conducted on fair and reasonable terms. This may occur if for example:

- the property was sold without reasonable steps to advertise its sale;
- the property was not presented for sale in a reasonable condition such as being in need of essential repairs;
- reasonable evidence of the property's value was not obtained prior to the sale; or
- the property was not sold by auction, unless it was appropriate to sell it in another way.

The effect of subsection 84A(2) is that if the market value of the property as determined by an accredited valuer is more than the sale price of the property and the debtor only pays an amount to the credit provider equal to the sale price, the debtor's obligations under the reverse mortgage and the mortgage securing those obligations will not be discharged. The debtor will need to pay the credit provider the amount determined by the accredited valuer as the property's market value to discharge their obligations and the mortgage.

Subsection 84A(4) defines an accredited valuer as a person who is either:

- accredited as a certified practising valuer by the Australian Property Institute;
- is a professional member of the Royal Institution of Chartered Surveyors who is entitled to be described as a Chartered Valuation Surveyor; or
- registered or authorised under a State or Territory law in which the property is situated to value that kind of property.

Schedule 2 – Amendment commencing on 1 March 2013

Item 1 inserts regulations 105A to 105L. The regulations introduce a number of obligations in relation to disclosure requirements by lessors in consumer leases.

Regulation 105A requires a lessor to disclose, in periodic statements of account, the fact that the lessee will not own the goods at the end of the consumer lease and the lessee will not have an obligation or a right to purchase the goods at the end of the lease. It was identified during consultations with stakeholders that many consumers expect to own the goods at the end of the lease through 'nod and wink' arrangements with the lessor (known as implied purchase leases). This regulation alerts lessees to the need to consider their options at an earlier point of time than is currently the case.

Regulation 105B sets out additional information that a lessor is required to provide in a periodic statement of account, including: the dates on which the statement period begins and ends; particulars of any amounts paid by the lessee to the lessor during the statement period; particulars of any amounts credited to the lessee's account; particulars of any payments debited from the lessee's account and paid to a third party (such as insurance payments); and any corrections to information contained in a previous statement of account.

Regulation 105C requires a lessor to provide the following information in a statement that must be provided before the end date of a lease: information on the date the lease ends; that the goods leased under the consumer lease must be returned; the total amount the lessee will pay for the goods under the lease (assuming the payments are made on the dates required under the lease); and the date when the goods must be returned.

Regulation 109D exempts a lessor from the need to provide an end of lease statement in the following situations: where the lessor has written off the debt of the lessee under the consumer lease; the lessee was in default and the lessor has commenced enforcement proceedings; or the lessee has died or is insolvent, and the lessee's personal representative or trustee has not requested a statement of account.

Regulation 105E requires a lessor to provide information in writing to a lessee where there has been a change by agreement to a consumer lease. This information includes: the date of the change; particulars of any change; fees and charges payable; particulars of any amounts payable to third parties; repayment details before and after the change; amounts of any commission to be paid by or to the lessee; the period of time by which the term of the consumer lease is increased; and the proposed new expiry date for the consumer lease. This disclosure ensures both parties are aware of the revised terms of their contract where there has been a change to a consumer lease.

Regulation 105G sets out information that is to be included in a statement of the amount that is payable on termination of a consumer lease. Lessors are required to provide the following information: the total amount to be paid to end a lease; the amounts the lessee is liable to pay if the leased goods are not returned; whether the lessor is prepared to negotiate the sale of the goods; an estimate of the sale price of goods; and the contact details for the person through whom the goods can be purchased, if the lessor is prepared to negotiate the sale of goods.

Regulation 105H provides an exemption to section 179C of the National Credit Code. Section 179C requires a lessor to provide a one-off notice to a lessee the first time a direct debit default occurs within 14 days of the default occurring. The regulation provides that a lessor is not required to give the lessor a notice about a direct debit default if the default is rectified within 14 days and prior to the lessor having sent the direct debit default notice.

Regulation 105J prescribes Form 18 [see [Item 2](#)] as the form a lessor is required to send where the obligation under section 179C of the National Credit Code is triggered. A lessor is required to send a notice where a lessee has authorised payment of an amount for a consumer lease by direct debit, and there has been a default in payment by the lessee.

Regulation 105L sets out requirements that a lessor has to comply with in order to obtain consent from an occupier to enter a residential property to take possession of goods. An occupier's consent is only obtained where a request for entry has been made by the lessor, or the lessor's agent, in writing or in person at the premises. Where a request is made in writing, it must be made in accordance with Form 19 [see [Item 2](#)]. Where a request is made in person, the request may only be made between 8 am and 8 pm on any day except for a Sunday or public holiday and the occupier

must be presented with Form 19. Paragraph 105L(d) prohibits a consent form from being presented for signature by an occupier with, or as part of, any other document. The intention is to ensure informed consent by the occupier so that the form is not presented for signature with other documents, such as where a consumer is given the form to sign at the same time as the lease contract.

Item 2 inserts:

- Form 18 – a direct debit notice as referred to in regulation 105H; and
- Form 19 – consent to enter premises as referred to in regulation 105J.