

EXPLANATORY STATEMENT

Select Legislative Instrument 2010 No. 235

Subject - *National Consumer Credit Protection Act 2009*

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

National Consumer Credit Protection Legislation Amendment Regulations 2010 (No. 2)

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 Regulations make amendments to the *National Consumer Credit Protection Regulations 2010* and the *National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010* (Principal Credit Regulations and Principal Transitional 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.

Specifically, the Regulations:

- insert an exemption from licensing for upstream referrers;
- insert an exemption from licensing for locums and employment agencies, and exemptions from certain obligations for temporary employees appointed as credit representatives;
- remove the 12-month sunset clause from the exemption from licensing for state licensed debt collectors;
- insert an exemption from certain licensing obligations for authorised deposit-taking institutions (ADIs) who provide credit assistance under “white labelling” arrangements;
- amend the existing exemption from licensing for providers of incidental membership benefits;

- amend the definition of unsolicited contact;
- replace references to licensee with references to unlicensed carried over instrument lender (UCOIL) in the Principal Credit Regulations;
- expand the exemption from having to make external dispute resolution (EDR) related disclosures to additional persons and provisions of the Credit Code;
- correct a reference to a prescribed UCOIL; and
- include orders under the *Criminal Organisation Act 2009* (Queensland) in the list of prescribed orders relevant to licensing.

Details of the Regulations are set out in the Attachment.

The Credit and Transitional Acts do 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 the day after they are registered on the Federal Register of Legislative Instruments.

Consultation

The amendments address stakeholder concerns in relation to the Principal Credit Regulations and Principal Transitional Regulations. Targeted and detailed consultation with stakeholders have 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*

Details of the *National Consumer Credit Protection Legislation Amendment Regulations 2010 (No. 2)*

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. 2)*.

Regulation 2 – Commencement

This regulation provides for the Regulations to commence on the day after they are registered, except for item 1 of Schedule 1 which commences on 1 October 2010.

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).

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

Item 1 clarifies the interaction between the definitions of authorised contact and unsolicited contact in subregulation 3(1) of the Principal Credit Regulations, by substituting a new definition of unsolicited contact. The definitions are relevant in determining when a supplier of goods and services are outside the scope of the exemption in regulation 23, and is therefore required to hold an Australian credit licence (ACL), or be appointed as a credit representative of an ACL holder.

The change is consistent with the existing policy intention, namely to ensure that fringe businesses cannot rely on the exemption where they solicit customers from ‘non-standard business premises’ (for example, temporary stalls in shopping centres). The change only applies from 1 October 2010, to allow a transition period for industry.

The effect of the changes is that:

- contact will be unsolicited where it falls within one or more of the paragraphs in the definition of unsolicited contact, including therefore in any circumstances where the first contact was made in person from a non-standard business premises (paragraphs 3(1)(a) and (b) of the definition of unsolicited contact);
- where the consumer provided the consumer’s contact details to the person for the sole purpose of being contacted by the person in relation to the supply of goods or services by the person to the consumer:
 - contact is authorised - where the contact is made within three months of the day the consumer provided their contact details; and

- contact is unsolicited - where the contact is made more than three months after the consumer provided their contact details, or where the initial contact was made from non-standard business premises;
- contact is authorised under paragraphs 3(1)(b) or (c) of the definition of authorised contact where:
 - contact is made by posting to, or leaving at, a residential address written promotional material about goods or services; or
 - it is in relation to the possible return of goods supplied to the consumer or the possible provision of replacement goods to the consumer.

Contact as described in paragraphs 3(1)(b) or (c) would, however, be unsolicited where the contact was made in person from non-standard business premises. In practice, this has limited application as the type of contact described in paragraphs 3(1)(b) or (c) of the definition of authorised contact is not affected by this requirement as:

- in paragraph 3(1)(b) – contact by post of flyer would not be contact in person, and the definition would not apply; and
- in paragraph 3(1)(c) – contact in relation to the return or replacement of goods will be unsolicited where the person operates from non-standard business premises, but in this case the initial contact will also be unsolicited (so whether or not the contact was the first contact or a subsequent contact does not affect the regulatory outcome).

Item 2 amends regulation 5 of the Principal Credit Regulations, which lists state Acts under which prescribed orders can be made. Where a prescribed order is in force against a person, they can not be granted an ACL. A reference to the recently passed *Criminal Organisation Act 2009* (Queensland) is included.

Items 3 and 9:

- provide a new exemption from the requirement to hold an ACL for people who, as an incidental part of their business, refer customers to lenders and brokers by giving a licensee or registered person a consumer’s name, contact details and a short description of the purpose of the credit sought; and
- impose additional obligations on licensees in their dealings with referrers.

This supports current industry practice where non-credit businesses refer customers’ details to credit and credit assistance providers who may subsequently contact the customer, otherwise known as upstream referrals.

To help industry adapt to the new arrangements for referrers, the full requirements of the exemption will be introduced over a three-month period. Most of the obligations will begin on commencement of the regulations. However, some additional requirements which may require referrers and licensees to put in place new processes do not commence until 1 October 2010.

Item 3 specifies additional licence conditions for licensees when they have arrangements to receive referrals as described in subregulation 25(5). A licensee or registered person who makes contact with a consumer as a result of a referral must, from 1 October 2010:

- keep, or have access to a register of referrers from which they receive referrals;
- do so within 10 business days;
- if subsequent contact is made in person;
 - : inform the consumer that they have obtained the consumer’s contact details from the referrer and confirm that the consumer has consented to the contact being made;
 - : explain the financial benefits, if any, the referrer may receive for the referral; and
 - : specifically ask the consumer whether they are happy to continue with the conversation; or
- if subsequent contact is made by letter or email;
 - : inform the consumer that they have obtained the consumer’s contact details from the referrer; and
 - : explain the financial benefits, if any, the referrer may receive for the referral.

Item 9 provides an exemption from licensing for referrers and specifies the conditions for referrers upon which a referral can be made. To be eligible for the referrer exemption, businesses that pass on consumers’ details (referrers) to licensees, or their credit representatives, will need to, from 1 July 2010:

- only inform the consumer that the licensee or registered person is able to provide a particular credit activity or class of credit activities, not any particular product;
- not have been banned from engaging in credit activities under state, territory or Commonwealth law;
- inform the consumer of commissions or other benefits they receive;
- not charge a fee to the consumer for the referral;
- obtain the consent of the consumer to pass their name, contact details and the purpose for which the credit is sought to the licensee or registered person; and
- only engage in credit activities as a referrer incidentally to another business they are carrying on.

The following additional requirements come into force from 1 October 2010. By the end of the transitional period businesses using the upstream referrer exemption will need to:

- pass on a consumer’s contact details within five business days;
- have in place an agreement with the licensee or registered person (in which the referrer acknowledges and agrees to the limitations on the information they can provide to a consumer and the need to obtain their consent to having their details passed on); and
- not conduct their business from temporary or non-standard business premises (such as a stall in a shopping centre).

Items 4 and 5 amend regulation 9A of the Principal Credit Regulations to replace incorrect references to licensee and the application for an ACL with references to UCOILs, as these lenders are regulated outside of the licensing regime.

Items 6 and 7 omits subregulations 20(9) and 21(4) of the Principal Credit Regulations so that the exemption from licensing for state licensed debt collectors will not expire after 12 months, as the states have not yet reached agreement on the regulation of debt collectors.

Item 8 provides an exemption from licensing for employment agencies that only engage in credit activities by providing temporary staff or locums. The obligations on the agencies that provide temporary employees to ACL holders or their credit representatives are significant and unnecessary where the on-hired employees are subject to day-to-day control of the ACL holder in relation to credit activities or registered person, and where their role and function is substantially similar to that of an employee.

Item 10 substitutes 25G of the Principal Credit Regulation. This aligns the timing of the commencement of the responsible lending obligations to special purpose funding entities (SPFEs) so that they operate consistently with the staggered timetable in the Transitional Act. In practice, an SPFE will be complying with these obligations through a servicing agreement with a third party who is either licensed or registered. The effect of regulation 25G means that the responsible lending conduct obligations apply to the SPFE only to the extent or from the date they would apply to this licensed or registered third party if it was the credit provider or lessor.

Item 10 also inserts 25H, 25I and 25J into the Principal Credit Regulations. Regulations 25H and 25I of the Principal Credit Regulations provide an exemption from certain obligations of credit representatives for temporary employees, and for locums to be considered as employees for the purposes of the Credit Act respectively. Regulation 25J of the Principal Credit Regulations makes credit providers liable for misrepresentations made by persons who are exempted under subregulations 20(11), 25(4) or 25(5) of the Principal Credit Regulations.

Temporary staff will be treated as credit representatives but exempted from the requirement to be a member of an ASIC approved dispute resolution scheme (paragraph 65(6)(c) of the Credit Act), have the licensee notify ASIC of their authorisation (section 71 of the Credit Act), and issue their own credit guide (section 158 of the Credit Act), subject to the conditions that they:

- be only engaged on a temporary basis of not more than 24 months;
- be engaged in similar duties and be under a similar level of control, management and supervision in relation to credit activities as other employees of the licensee;
- not be engaged because they possess particular skills that would prevent the licensee or registered person exercising the level of control that the person can exercise over its actual employees;
- be predominantly remunerated other than by way of commission; and
- do not hold out or represent to consumers that the person is acting other than as an employee.

Locums will be treated in the same way as employees of a licensee where they:

- replace a person who is absent from work as an employee who is reasonably expected to return;

- be substantially performing the same duties of that employee; and
- be subject to similar control or direction as that employee when the locum is engaging in credit activities.

The obligations on temporary staff and locums engaged to meet fluctuations in demand for staff are significant and unnecessary where they are subject to day-to-day control from the licensee in relation to the credit activities they perform, and where their role and function is similar to that of an employee.

Item 10 also modifies section 33 of the Credit Act to apply section 128 of the National Credit Code (the Code) to have the effect of making a credit provider liable for misrepresentations of the organisation providing incidental membership benefits under subregulation 20(11) of the Principal Credit Regulations. This extension of liability also covers instances where persons are exempt under the upstream referrer exemption under subregulations 25(4) and 25(5) of the Principal Credit Regulations.

This provision addresses a potential regulatory gap where consumers may have had no recourse for misrepresentations by organisations providing membership benefits or upstream referrers in relation to the credit provider's product.

Item 11 provides an exemption from the requirement to provide preliminary assessments for ADIs who refer customers to other credit providers as part of a "white labelling" arrangement, that 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, and that ADI will primarily be responsible for any interaction with the borrower.

This exemption allows ADIs to continue existing business arrangements whereby one ADI has arrangements with another ADI for that ADI to act as the credit provider in relation to credit labelled with the first ADI's name (or otherwise identified with them). The second ADI will be the credit provider and responsible for meeting the obligations applying to credit providers under the Credit Act (including responsible lending assessments). The first ADI will assist in the completion and receiving of credit applications, and will be required to give the credit provider the consumer's details and other information in order to assist the credit provider make an assessment about the credit contract under section 130 of the Credit Act.

The exemption removes the requirement for the credit assistance provider to conduct a preliminary assessment of the applicant under a white label agreement. This allows these arrangements to continue with minimal disruption. The exemption only applies to credit contracts and not to consumer leases, as it is understood ADIs do not offer leases.

Items 11 and 12 also provide an exemption from certain responsible lending conduct obligations (paragraphs 128(a) and 133(1)(a) of the Credit Act) and precontractual disclosure obligations (section 16 of the Code) for credit contracts in relation to residential investment properties. Residential investment properties were not previously subject to certain requirements under the UCCC. These items exempt contracts where the offer for credit was made before commencement of the Credit Act on 1 July 2010 with acceptance by the consumer after 1 July 2010, but before 1 October 2010, from certain obligations where they were not required at the time when the offer was made.

Item 13 substitutes a new heading for regulation 111A of the Principal Credit Regulations (consequent on the amendments made by Items 14 to 16).

Items 14 to 16 amend regulation 111A of the Principal Credit Regulations to extend the exemption from external dispute resolution (EDR) related disclosures to other credit providers who are exempt from licensing and registration (and therefore not required to be EDR members) but are still subject to the National Credit Code.

Item 16 amends subregulation 111A(3) of the Principal Credit Regulations to extend the list of provisions which require EDR related disclosure from which certain credit providers are exempt.

Item 17 makes a minor technical correction to the reference to trustees in the definition of prescribed UCOIL in modified section 5A of the Credit Act (as modified by Schedule 2 to the Principal Credit Regulations).

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

Item 1 specifies conditions for registered persons upon which a referral can be made from a person who is exempt from registration. A registered person who makes contact with a consumer as a result of a referral must, from 1 October 2010:

- keep, or have access to a register of referrers from which they receive referrals;
- do so within 10 business days;
- if subsequent contact is made in person;
 - : inform the consumer that they have obtained the consumer’s contact details from the referrer and confirm that the consumer has consented to the contact being made;
 - : explain the financial benefits, if any, the referrer may receive for the referral; and
 - : specifically ask the consumer whether they are happy to continue with the conversation; or
- if subsequent contact is made by letter or email;
 - : inform the consumer that they have obtained the consumer’s contact details from the referrer; and
 - : explain the financial benefits, if any, the referrer may receive for the referral.

Item 2 corrects a drafting error so that a reference to paragraph 110(a) of the Transitional Act is replaced with a reference to paragraph 42(a) of Schedule 2 of the Transitional Act.

Item 3 provides an exemption from registration for employment agencies that only engage in credit activities by providing temporary staff or locums. The obligations on the agencies that provide temporary employees to ACL holders, registered persons or their credit representatives are significant and unnecessary where the on-hired employees are subject to the day-to-day control of the ACL holder or registered person, and where their role and function is substantially similar to that of an employee. This exemption mirrors that in regulation 23D of the Principal Credit Regulations except that it applies during the transitional period in which registration operates.

Item 4 provides an exemption from registration for referrers and specifies the conditions for referrers upon which a referral can be made, during the transitional period. To be eligible for the referrer exemption, businesses who pass on consumers' details (referrers) to licensees, registered persons or their credit representatives, will need to, from 1 July 2010:

- only inform the consumer that the licensee or registered person is able to provide a particular credit activity or class of credit activities, not any particular product;
- not have been banned from engaging in credit activities under state, territory or Commonwealth law;
- inform the consumer of commissions or other benefits they receive; and
- not charge a fee to the consumer for the referral;
- obtain the consent of the consumer to pass their name, contact details and the purpose for which the credit is sought to the licensee or registered person; and
- only engage in credit activities as a referrer incidentally to another business they are carrying on.

The following additional requirements need to be in place by the end of the transitional period so that businesses using the upstream referrer exemption will need to, from 1 October 2010:

- pass on a consumer's contact details within five business days;
- have in place an agreement with the licensee or registered person (in which the referrer acknowledges and agrees to the limitations on the information they can provide to a consumer and the need to obtain their consent to having their details passed on); and
- not conduct their business from temporary or non-standard business premises (such as a stall in a shopping centre).

Item 5 provides that locums will be considered as employees for the purposes of the Credit Act. Locums will be treated in the same way as employees of a licensee where they:

- replace a person who is absent from work as an employee who is reasonably expected to return;
- be substantially performing the same duties of that employee; and
- be subject to similar control or direction as that employee when the locum is engaging in credit activities.

The obligations on locums engaged to replace staff temporarily are significant and unnecessary where they are subject to the day-to-day control of the registered person, and where their role and function is substantially similar to that of an employee.

Item 6 corrects the numbering of the subregulations in regulation 35 of the Principal Transitional Regulations.