# EXPLANATORY STATEMENT

## Issued by authority of the Assistant Treasurer

*National Consumer Credit Protection Act 2009*

*National Consumer Credit Protection Amendment (Small Amount Credit Contracts) Regulation 2013*

Section 329 of the *National Consumer Credit Protection Act 2009* (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 *Consumer Credit Legislation Amendment (Enhancements) Act 2012* introduced, from 1 July 2013, a cap on interest costs and a ban on fees for small amount credit contracts.

The introduction of the cap on costs for small amount lending has resulted in an unintended increase in avoidance activity. Some credit providers are avoiding the cap on costs by using existing exemptions in the national credit legislation more broadly than they were intended for. This has allowed unlicensed credit providers to provide credit to consumers quicker by circumventing the responsible lending obligations, while charging more than is allowed under the cap on costs.

The Regulation amends the *National Consumer Credit Protection Regulations 2010* (Principal Credit Regulations) to support the reforms introduced by the *Consumer Credit Legislation Amendment (Enhancements) Act 2012* and address these avoidance issues.

Specifically, the proposed Regulation:

* clarifies the boundaries between small amount and medium amount credit contracts, to ensure that the small amount lending cap applies to contracts where the consumer receives a maximum amount of $2,000 in their hand, with fees and charges allowed to be additional;

* confirms that credit providers cannot rely on the exemption for short-term credit in the National Credit Code to remain unlicensed while levying fees and charges in excess of what is allowed under the cap on costs for small amount credit contracts; and

* addresses avoidance practices where credit providers establish a brokerage arm to their business, in which the broker only arranges credit with the related credit provider, in order to charge brokerage fees that are not included in the calculation of the amount payable under the cap.

Details of the Regulation are set out in Attachment A.

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 commences on the day following registration.

**Details of the *National Consumer Credit Protection Amendment (Small Amount Credit Contracts) Regulation 2013***

Section 1 – Name of Regulation

This section provides that the name of the Regulation is the *National Consumer Credit Protection Amendment (Small Amount Credit Contracts) Regulation 2013*.

Section 2 – Commencement

This section provides that the provisions of the Regulation commence the day following registration.

Section 3 – Authority

This section provides that the Regulation is made under the *National Consumer Credit Protection Act 2009* (Credit Act).

Section 4 – Schedule 1

Item [1] inserts section 4D into the *National Consumer Credit Protection Regulations 2010*.

Section 4D clarifies the distinction between a small amount credit contract (SACC), and a medium amount credit contract (MACC), to clarify that fees and charges allowed under the cap can be included in addition to the SACC amount limit.

A SACC allows up to $2,000 cash in hand to the consumer. The distinction is relevant to the operation of the cap on the maximum amount a credit provider can charge under these contracts, and to the application of product-specific responsible lending obligations to SACCs.

The cap for a SACC allows credit providers to charge maximum fees of:

• An upfront fee of 20 per cent of the adjusted credit amount (the amount the consumer receives in the hand).

• A monthly fee of 4 per cent of this amount.

The cap for a MACC allows credit providers to charge maximum interest and fees of:

• An establishment fee of $400.

• Interest at a maximum rate of 48 per cent.

It was originally intended that the definition of a SACC would allow credit providers to apply the SACC cap to all contracts where the consumer receives a maximum amount of $2,000 in their hand. However, there are currently different legal opinions as to which cap applies to contracts where the consumer receives $2,000 or less, but is charged fees so that the total amount of credit exceeds $2,000.

The item clarifies that credit providers can apply the small amount lending cap to contracts where the consumer receives a maximum amount of $2,000 in their hand. Fees and charges allowed under the cap can be in addition to this amount.

Item [2] inserts section 50A into the Principle Credit Regulations.

Subsections 6(1), (2) and (3) of the National Credit Code currently provide an exemption from the Credit Act for low-cost credit contracts. The exemption applies if the loan has a maximum term of 62 days, and the credit provider only charges maximum costs of an upfront fee of 5 per cent of the amount of credit, and interest at 24 per cent.

- In practice this means that on a loan of $100, over 2 months a credit provider could charge a maximum of about $9.

The Regulation addresses concerns that a number of credit providers are relying on this exemption while charging amounts more than are permitted under the cap on costs in Division 4 of the National Credit Code. They do this by charging additional amounts they do not consider to be included in the charges allowed under paragraph 6(1)(b).

The Regulation addresses this conduct by specifying the particular fees that are considered credit fees and charges for the purpose of the application of this exemption. This will ensure that no additional amounts can be charges above 5 per cent of the amount of credit, and interest at 24 per cent allowed under the exemption.

Item [3] replaces regulation 51 in the Principle Credit Regulations.

Regulation 51 currently specifies the circumstances in which the exemption provided in subsection 6(5) of the National Credit Code for low-cost continuing credit contracts from the Credit Act operates.

The exemption currently applies if the maximum charges are $200 in the initial 12 months of the contract, and $125 in any subsequent 12 month period.

A practice has developed among some small amount credit providers of arranging for a consumer to enter into a new continuing credit contract each time they require a further advance, when the credit provider charges a further fee of $200 on each such occasion. An effect of this practice is that, for loans for small amounts, the credit provider can charge more than would be permitted under the cap on costs introduced by the *Consumer Credit Legislation Amendment (Enhancements) Act 2012*. The credit provider also avoids the licensing and responsible lending obligations under the Credit Act.

The Regulation ensures that credit providers (other than authorised deposit-taking institutions) are only able to charge an initial fee of $200, and $125 per annum in any subsequent years, per client, regardless of the number of credit contracts that are entered into.

Item [4] inserts section 79AE into the Principle Credit Regulations.

Practiced have been developed under which credit providers establish a brokerage arm to their business, in which the broker only ever arranged credit with the related

credit provider, in order to charge brokerage fees where they were not included in the calculation of the amount payable under the cap.

Subsection 31B(1) of the Code prohibits a person, as prescribed by the regulations, from requiring or accepting payment of a fee or charge in relation to a SACC.

The Regulation addresses these avoidance arrangements by specifying that the following persons are prescribed persons for the purposes of Subsection 31B(1) of the Code:

• 	a person who introduces the debtor to a credit provider (whether or not the person is associated with the credit provider); or

• 	a person who has been introduced to a debtor by a credit provider to provide a service in relation to a small amount credit contract (whether or not the person is associated with the credit provider).

The Regulation is consistent with the approach taken to the exemption for low-cost loans in subsections 6(1), (2) and (3) of the National Credit Code, which similarly provides that these types of fees cannot be charged outside the cap on costs.

## 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 (Small Amount Credit Contracts) Regulation 2013

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:

- clarify the boundaries between the small amount and medium amount credit contracts, to ensure that providers can apply the small amount lending cap to contracts where the consumer receives a maximum amount of $2,000 in their hand, with fees and charges allowed to be additional;

- confirm that credit providers cannot charge fees and charges in excess of what is allowed under the cap on costs, while using various low-cost exemptions in the National Credit Code to remain unlicensed; and

- address avoidance practices where credit providers establish a brokerage arm to their business, in which the broker only ever arranged credit with the related credit provider, in order to charge brokerage fees where they are not included in the calculation of the amount payable under the cap.

### 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.