

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2009 No.**

Issued by the Authority of Minister for Superannuation and Corporate Law

*National Consumer Credit Protection Act 2009*

*National Consumer Credit Protection (National Credit Code) Regulations 2009*

The *National Consumer Credit Protection Act 2009* (the Act) applies to the provision of certain kinds of credit, to certain credit contracts and to related matters.

Section M500 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by that Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to that Act.

Schedule 1 to the Act sets out the National Credit Code (the Code). The Code applies to the provision of credit (and to a credit contract and related matters) if, when a credit contract is entered into or is proposed to be entered into:

- the debtor is a natural person or a strata corporation; and
- the credit is provided or intended to be provided wholly or predominantly:
  - for personal, domestic or household purposes; or
  - to purchase, renovate or improve residential property for investment purposes; and
- a charge is or may be made for providing the credit; and
- the credit provider provides the credit in the course of a business of providing credit in this jurisdiction or as part of or incidentally to any other business of the credit provider carried on in this jurisdiction.

The Code previously formed part of a legislative scheme that was based on the Uniform Credit Laws Agreement 1993 (the Agreement) of the States and Territories. Under this Agreement, the States and Territories agreed to adopt uniform consumer credit laws throughout Australia. The Agreement provided for the establishment of the uniform laws by what is termed “template” legislation. Thus, the uniform consumer credit laws were established principally by one state, Queensland, in its Consumer Credit (Queensland) Act 1994, with the Code set out in an appendix to this legislation.

The other States and Territories (including Western Australia from 9 May 2003) enacted application of laws legislation applying, as the law of the relevant State or Territory, the Code. Initially Western Australia chose to enact its own substantially similar legislation, which was allowed under the Agreement. The Code and the Consumer Credit Regulations (the Regulations) commenced operation on 1 November 1996 in all States and Territories other than Tasmania. In Tasmania, the general commencement date was 1 March 1997.

As a result of the template scheme, any amendments to the Code or Regulations only needed to be made to the template legislation and they then automatically applied in other States without amendment to those States’ Enabling Acts. Slightly different

arrangements existed in Tasmania and Western Australia although the outcomes were the same.

The Code explains a number of concepts relating to the provision of credit, such as:

- the meaning of *credit* and *amount of credit*; and
- the meaning of *credit contract*; and
- the matters to which the Code applies or does not apply; and
- a person's rights and obligations under a credit contract; and
- related mortgages and guarantees; and
- ending and enforcing a credit contract, mortgage or guarantee; and
- civil penalties for defaults of credit providers; and
- related sake contracts; and
- related insurance contracts; and
- advertising and related conduct; and
- comparison rates; and
- consumer leases.

The Code identifies a number of matters that are to be provided for in regulations. Details of the Regulations appear in the Attachment.

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

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

The Regulations will commence on **TBA**.

## ATTACHMENT

**DETAILS OF THE NATIONAL CONSUMER CREDIT PROTECTION (NATIONAL CREDIT CODE) REGULATIONS 2009****Part 1 Preliminary**Regulation 1 – Name of Regulations

Regulation 1 provides that the name of the Regulations is the *National Consumer Credit Protection (National Credit Code) Regulations 2009*.

Regulation 2 – Commencement

Regulation 2 provides that the Regulations commence on **TBA**.

Regulation 3 – Definitions

Regulation 3 defines words and expressions that are used in the Regulations. This includes defining **Code** to mean the National Credit Code set out in Schedule 1 to the *National Consumer Credit Protection Act 2009*.

Regulation 4 – Forms

Regulation 4 provides that forms to be used for the purposes of the Regulations and the Code are set out in Schedule 1.

Regulation 5 – Continued application of Part 11 of the Code and interpretation provisions

Part 1 of the Regulations provides that certain matters are not covered by the Code, in part or in full. Regulation 5 continues to apply the Code to the extent necessary to define the terms used in those exclusion provisions and to apply any matters (such as transitional provisions) that should relate to the exclusion provisions.

Regulation 6 – Exempt credit — maximum account charges

Section 7 of the Code relates to the provision of credit to which the Code does not apply.

Subsection 7(3) of the Code provides that the Code does not apply to the provision of credit under a continuing credit contract if the only charge that is or may be made for providing the credit is a periodic or other fixed charge that does not vary according to the amount of credit provided.

However, the Code does apply if the charge is of a nature prescribed by the regulations for the purposes of this subsection or if the charge exceeds the maximum charge (if any) so prescribed.

Regulation 6 limits the exemption to continuing credit contracts where the account charge payable is \$200 or less for the first twelve months, and \$125 or less for each subsequent period of 12 months. A maximum charge is prescribed to limit the

exemption to credit contracts where the account charges reflect the costs of establishing and maintaining an account.

#### Regulations 7 to 17

Section 7 of the Code relates to the provision of credit to which the Code does not apply.

Subsection 7(10) of the Code provides that the regulations may exclude, from the application of all or any provisions of this Code, the provision of credit of a class specified in the regulations. In particular (but without limiting the generality of the foregoing), the regulations may so exclude the provision of credit if the amount of the credit exceeds or may exceed a specified amount or if the credit is provided by a credit provider of a specified class.

Regulations 7 to 17 are made for subsection 7 (10) of the Code.

#### Regulation 7 – Additional exempt credit

Regulation 7 provides that the Code (except Division 3 of Part 4 and Part 5) does not apply to the provision of credit under a contract (other than a continuing credit contract) if:

- the amount of credit does not at any time exceed \$50; and
- there is no insurance financed under the contract; and
- there is no mortgage or guarantee taken by the credit provider; and
- the annual percentage rate for the contract does not exceed the maximum annual percentage rate (if any) for the contract if it were a contract to which the Code applies.

This exemption is intended to prevent the removal of low value credit from the market, which could occur as a result of the costs of complying with the Code exceeding the profitability of these loans.

#### Regulation 8 - GIO Finance Limited's No Interest Loan Scheme – exemption from Code.

Regulation 8 provides that the Code does not apply to this scheme which is operated by GIO Finance in accordance with a deed of agreement executed by the NSW Minister for Further Education, Training and Employment and GIO Finance Ltd.

This No Interest Loan Scheme provides interest-free loans to people with disabilities in the workplace to assist them to purchase aids and appliances for their daily living needs. The debtor pays only the principal and would not ordinarily receive the protection of the Code. However, the State Government pays the interest component of the loan. The Government is not a person or a strata corporation and should not therefore receive the protection of the Code.

This exemption replicates one that was granted under the UCCC on the basis that the provision of credit in this instance would otherwise be unintentionally caught by the Code.

### Regulation 9 – Rental Purchase Plan — exemption from certain provisions of Code

Regulation 9 provides that the Code, other than sections 70 to 74, does not apply to the provision of credit under the Queensland Government scheme known as the Rental Purchase Plan Scheme, and formerly known as the H.O.M.E. Shared Scheme.

The Queensland Rental Purchase Plan Scheme is no longer available to new applicants. However, because the Queensland Government allows existing customers to purchase further shares under the scheme in its existing format, the exemption provided to the scheme under the UCCC has been maintained.

This scheme involves a debtor entering into a contract under which:

- a share in the property is acquired over time, by an installment purchase with interest;
- the consumer rents the Queensland Government's share of the property; and
- the consumer is at liberty to purchase additional shares in the property, leading to full ownership.

A partial exemption was provided for this scheme as:

- it was difficult for the Queensland Government to comply with a number of the requirements of the Code and breaking up the transaction into its component parts in order to comply could result in more confusion to consumers;
- it was a progressive home ownership scheme and had not been available to new consumers since mid-1996. Therefore, only people already committed to rental purchase and wishing to add to existing shares were involved in further rental purchase contracts; and
- the product is unique to Queensland and therefore would not contravene the UCCC's principle of competitive neutrality.

However, the exemption did not extend to the unconscionable contract provisions (sections 70-74).

### Regulation 10 – Partnership loans — exemption from certain provisions of Code

Subregulation 10 (1) provides that the Code, other than:

- Part 1; and
- Division 3 of Part 4; and
- Divisions 4 and 5 of Part 5; and
- Part 7;

does not apply to the provision of credit by a firm, or by a related body corporate of the firm, to a partner of the firm, whether or not it is provided to the partner with another person.

Subregulation 10(2) provides that for a credit provider who provides credit in the course of a business of providing credit to which the Code applies to partners of a firm and to others, regulation 11 applies only to the provision of credit on terms that are more favourable to the debtor than the terms on which the credit provider provides credit to which the Code applies to persons who are not partners of the firm.

The exemption for partnership loans is to encourage firms to make loans to partners at a cost which is lower than market rates while retaining essential protection for those

partners in the event of hardship or other difficulties. As businesses structured as professional partnerships may not be captured by the exemption for employee loans under section 7(9) of the Code, a separate protection for partnership loans was considered to be warranted.

#### Regulation 11 – Student loans — exemption from certain provisions of Code

Subregulation 11(1) provides that the Code, other than subsection 56(1) (increase in guarantor's liability) and sections 70 to 74, does not apply to the provision of credit by a higher educational institution, or by an association of students of the institution, to a student of the institution on the grounds of hardship or of an emergency.

Subregulation 11(2) provides that the provisions do not apply only if the institution or association gives the debtor and any guarantor specified documents before the contract for the provision of credit is entered into by the debtor or the guarantee is signed by the guarantor.

Subregulation 11(3) defines the expressions 'association of students' and 'higher educational institution' used in subregulations (1) and (2).

A partial exemption was granted for student loans to preserve the viability of student loans, which are considered to be in the public interest as they offer small amounts of credit on generous terms to students and are unlikely to be available in the general credit market. The cost of complying with regulation could restrict the availability of such loans and a partial exemption was considered to strike an appropriate balance between ensuring the schemes' viability and providing a minimum level of consumer protection and disclosure of information.

#### Regulation 12 – Loans for conservation of heritage items — exemption from Code

Regulation 12 provides that the Code does not apply to the provision of credit under certain provisions of the heritage legislation of New South Wales, South Australia and Victoria.

In these three States, loans are provided to owners of property listed under the various heritage Acts in order that conservation works can be carried out. The loans are provided at a fixed interest rate that is well below market rates and the interest rate is disclosed to prospective borrowers. The number of such loans granted is very small, and the cost of complying with regulation would prevent their continuation. For these reasons, an exemption is granted.

#### Regulation 13 – ADIs — exemption from Code

Regulation 13 provides that the Code does not apply to the provision of credit by an authorised deposit-taking institution limited by the contract to a total period not exceeding 62 days.

#### Regulation 14 – Estate administrators — exemption from certain

Regulation 14 provides that the Code, other than sections 70 to 74, does not apply to the provision of credit to a person's estate, whether or not the person is deceased, by a public official or a public body authorised by any law or court to administer the estate.

The purpose of this exemption is to remove the requirement for organisations such as the Public Trustee, when acting with statutory authority on behalf of persons who have been deemed incapable of managing their own affairs, from being required to make disclosures to themselves when they are advancing credit on behalf of that person's estate.

For example, when the Public Trustee is administering an estate on behalf of persons who have been deemed incapable of managing their own affairs and there is insufficient money in the estate to make payments as required, the Public Trustee may advance and pay money on account of the estate as required. Since the Public Trustee is acting on behalf of the protected person in this situation, it is essentially the credit provider and the debtor and therefore the disclosures required under the Code would be made to itself.

To end the redundant nature of a statutory appointed authority making disclosures to itself while acting as both the lender and the debtor, a partial exemption is granted. However, the unjust transactions and review of unconscionable interest and other charges provisions still apply to protect the debtor in instances where the transaction may be unjust or the fees or charges are unconscionable in the credit contract.

#### Regulation 15 – Credit under *Aged Care Act 1997* — exemption from certain provisions of Code

Regulation 15 provides that the Code, other than sections 66 to 68 and 70 to 74, does not apply to the provision of credit by an approved provider, within the meaning of the *Aged Care Act 1997* of the Commonwealth, but only in respect of the provision of credit that is made and regulated under that Act.

This partial exemption is granted as it is considered that the aged care industry is extensively regulated by the Federal Government through the *Aged Care Act 1997*. The Act provides sufficient up-front disclosure to allow aged persons to assess and compare the deferment scheme in the legislation with other forms of credit.

However, the *Aged Care Act* does not provide for rectification of contracts which are harsh or unconscionable and there is no means for a Court to re-open such contracts. Given the vulnerable nature of the consumers involved, it is considered that it would be appropriate for these provisions to remain accessible to them.

Therefore, only a partial exemption from the Code for aged care providers (as defined in the Act) is provided for credit regulated by the Act. Aged care providers remain subject to the Code's provisions relating to unconscionability and the re-opening provisions in the Code.

Regulation 16 – Firefighter’s Benefit Fund of WA Incorporated — exemption from certain provisions of Code

Regulation 16 provides that the Code, other than Division 3 of Part 2, Division 3 of Part 4 and Divisions 1 and 2 of Part 5, does not apply to the provision of credit to a person by the Firefighter’s Benefit Fund of WA Incorporated in specified circumstances.

A partial exemption was granted to enable the Fund to reduce its compliance costs and thereby continue to offer these loans to its members. It was considered that the granting of a partial exemption would not adversely affect the overall policy of the Code as:

- the loan product is sufficiently simple as to not compromise prospective debtors’ ability to make informed choices when purchasing credit;
- redress mechanisms in the Code would be available to debtors; and
- the impact on competitive neutrality would be minimal as the loans are unique, limited to members of the Fund and the size of the loans offered is comparatively small.

Regulation 17 – Charge card contracts — exemption of certain contracts from Code

Regulation 17 provides that the Code does not apply to the provision of credit under a charge card contract made available by specified providers. The regulation explains the meaning of *charge card contract*.

The Code exempts credit which is provided for no more than 62 day, where the maximum fees and charges under a contract comprise less than 5 percent of the credit provided and the total interest is less than 24 percent per annum.

Charge cards do not charge interest on the amount borrowed but instead require the balance on the charge card account to be paid in full when the statement is received. A late fee is payable if the debtor does not repay the amount of credit by the due date.

However, the Code could apply to charge cards where the annual fee exceeds 5 of the amount of credit provided. The annual fee may exceed 5 percent of the amount of credit provided if the cardholder does not regularly pay the balance on the charge card account in full when the statement is received and thereby incurs late fees.

It was never intended for the Code to apply to charge cards and therefore this exemption was granted.

Regulation 18 – Mortgages — exemptions from Code

Section 8 of the Code provides that the Code applies to certain mortgages. However, subsection 8(3) of the Code provides that the regulations may exclude, from the application of all or any provisions of the Code, a mortgage of a class specified in the regulations.

Subregulation 18(1) specifies:

- a mortgage relating to perishable goods, livestock, primary produce or food stuffs; and
- a banker’s right to combine accounts; and

- a lien or charge arising by operation of any Act or law or by custom.

Mortgages relating to perishable goods, livestock, primary produce or food stuffs are provided with an exemption from the Code as it is considered that these types of mortgages are adequately regulated under other legislation in Australia.

Although a banker's right to combine accounts is arguably not a mortgage within the meaning of the Code, this Regulation specifies that a banker's right to combine accounts is exempt from the Code to remove any uncertainty. It is not intended that the Code applies to a banker's right to combine accounts as the provisions governing notice before enforcement could prejudice the bank's position by enabling the customer to withdraw funds from the account that is in credit before the right was exercised.

The definition of mortgage in the Code can be read as extending to mortgages arising by operation of law. To prevent the Code applying to these mortgages, which would cause difficulties as the Code's documentation requirements could not be complied with, this Regulation exempts any lien or charge arising by operation of any Act or law or by custom.

#### Regulation 19 – Guarantees — exemption from Code

Section 9 of the Code provides that the Code applies to certain guarantees. However, subsection 9(3) of the Code provides that the regulations may exclude, from the application of all or any provisions of the Code, a guarantee of a class specified in the regulations.

Regulation 19 specifies any guarantee by the supplier under a tied loan contract or tied continuing credit contract.

The reason for this exemption is to exclude guarantees that are provided by the supplier to a linked credit provider as this type of guarantee is one that is given in the course of a business and therefore the protections in the Code are not appropriate. Although section 9 of the Code excludes a guarantee if the guarantor is a body corporate, there is no exclusion for a guarantee on the ground that it is given in the course of a business.

#### Regulation 20 – Deemed mortgages for goods lease with option to purchase

Subsection 10(1) of the Code provides that a contract for the hire of goods under which the hirer has a right or obligation to purchase the goods is to be regarded as a sale of the goods by instalments if the charge that is or may be made for hiring the goods, together with any other amount payable under the contract (including an amount to purchase the goods or to exercise an option to do so) exceeds the cash price of the goods.

Subsection 10(3) of the Code provides that if the contract is also a credit contract, the Code applies as if the contract had always been a sale of goods by instalments. The subsection sets out consequential arrangements for this purpose, including a requirement under paragraph 10(3)(f) that a mortgage containing the terms and conditions set out in the regulations is taken to have been entered into in writing between the person to whom the goods are hired under the contract and the supplier as

security for payment to the supplier of the amount payable to the supplier by the person to whom the goods are hired under the contract.

Regulation 20 provides that the terms and conditions are as set out in Form 1, which is in Schedule 1 to these Regulations.

Form 1 is based on Form 1 of the regulations under the UCCC.

#### Regulation 21 – Declaration of purposes for which credit provided

Subsection 11(2) of the Code provides that credit is presumed, for the purposes of the Code, not to be provided wholly or predominantly for personal, household or domestic purposes or to purchase, renovate or improve residential property for investment purposes if the debtor declares, before entering the credit contract, that the credit is to be applied wholly or predominantly for a different purpose.

Subsection 11(7) of the Code requires the declaration to be substantially in the form (if any) required by the regulations.

Regulation 21 sets out the form of the declaration and makes arrangements related to the declaration.

The intention of this Regulation is to inform consumers of the circumstances in which they should sign a declaration, the consequences of signing a declaration and to establish the date on which the consumer signed the declaration.

## **Part 2      Credit contracts**

#### Regulation 22 – Statement about debtor’s statutory rights and obligations

Section 14 of the Code provides that a credit provider must not enter into a credit contract unless the credit provider has given the debtor a pre-contractual statement and information statement of the debtor’s rights and obligations.

Paragraph 14(1)(b) of the Code provides that the information statement must be in the form required by the regulations.

Regulation 22 provides that the information statement must be in writing and must be in accordance with Form 2, which is in Schedule 1 to the Regulations.

Form 2 is a summary of the debtor’s statutory rights. A similar disclosure was required under the former credit laws.

#### Regulation 23 – Comparison rate

Subsection 14(3) of the Code provides that a credit provider may inform a debtor of the comparison rate before entering into a credit contract. The comparison rate must be calculated as prescribed by the regulations.

Regulation 23 explains how to calculate a comparison rate. The regulation also sets out arrangements related to the comparison rate.

The purpose of the mandatory comparison rate calculation is to require credit providers to follow a specified method of calculating the comparison rate that reflects the credit fees and charges payable under the contract as well as the interest charges. The formula factors in all credit fees and charges that are ascertainable when the comparison rate is disclosed. It is intended that this will assist consumers to compare various loan products in order to select a product that best suited their budget and other borrowing needs.

The comparison rate can only be calculated if the amount of credit and term of the loan is known. Regulation 23(8) and (9) provides credit providers with the assumptions to make for cases such as draw-down facilities and continuing credit contracts where this information is unknown at the disclosure date.

Regulation 23(10) provides that at the time the debtor is informed of the comparison rate under the Code, the debtor must be given a warning in the prescribed form. This warning is intended to alert debtors to the fact that the comparison rate is only relevant for the particular amount and term upon which it is calculated and that certain costs are not included in the comparison rate that may influence the cost of the loan.

#### Regulation 24 – Pre-contractual statement

Subsection 14(4) of the Code provides that a pre-contractual statement mentioned in paragraph 14(1)(a) of the Code must contain the financial information specified by the regulations in the form prescribed by the regulations.

Regulation 24 sets out the financial information and the form of the statement.

This Regulation prescribes a tabular format for disclosure of relevant financial information. The purpose of the Regulation is to give the debtor a prominent statement in summary form of the main financial aspects of the transaction.

The Regulation requires the relevant financial information to be kept separate from the remainder of the information that is to be set out in the pre-contractual statement to highlight the significance of the information to the debtor.

#### Regulation 25 – Additional disclosures about insurance financed by contract

Section 15 of the Code sets out a number of matters that must be in a contract document. Subsection 15(15) of the Code provides that if the credit provider knows that the debtor is to enter into a credit-related insurance contract, and that the insurance is to be financed under the credit contract, the contract document must contain specified information, including the kind of insurance and any other particulars that may be prescribed by the regulations.

Regulation 25 prescribes the term of each credit-related insurance contract, if ascertainable.

The intention of this Regulation is to enable the debtor to be informed of the terms of each credit-related insurance contract.

### Regulation 26 – Additional disclosures about credit contracts to be signed by debtor

Section 15 of the Code sets out a number of matters that must be in a contract document (for example, credit provider's name, amount of credit, annual percentage rate etc). Subsection 15(16) of the Code provides that a contract document must contain any information or warning required by the regulations.

Regulation 26 provides that the information and warnings are set out in Forms 3 and 4, which are in Schedule 1 to the Regulations.

The intention of this Regulation is to provide the debtor with important information about what a debtor should do before signing the document and things the debtor should know before signing the document.

The Regulation requires the information to be in the form of boxes and to be set out immediately above each place where the debtor is to sign the contract to increase the likelihood that the debtor's attention will be drawn to the information.

The form to be inserted in the contract depends on whether the document being signed is the offer by the debtor (Form 3) or the acceptance of the credit provider's offer (Form 4).

This distinction is made so that that the debtor can be informed that they may withdraw the offer at any time before the credit provider accepts it in the case where the debtor made the offer (Form 3).

In the case where the debtor is accepting the credit provider's offer, the debtor is informed that a contract will have been formed if the debtor signs the document (Form 4).

### Regulation 27 – Deduction of amount for interest charges

Subsection 23(1) of the Code provides that a credit provider must not deduct from a payment to, or in accordance with the instructions of, the debtor an amount for interest charges under the credit contract.

However, subsection 23(2) of the Code authorises the making of regulations that provide that subsection 23(1) does not apply to the deduction of an amount for the first payment of interest charges under the contract.

Regulation 27 provides that subsection 23(1) does not apply to the deduction of the first interest payment if the interest charges are for a period that is less than the normal period for which interest charges are to be periodically debited to the debtor's account. In this limited situation, the credit provider is allowed to deduct the first interest charge from the payment as the timeframe between the payment and the first interest charge is shorter than normal.

### Regulation 28 – Calculation of unpaid daily balances

Section 26 of the Code deals with the maximum amount of an interest charge that may be imposed or provided for under a credit contract.

Subsection 26(1) of the Code limits the maximum amount of an interest charge that may be imposed or provided for under a credit contract to the amount determined by applying the ‘daily percentage rate’ to the ‘unpaid daily balances’.

Subsection 26(2), however, allows an interest charge under a credit contract for a month, a quarter or half a year to be determined by applying the annual percentage rate or rates divided by 12 (for a month), by 4 (for a quarter) or by 2 (for half a year), to all or part of the average unpaid daily balances to which it applies. Subsection 26(2) then provides that the regulations may provide for the calculation of unpaid daily balances in these circumstances.

Regulation 28 prescribes the method of calculation of unpaid daily balances for the purposes of clause 26(2). If the annual percentage rate is applicable to part, but not the whole of any month, quarter or half-year, then the average unpaid daily balance for that part must be calculated using:

- the actual unpaid daily balance for each day in that part; and
- a deemed unpaid daily balance of nil for each other day in that month, quarter or half-year (whether or not these other days are before the contract is entered into or after it is terminated).

In such a case the interest charges for the month, quarter or half-year should be the sum of the calculations made in respect of each part.

#### Regulation 29 – Early debit or payment of interest charges

Subsection 27(1) of the Code prohibits a credit provider from debiting, or requiring the payment of, an interest charge before the end of the day to which the charge applies.

However, subsection 27(3) of the Code authorises the making of regulations that provide that subsection 27(1) does not apply to the first payment of interest charges under the credit contract.

Regulation 29 sets out circumstances in which subsection 27(1) does not apply.

This Regulation makes an exception to the rule that a credit provider cannot demand or debit interest charges until the day following the date on which they accrue. The exception is limited to instances where the period for the first payment of interest charges is less than the period over which interest is normally charged under the contract.

#### Regulation 30 – When statement of account not required

Subsection 31(1) of the Code requires a credit provider to give to a debtor, or to arrange for a debtor to be given, periodic statements of account.

However, subsection 31(3) of the Code provides that a statement need not be given in specified circumstances. The circumstance in paragraph 31(3)(b) is that no amount has been debited or credited to the account during the statement period (other than

debits for government charges, or duties, on receipts or withdrawals) and the amount outstanding is zero or below a level fixed by the regulations.

Regulation 30 specifies a level of \$10. It is considered that when the amount outstanding is \$10 or less, there is no need for a credit provider to provide a statement of account.

### **Part 3      Related mortgages and guarantees**

#### Regulation 31 – Mortgage arising from certain home ownership schemes—exemption from subsection 46 (1) of the Code

Subregulation 32(1) identifies two home ownership schemes operated by Mt Newman Joint Ventures and Mount Goldsworthy Mining Association Joint Ventures, which are exempted from subsection 46(1) of the Code.

The home ownership scheme was developed by the joint ventures as an incentive to encourage employees working at the remote areas of Newman and Portland in Western Australia to commit to buying homes in the area. The joint ventures sell homes to relevant employees on terms requiring payment of interest free instalments over a period of 15 years, at which time the employee is entitled to receive a transfer of the property. If the employee leaves BHP before the house is paid in full, they are repaid all their contributions plus the value of any improvements made to the property, plus a bonus payment.

The purchase rights are mortgaged to BHP Credit Union. The “security” is against the employee’s Net Termination Refund entitlement. This constitutes an equitable mortgage under the Code.

While this scheme itself would not be caught by the Code because it is interest free, those employees who are also members of the Credit Union may borrow funds on the security of their interest under the purchase contract.

This Regulation replicates a regulation made under the UCCC. That exemption was granted on the basis that section 46 was not intended to prevent such a mortgage being taken which would, in effect, prohibit employee benefit schemes such as the home ownership scheme.

#### Regulation 32 – Form of guarantees

Section 50 of the Code relates to guarantees.

Subsection 50(3) of the Code provides that the regulations may make provision for or with respect to the content of guarantees and the way they are expressed.

Subregulation 32(1) provides that a guarantee must contain the warning set out in Form 4, which is in Schedule 1 to the Regulations. Subregulation 33 (2) sets out other requirements relating to the warning (e.g. where warning is to be disclosed).

This Regulation prescribes the information that must be in Form 5, as well as the practical information concerning the appearance and placement of the Form 5 warning box.

A warning box is prescribed as there are various features of the contract of guarantee that result in the guarantor being in a vulnerable position. There is usually no direct benefit accruing to the guarantor from the contract, but the costs to the guarantor may be very high if things go wrong.

The box format is required to be used to enhance the clarity of the information provided and the form is required to be placed immediately above the place where the guarantor is to sign to increase the likelihood that the guarantor will notice and read the information.

Form 5 is based on the warnings in Forms 3 and 4 and warnings in guarantees used by industry.

#### Regulation 33 – Explanation about guarantor’s rights and obligations

Section 51 of the Code requires a credit provider to give specified documents to a prospective guarantor. Paragraph 51(1)(b) of the Code refers to a document in the form prescribed by the regulations explaining the rights and obligations of a guarantor.

Subregulation 33(1) provides that the document must be in accordance with Form 6, which is in Schedule 1 to the Regulations. Subregulation 34(2) makes arrangements related to the document.

The intention of this regulation is to prescribe the required form. Form 6 is based on a similar format to Form 2.

This Regulation also notes that this form must be given before the obligations under the relevant credit contract are secured by the guarantee.

### **Part 4 Changes to obligations under credit contracts, mortgages and guarantees**

#### Regulation 34 – Information about increases in the amount of credit

Subsection 65(1) of the Code requires a credit provider to give notice to the other party of a change to a credit contract, mortgage or guarantee that has been agreed to by the credit provider and the other party. The notice must be given within 30 days after the date of the agreement.

Subsection 65(3) of the Code provides that, if the parties propose to increase the amount of credit by agreement, the credit provider must also give to the debtor, before the agreement is made, a written notice containing the information required by the regulations.

Subregulation 34(1) sets out the information.

The intention of this Regulation is to prescribe the information that must be disclosed for the purposes of clause 65(3).

## **Part 5      Ending and enforcing credit contracts, mortgages and guarantees**

### Regulation 35 – Information after surrender of mortgaged goods

Section 78 of the Code enables a debtor of goods sold by instalments or mortgagor to surrender the mortgaged goods.

Subsection 78(3) of the Code requires a credit provider to give a debtor or mortgagor a written notice containing the estimated value of the goods and any other information required by the regulations.

Regulation 35 provides that the information must include the information set out in Form 7, which is in Schedule 1 to the Regulations.

Form 7 gives the mortgagor details of the estimated value of the goods, enforcement expenses and ongoing storage costs together with information about the sale process and how to finalise the contract.

The statutory notice in Form 7 mirrors the notice which must be served when mortgaged goods are seized.

### Regulation 36 – Notice after direct debit default occurs

Section 79A of the Code deals with some of the consequences if a debtor first defaults under a credit contract that includes arrangements for payment by direct debit.

Subsection 79A (2) of the Code requires the credit provider to give the debtor, and any guarantor, a direct debit default notice. Subsection 79A (3) of the Code provides that the notice must contain the information prescribed under the regulations.

Regulation 36A provides that the information is set out in Form 8, which is in Schedule 1 to the Regulations.

The prescribed information in Form 8 seeks to address the problem of some debtors lacking adequate knowledge about how direct debits operate and how to cancel a direct debit authority, and therefore continue to incur direct debit default charges.

The prescribed information also informs debtors about what they should do if they are unable to make a repayment.

### Regulation 37 – Notice after default occurs

Section 80 of the Code sets out requirements that must be met before a credit provider can enforce credit contract or mortgage against a defaulting debtor or mortgagor.

Subsection 80 (2) of the Code requires the credit provider to give a mortgagor a default notice. Subsection 80 (3) of the Code provides that the notice must specify certain matters, including information prescribed by the regulations.

Regulation 37 provides that the information is set out in Form 9, which is in Schedule 1 to the Regulations.

The information prescribed in Form 9 is intended to address the problem of some debtors not being aware of their right to make an application for hardship and postponement under the Code.

Given the importance of debtor's being aware of these rights, the specific words that must be included in the default notice are prescribed to ensure it is expressed in plain English.

#### Regulation 38 – Consent to enter premises

Subsection 91(1) of the Code provides that a credit provider, or an agent of the credit provider, must not enter any part of premises used for residential purposes for the purpose of taking possession of mortgaged goods under a goods mortgage unless the court has authorised entry or the occupier of the premises (after being informed in writing of the provisions of section 91) consented in writing to the entry.

Under subsection 91(2) of the Code, the regulations may provide procedures for the purposes of section 91 and set out circumstances in which consent is or is not taken to have been given.

The intention of Regulation 38 is to prescribe the circumstances in which consent will be taken to have been given by the occupier of the premises to the credit provider's entry to seize mortgaged goods.

Regulation 38 provides that the credit provider or its agent can seek consent in writing or by personal visit to the premises. The effect of this is that the credit provider or its agent cannot visit the occupier elsewhere, such as at a workplace. A visit can only be made between 8 a.m. and 8 p.m. on a day other than Sunday or a public holiday.

Form 10 is the form required for the occupier's consent and it identifies the premises concerned and brief details of the mortgaged goods. It contains a warning that the occupier can refuse consent but that a court order may be sought if consent is not given.

Consent is not to be taken to have been given if it is obtained in circumstances which breach the procedural rules set out in Regulation 38.

#### Regulation 39 – Statement about mortgagor's rights and obligations

Subsection 94(1) of the Code requires a credit provider that has taken possession of goods under a mortgage to give the mortgagor certain information, including a statement of the mortgagor's rights and obligations in the form set out in the regulations.

Regulation 39 provides that the information is set out in Form 11, which is in Schedule 1 to the Regulations. This Regulation seeks to inform mortgagor's about their rights and obligations once a credit provider has taken possession of goods under a mortgage. The information prescribed in Form 11 includes information about the reason the goods were taken, how the debtor can get the goods back and what the credit provider's obligations are if the goods are sold. Form 11 includes information

about the estimated value of the goods. This requirement is intended to assist the mortgagor calculate the likely surplus or deficiency after the goods are sold.

#### Regulation 40 – Information about proceeds of sale of mortgaged goods

Subsection 96(3) of the Code requires a credit provider that sells mortgaged goods to give the mortgagor a written notice stating the gross amount realised on the sale, the net proceeds of the sale and certain other information, including other information required by the regulations.

Regulation 40 provides that the information required is an itemised account of each deduction made from the gross amount realised on the sale to arrive at the net proceeds of sale. This information is provided so that a debtor is aware of the deductions that have been made from the gross amount realised on the sale figure to arrive at the net proceeds of sale figure.

### **Part 7      Related sale contracts**

#### Regulation 41 – Rate of interest on damages

Subsection 122(1) of the Code allows interest to be paid on damages awarded under the linked credit provider provisions of the Code. The rate of interest is to be the rate prescribed by the regulations.

Regulation 41 provides that the rate of interest is the annual percentage rate under the contract as at the date of the judgment. If the contract was not still in force at the date of the judgment, the rate of interest is the annual percentage rate under the contract as at the date immediately before the contract was terminated.

#### Regulation 42 – Informing debtor of rights

Subsection 126(1) of the Code provides that, if a debtor terminates a linked maintenance services contract because of the termination of the credit contract, the debtor is entitled to a proportionate rebate of consideration under the maintenance services contract.

Subsection 126(2) of the Code requires the credit provider in that case to inform the debtor in accordance with the regulations of the debtor's rights under section 126.

Regulation 42 provides that the information must be in accordance with Form 12, which is in Schedule 1 to the Regulations.

Regulation 42 also specifies that the information must be given to the debtor within 21 days of the termination of the tied loan contract or tied continuing contract. Form 12 informs the debtor of the right to terminate the maintenance services contract and recover a rebate in accordance with the law.

#### Regulation 43 – Rebate of consideration

Subsection 126(1) of the Code provides that, if a debtor terminates a linked maintenance services contract because of the termination of the credit contract, the

debtor is entitled to a proportionate rebate of consideration under the maintenance services contract.

Subsection 126(3) of the Code provides that the regulations may prescribe the manner of calculating that proportionate rebate of consideration.

Regulation 43 prescribes the formula for calculating the rebate. The formula provides for calculation of the rebate on a pro rate basis. The formula provides that the statutory rebate is the amount derived by multiplying the amount of maintenance charges by the number of whole months in the unexpired portion of the period for which maintenance is agreed to be provided and dividing the product by the number of whole months for which maintenance is agreed to be provided.

## **Part 8      Related insurance contracts**

### Regulation 44 – Particulars of insurance entered into by credit provider

Subsection 136(2) of the Code provides that, if a credit provider enters into a credit-related insurance contract in which the debtor has a beneficial interest, the credit provider must ensure that a written notice containing particulars of the insurance prescribed by the regulations is given to the debtor within 14 days after the beneficial interest is acquired by the debtor.

Credit-related insurance consists of insurance over mortgaged property or consumer credit insurance.

Regulation 44 requires, for the purposes of subsection 136(2) of the Code, that the credit provider gives the debtor a statement of the key features of the credit-related insurance contract. Subregulation 44(2) prescribes what the key features of the contract are, and therefore what must be disclosed. The premium, fees and charges payable are only required to be disclosed to the extent ascertainable.

Subregulation 44(3) provides that a credit provider can comply with the requirement to disclose a key feature by providing a copy of the policy containing the key feature.

### Regulation 45 – Proportionate rebate of consumer credit insurance premium

Subsection 138(1) of the Code is to the effect that, on the termination of a credit contract, any relevant credit-related insurance contract financed under that credit contract for consumer credit insurance is also terminated. The credit provider must pay the debtor, or credit the debtor with, a proportionate rebate of the premium paid for any such insurance contract (subsection 138(2)). Subsection 138(4) then states that the regulation may prescribe the manner of calculating the proportionate rebate of premium for the purposes of section 138.

Regulation 45 prescribes the manner of calculating the proportionate rebate of premium.

### Regulation 46 – Notice of right to cancel mortgaged property insurance

Section 139 of the Code provides that if a credit contract is terminated before the end of the term of a credit-related insurance contract over mortgaged property financed

under the credit contract, the debtor may terminate the insurance contract and recover from the insurer a proportionate rebate of premium.

Subsection 139(2) of the Code provides that a credit provider must inform the debtor, in accordance with the regulations, of the debtor's rights under section 139.

Regulation 46 provides that the information must be a written statement in accordance with Form 13, which is in Schedule 1 to the Regulations.

#### Regulation 47 – Proportionate rebate of premium for insurance over mortgaged property

Section 139 of the Code provides that if a credit contract is terminated before the end of the term of a credit-related insurance contract over mortgaged property financed under the credit contract, the debtor may terminate the insurance contract and recover from the insurer a proportionate rebate of premium.

Subsection 139(3) of the Code provides that the regulations may prescribe the manner of calculating the proportionate rebate of premium.

Regulation 47 specifies how to calculate a proportionate rebate.

### **Part 9A Comparison rates**

#### Regulation 48 – Relevant comparison rate where annual percentage rate stated

Section 146F of the Code explains the basis of a comparison rate.

A comparison rate is a way to assist consumers to identify the true cost of credit offered by credit providers. As different loan amounts and terms produce different comparison rates, subsection 146F(1) of the Code provides that the comparison rate is the comparison rate calculated for whichever of the designated amounts and terms most closely represents the typical amount of credit and term initially provided by the credit provider for the consumer credit product being advertised.

Subsection 146F(2) of the Code provides that designated amounts and terms are the amounts and terms prescribed by the regulations.

Regulation 48 sets out the designated amounts and terms. The designated amounts and terms are based on typical loan amounts and terms. For example, the designated amounts and terms include a loan of \$30,000 for 5 years, which is similar to a typical car loan.

#### Regulation 49 – Information about whether comparison rate relates to secured loan

Section 146G of the Code deals with the manner of advertising a comparison rate.

Subsection 146G(2) of the Code sets out specific arrangements if the comparison rate is calculated for an amount of credit prescribed by the regulation.

Regulation 49 sets out amounts of credit.

The intention of this Regulation is to require disclosure about whether the comparison rate is for a secured or unsecured loan for loan amounts that are typical loan amounts for cars and other goods where the loan may be secured against the good purchased with the credit. As the comparison rate will usually differ depending on whether the loan is secured or unsecured, this disclosure is important for a consumer to know.

#### Regulation 50 – Warnings about comparison rate

Section 146H of the Code deals with warnings about the accuracy of a comparison rate that are to be included in the advertising of a comparison rate. The warnings must be prescribed by the regulations.

The warning is intended to make consumers aware that while a comparison rate can be a useful tool for comparing the cost of different loans, it is important to consider all of a loan's features and not just focus on the comparison rate.

Regulation 50 sets out a long form of warning and a short form of a warning.

The long warning must still appear in comparison rate schedules. However, the shortened form of the warning can be used in credit advertising, as the long form may be unworkable for certain forms of media, such as radio, due to the time that it takes to read.

#### Regulation 51 – Calculation of comparison rates

Regulation 51 prescribes the method for calculating a comparison rate.

The intention of Regulation 51 is to prescribe a comparison rate formula that will most accurately reflect the credit fees and charges payable under the contract in addition to interest charges. The formula in Regulation 51 takes into account:

- the amount of the loan;
- the term of the loan;
- the repayment frequency;
- the interest rate; and
- the fees and charges connected with the loan, except for:
  - government charges, such as stamp duty or mortgage registration fees;
  - fees and charges which may or may not be charged, because they depend on some event which may or may not occur (for example, fees for early repayment or redraw fees); and
  - fees and charges which are not ascertainable at the time the comparison rate is provided.

The tolerances and assumptions under the Code apply to the calculation of the comparison rate.

### Regulation 52 – Matters that may be included in comparison rate schedules

Regulation 52 provides that a comparison rate schedule may include a statement as to the frequency of repayments used to calculate a comparison rate contained in the schedule.

The intention of this Regulation is to enable credit providers to include information about the frequency of repayments used to calculate a comparison rate in the comparison rate schedule.

## **Part 10 Consumer leases**

### Regulation 53 – Declaration about purpose of leases

Subsection 150(2) of the Code provides that goods hired under a consumer lease are presumed not to be hired for those purposes if the lessee declares, before hiring the goods, that the goods are hired wholly or predominantly for business purposes.

The declaration is not effective unless it is substantially in the form required by the regulations.

Subregulation 53(1) sets out the form of the declaration. Subregulations 53(2) and (3) make other arrangements related to the declaration.

This Regulation is intended to inform consumers of the circumstances in which they should sign a declaration, the consequences of signing a declaration and to establish the date on which the consumer signed the declaration.

### Regulation 54 – Explanation about rights and obligations of consumer lessees

Section 153 of the Code requires a lessor under a consumer lease to give a lessee a statement in the form required by the regulations explaining the lessee's rights and obligations.

Regulation 54 provides that the statement must be in writing and must be in accordance with Form 14, which is in Schedule 1 to the Regulations.

Form 14 is intended to inform the debtor about some of their rights and obligations and those of the lessor.

## **Part 11 Miscellaneous**

### Regulation 55 – Tolerances relating to disclosures

Section 158 of the Code provides that information disclosed in a precontractual statement, contract document, mortgage document or guarantee, statement, notice or consumer lease, or otherwise disclosed for the purposes of the Code is taken to be correctly disclosed if it is within tolerances allowed by the regulations and the disclosure is made as at a date stated in it.

Regulation 55 sets out tolerances for a number of classes of information.

The intention of this Regulation is to assist the credit provider comply with the disclosure provisions in the Code and thereby protect the credit provider from the consequences of minor inaccuracies in stating the relevant information. This Regulation specifies the amount of error that is permissible.

#### Regulation 56 – Tolerances relating to amounts payable etc.

Section 159 of the Code provides that all amounts charged, payable or calculated under or in connection with a credit contract, mortgage, guarantee or consumer lease comply with the Code if they are within tolerances allowed by the regulations.

Regulation 56 sets out tolerances for a number of classes of amounts.

The intention of this Regulation is to assist the credit provider comply with the requirements of the Code and thereby protect the credit provider from the consequences of minor inaccuracies in stating the relevant information. This Regulation specifies the amount of error that is permissible.

#### Regulation 57 – Additional assumptions relating to disclosures

Regulation 57 sets out assumptions that may be relied on for disclosures for the purposes of the Code relating to repayments, fees and interest charges.

The intention of this Regulation is to assist the credit provider comply with the requirements of the Code. For example, the assumption in regulation 57(1) is intended to overcome any inconsistencies in the different terms of the credit contract and to simplify calculations which would otherwise involve additional work identifying non-business days and allowing for them.

#### Regulation 58 – Contracts linked to loan account offset arrangements

Regulation 58 sets out assumptions that may be relied on for disclosures for the purposes of the Code relating to a credit contract linked to a loan account offset arrangement.

The intention of this Regulation is to make it easier for a credit provider to comply with the disclosure requirements of the Code. If a credit contract is linked to a loan offset arrangement, the credit provider's obligation to disclose information is likely to be more difficult because the credit provider will not know whether or to what extent the balance in the debtor's offset account will be maintained throughout the term of the credit contract. Therefore, this Regulation allows a credit provider to assume that the contract is not linked to the offset arrangement. The effect of this is that the credit provider is required to disclose the matters required by the Code without making any adjustment for the fact that interest may be less than planned.

#### Regulation 59 – Requirements for print or type

Section 162 of the Code deals with the legibility or language of certain credit contracts, mortgages and guarantees and notices given by a credit provider under the Code.

Paragraph 162 (1)(b) of the Code provides that a credit contract, guarantee or notice given by a credit provider under the Code, to the extent that it is printed or typed, must conform with the provisions of the regulations as to print or type.

Subregulation 59(1) provides that print or type must be not less than 10 point.

Paragraph 162(1A)(b) of the Code provides that a credit contract, guarantee or notice given by a credit provider under the Code must conform with the provisions of the regulations, if any, as to content, legibility and accompanying information.

Subregulation 59(2) sets out requirements for a credit contract, mortgage or guarantee or a notice that is transmitted by electronic communication.

### Regulation 60 – Notices

Section 171 of the Code deals with matters relating to the giving of notices and other documents.

Subsections 171(4) and (6) of the Code provide that a person may be nominated to receive a notice or other document on behalf of 1 or more other persons.

Subregulation 61(1) sets out the form of a nomination.

Subsection 171(5) of the Code provides that a single copy of a notice or other document may be given to any two or more joint debtors, mortgagors or guarantors at the same address if each of them has consented to a single copy being given and the notice or other document is addressed jointly to them.

Subregulation 60(2) sets out the form of a consent.

## **Part 12 Savings and transitional provisions**

Part 12 of the Code deals with transitional arrangements required as part of the implementation of the Code.

### Regulation 61 – References in documents to Consumer Credit Code of a State or Territory

Subregulation 61(1) provides that a person does not contravene the Regulations solely by the use of a document that refers a similar provision in the Consumer Credit Code of a State or Territory.

The allowance made by subregulation 61(1) ceases to have effect at the end of the period of two years starting when regulation 61 commences.

This transitional provision is made to reduce the cost to business in updating forms by allowing changes to be made contemporaneously with new print runs.

## Schedule 1 Forms

Schedule 1 sets out the forms identified by various provisions of the Regulations.

The forms are:

- |         |   |
|---------|---|
| Form 1  | Prescribed terms and conditions of mortgage<br>(regulation 20)                |
| Form 2  | Information statement<br>(regulation 22)                                      |
| Form 3  | Disclosure about credit contracts<br>(regulation 26)                          |
| Form 4  | Disclosure about credit contracts<br>(regulation 26)                          |
| Form 5  | Disclosure about guarantee<br>(regulation 32)                                 |
| Form 6  | Information statement<br>(regulation 33)                                      |
| Form 7  | Information after surrender of mortgaged goods<br>(regulation 35)             |
| Form 8  | Direct debit default notice<br>(regulation 36)                                |
| Form 9  | Information about debtor's rights after default<br>(regulation 37)            |
| Form 10 | Consent to enter premises<br>(regulation 38)                                  |
| Form 11 | Notice after taking possession of mortgaged goods<br>(regulation 39)          |
| Form 12 | Notice of right to terminate maintenance services contract<br>(regulation 42) |
| Form 13 | Notice of right to cancel mortgaged property insurance<br>(regulation 46)     |
| Form 14 | Information statement<br>(regulation 54)                                      |