

EXPLANATORY STATEMENT

Select Legislative Instrument 2009 No.

Issued by the Authority of the Minister for Superannuation and Corporate Law

National Consumer Credit Protection Act 2009

National Consumer Credit Protection 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.

These Regulations deal with the licensing of persons who engage in credit activities, including:

- exemptions from the licensing regime; and
- the imposition of conditions on an Australian credit licence; and
- the obligations of holders of Australian credit licensees.

The Act does 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 will commence on **TBA**.

ATTACHMENT

DETAILS OF THE NATIONAL CONSUMER CREDIT PROTECTION REGULATIONS 2009**Part 1A Preliminary**Regulation 1A.1 – Name of Regulations

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

Regulation 1A.2 – Commencement

Regulation 1A.2 provides that the Regulations commence on **TBA**.

Regulations 1A.3 to 1A.5 – Definitions

Regulations 1A.3 to 1A.5 define words and expressions that are used in the Regulations. Terms such as ‘associate’ and ‘related body corporate’ have the same meaning as they are given in the *Corporation Act 2001*.

Part 2 Australian Credit LicencesRegulation 2.1 and 2.4 – Requirements for a foreign entity to appoint and continue to have a local agent.

These regulations set out the requirements for foreign entities carrying on business in Australia to have a local agent. Licensees which are foreign bodies corporate will need to register with the Australian Securities and Investments Commission (ASIC) under Part 5B.2 Division 2 of the Corporations Act, which requires them to appoint a local agent, who is able to accept effective service of court documents, and will generally be liable for any penalty imposed under the Act on the foreign body corporate. Other foreign entities (that is, natural persons, trusts and partnerships) do not have a similar obligation.

Regulation 2.1 requires foreign entities which do not need to register with ASIC under Part 5B.2 Division 2 to appoint a local agent before applying for a licence. The local agent must be a natural person or a company that is resident in this jurisdiction and authorised to accept service of process and notices, on behalf of the foreign entity. Evidence of the appointment is to be provided to ASIC with the application for the licence (subregulation 2.1(2)(b) and 3).

Regulation 2.4 requires all foreign entities that are not foreign companies to continue to have a local agent as a condition of holding an Australian Financial Services Licence (AFSL). Foreign entities are also obliged to notify ASIC of any changes to their local agent or changes to the contact details of the appointed local agent.

Regulation 2.4 allows ASIC to treat a document as being served on the foreign entity by serving that document on the local agent of the entity.

The requirement to have a local agent provides ASIC and consumers with important practical assistance in enforcing the Act and contractual rights.

Regulation 2.2 – The conditions on the licence

Under the Act, ASIC may grant a person an Australian Credit Licence. Subsection LIC165(7) provides that a licensee is subject to such conditions as are prescribed by regulations. Regulation 2.2 sets out standard conditions that apply to all licensees.

The regulations impose conditions in relation to:

- changing and updating particulars entered in the Australian Credit Register; and
- the authorisation of credit agents and other persons to engage in a credit activity on behalf of the licensee; and
- notifying ASIC of certain matters relevant to the licence.

The conditions relate to a range of technical or practical matters that ensure ASIC has the current and relevant information to enable it to effectively carry out its functions in respect of supervising licensees.

It should be noted that ASIC is empowered to impose conditions on an Australian Credit Licence, noting they cannot vary or revoke any conditions specified under subsection LIC165(7). Accordingly, the conditions specified in Regulation 2.2 will not be an exhaustive list of conditions that may be imposed on licensees. It is envisaged that ASIC may use its statutory power to apply conditions to all licensees, to particular classes of licensees, or to individual licensees.

Regulation 2.3 – Alternative dispute resolution systems

Section LIC170 of the Act sets out the general conduct obligations of the holder of an Australian Credit Licence. Subparagraph LIC170(1)(h)(i) of the Act requires a licensee to have an internal dispute resolution procedure that complies with standards and requirements made or approved by ASIC in accordance with the regulations.

Subparagraph LIC170(1)(h)(i) of the Act provides that a licensee must be a member of an approved external dispute resolution scheme and DEF 10 provides that an approved external dispute resolution scheme is one approved by ASIC in accordance with the regulations.

Regulation 2.3 sets out matters which ASIC must take into account for the purpose of:

- considering whether to make or approve standards or requirements relating to internal dispute resolution; and
- considering whether to approve an external dispute resolution scheme.

The regulation makes related arrangements relating to how ASIC exercises its powers under subparagraph LIC170(1)(h)(i).

The regulation also specifies the circumstances in which a licensee is not required to comply with the obligation in subparagraph LIC170(1)(i) of the Act to be a member of an approved external dispute resolution scheme. These are where the licensee engages in credit activities in specified and limited circumstances (for example the trustee appointed under a will), and where complaints about credit activities may be made to the Ombudsman of a State or Territory.

Regulation 2.5 – Requirements for compensation arrangements

Section LIC175 of the Act requires a licensee to have arrangements for compensating persons for loss or damage suffered because of breaches of the relevant obligations under the Act by the licensee or its representatives. The arrangements must meet the requirements of subsection LIC170(2).

Paragraph LIC175(2)(a) of the Act provides that if the regulations prescribe requirements that apply to all arrangements or to arrangements of the kind made by the licensee, the licensee's arrangements must satisfy those requirements.

Subregulation 2.5(1) requires licensees (except exempt licensees) to hold professional indemnity insurance cover that is adequate to cover the risk of claims, having regard to the likely amount of claims, and given the type of business the licensee is engaged in.

Paragraph LIC175(2)(b) of the Act provides for alternative compensation arrangements where they are approved in writing by ASIC. Before approving arrangements, ASIC must have regard to any matters that are prescribed by the regulations. Subregulation 2.5(2) provides that ASIC must have regard to whether the licensee's arrangements would provide coverage that is adequate.

Exempt licensees are not required to hold professional indemnity insurance. Exempt licensees are Authorised Deposit-taking Institutions (ADIs) and insurance companies regulated by APRA, and companies in the same corporate group, where the relevant company has a guarantee from the ADI or insurance company ensuring payment of its obligations to an adequate extent. Such guarantees are to be approved by ASIC.

Regulation 2.6 – Offence — failure to cite licence number in documents

Paragraph LIC195(1)(b) of the Act provides that a licensee commits an offence if they fail to cite their Australian credit licence number on documents prescribed in the regulations.

Those documents are:

- documents required to be produced in accordance with the responsible lending obligations of a licensee (Chapter 3);
- advertisements;
- notices required under the Consumer Credit Code;
- a credit contract;
- a document lodged with ASIC; and
- a statement of account given to a debtor.

Part 6 Exemptions

DEF 5 of the Act describes when a person is 'engaging in credit activities' and therefore needs to be either a registered person or the holder of an Australian Credit Licence (depending on the date). However, to allow for the flexible application of the Credit Bill LIC410 provides that regulations may prescribe persons or activities that are exempt from licensing, or activities that are exempted from being credit activities.

Regulation 6.1 – Persons exempted from requiring a licence

The following persons are exempted from the need to hold a licence where they engage in credit activities, while they perform functions, or exercise powers, in any of the following capacities or circumstances:

- an official receiver or trustee ;
- a receiver, receiver and manager, or liquidator;
- a person appointed by a court to engage in a credit activity;
- the Public Trustee of a State or Territory;
- an administrator of a body corporate;
- an administrator of a deed of company arrangement executed by a body corporate;
- a trustee or person administering a compromise or arrangement;
- a personal representative of a deceased person, other than a deceased licensee;
- a personal representative of a deceased licensee;
- a person administering a bankrupt estate or in the winding up of a body corporate or partnership; and
- registered debt agreement administrators.

There is also an exemption from the requirement to be licensed for financial counselling agencies that may engage in credit activities in the course of providing a financial counselling service. This relief is subject to certain conditions including requirements that:

- no fees or charges are payable by the client for any aspect of the activities provided;
- the financial counsellor is appropriately trained to engage in the activities; and
- the financial counsellor is a member of, or is eligible for membership of, a relevant financial counselling association.

This exemption is designed to facilitate the professional delivery of financial counselling services to consumers in financial difficulty.

In addition, there is an exemption from the requirement to be licensed where credit activities are engaged on behalf of a licensee by a related body corporate of the licensee. This is intended to provide an exemption for a company in a corporate group that employs staff who are engaged in credit activities on behalf of a related licensee.

Regulation 6.2 – Activities exempt from being credit activities

Regulation 6.2 exempts the following credit activities from all of the provisions to which Part 6 of Chapter 2 of the Act applies.

Activities undertaken by lawyers

Credit activities undertaken by lawyers in the course of their professional duties are exempted in sub regulation 6.2(2) and (3), and are therefore taken not to be activities that are regulated under the licensing regime. These activities will include the provision of legal advice on credit contracts, consumer leases or mortgages and assisting a consumer in applying for a credit contract by completing a document on the client's instructions.

Activities undertaken by registered tax agents

The activities undertaken by a registered tax agent in the ordinary course of the tax agent's business may amount to credit activities (for example, where the tax agent in providing taxation advice suggests that a consumer apply for the provision of credit under a particular credit contract). This conduct is exempted in subregulation 6.2(4) where it is a necessary part of the tax agent's activities.

Administrative functions

It is intended that the exercising of administrative functions will be exempted from the conduct where it may otherwise fall within the definition of engaging in credit activities.

Passing on factual information

It is intended that communications that consist only of factual information (that is, objectively ascertainable information whose truth or accuracy cannot be reasonably questioned) will generally not involve the provision of a credit service, and therefore will not constitute engaging in credit activities.

The exemption in sub regulation 6.2(6) deals with this situation and is intended to ensure that this conduct does not, by itself, constitute engaging in credit activities.

In some circumstances, a communication that consists only of factual information may amount to credit assistance. For example, where factual information is presented in a manner that may reasonably be regarded as suggesting that a person enter a credit contract, the communication may constitute the provision of credit assistance. An example of this may be where the features of two credit contracts are described in such a manner as to suggest that one compares more favorably than the other. It is intended that this conduct is regulated as engaging in credit activity and the person providing the information would not necessarily be exempt.

Clerks and Cashiers

The exemption in sub regulation 6.2(7) is an exemption for an activity if it is done in the course of work of a kind ordinarily done by clerks or cashiers. If a consumer asks a person to assist him in filling in the application form for a credit product (for example, asking the person to indicate where to include the consumer's details on the form), the assistance provided by the person may be a credit activity as the person is assisting the consumer to apply for a credit contract. This exemption is intended to ensure this conduct does not constitute a engaging in a credit activity.

Passing on prepared documents

There is an exemption in sub regulation 6.2(5) for conduct where it consists only of passing on, publishing, distributing or otherwise disseminating a document (that, for example, contains information about a particular credit contract) which might otherwise amount to acting as an intermediary or providing credit assistance. This exemption is intended to include publishers and internet portal operators.

Regulation 6.3 – Activities exempt from requiring a licence

Referrers

Sub regulation 6.3(2) is an exemption from a requirement to hold a licence in relation to activities that consist solely of the referral of a person to a licensee. The exemption is conditional on the provision of disclosure, at the time the referral is made, of any benefits (including commissions) that the person making the referral (or an associate) is to receive in respect of, or that are attributable to, the referral.