



National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2009¹

Select Legislative Instrument 2009 No.

I, QUENTIN BRYCE, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following Regulations under the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*.

Dated 2009

Governor-General

By Her Excellency's Command

[DRAFT ONLY – NOT FOR SIGNATURE]

Treasurer

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Part 1 Preliminary

1 Name of Regulations

These Regulations are the *National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2009*.

2 Commencement

These Regulations commence on [\[TBA\]](#).

3 Definitions

In these Regulations:

Act means the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*.

associate has the meaning given by regulation 4.

financial counselling association means any of the following:

- (a) the Australian Financial Counselling and Credit Reform Association Incorporated;
- (b) the Financial and Consumer Rights Council Inc (Vic);
- (c) the Financial Counsellors Association of NSW Inc;
- (d) the Financial Counsellors Association of Western Australia;
- (e) the Financial Counsellors Association of Queensland;
- (f) the Financial Counsellors Credit Reform Association Northern Territory;
- (g) the South Australian Financial Counsellors Association Incorporated.

financial counselling service means a counselling and advocacy service provided predominantly for the purpose of assisting individuals who are in financial difficulty due to circumstances such as debt over-commitment, unemployment, sickness or family breakdown.

holding company, in relation to a body corporate, means a body corporate of which the first body corporate is a subsidiary.

lawyer means a duly qualified legal practitioner and, in relation to a person, means a practitioner of that kind acting for the person.

registered debt agreement administrator means a person registered by the Insolvency and Trustee Service Australia as a debt agreement administrator under Part IX of the *Bankruptcy Act 1996*.

related body corporate has the meaning given in regulation 5.

subsidiary, in relation to a body corporate, means a body corporate that is a subsidiary of the first-mentioned body by virtue of Division 6 of Part 1.2 of the Corporations Act.

4 **Meaning of *associate***

- (1) This regulation has effect for the purposes of interpreting a reference (the *associate reference*), in relation to a person (the *primary person*), to an associate.
- (2) A person is not an associate of the primary person except as provided in this regulation.
- (3) Nothing in this regulation limits the generality of anything else in it.
- (4) If the primary person is a body corporate, the associate reference includes a reference to:
 - (a) a director or secretary of the body; and
 - (b) a related body corporate; and
 - (c) a director or secretary of a related body corporate.
- (5) An associate reference includes a reference to:
 - (a) a person in partnership with whom the primary person engages in a credit activity; and
 - (b) subject to subregulation (8), a person who is a partner of the primary person otherwise than because of the engaging in a credit activity in partnership with the primary person; and
 - (c) a trustee of a trust in relation to which the primary person benefits, or is capable of benefiting; and
 - (d) a director of a body corporate of which the primary person is also a director and that engages in a credit activity; and
 - (e) subject to subregulation (8), a director of a body corporate of which the primary person is also a director and that does not engage in a credit activity; and
 - (f) a person in concert with whom the primary person is acting, or proposes to act, in respect of the matter to which the associate reference relates; and
 - (g) a person with whom the primary person is, or proposes to become, associated, whether formally or informally, in any other way, in respect of the matter to which the associate reference relates.

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- (6) If the primary person has entered, or proposes to enter, into a transaction, or has done, or proposes to do, any act or thing, in order to become associated with another person as mentioned in an applicable provision of this regulation, the associate reference includes a reference to that other person.
- (7) A person is not an associate of another person by virtue of subregulation (5), or by virtue of subregulation (6) as it applies in relation to subregulation (5), merely because of one or both of the following:
- (a) one gives advice to the other, or acts on the other's behalf, in the proper performance of the functions attaching to a professional capacity or a business relationship;
 - (b) one, a client, gives specific instructions to the other, whose ordinary business includes engaging in a credit activity, to enter into a credit contract on the client's behalf in the ordinary course of that business.
- (8) For the purposes of proceedings under these Regulations in which it is alleged that a person was an associate of another person by virtue of paragraph 5 (b) or (e), the first-mentioned person is not taken to have been an associate of the other person in relation to a matter by virtue of that paragraph unless it is proved that the first-mentioned person knew, or ought to have known, at that time, the material particulars of that matter.
- (9) A reference to an associate, in relation to an entity (other than a body corporate) that:
- (a) engages in a credit activity; and
 - (b) is constituted by 2 or more persons;
- includes a reference to an associate of any of those persons.

5 Meaning of *related body corporate*

- (1) In these Regulations, *related body corporate*, in relation to a body corporate, means a body corporate that is related to the first-mentioned body in accordance with subregulation (2).
- (2) If a body corporate is:
- (a) a holding company of another body corporate; or
 - (b) a subsidiary of another body corporate; or

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- (c) a subsidiary of a holding company of another body corporate;
the first-mentioned body and the other body are related to each other.

Part 3 Registration

Division 2 The conditions on the registration

3.1 The conditions on the registration

- (1) For subsection **TL60 (7)** of the Act, the registration is subject to the conditions set out in this regulation.
- (2) If:
- (a) there is a change in a matter particulars of which are entered in the Australian credit register for registered persons; and
 - (b) the change is not a direct consequence of an act by ASIC; the registered person must lodge particulars of the change with ASIC, in the approved form, within 10 business days after the change occurs.
- (3) If:
- (a) there is a change in a matter particulars of which are entered in the Australian credit register for credit agents; and
 - (b) the change is not required to be reported in accordance with section **LIC 275** of the *National Consumer Credit Protection Act 2009*; and
 - (c) the change is not a direct consequence of an act by ASIC; the registered person must ensure that particulars of the change are lodged with ASIC in the prescribed form within 10 business days after the change occurs.
- (4) The registered person must ensure that each credit agent of the registered person that may give an authorisation to another credit agent is aware of the requirements in section **LIC 275** of the *National Consumer Credit Protection Act 2009*.

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- (5) The registered person must ensure that, before the registered person authorises a credit agent to engage in a credit activity on its behalf as mentioned in section **LIC 250** of the *National Consumer Credit Protection Act 2009*, reasonable inquiries are made to establish:
- (a) the credit agent's identity; and
 - (b) whether the credit agent has already been allocated a number by ASIC as a credit agent.
- (6) The registered person must ensure that, before a body corporate that is a credit agent of the registered person authorises an individual to engage in a credit activity on behalf of the registered person as mentioned in section **LIC 257** of the *National Consumer Credit Protection Act 2009*, reasonable inquiries are made to establish:
- (a) the individual's identity; and
 - (b) whether the individual has already been allocated a number by ASIC as a credit agent.
- (7) The registered person must ensure that, if:
- (a) ASIC has allocated a number to a credit agent; and
 - (b) the registered person, or a body corporate that has authorised an individual to engage in a credit activity on behalf of the registered person as mentioned in section **LIC 257** of the *National Consumer Credit Protection Act 2009*, lodges a document with ASIC that refers to the credit agent;
- the document refers to the number.
- (8) The registered person must provide a copy of an authorisation of any of its credit agents:
- (a) on request by any person; and
 - (b) free of charge; and
 - (c) as soon as practicable after receiving the request and, in any event, within 10 business days after the day on which it received the request.
- (9) The registered person must take reasonable steps to ensure that each of its credit agents supplies a copy of its authorisation by the registered person:

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- (a) on request by any person; and
 - (b) free of charge; and
 - (c) as soon as practicable after receiving the request and, in any event, within 10 business days after the day on which it received the request.
- (10) If the registered person becomes aware of any change in control of the registered person, the registered person must lodge with ASIC particulars of the change, in the approved form, not later than 10 business days after the change.
- (11) For subregulation (10):
- (a) a change in control, in relation to a registered person, includes a transaction, or a series of transactions in a period of 12 months, that results in a person having control of the registered person (either alone or together with associates of the person); and
 - (b) control, in relation to a registered person, means:
 - (i) if the registered person is a body corporate:
 - (A) having the capacity to cast, or control the casting of, more than one half of the maximum number of votes that might be cast at a general meeting of the registered person; or
 - (B) directly or indirectly holding more than one half of the issued share capital of the registered person (not including any part of the issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital); or
 - (ii) the capacity to control the composition of the registered person's board or governing body; or
 - (iii) the capacity to determine the outcome of decisions about the registered person's financial and operating policies.
- (12) For subparagraph (11) (b) (iii), the following matters must be taken into account in determining whether a person has the capacity to determine the outcome of decisions about the registered person's financial and operating policies:

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- (a) the practical influence the person can exert (rather than the rights it can enforce);
 - (b) any practice or pattern of behaviour affecting the registered person's financial or operating policies is to be taken into account (whether or not it involves a breach of an agreement or a breach of trust).
- (13) On the request of any person, the registered person must make available a copy of its registration within a reasonable time for inspection by that person.
- (14) If:
- (a) the registered person is not a body regulated by the Australian Prudential Regulation Authority; and
 - (b) an event occurs that may make a material adverse change to the financial position of the registered person by comparison with its financial position:
 - (i) at the time of the application for registration; or
 - (ii) as described in documents lodged with ASIC after the application for registration;

the registered person must lodge with ASIC in the prescribed form a notice setting out particulars of the event as soon as practicable, and in any case not later than 3 business days, after the registered person becomes aware of the event.

Part 5 Exemptions

5.1 Persons exempt from being registered

- (1) For @TL190 (a) of the Act, this regulation exempts certain persons engaging in a credit activity from:
- (a) sections TL25 and TL35 of the Act (which deal with the requirement to be registered); and
 - (b) definitions in the Act, as they apply to references in the provisions referred to in paragraph (a); and
 - (c) regulations or other instruments made for the purposes of any of the provisions referred to in paragraphs (a) and (b).

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- (2) A person is exempted if the person engages in a credit activity while performing functions, or exercising powers, in any of the following capacities or circumstances:
- (a) as an official receiver or trustee within the meaning of the *Bankruptcy Act 1966*;
 - (b) as a receiver, receiver and manager, or liquidator (whether appointed by a court or otherwise);
 - (c) as a person appointed by a court to engage in a credit activity;
 - (d) as the Public Trustee acting under a law, prescribed by regulations made for the purposes of this paragraph, of a State or Territory;
 - (e) as an administrator of a body corporate;
 - (f) as an administrator of a deed of company arrangement executed by a body corporate;
 - (g) as a trustee or person administering a compromise or arrangement between a body corporate and another person or persons;
 - (h) as a personal representative of a deceased person other than a deceased registered person;
 - (i) subject to subregulation (3), as a personal representative of a deceased registered person;
 - (j) in the administration of a bankrupt estate or in the winding up of a body corporate or partnership;
 - (k) as a registered debt agreement administrator administering a debt agreement under Part IX of the *Bankruptcy Act 1996*.
- (3) Paragraph (2) (i) only applies until the first of the following events takes place:
- (a) the end of 6 months after the death of the registered person;
 - (b) the removal or discharge of the personal representative;
 - (c) the final distribution of the registered person's estate.
- (4) A person is exempted if the following circumstances exist:
- (a) the person is a financial counselling agency;

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- (b) the credit activity is engaged in as part of a financial counselling service;
 - (c) no remuneration (whether by way of commission or otherwise) is payable to, or on behalf of, the financial counselling agency by any person in relation to any action by, or on behalf of, the client arising from:
 - (i) engaging in the credit activity; or
 - (ii) any other aspect of the provision of the financial counselling service
 - (d) no remuneration (whether by way of commission or otherwise) is payable to, or on behalf of, a representative of the financial counselling agency by any person in relation to any action by, or on behalf of, the client arising from:
 - (i) engaging in the credit activity; or
 - (ii) any other aspect of the provision of the financial counselling service
 - (e) no remuneration (whether by way of commission or otherwise) is payable to, or on behalf of, an associate of the financial counselling agency by any person in relation to any action by, or on behalf of, the client arising from:
 - (i) engaging in the credit activity; or
 - (ii) any other aspect of the provision of the financial counselling service
 - (f) the financial counselling agency takes all reasonable steps to ensure that each person who engages in credit activities on its behalf:
 - (i) is a member of, or is eligible to be a member of, a financial counselling association; and
 - (ii) has undertaken appropriate training to ensure that the person has adequate skills and knowledge to engage satisfactorily in the credit activity and any other aspect of the provision of the financial counselling service.
- (5) A person is exempted if the person is:
- (a) a related body corporate of a registered person; and

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- (b) engaging in credit activities on behalf of the registered person.

5.2 Activities exempt from being credit activities

- (1) For @**TL190** of the Act, this regulation exempts certain credit activities, or classes of credit activities, from all of the provisions to which Part 5 of Schedule 1 to the Act applies.

Note Section **TL180** of the Act identifies the provisions to which Part 5 of Schedule 1 to the Act applies.

- (2) The following activities are exempted:
- (a) the providing of credit assistance by a lawyer in his or her professional capacity in relation to matters of law, legal interpretation or the application of the law to any facts;
 - (b) the providing of any credit assistance not mentioned in paragraph (a) by a lawyer in the ordinary course of activities as a lawyer that is reasonably regarded as a necessary part of those activities.
- (3) A credit activity is exempted if it is engaged in by a lawyer in the following circumstances:
- (a) the lawyer is acting:
 - (i) on the instructions of a client, an associate of the client or a relative of the client; and
 - (ii) in his or her professional capacity; and
 - (iii) in the ordinary course of his or her activities as a lawyer;
 - (b) the credit activity can reasonably be regarded as a necessary part of those activities;
 - (c) the lawyer has not received, and will not receive, from the client or from another person on behalf of the client a benefit in connection with those activities other than:
 - (i) the payment of professional charges in relation to those activities; and
 - (ii) reimbursement for expenses incurred or payment on account of expenses to be incurred on behalf of the client, an associate of the client or a relative of the client.

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- (4) A credit activity is exempted if it is engaged in by a tax agent in the following circumstances:
- (a) the tax agent is registered under Part VIIA of the *Income Tax Assessment Act 1936*;
 - (b) the tax agent engages in the credit activity in the ordinary course of activities as a tax agent.
- (5) A credit activity is exempted if:
- (a) the credit activity consists only of a person (*person 1*) passing on, publishing, distributing or otherwise disseminating a document; and
 - (b) the document was provided by another person (*person 2*); and
 - (c) person 2 is not acting on behalf of person 1; and
 - (d) person 1 is not a registered person; and
 - (e) person 1 does not select the content of the document, modify the content of the document or otherwise exercise control over the content of the document; and
 - (f) a reasonable person would not consider that person 1 provided, endorsed or otherwise assumed responsibility for the information contained in the document.
- (6) A credit activity is exempted if:
- (a) the credit activity consists of a person (*the provider*) giving to another person (*the inquirer*), in response to a request made by the inquirer to the provider, information about:
 - (i) the cost, or an estimate of the likely cost, of a credit contract;
 - (ii) terms and conditions of a credit contract; and
 - (b) the provider could have complied with the request by giving the inquirer equivalent information about 1 or more other credit contracts; and
 - (c) the provider did not give the inquirer that equivalent information.
- (7) A credit activity is exempted if it is engaged in by a clerk or cashier in the ordinary course of activities as a clerk or cashier.

5.3 Activities exempt from being registered

- (1) For @TL190 (b) of the Act, this regulation exempts certain credit activities (an *exempt credit activity*) from:
 - (a) sections TL25 and TL35 of the Act (which deal with the requirement to be registered); and
 - (b) definitions in the Act, as they apply to references in the provisions referred to in paragraph (a); and
 - (c) regulations or other instruments made for the purposes of any of the provisions referred to in paragraphs (a) and (b).
- (2) A credit activity is exempted if:
 - (a) the activity consists only of:
 - (i) a person (*person 1*) informing another person (*person 2*) that a registered person, or a representative of the registered person, is able to provide a particular credit activity or a class of credit activities; and
 - (ii) person 1 giving person 2 information about how person 2 may contact the registered person or representative;
 - (b) at the time the activity is engaged in, person 1 discloses to person 2:
 - (i) any benefits, including commission, that person 1, or an associate of person 1, may receive in respect of the activity; and
 - (ii) any benefits, including commission, that person 1, or an associate of person 1, may receive that are attributable to the activity;
 - (c) the disclosure mentioned in paragraph (b) is provided in the same form as the information mentioned in paragraph (a).

Note

1. All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.