

EXPLANATORY STATEMENT

Select Legislative Instrument 2009 No.

Issued by the Authority of Minister for Financial Services, Superannuation and Corporate Law

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

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

The *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Act) sets out the transitional and consequential arrangements to support the transfer of the regulation of credit from the States and Territories to the Commonwealth.

Section 6 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 deals with the transition from the regime provided in the old Credit Code to the new consumer credit regime provided for in both the *National Consumer Credit Protection Act 2009* (Credit Act) and Schedule 2 to the Act, including:

- the application of the existing legislation or the proposed legislation to legal proceedings that arose before the change;
- the rights or liabilities a person may have under the existing legislation; and
- the extent to which the existing legislation may continue to have effect under the Credit Act.

Schedule 2 to the Act sets out the requirement for persons currently engaging in credit activities to become registered with the Australian Securities and Investments Commission (ASIC), prior to applying for an Australian credit licence (ACL).

Schedule 3 to the Act includes consequential amendments to other laws.

The Act 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 the day Schedule 1 to the Act commences (except regulation 8 which commences on the day item 22 of Schedule 1 to the Act commences).

Part 1 Preliminary

Regulation 1 – Name of Regulations

Regulation 1 provides that the name of the Regulations is the *National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2009*.

Regulation 2 – Commencement

Regulation 2 provides that the Regulations commence on the day Schedule 1 to the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* commences except regulation 8 which commences on the day item 22 of Schedule 1 to that Act commences..

Regulation 3 – Definitions

Regulation 3 defines words and expressions that are used in the Regulations. This includes defining *Act* to mean the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*.

Regulation 4 – Meaning of Associate

Regulation 4 provides for the definition of the term *associate* for the purposes of interpreting a reference (the associate reference), in relation to a person (the primary person), to an associate.

Part 2 Transitional provisions

Regulation 5 – Application of new Credit Code to particular sale contracts

Regulation 5 provides that subsections 10, 11 and 12 of the National Credit Code (which relate to the sale of land or goods by instalments) do not apply to the provision of credit, before 29 May 2009.

Regulation 6 – Treatment of proceedings brought under old Credit Code before commencement

Regulation 6 provides that when a State or Territory “Government Consumer Agency” is a party to an existing court proceeding, it is acting as an agent of the ASIC.

Regulation 7 – ASIC’s approach during the transitional period

Regulation 7 provides that, during the transitional period, ASIC must undertake extensive industry consultation, and work closely and cooperatively with stakeholders to develop guidance material and to explain and clarify the requirements of the Credit Act.

Regulation 8 – Transfer of assets or liabilities to ASIC

Regulation 8 provides that a transfer agreement may be entered into between ASIC (or on behalf of ASIC) and a referring State or Territory. The transfer agreement may determine how assets or liabilities relating to the regulation of credit providers may be transferred to ASIC from a referring State or Territory or an authority of a referring State or Territory.

Part 4 Registration

Regulation 9 – The conditions on the registration

Section 14(7) of the Act provides that the registration is subject to the conditions set out in the regulation.

The regulation requires a registered person to notify ASIC of specified matters including:

- changes to particulars entered in the Australian Credit Register established under Part 5-1 of the Credit Act (for example, changes in the name or contact details of the licensee);
- details in relation to the authorisation of credit agents to engage in a credit activity on behalf of the registered person, and changes to authorisations; and
- certain matters relevant to the registration, including changes in control and, except in respect of bodies regulated by Australian Prudential Regulation Authority, events that may have a material adverse impact on the financial position of the registered person.

This regulation imposes conditions in respect of a range of technical or practical arrangements that ensure licensees persons provide ASIC with information that is current and relevant. This information enhances ASIC's capacity to effectively carry out its regulatory functions in respect of supervising those licensees. It also assists ASIC to ensure that when persons, both consumers and industry bodies, seek information from the Australian Credit Register that this data is current.

Part 5 Exemptions

Sections 3 to 6 of Schedule 2 to the Act require a person to be registered or licensed to engage in credit activities within specified periods.

Regulations 10 to 15 provide for exemptions, so that persons meeting specified criteria do not need to comply with the registration and licensing requirements under the Act.

Regulation 10 – Persons exempt from being registered — general

Subregulation 10(2) exempts the following persons from the need to be registered or licensed if they engage in credit activities while performing functions, or exercising powers, in any of the following capacities or circumstances:

- an official receiver or trustee within the meaning of the *Bankruptcy Act 1966*;
- 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 (with Regulation 2.8(3) limiting the period of the exemption until either six months have elapsed, the estate had been distributed or the personal representative has been removed);
- a person administering a bankrupt estate or the winding up of a body corporate or partnership; and
- registered debt agreement administrators, administering debt agreements under Part IX of the *Bankruptcy Act 1966*.

Subregulation 10(4) exempts financial counselling agencies that may engage in credit activities in the course of providing their services. The exemption only applies where the agency meets certain conditions, including 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.

The regulation defines *financial counselling association* to mean the peak bodies for financial counsellors in Australia.

This exemption will allow financial counselling services, which are predominantly funded by government, to continue to provide advice and assistance to consumers in financial difficulty, without needing to meet the requirements applying to licence holders.

Subregulation 10(5) exempts a person from the need to be registered in the following situations:

- where a person is a related body corporate of the registered person and engages in credit activities on behalf of that registered person;
- where a person is a public body or authority or a local government body authority (constituted under an Act of the Commonwealth, or a State or Territory); or
- a person authorised by an Act of the Commonwealth, or a State or Territory to lend money or provide credit.

Subregulation 10(6) exempts a person from the need to be registered where:

- the person is an organisation that makes benefits available to its members, and one benefit is that members are able to enter into a particular credit contract or consumer lease; and
- the person provides credit services in relation to the particular credit contracts or consumer leases, and does not otherwise engage in credit activities.

Regulation 11 – Persons exempt from being registered — persons holding a licence under a State or Territory Act

Regulation 11 exempts a person from the need to be registered where:

- the person engages in credit activities by:
 - demanding and receiving meetings from borrowers or guarantors under credit contracts;
 - enforcing rights in relation to taking possession of property secured by a mortgage;
- the person either holds a licence or authorisation under a specified State or Northern Territory Act to engage in those collection activities or is authorised by a licence holder in accordance with a specified Act; and

- the person is authorised in writing by a registered person or a licensee to engage in the credit activities.

Subregulation 11(3) provides that the exemption only applies for a 12 month period.

Debt collectors are already subject to licensing requirements in every State and in the Northern Territory. The exemption means that debt collectors are not subject to dual licensing regimes.

Regulation 12 – Persons exempt from being registered — third parties

Regulation 12 exempts a person from the need to be registered where the person only engages in credit activities on behalf of a credit provider, a mortgagee or a person who is the beneficiary of a guarantee by:

- selling or transporting property of a debtor or guarantor; or
- giving or sending notices or documents to a debtor or guarantor.

Regulation 13 – Persons exempt from being registered — providers of point of sale credit assistance

Regulation 13 exempts a person from the need to be registered where:

- the person is a supplier of goods or services;
- the supplier only engages in credit activities by providing credit services in relation to a credit contract or consumer lease; and
- the relationship between the supplier and credit providers or lessors is such that they are linked credit providers or linked lessors.

Subregulation 13(3) extends the definition of linked credit provider in section 127 of the Credit Code to also cover consumer leases. A credit provider or lessor will be linked with the supplier where there is an ongoing relationship between the two parties, including where:

- there is a contract, arrangement or understanding between them relating to the supply to the supplier of goods, or to the business carried on by the supplier; or
- the supplier;
 - regularly refers consumers to the linked credit provider or linked lessor; or
 - consumers can sign application forms or credit contracts or consumer leases at the premises of the supplier.

The exemption will not apply in the following situations:

- where the supplier is a related body corporate of the linked credit provider or linked lessor;
- where the supply of the goods or services is the result of an unsolicited meeting or phone call to the consumer - a supplier cannot rely on the exemption where, for example, the goods or services are being provided as a result of door-to-door canvassing.

Regulation 14 – Activities exempt from being credit activities

Regulation 14 exempts the following credit activities from the Act:

- credit assistance provided by a lawyer in the lawyer's professional capacity in relation to matters of law or in the ordinary course of legal activities;

- credit activities undertaken by a registered tax agent in the ordinary course of the tax agent's business;
- where the only credit activities engaged in is engaging in communications that consist only of passing on factual information to the consumer;
- responding to requests for information in relation to the cost of a credit contract, or the terms or conditions of a credit contract; or
- activity done in the course of work of a kind ordinarily done by clerks or cashiers.

Activities undertaken by lawyers

The following conduct by lawyers is exempted by subregulations 14(2) and (3):

- the providing of credit assistance in their professional capacity as a lawyer - 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.
- engaging in credit activities on the instructions of a client where the credit activities is a necessary part of acting on those instructions.

These exemptions will enable lawyers to act for either borrowers or licensees without needing to hold a licence, where their conduct comes within the ordinary course of the activities of a lawyer, or is otherwise within the exemption.

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. This conduct is exempted in subregulation 14(4) where it is a necessary part of the tax agent's activities.

Passing on prepared documents

There is an exemption in subregulation 14(5) for conduct where it consists only of passing on, publishing, distributing or otherwise disseminating a document which might otherwise amount to acting as an intermediary or providing credit assistance.

This exemption is intended to include publishers and internet portal operators, and covers situations such as passing on a document that, for example, contains information about a particular credit contract.

Passing on factual information

It is intended that some communications in relation to the provision 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 subregulation 14(6) deals with this situation and provides that this conduct does not, by itself, constitute engaging in credit activities where:

- the factual information is limited to information about either the cost or an estimate of the likely cost of a credit contract or lease, or the terms and conditions of a credit contract or lease;

- the information is only provided in response to a request by a person, and is not provided in an unsolicited way; and
- the provider could have complied with the request by giving the other person information about one or more other credit contracts or leases, but elected not to do so.

Clerks and Cashiers

Subregulation 14(7) exempts 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, photocopying documents provided by the consumer or faxing a completed application 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 ensures that conduct of this nature, which is more appropriately characterised as administrative, does not constitute engaging in a credit activity.

Regulation 15 – Activities exempt from being registered

Subregulation 15(2) is an exemption from a requirement to be registered where a person only engages in credit activities by referring a person to a registered person.

The exemption only applies where, at the time the referral is made, the person discloses to the consumer, any benefits (including commissions) that the referrer or an associate may receive in respect of, or that are attributable to, the referral.

The exemption allows persons who may otherwise be acting as an intermediary within the meaning of section 9 of the Credit Act to rely on the exemption where their role is minimal, in only passing on contact details to the borrower.

Subregulation 15(3) is an exemption from a requirement to hold a licence where a person only engages in credit activities in relation to credit where the credit is already largely, but not entirely, exempt from the requirements of the Code.