

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2010 No.**

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

*National Consumer Credit Protection Act 2009*

*National Consumer Credit Protection Regulations 2010*

The *National Consumer Credit Protection Act 2009* (Credit Act) applies to the provision of credit for personal use, and to related matters, including the establishment of a licensing regime for persons engaging in credit activities.

Section 329 of the Credit 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.

The purpose of the *National Consumer Credit Protection Regulations 2010* (Credit Regulations) is to deal with matters of detail within the framework established by the Credit Act. The Regulations are divided into seven Chapters.

Chapter 1 deals with preliminary matters, such as the name of the regulations, definitions and the commencement of the Regulations.

Chapter 2 deals with the licensing of persons who engage in credit activities, and include regulations that:

- impose standard form conditions that apply to all holders of an Australian credit licence (ACL), and some further conditions only applying to foreign entities;
- exempt persons or activities from the requirement to be licensed, for example for point of sale credit services; financial counsellors and State licensed debt collectors for 12 months;
- set out the procedures for streamlining specified applicants to an ACL; and
- specifying the qualifications that must be met by auditors providing reports on licence holders, and the standards they must meet when drafting their reports.

Chapter 3 contains a regulation related to the responsible lending conduct obligations. Specifically, it varies the period for which an assessment can be relied on, where the credit contract is being used to finance the purchase of a residential property secured by a mortgage.

Chapter 4 deals with the details which the Australian Securities and Investments Commission (ASIC) must include in its credit registers.

Chapter 5 deals with:

- prescribing the forms to be used by ASIC when issuing a written notice or summons to a person;
- whom ASIC can provide a report of an investigation;
- evidences of authority for ASIC staff and ASIC members; and

- allowances and expenses that can be paid to a person who appears at an ASIC hearing.

Chapter 6 sets out where legal proceedings are to be commenced and provides regulations which support the infringement notice regime under the Credit Act.

Chapter 7 contains regulations relating to the National Credit Code (Code). These include:

- Exemptions from the Code;
- Prescribed disclosure requirements, for example in relation to business purpose declarations, interest rates, information to be included in notices, etc.

Details of the Regulations appear in the Attachment.

The Credit 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 commence on the date 1 July 2010.

DRAFT

## Chapter 1 Preliminary

### Regulation 1 – Name of Regulations

Regulation 1 provides that the name of the Regulations is the *National Consumer Credit Protection Regulations 2010*.

### Regulation 2 – Commencement

Regulation 2 provides that the Regulations commence on 1 July 2010.

### Regulation 3 – Definitions

This regulation defines words and expressions that are used in the Regulations.

### Regulation 4 – Meaning of associate

This regulation explains the circumstances under which a person will become an associate of a primary person. A person will become an associate of a primary person if the person's interests and the primary person's interests are linked by virtue of their being in a formal relationship (for example, that between a director and a company) or an informal relationship (for example, where the parties have not entered into an agreement but act together to pursue a common objective)

### Regulation 5 – Prescribed orders

Orders made under the following Acts are prescribed for the purposes of the term *prescribed State or Territory order* in subsection 5(1) of the Credit Act:

- the *Crimes (Criminal Organisation Control) Act 2009* (NSW); and
- the *Serious and Organised Crime (Control) Act 2009* (SA).

An order in respect of a person under these Acts, because of their involvement in organised crime, will be relevant to ASIC's decision whether or not to grant, cancel or suspend a licence, or ban an individual from engaging in credit activities.

### Regulation 6 – Forms

This regulation specifies details relating to the use of forms in the Regulations.

## Chapter 2 Licensing of person who engage in credit activities

### Part 2-1 Australian credit licences

#### Regulation 7 – How to get an Australian credit licence – requirements for a foreign entity to appoint a local agent.

This regulation sets out specific obligations applying to foreign entities engaging in credit activities in Australia and that therefore need to hold an Australian credit licence (ACL).

Regulation 7 requires these foreign entities:

- to appoint a local agent, that is, 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; and
- to provide evidence of the appointment to ASIC with the application for the licence.

There is already an existing requirement for foreign bodies corporate conducting business in Australia to meet equivalent requirements under Part 5B.2 Division 2 of the *Corporations Act 2001* (Corporations Act). The effect of this regulation is to extend the requirement for a local agent to natural persons, trusts and partnerships, that are currently not subject to this obligation. It also ensures that all foreign bodies provide this information to ASIC as part of the application process. The regulation therefore ensures that foreign entities are represented in Australia, and that ASIC and consumers can serve notices on that entity in Australia, rather than having to do so overseas.

#### Regulation 8 – How to get an Australian credit licence – streamlined process for particular classes of applicants

Section 39 of the Credit Act provides that the application procedures for particular classes of applicants can be streamlined by providing that the eligibility requirements in sections 36 and 37 of the Act do not apply, and that alternative processes apply. Regulation 8 sets out alternative processes for the classes of applicants identified in the regulation. There are two classes of applicants who can be streamlined:

- persons authorised to engage in credit activities under a law of a State or Territory where the effect of that law is that those persons are already subject to obligations that are similar to those in the Credit Act; and
- persons authorised by APRA to carry on business as a provider of lenders' mortgage insurance.

The regulation provides that:

- The requirement in paragraph 37(1)(b) of the Credit Act (that ASIC must have no reason to believe the applicant is likely to contravene the obligations in section 47) does not apply to applicants:
  - who are authorised to engage in credit activities under a law of a State or Territory; and
  - the State or Territory law requires those person to meet requirements similar to those in the Credit Act (for example, it requires persons to comply with the law themselves and to ensure people they supervise also comply with the law).
- The requirement in paragraph 37(1)(c) of the Act (that ASIC must have no reason to believe the applicant is not a fit and proper person) does not apply to applicants:
  - who are authorised to engage in credit activities under a law of a State or Territory; and
  - the State or Territory law has a requirement to the effect that persons engaging in credit activities are fit and proper persons (however described).
- For persons authorised by APRA to carry on business as a provider of lenders' mortgage insurance, the requirements in section 37 of the Act do not apply to those persons where they apply for a licence under section 36 of the Act, and include a statement that if they are granted a licence they will comply with the obligations imposed on a licensee.

## Regulation 9 – The conditions on the licence

Section 45 of the Act provides that the holder of an ACL is subject to such conditions as are prescribed by regulations. Regulation 9 sets out standard conditions that apply to all licensees.

The regulations require licensees to notify ASIC of specified matters including:

- changes to particulars entered in the credit registers established under Part 5-1 of the 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
- notifying ASIC of certain matters relevant to the registration, including changes in control and, except in respect of bodies regulated by the Australian Prudential Regulation Authority (APRA), events that may have a material adverse impact on the financial position of the registered person.

Subregulations 9(10) and (11) set out the circumstances that will amount to a change in control of the licensee. In these circumstances, the licence must lodge particulars of the change in control with ASIC within 10 days.

This regulation imposes conditions in respect of a range of technical or practical arrangements that ensure licensed 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 credit registers that this data is current.

Subregulations 9(8), (9) and (13) require a licensee to:

- respond within 10 business days, to requests by persons by providing, free of charge, evidence of its Australian credit licence; or an authorisation of any of its credit representatives; and
- take reasonable steps to ensure that each of its credit representatives is able to supply, free of charge, evidence of its authorisation by the licensee within 10 business days of a request by a person.

These requirements are intended to allow consumers to be satisfied that the person they are dealing with is properly authorised to engage in credit activities under the Credit Act.

Subsection 45(5) of the Act provides that ASIC cannot vary or revoke these conditions, ensuring that these conditions continue to apply uniformly to all persons while they hold a licence.

ASIC also has statutory power under section 45 to apply additional conditions, to all licensees, to particular classes of licensees, or to individual licensees.

## Regulation 10 – Obligations of licensees – alternative dispute resolution systems

Subparagraph 47(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.

Paragraph 47(1)(i) of the Act provides that a licensee must be a member of an approved external dispute resolution scheme. The definition of *approved external dispute resolution scheme* in section 11 of the Act is a scheme approved by ASIC in accordance with the regulations.

Regulation 10 prescribes:

- 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 (IDR); and
  - whether to approve an external dispute resolution scheme.
- that ASIC may vary or revoke a standard that it has made or approved in respect of an internal dispute resolution procedure.

When making or approving standards in relation to IDR procedures, ASIC will consider a range of factors, including:

- (a) the size of a person's business;
- (b) the range of credit activities they engage in;
- (c) the nature of their customer base; and
- (d) the likely number and complexity of complaints.

The regulation also specifies limited circumstances in which a licensee is not required to be a member of an approved external dispute resolution scheme.

These circumstances are where:

- the licensee engages in credit activities in the following capacities:
  - as a trustee appointed under a will, or on the intestacy of a person;
  - a trustee appointed under an express trust, where the settler is a natural person and the interest in the trust is not a credit contract; or
  - an attorney appointed under an enduring power of attorney; and
- complaints about the licensee may be made to the Ombudsman of a State or Territory.

### Regulation 11 – Obligations of licensees – foreign entity must continue to have local agent.

Regulation 11 imposes the following conditions on all foreign entities that are not foreign companies that hold an ACL:

- to continue to have a local agent authorised to accept service of process and notices, on behalf of the foreign entity;
- to notify ASIC of any changes to their local agent or changes to the contact details of the appointed local agent; and
- to have arrangements so that ASIC may 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.

Corporate foreign bodies conducting business in this jurisdiction are already under equivalent requirements under Part 5B.2 Division 2 of the Corporations Act.

### Regulation 12 – Obligations of licensees – requirements for compensation arrangements

Paragraph 47(1)(j) of the Act requires licensees 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 satisfy any requirements that may be prescribed under subsection 48(2).

Subregulation 12(1) requires all licensees to hold professional indemnity insurance cover, except exempt those licensees exempt under subregulation 12(3). The insurance must be adequate to cover the risk of claims by consumers, having regard to the likely amount of claims, and given the type of business the licensee is engaged in.

Subregulation 12(3) defines exempt licensees as:

- Authorised Deposit-taking Institutions (ADIs) and insurance companies regulated by APRA.
- Companies in the same corporate group, where the licensee has a guarantee from the ADI or insurance company ensuring payment of its obligations to an adequate extent. Such guarantees are required to be specifically approved in writing by ASIC.
- Licensees who are only authorised to engage in lending activities (and not to provide credit services).

Paragraph 47(2)(b) of the Act allows for alternative compensation arrangements to apply to licensees, where those arrangements have been approved in writing by ASIC. Paragraph 47(3)(c) requires ASIC to have regard to any matters that are prescribed by the regulations before approving any alternative arrangements.

Subregulation 12(2) provides that ASIC must have regard to whether any arrangements proposed as an alternative to those in the regulations (that is, currently, as an alternative to professional indemnity insurance) would provide coverage that is adequate.

### Regulation 13 – Obligations of licensees – offence in relation to failure to cite licence number in documents

Subsection 52(2) of the Act provides that a licensee commits an offence if they fail to cite their ACL number on documents prescribed in the regulations.

The relevant documents are specified in regulation 13 as follows:

- documents required to be produced in accordance with the responsible lending obligations of a licensee under Chapter 3 of the Act;
- printed advertisements related to regulated credit– subregulation 13(2) allows for advertisements to only include the licence number of one licensee, notwithstanding that the advertisement identifies more than one licensee;
- documents that a licensee is required to create, produce, give or published under the National Credit Code (in Schedule 1 to the Act) – this will include, for example, credit contracts and statement of account given to a debtor; and
- a document lodged with ASIC related to credit.

### Regulation 14 – Obligations of licensees – who compliance certificate must be signed by

Section 53 of the Act requires licence holders to lodge an annual compliance certificate with ASIC. Paragraph 53(3)(b) provides that where the licensee is a body corporate, the certificate must be signed by a person of a kind prescribed by the regulations.

Regulation 14 provides that the compliance certificate must be signed by:

- the Chief Executive Officer of the body corporate; or
- if the body corporate does not have a Chief Executive Officer – the person responsible for managing the affairs of the body corporate who has authority in relation to the allocation of resources within the licensee for complying with the Act.

### Regulation 15 – When a licence can be suspended, cancelled or varied – grounds to suspend or cancel licence

Paragraph 55(2)(e) of the Act provides for matters to be prescribed that ASIC must take into account in deciding whether or not to suspend or cancel a licence. Regulation 15 provides that ASIC must take into account the following matters:

- any failure by a licensee to lodge an annual compliance certificate (as required by section 53); and
- a licensee lodging a compliance certificate that contains information that is either false or misleading, or that cannot be reasonably be believed to be true by the person signing the certificate.

The purpose of this regulation is to ensure that there is proper attention given to the contents of the compliance certificate by the person who is signing it, and that its contents can reasonably be relied upon by ASIC.

## **Part 2-2 Authorisation of credit representatives**

### Regulation 16 – Sub-authorisation by body corporate

Paragraph 65(6)(c) of the Credit Act has the effect that a body corporate that is a credit representative can only sub-authorise a credit representative if that person is a member of an approved EDR scheme.

This regulation modifies the effect of that requirement so that credit representatives who are employees or directors of the body corporate can be sub-authorised without having to hold membership of an EDR scheme in their own right.

## **Part 2-2 Financial records, trust accounts and audit reports**

### Regulation 17 – Information and matters to be contained in a trust account audit report

This regulation sets out the information and matters that must be included in a trust account audit report pursuant to paragraph 100(3)(b) of the Credit Act. These obligations therefore only apply to holders of an ACL where they are hold a trust account in relation to the provision of credit services (and are therefore holding money on behalf of another person).

An auditor is required to include the following information in their report:

- whether, in the opinion of the auditor, the trust accounts have been properly maintained;
- whether the auditor received all necessary records, information and explanations from the licensee;
- whether, in the opinion of the auditor, the licensee's trust accounts provide a n accurate statement of the transactions in relation to funds passing through the account, and the balance of the account; and
- any other matter in relation to the trust accounts which should, in the opinion of the auditor, be communicated to ASIC.

For example, if in the course of auditing a credit service provider's trust accounts, an auditor discovers that one or more of the accounts are not kept in such a manner as to enable them to be properly audited, or discovers any matter which appears to the auditor to involve dishonesty or a breach of the law on the part of the credit service provider, or discovers loss or deficiency of trust moneys (whether generally or in an individual trust ledger account), or failure to pay or account for any such moneys, or to comply with the provisions of the Act, the regulation requires the auditor to fully set out the facts, so discovered, in the report.

### Regulation 18 – Eligibility of auditors to prepare trust account audit report

Subsection 100(4) of the Act enables regulations to be made in relation to the eligibility requirements of persons preparing a trust account audit report, as required under subsection 100(2).

Regulation 18 provides that a person will not be eligible to prepare a trust account audit report unless:

- the person has been registered by ASIC as a registered company auditor (having satisfied the requirements in the Corporations Act by completing specified courses at specified universities and institutions and obtaining the requisite practical experience in auditing); and the person is

not in a specified relationship with the licensee that may have the potential to cast doubt on the auditor's independence. The specified relationships are that the person must neither be an employee, director or partner of the licensee or of any person engaged in credit activities, nor should the person be carrying on a business of engaging in credit activities; or

- the person has been registered by ASIC as an authorised audit company (having satisfied the requirements in the Corporations Act including the qualification of its directors, shareholding by individuals and the possession of professional indemnity insurance); or
- the person is not in a financial relationship with the licensee that would otherwise make the person ineligible, for example, where the person or a body corporate in which the person has a substantial holding, owes money to, or is owed money by, the licensee. A person is not ineligible if the person obtains a loan from an Australian authorised deposit institution or life insurance company to pay for all or part of the purchase price of the person's principal place of residence; or
- if the licensee is a body corporate, the person is neither an officer of the licensee nor a partner or employee of an officer of the licensee.

#### Regulation 19 – Auditors who prepare audit reports

Paragraph 106(c) of the Act enables regulations to be made in relation to auditors who prepare licensees' audit reports for each financial year; or any other period within the financial year, where ASIC directs that a licensee provides an audit report in relation to specified information.

Subregulation 19(2) provides that a person is eligible to be an auditor only if that person has been registered by ASIC as a registered company auditor (having satisfied the requirements in the Corporations Act by completing specified courses at specified universities and institutions and obtaining the requisite practical experience in auditing); and the person does not have a specified relationship with the licensee that may have the potential to cast doubt on the auditor's independence. The specified relationships are that the person must neither be an employee, director or partner of the licensee or of any person engaged in credit activities, nor should the person be carrying on a business of engaging in credit activities.

Subregulation 19(3) provides that within three months of a licensee being required to open a trust account, the licensee must appoint a person who is eligible to be an auditor and the licensee must notify ASIC within 14 days of the appointment.

Subregulation 19(4) provides that the auditor's appointment is continuous until the licensee has no obligation to maintain a trust account, or the auditor dies, resigns or is removed by the licensee.

If the auditor's appointment is discontinued under these circumstances, subregulation 19(5) provides that the licensee must, within 28 days, appoint a replacement person who is eligible to be an auditor and notify ASIC within 14 days of the appointment.

### **Part 2-3 Exemptions**

Sections 6 to 10 of the Act define when a person is 'engaging in credit activities', and, therefore, when they must meet the obligations applying to a licensee. Regulations 20 to 26 provide for exemptions and modifications, so that persons meeting the criteria in these regulations do not need to comply with the licensing requirements.

## Regulation 20 – Persons exempt from requiring a licence – general

Subregulation 20(3) provides that 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 within the meaning of the *Bankruptcy Act 1966*;
- a receiver, receiver and manager, provisional liquidator 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 subregulation 20(4) limiting the period of this 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, where they are preparing or administering debt agreements under Part IX of the *Bankruptcy Act 1966*.

These exemptions cover a range of situations where a third party may be acting to assist or act on behalf of a licensee, borrower or consumer, because of specific circumstances where licensing is unnecessary (for example, the licensee has become insolvent). Requiring these third parties to be licensed would be unnecessary given that their function is to finalise the operation of the business.

Subregulation 20(2) provides that a person is only exempted to the extent they are engaging in the specified credit activity. This means, for example, the exemption for registered debt agreement administrators only applies to the extent they are preparing or administering debt agreements, and allows these persons to negotiate with credit providers on behalf of consumers, without needing to be licensed.

Subregulation 20(5) provides an exemption for 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.

Regulation 3 defines *financial counselling association* to mean the peak bodies for financial counselors 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. This exemption is consistent with that provided for financial counsellors under ASIC Class Order 03/1069, in respect of activities that would otherwise require them to hold an Australian financial services licence.

Subregulation 20(6) provides an exemption from the requirement to be licensed where a person is:

- a related body corporate of the licensee;
- engaging in credit activities:
  - only on behalf of that licensee; and
  - only because its employees and directors are engaging in credit activities on behalf of that licensee; and
- the person is not engaging in credit activities listed in items 1(a) and (b) or 3(a) and (b) of the table in subsection 6(1) of the Credit Act (that is, lending activities in its own right).

The exemption is consistent with the defence to the prohibition on engaging in credit activities in subsection 29(3) of the Credit Act. That provision provides a defence for the employees and directors of a related body corporate, but not the body corporate itself. This regulation exempts the related body corporate where it only engages in credit activities through its employees where they are acting on behalf of the licensed body corporate.

Subregulation 20(7) provides an exemption from the requirement to be licensed where a person is a public body or authority or a local government body or authority, constituted under an Act of the Commonwealth or a State or Territory. These persons are exempt as they are generally subject to other forms of oversight or accountability.

Subregulation 20(8) provides an exemption from the requirement to be licensed where a person is authorised:

- to engage in credit activities either by:
  - an Act of the Commonwealth or a State or Territory; or
  - a licence or registration issued or granted under an Act of the Commonwealth or a State or Territory (other than an Australian credit licence issued under the Credit Act or a registration under the Transitional Act); and
- the person only engages in credit activities to the extent they are authorised by the Act, licence or registration.

The purpose of subregulation 20(8) is to provide for an exemption from the requirement to be licensed where a person is authorised to engage in credit activities under legislation other than the Credit Act or the Transitional Act. It will usually be the case that such authorisations are limited or that the entity only engages in credit activities in a way incidental to other activities, given that the Credit Act and the Transitional Act are intended to be the primary sources of regulation for those engaging in credit activities.

Subregulation 20(9) provides that this exemption will not apply to debt collectors following the expiration of the 12 month period for the specific exemption for this class of persons in Regulation 20.

Subregulation 20(10) provides an exemption from the requirement to be licensed for persons where:

- the person is an organisation that provides services and makes benefits available to its members, and an incidental benefit is that members are eligible to apply 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 provide credit services.

The reference to ‘being eligible to apply to enter into a particular credit contract or consumer lease’ contemplates that as a result of membership a consumer may receive offers to enter into credit contracts or consumer leases, either from the organisation directly or from credit providers or lessors, after they have been provided with membership details of the consumer.

The exemption will apply if the services and benefits are made available either to:

- members of the organisation; or
- an entity within the organisation.

The reference to an entity within the organisation allows the exemption to operate flexibly and addresses the situation where the benefits are provided through a particular program within the organisation, so that a consumer only becomes a member of the entity within the organisation operating the program but not the organisation itself.

The exemption can only be relied upon where the following conditions are met:

- the organisation provides services to its members;
- becoming eligible to receive offers to enter into a particular credit contract or consumer lease is incidental to other benefits provided by the organisation – that is, the organisation’s primary function is to provide other benefits to members (so that, for example, the only benefit is the ability to apply to enter into a particular credit contract or consumer lease, the organisation would need to be licensed);
- the organisation has no reason to believe that that the credit contract or consumer lease will be unsuitable for its members - this does not require the organisation to positively investigate whether the credit is unsuitable, but would prevent it relying on the exemption where it is positively aware that the credit is unsuitable
- the person only provides credit services in relation to the particular credit contracts or consumer leases to members, and does not otherwise provide credit services; and
- the predominant purpose of the credit or lease is a purpose other than financing the supply or purchase of services, or the hiring of goods from the organisation, the entity within the organisation or an associate of the organisation.

Subregulation 20(11) provides an exemption for charities who provide credit services to low income consumers. Generally these low income consumers would not normally qualify for other credit products from mainstream lenders.

In relation to credit, these charities perform not-for-profit credit services for the benefit of low income consumers in association with credit providers, usually an ADI, through programs designed specifically for low income consumers. The credit provider or lessor will still need to be licensed in relation to providing credit or consumer leases to consumers under the Credit Act. In order to qualify for the exemption, the charity must not receive any payment as a direct consequence of the provision of the service to the individual client.

#### Regulation 21 – Persons exempt from requiring a licence – debt collectors

Regulation 21 provides that persons are exempt from the need to hold a licence where they:

- engage in credit activities by:
  - demanding and receiving payments from borrowers or guarantors under credit contracts or consumer leases; or
  - enforcing rights in relation to taking possession of property secured by a mortgage, or goods hired under a consumer lease;
- hold either a licence or an authorisation under one or more of the Acts listed in subregulation 21(5). That subregulation specifies the State and Territory Acts which currently regulate debt collectors; and
- are authorised in writing by a licensee to engage in the credit activities.

Subregulation 21(4) provides that the exemption only applies for a 12 month period from the date that Chapter 2 of the regulations commences.

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. The sunset period in the regulation will require Commonwealth and State and Territory governments to consider which level of government should be responsible for licensing after this time.

#### Regulation 22 – Persons exempt from requiring a licence – third parties

Regulation 22 provides that persons are exempt from the need to hold a licence where they only engage in credit activities on behalf of a credit provider, a mortgagee or a person who is the beneficiary of a guarantee, in a limited or minimal way, by:

- selling or transporting property of a debtor, mortgagor or guarantor; or
- giving or sending notices or documents to a debtor, mortgagor or guarantor that the licensee is required by law to give or send to the debtor, mortgagor or guarantor.

#### Regulation 23 – Persons exempt from requiring a licence – providers of point of sale credit services

Regulation 23 provides an exemption for providers of point of sale credit services. The structure of the regulation is that:

- it will exempt persons providing credit services in specified circumstances (in general terms where they are acting as an intermediary to finance the sale of goods or services from the intermediary); and
- the exemption is limited so that it will not operate in some particular situations (for example, in relation to the unsolicited or door-to-door sale of goods or services).

Subregulation 23(3) provides that these persons are exempt from the need to hold a licence where they meet the following criteria:

- they are a supplier of goods or services who only provides credit services (that is, they do not engage in lending activities);
- the relationship between the supplier and credit providers or lessors is such that they are linked credit providers or linked lessors; and
- the linked credit provider or linked lessor is a licensee or registered person.

Subregulation 23(4) extends the definition of linked credit provider in section 127 of the Code to also cover consumer leases. The effect of the subregulation is that a credit provider or lessor will be linked with the supplier where there is a commercial or business 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.

Subregulation 23(5) modifies the definition of services in subsection 204(1) of the Code. The effect of the subregulation is that the supplier will be exempt if the services they provide fall within this definition but not if the services are specifically excluded.

A person will not be able to rely on the exemption where the services they are providing fall within the two specific exclusions, that is:

- where the services being supplied are services relating to credit or consumer leases regulated by the Act (other than credit services) – a supplier cannot rely on the exemption where the services being provided are, for example, debt reduction services advising consumers how to repay their home loan more quickly; and
- where the item being supplied is an interest in land – a supplier cannot rely on the exemption, for example, where they are a property developer arranging loans to finance the sale of units or town houses they had built.

Notwithstanding that a person otherwise satisfies the criteria for the exemption they will need to be licensed in the following circumstances:

- where the supplier is a related body corporate of the linked credit provider or linked lessor (except where the supplier is engaging in credit activities only because its employees and directors are engaging in credit activities on behalf of the linked credit provider or linked lessor – this qualification allows the exemption to operate consistently with that in subregulation 20(6)); and
- 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 24 – Persons exempt from requiring a licence – securitisation entity

Regulation 24 provides an exemption for securitisation entities where they meet the following criteria:

- the person is a securitisation entity (as defined in regulation 3);
- The person is party to or has rights under an origination agreement – this refers to an agreement under which the person may acquire assets (usually a right to receive an income stream, with assets limited to a credit contract, consumer lease, mortgage or guarantee);
- The person is party to a servicing agreement – this refers to an agreement with a third party to perform functions on behalf of the person;
- The person has entered into a management agreement with:
  - a licensee or a registered person in relation to the assets covered by the origination agreement; and
  - the agreement has terms that enable borrowers to exercise rights against the licensee or the registered person as if they were the legal assignee.

The purpose of the regulation is to exempt securitisation entities where they are legal assignees of rights under credit contracts, consumer leases, mortgages or guarantees. The exemption allows a securitisation entity to continue to operate through third parties with whom it has entered into agreements, provided that consumers can exercise rights against a third party as if they were the legal assignee.

### Regulation 25 – Activities exempt from being credit activities

Regulation 25 exempts the following credit activities from the Act:

- credit assistance provided by a lawyer 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 25(2) and (3):

- the provision of credit assistance in their professional capacity as a lawyer – this would encompass activities such as 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 (provided that the lawyer does not hold out or advertise that they are able to provide credit services).

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*

Some activities undertaken by a registered tax agent in the ordinary course of the tax agent's business may constitute engaging in credit activities. This conduct is exempted in subregulation 25(5) where:

- the tax agent engages in the credit activity in the ordinary course of activities as a tax agent; and
- the credit activity is only providing credit services; and
- the credit activity is not providing a certificate or assessment relating to whether a consumer will be able to meet financial obligations under a credit contract or consumer lease.

A report by ASIC, *Protecting wealth in the family home*<sup>1</sup>, identified the role of accountants in providing certificates in relation to borrowers' capacity to meet repayments as a structural element in equity-stripping practices, and a method of lenders transferring risks arising from a default by the borrower to a third party.

Accordingly, tax agents are not exempted where they are in some way expressing an opinion as to the capacity of the consumer to meet financial obligations under a credit contract or consumer lease. However, they will be exempt where, for example, they provide a statement of financial position to assist a client in applying for finance, but express no view as to whether the consumer can meet the repayments.

#### *Passing on prepared documents*

Subregulations 25(6) and (7) provide exemptions in respect of conduct which consists only of passing on, publishing, distributing or otherwise disseminating a document on behalf of a licensee. This conduct is exempted where it amounts to acting as an intermediary or, in some cases, providing credit assistance.

These exemptions are intended to include publishers and internet portal operators, and cover situations such as passing on a document that, for example, contains information about a particular credit contract or is an application for credit.

---

<sup>1</sup> *Protecting wealth in the family home: An examination of refinancing in response to mortgage stress*, Report No. 119, March 2008.

### **Example: subregulation 25(6)**

Milo runs a retail business, with many customers passing through his store. He has an arrangement with the holder of an Australian credit licence, Rosie's Credit Cards Pty Ltd, under which brochures inviting consumers to apply for a particular credit card are made available to those consumers. The brochures are prepared by Rosie's Credit Cards, and Milo does not answer any questions from the consumers about the credit contract but instead refers all inquiries to a phone number in the brochure.

Milo's conduct is restricted to passing on, publishing, distributing or otherwise disseminating a document that was provided by Rosie, a licensee, who is acting on its own behalf and not on behalf of Milo. He does not select, modify or exercise control over the content of the document.

Milo's conduct will be exempt as long as consumers are advised of Rosie's Credit Cards' licence number or a reasonable person would assume that Rosie's Credit Cards was the lender in respect of the credit card.

### **Example: subregulation 25(7)**

Milo also supplies goods through a website. The website includes an advertisement for Rosie's Credit Cards, and a link that takes consumers to an application form on the website for Rosie's Credit Cards. Milo has specified the form and content of the advertisement to Rosie's Credit Cards. The advertisement includes a statement that any inquiries should be addressed to Rosie's Credit Cards and provides email and phone number contact details.

This conduct is not exempted under subregulation 25(6) as Milo has exercised control over the content of the document. However, it will be exempted under subregulation 25(7) where either consumers are advised of the Rosie's Credit Cards' licence number or a reasonable person would assume that Rosie's Credit Cards was the lender in respect of the credit card.

### *Passing on some types of factual information*

The purpose of subregulation 25(8) is to exempt communications in relation to the provision of information about the cost or terms of a contract. The exemption 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 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 25(9) 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 26 – Activities exempt from requiring a licence

Regulation 26 exempts the following activities from the requirement to hold a licence:

- Subregulation 26(2) exempts activities where a person's role is limited to being a referrer between a consumer and a licensee; and
- Subregulation 26(3) exempts credit activities where they are in relation to provisions of credit that have been largely, but not entirely, exempted from the requirements of the Code.

### *Referrer Exemptions*

A person engages in credit activities if they act as an intermediary between a consumer and a credit provider or lessor (section 9 of the Credit Act). A person will be exempted where they act as an intermediary by giving the consumer contact information about a licensee or their representative.

The exemption is intended to allow referral networks to operate without needing to be licensed where a person's role is minimal and limited to giving the licensee and the consumer the opportunity to contact each other. Where there is a payment or potential financial benefit to the referrer they can only rely on the exemption if the consumer is advised of this, so that they are made aware of the interest of the referrer.

### *Exemption where credit largely excluded from the Code*

Subregulation 26(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.

Where a particular class of credit has been largely excluded from the Code, then the same policy considerations that led to the application of the Code being modified mean it is also appropriate that credit activities engaged in respect of such a class should be exempt from the licensing requirements.

The exemption applies to persons who engage in a credit activity in respect of the provisions of credit mentioned in subsection 6(9) or 6(11) of the Code; or regulations 51, 53, 54, 55, 56, 59, 60 or 62 of the *National Consumer Credit Protection Regulations 2010*.

For example, subsection 6(9) of the Code excludes pawnbroking transactions from all provisions of the Code except the sections allowing unjust contracts to be reopened. It is not appropriate to require pawnbrokers to meet the obligations imposed on holders of an Australian credit licence.

Also, subsection 6(11) of the Code excludes the provision of credit by an employer to an employee or former employee, subject to specified conditions.

Lastly, the exclusions in the *National Consumer Credit Protection Regulations 2010* include, for example: where the amount of credit to be provided does not exceed \$50; where there is no insurance financed under the contract; and where credit is provided by a higher educational institution to a student of the institution on the grounds of hardship or of an emergency.

## **Chapter 3 Responsible Lending Conduct**

### Regulation 27 – Obligations of credit providers before entering credit contracts or increasing credit limits

This regulation changes the period for which an assessment can be relied on, where the credit contract is being used to finance the purchase of a residential property secured by a mortgage. The regulation changes the assessment period from 90 days to 120 days between the date of assessment and the date on which the credit contract is entered into. This regulation gives lenders an additional 30 days in which they can rely on an assessment to permit greater flexibility, typically in situations where the consumer is purchasing a home and there may be a settlement period that exceeds 90 days.

## **Chapter 4 Administration – registers relating to credit activities**

### Regulation 28 – Credit registers – licensees, credit representatives and registered persons

This regulation sets out the details regarding licensees, credit representatives and registered persons that ASIC must include in its credit registers for the purposes of section 213 of the Act.

### Regulation 29 – Credit registers – persons against whom banning order or disqualification order is made

This regulation sets out the details regarding each person against who a banning or disqualification order is made under Part 2-4 of the Act, or a person who is banned from engaging in a credit activity under a law of a State or Territory, that ASIC must include in its credit registers for the purposes of section 213 of the Act.

## **Chapter 5 Compliance and enforcement**

### Regulation 30 – Investigation – distribution of report

This regulation sets out the agencies, bodies and authorities to whom ASIC may provide a copy of a report under paragraph 251(2)(d) of the Act.

### Regulation 31 – Examination of person – form of notice requiring assistance and appearance for examination

This regulation provides that Form 1 is prescribed for a notice given under subsection 253(2) of the Act.

### Regulation 32 – Inspection of books and audit information-gathering powers – evidence of authority

This regulation sets out circumstances in which a document issued by ASIC is evidence of an ASIC member's or ASIC staff member's authority for the purposes of section 268 of the Act.

### Regulation 33 – Hearings – form of summons to appear before ASIC

This regulation provides that Form 2 is prescribed for a written summons notice given under subsection 284(1) of the Act.

## Regulation 34 – Miscellaneous provisions – allowances and expenses

This regulation sets out the allowances and expenses which a person is entitled to be paid if they appear for examination under section 253 of the Act or appear under a summons issued under section 284 of the Act.

If a person appears they must be paid an amount equal to the remuneration they were not paid because of their attendance to the appearance. If they are not remunerated via wages salaries or fees, and they attend because of their professional skill, scientific or other special skill or knowledge, they must be paid an amount between \$81 and \$407 for each day they attend. Otherwise, they must be paid between \$46 and \$76 for each day they attend.

A person must also be paid a reasonable amount for allowances for transport, meals and accommodation involved in making their appearance under the circumstances specified.

## **Chapter 6 Miscellaneous**

### **Part 6-1 Court proceedings**

#### Regulation 35 – Where court proceedings may be brought

This regulation sets out where a court proceeding under section 330 of the Act must be brought. The court proceeding must be brought in the State or Territory where the debtor, mortgagor or guarantor ordinarily resides, or, if this is not known, the court proceeding must be brought in the court of the State or Territory where they ordinarily resided at the time when the credit contract, consumer lease, mortgage or guarantee was made.

These proceedings, once commenced may be transferred to a court of another State or Territory under Part 4-3, Division 2, Subdivision C of the Act.

This regulation also sets out in which court register a court proceeding should be filed. The court proceeding should be filed in the State or Territory where the debtor, mortgagor or guarantor ordinarily resides, or, if this is not known, the court proceeding must be filed in the court of the State or Territory where they ordinarily resided at the time when the credit contract, consumer lease, mortgage or guarantee was made.

The above arrangements do not apply to court proceedings commenced by ASIC, or by a credit provider under section 112 of the Act. They also do not apply to the commencement of class or representative actions which involve consumers from more than one State or Territory. In this situation, normal court proceeding rules and general cross-vesting or transfer arrangements set out in Part 4-3, Division 2, Subdivision C of the Act would apply.

Nor do these arrangements apply to a credit contract that is not a standard form contract (i.e. within the meaning of section 12BK of the *Australian Securities and Investments Commission Act 2001*) which states an alternative jurisdiction in which court proceedings must be brought. This seeks to recognise contractual rights, where such jurisdiction is mutually agreeable between parties. These proceedings, once commenced may be transferred to a court of another State or Territory under Part 4-3, Division 2, Subdivision C of the Act.

## **Part 6-2 Infringement notices**

### Regulation 36 – Purpose of Part

This regulation explains Part 6-2 sets out an infringement notice scheme in accordance with section 331 of the Act.

The regulation explains that it is not obligatory to give an infringement notice, and then sets out a number of legal consequences that apply whether or not an infringement notice is issued. In particular, the issuing of an infringement notice does not affect a person's liability under the Act if the person does not pay the penalty set out in an infringement notice.

### Regulation 37 – Definitions for Part

The regulation defines words and expressions that are used in regulations 38 to 48.

### Regulation 38 – When an infringement notice can be given

This regulation requires ASIC to have:

- reasonable grounds to believe that a person has committed an offence against the Act that is stated to be an offence of strict liability; or
- reasonable grounds to believe that a person has contravened a civil penalty provision referred to in paragraph 36(1)(b);

before giving the person an infringement notice.

The regulation sets a time limit of 12 months on giving an infringement notice, but allows ASIC to withdraw an infringement notice and give a new notice within that period.

### Regulation 39 – Contents of infringement notice

This regulation provides that the form of an infringement notice is set out in Schedule 1. The notice may include other information that ASIC considers necessary.

### Regulation 40 – Amount of penalty if infringement notice given

This regulation sets the amounts of the penalty payable under an infringement notice by individuals and bodies corporate. The amounts are consistent with the maximum amount permitted in section 331 of the Act.

### Regulation 41 – Extension of time to pay penalty

This regulation permits the extension of time in which to pay a penalty under an infringement notice, subject to specified conditions.

### Regulation 42 – Payment of penalty by installments

This regulation permits the payment of a penalty under an infringement notice by installments, subject to specified conditions.

### Regulation 43 – Time for payment of penalty

This regulation sets out the period in which a penalty under an infringement notice must be paid. The period is 28 days after the day on which the notice is given to the recipient, unless the recipient takes action such as requesting an extension of time to pay the penalty or requesting permission to pay the penalty by installments.

### Regulation 44 – Effect of payment of penalty

This regulation sets out the consequences if a person pays a penalty under an infringement notice:

- the person's liability is discharged; and
- no prosecution or civil proceedings may be brought by the Commonwealth against the person; and
- the person is not taken to have admitted guilt; and
- the recipient is not taken to have been convicted or found guilty.

If a person pays a penalty under an infringement notice for the alleged contravention of a civil penalty provision, neither a consumer nor ASIC on behalf of a consumer is prevented from commencing a civil proceeding for compensation or other orders under section 178 or 179 of the Act, for conduct the subject of the paid infringement notice.

### Regulation 45 – Withdrawal of infringement notice by nominated person

This regulation permits an infringement notice to be withdrawn by a nominated person, subject to specified conditions.

### Regulation 46 – Withdrawal of infringement notice by ASIC

This regulation permits ASIC to withdraw an infringement notice, subject to specified conditions.

### Regulation 47 – Notice of withdrawal of infringement notices

This regulation sets out the contents of a notice withdrawing an infringement notice.

### Regulation 48 – Refund of penalty

This regulation provides that if an infringement notice is withdrawn after the penalty stated in it has been paid, the Commonwealth must refund the amount of the penalty to the person who paid it.

## **Chapter 7 Matters in relation to the National Credit Code**

### **Part 7-1 Exemptions, declarations and other matters**

#### Regulation 49 – Continued application of Part 12 of the Code and interpretation provisions

These regulations modify the application of the Code to specified provisions of credit (for example, a number of partial exemptions from the Code are included in regulations 6 to 19). Where there is a partial exemption or modification of the Code, Regulation 5 provides that:

- the Code still applies to the extent necessary for the interpretation of a particular matter, and for the interpretation of those provisions of the Code that have not been excluded; and

- the application of Part 12 expressly continues to apply to the matter and to those provisions of the Code that have not been excluded (to the extent the context permits).

#### Regulation 50 – Exempt credit — maximum account charges

Section 6 of the Code relates to the provision of credit to which the Code does not apply.

Subsection 6(5) 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.

This regulation 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 51 to 58

Section 6 of the Code relates to the provision of credit to which the Code does not apply.

Subsection 6(13) 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 51 to 58 are made for subsection 6(13) of the Code.

#### Regulation 51 – Additional exempt credit

This regulation 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 52 - GIO Finance Limited's No Interest Loan Scheme – exemption from Code

This regulation 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 then 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 *Uniform Consumer Credit Code* (UCCC) on the basis that the provision of credit in this instance would otherwise be unintentionally caught by the Code.

#### Regulation 53 – Rental Purchase Plan — exemption from certain provisions of Code

This regulation provides that the Code, other than sections 76 to 81, 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 instalment 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 does not extend to the unconscionable contract provisions (sections 76 to 81).

#### Regulation 54 – Partnership loans — exemption from certain provisions of Code

Subregulation 54(1) provides that the Code, other than Part 1; Division 3 of Part 4; 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 54(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

10 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 subsection 6(11) of the Code, a separate protection for partnership loans was considered to be warranted.

#### Regulation 55 – Student loans — exemption from certain provisions of Code

Subregulation 55(1) provides that the Code, other than subsection 61(1) (increase in guarantor's liability) and sections 76 to 81, 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 55(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 55(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 55 – Loans for conservation of heritage items — exemption from Code

This regulation 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 57 – ADIs — exemption from Code

This regulation 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 58 – Estate administrators — exemption from certain provisions of the Code

This regulation provides that the Code, other than sections 76 to 81, 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 59 – Credit under *Aged Care Act 1997* — exemption from certain provisions of Code

This regulation provides that the Code, other than sections 72 to 74 and 76 to 81, does not apply to the provision of credit by an approved provider, within the meaning of the *Aged Care Act 1997*, (Aged Care Act) 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. 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 60 – Firefighter’s Benefit Fund of WA Incorporated — exemption from certain provisions of Code

This regulation 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 61 – Charge card contracts — exemption of certain contracts from Code

This regulation 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*.

Subsection 6(1) of 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 percent 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 62 – Credit providers providing credit to directors — exemption from certain provisions of Code

This regulation provides a similar exemption for credit provided to a director as that provided in subsection 6(1) of the Code for credit provided to employees.

The effect of the regulation is that the Code largely does not apply where credit is provided to a director by a corporate body, or by a related body corporate. The exemption cannot be relied upon where the credit provider provides credit in the usual course of its lending business to a person who is also a director, except where the credit is provided to a director on more favourable terms.

Whether or not the exemption applies is determined by the status of the person at the time the credit is provided. In other words, the person must be a current director at the time the credit is advanced

and, if this is the case, the exemption remains in force if the person ceases to be a director. The exemption will not apply if the person is a former director when the credit is advanced.

#### Regulation 63 – Mortgages — exemptions from Code

Section 7 of the Code provides that the Code applies to certain mortgages. However, subsection 7(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 63(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 64 – Guarantees — exemption from Code

Section 8 of the Code provides that the Code applies to certain guarantees. 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 guarantee of a class specified in the regulations.

This regulation 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 8 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 65 – Deemed mortgages for goods lease with option to purchase

Subsection 9(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 9(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 installments. The subsection sets out consequential arrangements for this purpose, including a requirement under paragraph 9(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.

This regulation provides that the terms and conditions are as set out in Form 4, which is in Schedule 1 to these Regulations.

Form 4 is based on Form 1 of the regulations under the UCCC.

### Regulation 66 – Prescribed person in relation to declarations

Subsection 13(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 improve or refinance 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 13(3) provides that the declaration is ineffective if, when the declaration was made, the credit provider or a **prescribed person** as defined in the regulations knew or had reason to believe that the credit was to be provided for a purpose resulting in regulation by the Code (or would have known if they had made reasonable inquiries).

The regulation specifies that a prescribed person is:

- where the person who obtains the declaration is the credit provider — a person associated with the credit provider;
- where the person who obtains the declaration is a person associated with the credit provider — the person associated with the credit provider;
- where the person who obtains the declaration is not the credit provider or a person associated with the credit provider then any of the following persons:
  - the person who obtained the declaration from the debtor;
  - a person who arranged for another person to obtain the declaration from that third party;
  - a person who suggested that the debtor apply for the provision of credit (provided this was done during the course of, or incidentally to, a business carried on by that person);
  - a person who assisted the debtor to apply for the provision of credit (provided this was done during the course of, or incidentally to, a business carried on by that person).

The phrase *a person associated with the credit provider* is defined in subsection 204(2) of the Code.

#### Regulation 67 – Declaration of purposes for which credit provided

Subsection 13(5) of the Code requires the declaration executed by the consumer (specifying that credit is to be applied wholly or predominantly for a business or investment purpose) to be substantially in the form (if any) required by the regulations.

This regulation sets out the form of that 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 7-2 Credit contracts**

#### Regulation 68 – Statement about debtor’s statutory rights and obligations

Section 16 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 16(1)(b) of the Code provides that the information statement must be in the form required by the regulations.

This regulation provides that the information statement must be in writing and must be in accordance with Form 5, which is in Schedule 1 to the Regulations.

Form 5 is a summary of the debtor’s statutory rights. A similar disclosure was required under the former credit laws.

#### Regulation 69 – Comparison rate

Subsection 16(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.

This regulation 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. Subregulation 69(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.

Subregulation 69(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 70 – Pre-contractual statement

Subsection 16(4) of the Code provides that a pre-contractual statement mentioned in paragraph 16(1)(a) of the Code must contain the financial information specified by the regulations in the form prescribed by the regulations.

This regulation 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 71 – Additional disclosures about insurance financed by contract

Section 17 of the Code sets out a number of matters that must be in a contract document. Subsection 17(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.

This regulation 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 72 – Additional disclosures about credit contracts to be signed by debtor

Section 17 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 17(16) of the Code provides that a contract document must contain any information or warning required by the regulations.

This regulation provides that the information and warnings are set out in Forms 6 and 7, 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 6) or the acceptance of the credit provider's offer (Form 7).

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 6).

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 7).

#### Regulation 73 – Deduction of amount for interest charges

Subsection 25(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 25(2) of the Code authorises the making of regulations that provide that subsection 25(1) does not apply to the deduction of an amount for the first payment of interest charges under the contract.

This regulation provides that subsection 25(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 74 – Calculation of unpaid daily balances

Section 28 of the Code deals with the maximum amount of an interest charge that may be imposed or provided for under a credit contract.

Subsection 28(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 28(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 28(2) then provides that the regulations may provide for the calculation of unpaid daily balances in these circumstances.

Regulation 74 prescribes the method of calculation of unpaid daily balances for the purposes of subsection 28(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 75 – Early debit or payment of interest charges

Subsection 29(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 29(3) of the Code authorises the making of regulations that provide that subsection 29(1) does not apply to the first payment of interest charges under the credit contract.

Regulation 75 sets out an exception to subsection 29(1). The Regulation provides that subsection 29(1) 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 76 – Interest charges in relation to residential investment property

Section 30A of the Code authorises the making of regulations to modify Division 3 of the Code. Division 3 of the Code contains the section 29 provision on early debit or payment of interest charges.

This Regulation provides that section 29 does not apply to credit provided or intended to be provided wholly or predominantly to purchase, or improve residential property for investment purposes. This type of credit can include requirements on borrowers to pay interest in advance during the life of the contract (in order to obtain taxation benefits), and this regulation allows those arrangements to continue.

### Regulation 77 – When statement of account not required

Subsection 33(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 33(3) of the Code provides that a statement need not be given in specified circumstances. The circumstance in paragraph 33(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 77 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 7-3 Related mortgages and guarantees**

### Regulation 78 – Mortgage arising from certain home ownership schemes—exemption from subsection 50(1) of the Code

Subregulation 78(1) identifies two home ownership schemes operated by Mt Newman Joint Ventures and Mount Goldsworthy Mining Association Joint Ventures, which are exempted from subsection 50(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 installments 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 50 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 79 – Form of guarantees

Section 55 of the Code relates to guarantees.

Subsection 55(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 79(1) provides that a guarantee must contain the warning set out in Form 8, which is in Schedule 1 to the Regulations. Subregulation 79(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 8, as well as the practical information concerning the appearance and placement of the 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 8 is based on the warnings in Forms 6 and 7 and warnings in guarantees used by industry.

#### Regulation 80 – Explanation about guarantor’s rights and obligations

Section 56 of the Code requires a credit provider to give specified documents to a prospective guarantor. Paragraph 56(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 80(1) provides that the document must be in accordance with Form 9, which is in Schedule 1 to the Regulations.

Form 9 is based on a similar format to Form 5.

This form must be given before the obligations under the relevant credit contract are secured by the guarantee.

## **Part 7-4 Changes to obligations under credit contracts, mortgages and guarantees**

### Regulation 81 – Information about increases in the amount of credit

Subsection 71(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 71(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 81(1) sets out the information that must be disclosed.

## **Part 7-5 Ending and enforcing credit contracts, mortgages and guarantees**

### Regulation 82 – Information after surrender of goods

Section 85 of the Code enables a debtor under a credit contract which takes the form of goods sold by installments or a mortgagor to surrender the goods.

Subsection 85(3) of the Code requires a credit provider to give a debtor or mortgagor a written notice within 14 days containing the estimated value of the goods and any other information required by the regulations.

Regulation 82 provides that the information must include the information set out in Form 10 which is in Schedule 1 to the Regulations.

Form 10 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 9 mirrors the notice which must be served when mortgaged goods are seized.

### Regulation 83 – Notice after direct debit default occurs

Section 87 of the Code applies the first time a default occurs because a direct debit instruction fails.

Subsection 87(2) of the Code requires the credit provider to give the debtor, and any guarantor, a direct debit default notice. Subsection 87(3) of the Code provides that the notice must contain the information prescribed under the regulations.

Regulation 83 provides that the information is set out in Form 11, which is in Schedule 1 to the Regulations.

The prescribed information in Form 11 alerts the debtor to the default, to assist them to avoid incurring additional direct debit default charges. It informs them about what they should do if they are unable to make a repayment and contains information about how direct debits operate and how to cancel a direct debit authority.

### Regulation 84 – Notice after default occurs

Section 88 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 88(2) of the Code requires the credit provider to give a mortgagor a default notice. Subsection 88(3) of the Code provides that the notice must specify certain matters, including information prescribed by the regulations.

Regulation 84 provides that the information is set out in Form 12, which is in Schedule 1 to the Regulations.

The information prescribed in Form 12 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 debtors 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 85 – Consent to enter premises

Subsection 99(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 99) consented in writing to the entry.

Under subsection 99(2) of the Code, the regulations may provide procedures for the purposes of section 99 and set out circumstances in which consent is or is not taken to have been given.

Regulation 85 prescribes 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 85 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 13 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 85.

### Regulation 86 – Statement about mortgagor's rights and obligations

Subsection 102(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 86 provides that the information is set out in Form 14, which is in Schedule 1 to the Regulations. This Regulation seeks to inform mortgagors' about their rights and obligations once a credit provider has taken possession of goods under a mortgage.

The information prescribed in Form 14 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. It also 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 87 – Information about proceeds of sale of mortgaged goods

Subsection 104(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 87 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 7-6 Related sale contracts**

#### Regulation 88 – Rate of interest on damages

Subsection 132(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 88 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 89 – Informing debtor of rights

Subsection 136(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 136(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 136.

Regulation 89 provides that the information must be in accordance with Form 15, which is in Schedule 1 to the Regulations.

Regulation 89 also specifies that the information must be given to the debtor within 21 days after the termination of the tied loan contract or tied continuing contract. Form 15 informs the debtor of the right to terminate the maintenance services contract and recover a rebate in accordance with the law.

#### Regulation 90 – Rebate of consideration

Subsection 136(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 136(4) of the Code provides that the regulations may prescribe the manner of calculating that proportionate rebate of consideration.

Regulation 88 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 7-7 Related insurance contracts**

### Regulation 91 – Particulars of insurance entered into by credit provider

Subsection 146(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 91 requires, for the purposes of subsection 146(2) of the Code, that the credit provider gives the debtor a statement of the key features of the credit-related insurance contract. Subregulation 91(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 91(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 92 – Proportionate rebate of consumer credit insurance premium

Subsection 148(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 148(2)). Subsection 148(4) then states that the regulation may prescribe the manner of calculating the proportionate rebate of premium for the purposes of section 148.

Regulation 92 prescribes the manner of calculating the proportionate rebate of premium.

### Regulation 93 – Notice of right to cancel mortgaged property insurance

Section 149 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 149(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 149.

Regulation 93 provides that the information must be a written statement in accordance with Form 16, which is in Schedule 1 to the Regulations.

## Regulation 94 – Proportionate rebate of premium for insurance over mortgaged property

Section 149 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 149(4) of the Code provides that the regulations may prescribe the manner of calculating the proportionate rebate of premium.

Regulation 94 specifies how to calculate a proportionate rebate.

## **Part 7-8 Comparison rates**

### Regulation 95 – Relevant comparison rate where annual percentage rate stated

Section 161 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 161(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 161(2) of the Code provides that designated amounts and terms are the amounts and terms prescribed by the regulations.

Regulation 95 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 96 – Information about whether comparison rate relates to secured loan

Section 162 of the Code deals with the manner of advertising a comparison rate.

Subsection 162(2) of the Code sets out specific arrangements if the comparison rate is calculated for an amount of credit prescribed by the regulation.

Regulation 96 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 97 – Warnings about comparison rate

Section 163 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 97 sets out a long form of warning and a short form of a warning.

### Regulation 98 – Calculation of comparison rates

Section 166 of the Code allows the regulations to prescribe the method for calculating a comparison rate.

Regulation 98 prescribes 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 98 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 99 – Matters that may be included in comparison rate schedules

Regulation 99 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 7-9 Consumer leases**

### Regulation 100 – Consumer lease excluded from application of Part 11 of the Code

This regulation provides a similar exemption for leases to a director as that provided in subsection 171(2) of the Code for employees. The effect of the regulation is that the Code does not apply

where goods are hired by a director in connection with the director's remuneration or benefits provided under their employment contract.

Whether or not the exemption applies is determined by the status of the person at the time the lease is provided. In other words, the person must be a current director at the time the lease is entered and, if this is the case, the exemption remains in force if the person ceases to be a director. The exemption will not apply if the person is a former director when the lease is entered.

#### Regulation 101 – Prescribed person in relation to declarations

Subsection 172(3) provides that the declaration is ineffective if, when the declaration was made, the lessor or a **prescribed person** as defined in the regulations knew or had reason to believe that the goods were to be hired for personal, household or domestic purposes a business purpose (or would have known if they had made reasonable inquiries).

Regulation 101 specifies that a prescribed person is:

- where the person who obtains the declaration is the lessee — a person associated with the lessee;
- where the person who obtains the declaration is a person associated with the lessee — the person associated with the credit provider;
- where the person who obtains the declaration is not the lessee or a person associated with the lessee, then any of the following persons:
  - the person who obtained the declaration from the debtor;
  - a person who arranged for a third party to obtain the declaration from the lessee;
  - a person who suggested that the lessee apply for the provision of credit (provided this was done during the course of, or incidentally to, a business carried on by that person);
  - a person who assisted the lessee to apply for the provision of credit (provided this was done during the course of, or incidentally to, a business carried on by that person).

The phrase **a person associated with the lessor** is defined in Regulation 4.

#### Regulation 102 – Declaration about purpose of leases

Subsection 172(4) of the Code provides that a declaration by the consumer, that goods are being hired wholly or predominantly for business purposes, is not effective unless it is substantially in the form required by the regulations.

Subregulation 102(1) sets out the form of the declaration. Subregulations 102(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 103 – Explanation about rights and obligations of consumer lessees

Section 175 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 103 provides that the statement must be in writing and must be in accordance with Form 17, which is in Schedule 1 to the Regulations.

Form 17 is intended to inform the debtor about some of their rights and obligations and those of the lessor.

## **Part 7-10 Miscellaneous**

### Regulation 104 – Tolerances relating to disclosures

Section 180 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 104 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 105 – Tolerances relating to amounts payable etc.

Section 181 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 105 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 106 – Additional assumptions relating to disclosures

Regulation 106 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 subregulation 106(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 107 – Contracts linked to loan account offset arrangements

Regulation 107 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 108 – Requirements for print or type

Section 184 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 184(1)(b) of the Code provides that a credit contract, mortgage, 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 108(1) provides that print or type must be not less than 10 point.

Paragraph 184(2)(b) of the Code provides that a credit contract, mortgage, guarantee or notice given by a credit provider under the Code, if transmitted by electronic communication, must conform with the provisions of the regulations, if any, as to content, legibility and accompanying information.

Subregulation 108(2) sets out requirements for a credit contract, mortgage or guarantee or a notice that is transmitted by electronic communication.

#### Regulation 109 – Notices

Section 194 of the Code deals with matters relating to the giving of notices and other documents.

Subsections 194(4) and (6) of the Code provide that a person may be nominated to receive a notice or other document on behalf of one or more other persons. Subregulation 109(1) sets out the form of a nomination.

Subsection 194(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 109(2) sets out the form of a consent.

### **Part 7-11 Savings and transitional provisions – reliance on State and Territory Consumer Credit Codes**

Part 7-11 of the Regulations deals with transitional arrangements required as part of the implementation of the Code.

#### Regulation 110 – References in documents to Consumer Credit Code of a State or Territory

Regulation 110 provides that a person does not contravene the Regulations solely by the use of a form prescribed in the regulations to the Consumer Credit Code of the relevant a State or Territory where has the same effect or substance as a form prescribed in these Regulations.

Where the new form requires additional information (for example about the person's external dispute resolution scheme), it may be provided in a separate document appended to the old form.

This two year transitional provision is made to reduce the cost to business in updating documents, for example by allowing changes to be made contemporaneously with new print runs.

## **Schedule 1 Forms**

Form 1	Notice requiring reasonable assistance in connection with an investigation and appearance at an examination (Regulation 31)
Form 2	Summons to witness (Regulation 33)
Form 3	Form of infringement notice (Regulation 39)
Form 4	Prescribed terms and conditions of mortgage (Regulation 65)
Form 5	Information statement (Regulation 68)
Form 6	Disclosure about credit contracts (Subregulation 72 (2))
Form 7	Disclosure about credit contracts (Subregulation 72 (3))
Form 8	Disclosure about guarantee (Regulation 79)
Form 9	Information statement (Regulation 80)
Form 10	Information after surrender of mortgaged goods (Regulation 82)
Form 11	Direct debit default notice (Regulation 83)
Form 12	Information about debtor's rights after default (Regulation 84)
Form 13	Consent to enter premises (Regulation 85)
Form 14	Notice after taking possession of mortgaged goods (Regulation 86)
Form 15	Notice of right to terminate maintenance services contract (Regulation 89)
Form 16	Notice of right to cancel mortgaged property insurance (Regulation 93)
Form 17	Information statement (Regulation 103)