



National Consumer Credit Protection (Transitional and Consequential Provisions) Amendment Regulations 2010 (No.)¹

Select Legislative Instrument 2010 No.

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

Dated 2010

Governor-General

By Her Excellency's Command

[DRAFT ONLY – NOT FOR SIGNATURE]

Minister for Financial Services, Superannuation and Corporate
Law

EXPOSURE DRAFT

1 Name of Regulations

These Regulations are the *National Consumer Credit Protection (Transitional and Consequential Provisions) Amendment Regulations 2010* (No.).

2 Commencement

These Regulations commence as follows:

- (a) 1 April 2010 — regulations 1 to 3 and Schedule 1;
- (b) 1 July 2010 — Schedule 2.

3 Amendment of *National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2009*

Schedules 1 and 2 amend the *National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2009*.

Schedule 1 Amendments commencing on 1 April 2010

(regulation 3)

[1] Before regulation 1

insert

Part 1 Preliminary

[2] Regulation 3, after definition of *Act*

insert

associate has the meaning given by regulation 3A.

debt instrument means a chose in action that includes an undertaking by a person to repay money deposited with or lent to the person.

financial counselling association means any of the following:

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

financial counselling service means a counselling and advocacy service provided predominantly for the purpose of assisting individuals who are in financial difficulty to resolve their problems.

origination agreement means an agreement under which a securitisation entity may acquire an asset, directly or indirectly, from a licensee or a person who has been exempted from the requirement to hold a licence.

registered debt agreement administrator means a person registered by the Insolvency and Trustee Service Australia as a debt agreement administrator under Part IX of the *Bankruptcy Act 1966*.

securitisation entity means a body corporate that:

- (a) carries on a business that consists of managing, by way of a securitisation transaction, some or all of the economic risk associated with assets, liabilities or investments (whether the body corporate assumes the risk from another person or creates the risk itself); and

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- (b) is an insolvency-remote special purpose entity according to criteria of an internationally recognised rating agency that are applicable to the body corporate's circumstances (regardless of whether the agency has determined that the body corporate satisfies those criteria); and
 - (c) raises substantially all of its funds by issuing securitisation products on terms that the funds raised would be applied in the business mentioned in paragraph (a).

securitisation product means:

- (a) a debt instrument; or
- (b) an interest in a managed investment scheme.

securitisation transaction means an assignment of interests in a pool of underlying assets that:

- (a) is made by a licensee, or a person who has been exempted from the requirement to hold a licence; and
- (b) is made to a securitisation entity to enable the securitisation entity (or another securitisation entity) to:
 - (i) issue tradeable instruments to raise funds to acquire the underlying assets; and
 - (ii) secure the tradeable instruments by granting a security interest over the pool of underlying assets.

servicing agreement means an agreement that:

- (a) is between:
 - (i) a securitisation entity; and
 - (ii) a licensee, or a person who has been exempted from the requirement to hold a licence (the ***exempted person***); and
- (b) under which the licensee or exempted person, on behalf of the securitisation entity, performs obligations, or exercises the rights, of:
 - (i) a credit provider in relation to a credit contract or proposed credit contract; or
 - (ii) a lessor in relation to a consumer lease or proposed consumer lease; or
 - (iii) a mortgagee in relation to a mortgage or proposed mortgage; or

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- (iv) a person who is a beneficiary of a guarantee or proposed guarantee in relation to the guarantee or proposed guarantee.

[3] After regulation 3

insert

3A Meaning of *associate*

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

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

[4] **Before regulation 4**

insert

Part 2 Transitional provisions

[5] **After regulation 4**

insert

6A References to the *National Consumer Credit Protection Regulations 2010*

From 1 April 2010 to immediately before 1 July 2010, the reference in paragraphs 28 (3) (b) and 32 (a) of these Regulations to the *National Consumer Credit Protection Regulations 2010* is taken to be a reference to those Regulations as if those Regulations had commenced.

Note Paragraph 6 (2) (a) of the Act provides that the regulations may prescribe matters of a transitional nature (including matters of an application or saving nature) arising out of the enactment of the National Credit Act.

6B Modification of the Act

- (1) For subsection 6 (3) of the Act, this regulation provides that certain provisions of the Act are taken to be modified as set out in this regulation.

Note Subsection 6 (3) of the Act provides that the regulations may provide that certain provisions of the Act are taken to be modified as set out in the regulations. Those provisions then have effect as if they were so modified.

- (2) Item 2 of the table in subsection 2 (1) of the Act is modified by substituting it with the following items:

2. Schedule 1, items 1 to 19	At the same time as section 3 of the <i>National Consumer Credit Protection Act 2009</i> commences.
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2AA. Schedule 1, item 20	1 April 2010
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2AB. Schedule 1,	At the same time as section 3 of the <i>National</i>
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2010,	<i>National Consumer Credit Protection (Transitional and Consequential Provisions) Amendment Regulations 2010</i> (No.)	7
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- (3) Item 3 of the table in subsection 2 (1) of the Act is modified by omitting the text in column 2 and inserting ‘1 April 2010’.
- (4) The definition of **commencement** in subsection 4 (1) of the Act is modified by substituting it with the following definition:
‘**commencement** means:
(a) for Schedule 2 to this Act — the start of 1 April 2010; and
(b) for the remainder of this Act — the start of 1 July 2010, or a later day prescribed by the regulations.’
- (5) Subitem 20 (2) of Schedule 1 is modified by omitting ‘commencement’ and inserting ‘1 April 2010’.
- (6) Paragraph 39 (1) (a) of Schedule 2 is modified by substituting that paragraph with the following paragraph:
‘(a) starts on 1 April 2010; and’
- (7) From 1 April 2010 to immediately before the day section 3 of the National Credit Act commences, if a provision (the **affected provision**) of:
(a) Schedule 2 to the Act; or
(b) these Regulations;
refers to the application of a part of the National Credit Act, the part of that Act applies for the purposes of the affected provision as if the part of that Act had commenced.

Part 3 **Application of Schedule 2 to
the Act to contracts and other
instruments made before
commencement**

Division 3 **Application of Schedule 2 to the
Act to contracts and other
instruments made before
commencement**

15 **Preliminary**

- (1) For subitem 20 (2) of Schedule 1 to the Act, this Division applies to a person who:
- (a) engages in credit activities within the meaning of items 1, 3, 4 and 5 of the table in subsection 6 (1) of the National Credit Act; and
 - (b) engages in the credit activities after commencement in relation to a credit contract or consumer lease that is a carried over instrument.

Note Subitem 20 (2) of Schedule 1 to the Act provides that the regulations may provide for the application of all or specified provisions of Schedule 2 to the Act to a person (including the registration of that person) in relation to credit activities engaged in after commencement in relation to a carried over instrument.

Subsection 6 (3) of the Act provides that the regulations may provide that certain provisions of the Act are taken to be modified as set out in the regulations, and that those provisions then have effect as if they were so modified.

- (2) Schedule 2 of the Act does not apply to the person other than as provided by this Division.
- (3) This Division only applies in relation to a person to the extent that the person is engaging in the credit activities mentioned in subregulation (1).
- (4) Part 1 of Schedule 2 to the Act applies to the person.

Note Part 1 of Schedule 2 to the Act provides how the definitions in the National Credit Act are to apply to this Act.

16 Person may apply to be registered or automatically be registered

- (1) Division 3 of Part 2 of Schedule 2 to the Act applies to the person.

Note Divisions 1 and 2 of Part 2 of Schedule 2 to the Act state among other things that, during specified periods, a person must not engage in credit activities unless the person is registered or licensed to engage in the credit activity. Those Divisions do not apply to persons to whom this Division applies.

Division 3 of Part 2 of Schedule 2 to the Act relates to the application of prohibitions in the National Credit Act to registered persons.

- (2) A person may apply to be registered under item 11 of Schedule 2 to the Act.

Note Item 11 of Schedule 2 to the Act provides how a person can apply to be registered.

- (3) If a person applies to be registered under item 11 of Schedule 2 to the Act, ASIC must register the person.

- (4) From the start date under paragraph 11 (2) (a) of Schedule 2 to the Act, to the end date under paragraph 11 (2) (b) of Schedule 2 to the Act, subregulation (5) applies in relation to a person who:

- (a) is not a registered person; and
- (b) has not applied to be registered; and
- (b) is engaging in credit activities of the kind mentioned in subregulation 15 (1).

- (5) For subregulation (4):

- (a) ASIC may decide to automatically register the person; and
- (b) if ASIC decides to automatically register the person, ASIC must, at least 28 days before registering the person, give written notice of the decision to the person.

- (6) If ASIC decides to register a person under this regulation, ASIC must give written notice to the person of:

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- (a) the day on which the person will become registered; and
 - (b) any conditions imposed on the registration under regulation 17.

- (7) If ASIC decides to register a person under this regulation, the person becomes registered on the day that ASIC enters the person's name on a credit register as a registered person.
- (8) If the person is registered under this regulation, item 13 of Schedule 2 to the Act applies in relation to the registered person.

Note Item 13 of Schedule 2 to the Act provides the basis on which a person is registered.

17 Conditions on the registration

- (1) If the person is registered under regulation 16, items 14 and 15 of Schedule 2 to the Act apply in relation to the registered person, subject to this regulation.

Note Items 14 and 15 of Schedule 2 to the Act relate to the conditions that ASIC may impose on a registration.

- (2) ASIC must not impose a condition on the registration if the condition would have the effect of preventing the registered person from collecting debts owing under the credit contract or consumer lease.
- (3) ASIC may impose a condition on the registration relating to the manner in which debts owing under the credit contract or consumer lease are collected.
- (4) Subitem 14 (6) of Schedule 2 to the Act applies so that if the person was registered on the basis of only engaging in credit activities in relation to the credit contract or consumer lease mentioned in paragraph 15 (1) (b), ASIC must impose a condition on the registration that the registered person is only authorised to engage in those credit activities.

18 Obligations of registered persons

- (1) If the person is registered under regulation 16, Division 3 of Part 3 of Schedule 2 to the Act applies in relation to the registered person to the extent permitted by this regulation.

Note Division 3 of Part 3 of Schedule 2 to the Act relates to the obligations of registered persons.

- (2) The application of item 16 of Schedule 2 to the Act is modified so that the registered person must:
- (a) do all things necessary to ensure that the credit activities authorised by the registration are engaged in efficiently, honestly and fairly; and
 - (b) comply with the conditions on the registration; and
 - (c) comply with the credit legislation, subject to section 7 of the Act; and
 - (d) take reasonable steps to ensure that the registered person's representatives comply with the credit legislation, subject to section 7 of the Act; and
 - (e) take reasonable steps to ensure that clients of the registered person are not disadvantaged by any conflict of interest that arises wholly or partly in relation to credit activities engaged in by the registered person or the registered person's representatives.

Note For paragraphs (c) and (d), section 7 of the Act provides that a provision of the Act does not apply to the extent that the operation of the provision would result in an acquisition of property from a person otherwise than on just terms.

- (3) Items 17 to 19 of Schedule 2 to the Act apply in relation to the registered person.

Note Items 17 to 19 of Schedule 2 to the Act relate to specific obligations of registered persons, being the obligation to provide a statement or obtain an audit report if directed by ASIC, the obligation to give ASIC information required by the regulations, and the obligation to provide ASIC with assistance if reasonably requested.

19 Suspension, cancellation and variation of registration

- (1) If the person is registered under regulation 16, Division 4 of Part 3 of Schedule 2 to the Act applies in relation to the registered person to the extent permitted by this regulation.

Note Division 4 of Part 3 of Schedule 2 to the Act relates to when registrations can be suspended, cancelled or varied.

- (2) Item 20 of Schedule 2 to the Act applies in relation to the registered person.

Note Item 20 of Schedule 2 to the Act relates to cancellation of a person's registration because ASIC has granted, or refused to grant, a licence to the person.

- (3) Item 23 of Schedule 2 to the Act is modified so that ASIC may suspend or cancel a registered person's registration if:

- (a) the registered person does not engage, or ceases to engage, in credit activities; or
- (b) the registered person is banned from engaging in a credit activity under a law of a State or Territory; or
- (c) if the registered person is not the trustees of a trust — the registered person is insolvent; or
- (d) the registered person:
 - (i) is a single natural person; and
 - (ii) is incapable of managing his or her affairs because of physical or mental incapacity.

- (4) Items 26 to 31 of Schedule 2 to the Act apply in relation to the registered person.

Note Item 26 provides that ASIC may vary a person's registration to reflect a change in the name of the registered person.

Item 27 relates to the effect of a suspension of a person's registration.

Item 28 provides that ASIC may revoke the suspension of a person's registration.

Item 29 relates to the date of effect, notice and publication of a variation, suspension, revocation of a suspension or a cancellation of a person's registration.

Item 30 provides that a statement of reasons must be provided if a person is given notice of a suspension or cancellation of the person's registration.

Item 31 relates to the continuing in force of a person's registration despite cancellation or suspension of the registration.

20 Parts 4 and 5 of Schedule 2 to apply

- (1) Parts 4 and 5 of Schedule 2 to the Act apply in relation to the person.

Note Part 4 of Schedule 2 to the Act provides that certain provisions of the National Credit Act apply in relation to registered persons, including the banning and disqualification provisions.

Part 5 of Schedule 2 to the Act provides that ASIC and the regulations may provide exemptions from, or modifications to, particular provisions of the Act.

Part 4 Registration

21 The conditions on the registration

- (1) For subitem 14 (7) of Schedule 2 to the Act, the registration is subject to the conditions set out in this regulation.
- (2) If:
- (a) there is a change in a matter particulars of which are entered in the credit register for registered persons; and
 - (b) the change is not a direct consequence of an act by ASIC; the registered person must lodge particulars of the change with ASIC, in the approved form, within 10 business days after the change occurs.
- (3) If:
- (a) there is a change in a matter particulars of which are entered in the credit register for credit representatives; and
 - (b) the change is not required to be reported in accordance with section 71 of the National Credit Act; and
 - (c) the change is not a direct consequence of an act by ASIC; the registered person must ensure that particulars of the change are lodged with ASIC in the approved form within 10 business days after the change occurs.

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- (4) The registered person must ensure that each credit representative of the registered person that may give an authorisation to another individual is aware of the requirements in section 71 of the National Credit Act.
- (5) The registered person must ensure that, before the registered person authorises an individual to engage in a credit activity on its behalf as mentioned in section 64 of the National Credit Act, reasonable inquiries are made to establish:
- (a) the individual's identity; and
 - (b) whether the individual has already been allocated a number by ASIC as a credit representative.
- (6) The registered person must ensure that, before a body corporate that is a credit representative of the registered person authorises an individual to engage in a credit activity on behalf of the registered person as mentioned in section 65 of the National Credit Act, reasonable inquiries are made to establish:
- (a) the individual's identity; and
 - (b) whether the individual has already been allocated a number by ASIC as a credit representative.
- (7) The registered person must ensure that, if:
- (a) ASIC has allocated a number to a credit representative; and
 - (b) the registered person, or a body corporate that has authorised an individual to engage in a credit activity on behalf of the registered person as mentioned in section 65 of the National Credit Act, lodges a document with ASIC that refers to the credit representative;
- the document refers to the number.
- (8) The registered person must provide evidence of an authorisation of any of its credit representatives:
- (a) on request by any person; and
 - (b) free of charge; and
 - (c) as soon as practicable after receiving the request and, in any event, within 10 business days after the day on which it received the request.

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

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- (12) For subparagraph (11) (b) (iii), the following matters must be taken into account in determining whether a person has the capacity to determine the outcome of decisions about the registered person's financial and operating policies:
- (a) the practical influence the person can exert (rather than the rights it can enforce);
 - (b) any practice or pattern of behaviour affecting the registered person's financial or operating policies is to be taken into account (whether or not it involves a breach of an agreement or a breach of trust).
- (13) On the request of any person, the registered person must make available, within 10 business days, evidence of its registration for inspection by that person.

Part 5 Exemptions

22 Persons exempt from being registered — general

- (1) For paragraph 42 (a) of Schedule 2 to the Act, this regulation exempts certain persons engaging in a credit activity from:
- (a) items 4 and 6 of Schedule 2 to the Act; and
 - (b) definitions in the Act, as they apply to references in the provisions referred to in paragraph (a); and
 - (c) regulations or other instruments made for the purposes of any of the provisions referred to in paragraphs (a) and (b).

Note Item 4 of Schedule 2 to the Act provides that a person must not engage in a credit activity during a specified period unless the person is registered or holds a licence.

Item 6 of Schedule 2 to the Act provides that a person must not engage in a credit activity during a specified period unless the person is:

- (a) registered and has applied for a licence; or
- (b) holds a licence.

- (2) The person is exempted only to the extent that the person is engaging in the specified credit activity.

Note If the person also engages in a credit activity that is not the subject of an exemption in these Regulations, the person is not exempted in relation to that credit activity.

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

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- (b) no remuneration (whether by way of commission or otherwise) is payable to, or on behalf of, the financial counselling agency by any person in relation to any action by, or on behalf of, the client arising from:
 - (i) engaging in the credit activity; or
 - (ii) any other aspect of the provision of the financial counselling service;
 - (c) no remuneration (whether by way of commission or otherwise) is payable to, or on behalf of, a representative of the financial counselling agency by any person in relation to any action by, or on behalf of, the client arising from:
 - (i) engaging in the credit activity; or
 - (ii) any other aspect of the provision of the financial counselling service;
 - (d) no remuneration (whether by way of commission or otherwise) is payable to, or on behalf of, an associate of the financial counselling agency by any person in relation to any action by, or on behalf of, the client arising from:
 - (i) engaging in the credit activity; or
 - (ii) any other aspect of the provision of the financial counselling service;
 - (e) no fees or charges (however described) are payable by or on behalf of the client in relation to the credit activity or any other aspect of the financial counselling service;
 - (f) the financial counselling agency:
 - (i) does not engage in a credit activity that is not covered by paragraphs (a) to (e); and
 - (ii) takes all reasonable steps to ensure that none of its representatives engages in a credit activity that is not covered by paragraphs (a) to (e);
 - (g) the financial counselling agency takes all reasonable steps to ensure that each person who engages in credit activities on its behalf:
 - (i) is a member of, or is eligible to be a member of, a financial counselling association; and

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- (ii) has undertaken appropriate training to ensure that the person has adequate skills and knowledge to engage satisfactorily in the credit activity and any other aspect of the provision of the financial counselling service.
- (6) A person is exempted if:
- (a) the person:
- (i) is a related body corporate of a registered person; and
- (ii) is engaging in credit activities only on behalf of the registered person; and
- (iii) is engaging in credit activities only because its employees and directors are engaging in credit activities on behalf of the registered person; and
- (b) the credit activities in which the person engages are not those mentioned in:
- (i) paragraph (a) or (b) of item 1 of the table in subsection 6 (1) of the National Credit Act; or
- (ii) paragraph (a) or (b) of item 3 of the table in subsection 6 (1) of the National Credit Act.
- (7) A person is exempted if the 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.
- (8) Subject to subregulation (9), if a person is authorised to engage in particular credit activities by:
- (a) an Act of the Commonwealth or a State or Territory (other than the Act or the National Credit Act); or
- (b) a licence or registration issued or granted under an Act of the Commonwealth or a State or Territory (other than the Act or the National Credit Act);
- the person is exempted to the extent that the person is engaging in the credit activities in which the person is authorised to engage under that Act, licence or registration.

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- (9) If a person would have been exempted under regulation 23 except that 12 calendar months have passed since the day this Chapter commences, the person is not exempted under subregulation (8).

Note Subregulation 23 (4) provides that a person to whom subregulation 23 (3) applies is only exempted for 12 calendar months starting on the day this Chapter commences.

- (10) A person is exempted if:
- (a) the person is an organisation that provides services and makes benefits available to members of:
 - (i) the organisation; or
 - (ii) an entity within the organisation; and
 - (b) an incidental benefit of membership of the organisation or entity is that members are eligible to apply for a particular credit contract or consumer lease; and
 - (c) the organisation has no reason to believe that the credit contract or consumer lease will be unsuitable for members; and
 - (d) the organisation provides a credit service (within the meaning given by section 7 of the National Credit Act) in relation to the particular credit contract or consumer lease only to members; and
 - (e) the credit to be provided under the credit contract is provided predominantly for purposes other than for the payment for services or benefits provided by the organisation, the entity within the organisation or an associate of the organisation; and
 - (f) the goods to be hired under the consumer lease are hired from a person other than the organisation, the entity within the organisation or an associate of the organisation; and
 - (g) the organisation does not otherwise engage in credit services.
- (11) A person is exempted if:
- (a) the person is a charitable body (within the meaning given by *ASIC Class Order [CO 02/184]*); and

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- (b) the body only engages in credit activities by providing a credit service in relation to credit contracts or consumer leases provided by a licensed credit provider or lessor (the *licensee*); and
 - (c) the credit contracts or consumer leases are offered as part of a program designed for low income consumers who are entitled to:
 - (i) hold a Health Care Card or Pension Concession Card; or
 - (ii) receive Family Tax Benefit Part A; and
 - (d) no remuneration (whether by way of commission or otherwise) is payable to, or on behalf of, the body by any person in relation to any action by, or on behalf of, the client arising from providing the credit service.

23 Persons exempt from being registered — debt collectors

- (1) For paragraph 42 (a) of Schedule 2 to the Act, this regulation exempts certain persons engaging in a credit activity from:
 - (a) items 4 and 6 of Schedule 2 to the Act; and
 - (b) definitions in the Act, as they apply to references in the provisions referred to in paragraph (a); and
 - (c) regulations or other instruments made for the purposes of any of the provisions referred to in paragraphs (a) and (b).

Note Item 4 of Schedule 2 to the Act provides that a person must not engage in a credit activity during a specified period unless the person is registered or holds a licence.

Item 6 of Schedule 2 to the Act provides that a person must not engage in a credit activity during a specified period unless the person is:

- (a) registered and has applied for a licence; or
- (b) holds a licence.

- (2) The person is exempted only to the extent that the person is engaging in the specified credit activity.

Note If the person also engages in a credit activity that is not the subject of an exemption in these Regulations, the person is not exempted in relation to that credit activity.

- (3) A person is exempted if:

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- (a) the person only engages in a credit activity within the meaning of:
- (i) paragraph (c) of item 1 of the table in subsection 6 (1) of the National Credit Act, on behalf of a credit provider; or
 - (ii) paragraph (c) of item 3 of the table in subsection 6 (1) of that Act, on behalf of the lessor; or
 - (iii) paragraph (b) of item 4 of the table in subsection 6 (1) of that Act, on behalf of a mortgagee; or
 - (iv) paragraph (b) of item 5 of the table in subsection 6 (1) of that Act, on behalf of the other person; and
- (b) the person only performs the obligations, or exercises the rights, referred to in those paragraphs in relation to:
- (i) demanding and receiving payments from:
 - (A) borrowers or guarantors under credit contracts; or
 - (B) lessees under consumer leases; and
 - (ii) enforcing rights in relation to taking possession of:
 - (A) property secured by a mortgage; or
 - (B) goods hired under a consumer lease; and
- (c) the person:
- (i) holds a licence or authorisation to engage in an activity mentioned in paragraph (a) under 1 or more of the Acts mentioned in subregulation (5); or
 - (ii) is authorised to act on behalf of a person holding a licence or authorisation of a kind mentioned in subparagraph (i); and
- (d) the person is authorised in writing by a registered person or a licensee to engage in an activity mentioned in paragraph (a).
- (4) The person is exempted for 12 calendar months starting on the day on which these Regulations commence.
- (5) For subparagraph (3) (c) (i), the Acts are the following:
- (a) the *Commercial Agents and Private Inquiry Agents Act 2004* (NSW);

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- (b) the **Private Agents Act 1966** (Vic);
 - (c) the *Property Agents and Motor Dealers Act 2000* (Qld);
 - (d) the *Debt Collectors Licensing Act 1964* (WA);
 - (e) the *Security and Investigations Agents Act 1995* (SA);
 - (f) the *Security and Investigations Agents Act 2002* (Tas);
 - (g) the *Commercial and Private Agents Licensing Act* (NT).

24 Persons exempt from being registered — third parties

- (1) For paragraph 42 (a) of Schedule 2 of the Act, this regulation exempts certain persons engaging in a credit activity from:
 - (a) items 4 and 6 of Schedule 2 to the Act; and
 - (b) definitions in the Act, as they apply to references in the provisions referred to in paragraph (a); and
 - (c) instruments made for the purposes of any of the provisions referred to in paragraphs (a) and (b).

Note Item 4 of Schedule 2 to the Act provides that a person must not engage in a credit activity during a specified period unless the person is registered or holds a licence.

That item also provides, among other things, that it is a defence if the person is a credit representative of a person who is registered or holds a licence.

Item 6 of Schedule 2 to the Act provides that a person must not engage in a credit activity during a specified period unless the person:

- (a) is registered and has applied for a licence; or
- (b) holds a licence.

That item also provides, among other things, that it is a defence if the person is a credit representative of a person who:

- (a) is registered and has applied for a licence; or
- (b) holds a licence.

- (2) The person is exempted only to the extent that the person is engaging in the specified credit activity.

Note If the person also engages in a credit activity that is not the subject of an exemption in these Regulations, the person is not exempted in relation to that credit activity.

- (3) A person is exempted if:

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- (a) the person only engages in a credit activity by selling or transporting property of a debtor, mortgagor or guarantor on behalf of:
 - (i) a credit provider; or
 - (ii) a mortgagee; or
 - (iii) a person who is the beneficiary of a guarantee; or
 - (b) the person only engages in a credit activity by giving or sending to a debtor, mortgagor or guarantor, on behalf of:
 - (i) a credit provider; or
 - (ii) a mortgagee; or
 - (iii) a person who is the beneficiary of a guarantee;
a notice or document that the person mentioned in subregulation (i), (ii) or (iii) is obliged by law to give or send to the debtor, mortgagor or guarantor.

25 Persons exempt from being registered — providers of point of sale credit services

- (1) For paragraphs 42 (a) and (c) of Schedule 2 to the Act, this regulation:
 - (a) exempts certain persons engaging in a credit activity from:
 - (i) items 4 and 6 of Schedule 2 the Act; and
 - (ii) definitions in the Act, as they apply to references in the provisions referred to in subparagraph (i); and
 - (iii) instruments made for the purposes of any of the provisions referred to in subparagraphs (i) and (ii); and
 - (b) modifies specified provisions for the purposes of the exemption under paragraph (a).

Note Item 4 of Schedule 2 to the Act provides that a person must not engage in a credit activity during a specified period unless the person is registered or holds a licence.

Item 6 of Schedule 2 to the Act provides that a person must not engage in a credit activity during a specified period unless the person is:

- (a) registered and has applied for a licence; or
- (b) holds a licence.

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- (2) The person is exempted only to the extent that the person is engaging in the specified credit activity.

Note If the person also engages in a credit activity that is not the subject of an exemption in these Regulations, the person is not exempted in relation to that credit activity.

- (3) A person is exempted if:
- (a) the person is a supplier of goods or services; and
 - (b) the supplier is only providing credit services (within the meaning of section 7 of the National Credit Act) in relation to a credit contract or consumer lease; and
 - (c) the credit provider or lessor in relation to the credit contract or consumer lease is:
 - (i) a linked credit provider or linked lessor of the supplier; and
 - (ii) a licensee or a registered person.
- (4) For paragraph 42 (c) of Schedule 2 to the Act, the definition of ***linked credit provider*** of a supplier in section 127 of Schedule 1 to the National Credit Act is modified for the purposes of this exemption so that it provides that a ***linked credit provider or linked lessor*** of a supplier means a credit provider or lessor:
- (a) with whom the supplier has a contract, arrangement or understanding relating to:
 - (i) the supply to the supplier of goods in which the supplier deals; or
 - (ii) the business carried on by the supplier of:
 - (A) supplying goods or services; or
 - (B) causing goods to be supplied to the consumer by way of a consumer lease; or
 - (iii) the provision to persons to whom goods or services are supplied by the supplier of credit in respect of payment for those goods or services; or
 - (b) to whom the supplier, by arrangement with the credit provider or lessor, regularly refers persons for the purpose of obtaining credit or being provided with a consumer lease; or
 - (c) whose:

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- (i) forms of contract; or
 - (ii) forms of application; or
 - (iii) offers for credit; or
 - (iv) offers to be provided with a consumer lease;
are, by arrangement with the credit provider or lessor,
made available to persons by the supplier; or
 - (d) with whom the supplier has a contract, arrangement or
understanding under which:
 - (i) contracts; or
 - (ii) applications; or
 - (iii) offers for credit; or
 - (iv) offers to be provided with a consumer lease;
from the credit provider or lessor may be signed by
persons at the premises of the supplier.
- (5) For paragraph 42 (c) of Schedule 2 to the Act, the definition of *services* in subsection 204 (1) of Schedule 1 to the National Credit Act is modified for the purposes of this exemption to provide that *services*:
- (a) includes:
 - (i) insurance; or
 - (ii) professional services; or
 - (iii) a right to services; or
 - (iv) credit services that are provided to facilitate the
supply of goods and services (other than credit
services) by the supplier to the consumer; and
 - (b) does not include:
 - (i) rights in relation to, and interest in, real property; or
 - (ii) services relating to credit or consumer leases that are
regulated under the National Credit Act, or would be
regulated under the Act if entered into, (other than
those services mentioned in subparagraph (a) (iv)).
- (6) The exemption does not apply to a person if:
- (a) the person:
 - (i) is a related body corporate of the linked credit
provider or linked lessor; and

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- (ii) is not engaging in credit activities on behalf of the linked credit provider or linked lessor; and
 - (iii) is not engaging in credit activities only because its employees and directors are engaging in credit activities on behalf of the linked credit provider or linker lessor; or
- (b) the supplying of goods or services to the consumer is the result of:
- (i) an unsolicited meeting with the consumer; or
 - (ii) an unsolicited telephone call to the consumer.

26 Persons exempt from being registered — securitisation entity

- (1) For paragraph 42 (a) of Schedule 2 to the Act, this regulation exempts certain persons engaging in a credit activity from:
- (a) items 4 and 6 of Schedule 2 to the Act; and
 - (b) definitions in the Act, as they apply to references in the provisions referred to in paragraph (a); and
 - (c) regulations or other instruments made for the purposes of any of the provisions referred to in paragraphs (a) and (b).

Note Item 4 of Schedule 2 to the Act provides that a person must not engage in a credit activity during a specified period unless the person is registered or holds a licence.

Item 6 of Schedule 2 to the Act provides that a person must not engage in a credit activity during a specified period unless the person is:

- (a) registered and has applied for a licence; or
- (b) holds a licence.

- (2) The person is exempted only to the extent that the person is engaging in the specified credit activity.

Note If the person also engages in a credit activity that is not the subject of an exemption in these Regulations, the person is not exempted in relation to that credit activity.

- (3) A person is exempted if:
- (a) the person is a securitisation entity; and
 - (b) the person is party to, or has rights under, an origination agreement; and

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- (c) the person is party to a servicing agreement; and
 - (d) 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
 - (e) the management agreement has terms that enable borrowers to exercise rights against the licensee or registered person as if the licensee or registered person were the legal assignee.
- (3) In this regulation, *asset* means a credit contract, a consumer lease, a mortgage, or a guarantee.

27 Activities exempt from being credit activities

- (1) For paragraph 42 (b) of Schedule 2 to the Act, this regulation exempts certain credit activities, or classes of credit activities, from all of the provisions to which Part 5 of Schedule 2 to the Act applies.

Note Item 40 of Schedule 2 to the Act identifies the provisions to which Part 5 of Schedule 2 to the Act applies.

- (2) Subject to subregulation (3), the following activities are exempted:
- (a) the providing of credit assistance by a lawyer in his or her professional capacity in relation to matters of law, legal interpretation or the application of the law to any facts;
 - (b) the providing of any credit assistance not mentioned in paragraph (a) by a lawyer in the ordinary course of activities as a lawyer that is reasonably regarded as a necessary part of those activities.
- (3) For subregulation (2), the credit activity is exempted only if the lawyer providing the credit assistance does not hold out or advertise that he or she is able to provide credit services.
- (4) A credit activity (other than the provision of credit assistance mentioned in subregulation (2)) is exempted if it is engaged in by a lawyer in the following circumstances:
- (a) the lawyer is acting:

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- (i) on the instructions of a client, an associate of the client or a relative of the client; and
 - (ii) in his or her professional capacity; and
 - (iii) in the ordinary course of his or her activities as a lawyer;
 - (b) the credit activity can reasonably be regarded as a necessary part of those activities;
 - (c) the lawyer has not received, and will not receive, from the client or from another person on behalf of the client a benefit in connection with those activities other than:
 - (i) the payment of professional charges in relation to those activities; and
 - (ii) reimbursement for expenses incurred or payment on account of expenses to be incurred on behalf of the client, an associate of the client or a relative of the client;
 - (d) the lawyer does not hold out or advertise that he or she is able to provide credit services.
- (5) A credit activity is exempted if:
- (a) it is engaged in by a tax agent in the following circumstances:
 - (i) the tax agent is registered under Part VIIA of the *Income Tax Assessment Act 1936*;
 - (ii) the tax agent engages in the credit activity in the ordinary course of activities as a tax agent; and
 - (b) it is a credit activity mentioned in item 2 of the table in subsection 6 (1) of the Act; and
 - (c) it does not involve providing a certificate or assessment (however described) relating to whether a consumer will be able to meet financial obligations under a credit contract or consumer lease.
- (6) A credit activity is exempted if:
- (a) the credit activity consists only of a person (***person 1***) passing on, publishing, distributing or otherwise disseminating a document that was provided by another person (***person 2***); and

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- (b) person 2:
 - (i) is not acting on behalf of person 1; and
 - (ii) is the holder of an Australian credit licence; and
 - (c) person 1 does not otherwise engage in credit activities; and
 - (d) either:
 - (i) a consumer in relation to the credit activity mentioned in paragraph (a) is:
 - (A) advised by person 1 that person 2 is the holder of an Australian credit licence; and
 - (B) provided with the licence number of person 2 by person 1; or
 - (ii) a reasonable person would not consider that person 1 is the licensee in relation to credit activities being engaged in by person 2; and
 - (e) person 1 does not select the content of the document, modify the content of the document or otherwise exercise control over the content of the document.
- (7) A credit activity is exempted if:
- (a) the credit activity consists only of a person (*person 1*) allowing another person (*person 2*) to use person 1's name, logo or trademark in relation to the passing on, publishing, distributing or other dissemination of a document; and
 - (b) person 2:
 - (i) is not acting on behalf of person 1; and
 - (ii) is the holder of an Australian credit licence; and
 - (c) person 1 does not otherwise engage in credit activities; and
 - (d) either:
 - (i) a consumer in relation to a credit activity mentioned in paragraph (a) is:
 - (A) advised by the person performing the credit activity that person 2 is the holder of an Australian credit licence; and

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- (B) provided with the licence number of person 2 by the person performing the credit activity; and
 - (ii) a reasonable person would not consider that person 1 is the licensee in relation to credit activities being engaged in by person 2.
- (8) A credit activity is exempted if:
- (a) the credit activity consists only of a person (*the provider*) giving to another person (*the inquirer*), in response to a request made by the inquirer to the provider, information about:
 - (i) the cost, or an estimate of the likely cost, of a credit contract or a consumer lease;
 - (ii) terms and conditions of a credit contract or a consumer lease; and
 - (b) the provider could have complied with the request by giving the inquirer equivalent information about 1 or more other credit contracts or consumer leases; and
 - (c) the provider did not give the inquirer that equivalent information.
- (9) A credit activity is exempted if it is engaged in by a clerk or cashier in the ordinary course of activities as a clerk or cashier.

28 Activities exempt from being registered

- (1) For paragraph 42 (b) of Schedule 2 to the Act, this regulation exempts certain credit activities from:
- (a) items 4 and 6 of Schedule 2 to the Act; and
 - (b) definitions in the Act, as they apply to references in the provisions referred to in paragraph (a); and
 - (c) regulations or other instruments made for the purposes of any of the provisions referred to in paragraphs (a) and (b).

Note Item 4 of Schedule 2 to the Act provides that a person must not engage in a credit activity during a specified period unless the person is registered or holds a licence.

Item 6 of Schedule 2 to the Act provides that a person must not engage in a credit activity during a specified period unless the person is:

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- (a) registered and has applied for a licence; or
 - (b) holds a licence.
- (2) A credit activity is exempted if:
- (a) the activity consists only of:
 - (i) a person (*person 1*) informing another person (*person 2*) that a registered person, or a representative of the registered person, is able to provide a particular credit activity or a class of credit activities; and
 - (ii) person 1 giving person 2 information about how person 2 may contact the registered person or representative;
 - (b) at the time the activity is engaged in, person 1 discloses to person 2:
 - (i) any benefits, including commission, that person 1, or an associate of person 1, may receive in respect of the activity; and
 - (ii) any benefits, including commission, that person 1, or an associate of person 1, may receive that are attributable to the activity;
 - (c) the disclosure mentioned in paragraph (b) is provided in the same form as the information mentioned in paragraph (a).
- (3) A credit activity is exempted if it is a credit activity engaged in in respect of the provision of credit mentioned in:
- (a) subsection 6 (9) or (11) of Schedule 1 to the National Credit Act; or
 - (b) regulation 51, 53, 54, 55, 56, 59, 60 or 62 of the *National Consumer Credit Protection Regulations 2010*.

Part 6 Infringement notices

29 Purpose of Part

- (1) The purpose of this Part is to set out a scheme under item 43 of Schedule 2 to the Act under which:

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- (a) a person who is alleged to have committed an offence against the Act that is stated to be an offence of strict liability may pay a penalty to the Commonwealth as an alternative to prosecution; and
 - (b) a person who is alleged to have contravened a civil penalty provision may pay a penalty to the Commonwealth as an alternative to civil proceedings.
- (2) This Part does not require an infringement notice to be given to a person for the alleged commission of an offence or contravention of a civil penalty provision.
 - (3) This Part does not affect the liability of a person to prosecution for the commission of an alleged offence or contravention of a civil penalty provision if an infringement notice is not given to the person.
 - (4) This Part does not affect the liability of a person to prosecution for the commission of an alleged offence or contravention of a civil penalty provision if:
 - (a) an infringement notice is given to the person; and
 - (b) the person does not pay the penalty stated in the notice in accordance with regulation 36.
 - (5) This Part does not limit or otherwise affect:
 - (a) the penalty that a court could impose on the person for the offence; or
 - (b) the penalty that a court could impose on the person for contravention of the civil penalty provision.

30 Definitions for Part

In this Part:

infringement notice means an infringement notice under regulation 31.

infringement notice offence means:

- (a) an offence against the Act that is stated to be an offence of strict liability; or
- (b) a contravention of the civil penalty provision in subitem 19 (1) of Schedule 2 to the Act.

nominated person, in relation to an infringement notice, means the person specified in the notice as the nominated person.

Note The nominated person is responsible for the administration of the infringement notice for the purposes of the payment of a penalty and the withdrawal of the notice.

recipient, in relation to an infringement notice, means the person to whom the notice is given under regulation 31.

31 When an infringement notice can be given

Alleged commission of offence against the Act

- (1) If ASIC has reasonable grounds to believe that a person has committed an offence against the Act that is stated to be an offence of strict liability, ASIC may give to the person an infringement notice relating to the alleged commission of the offence.
- (2) The infringement notice must be given within 12 months after the day on which the offence is alleged to have been committed.
- (3) If an infringement notice given to a person in relation to the alleged commission of a particular offence is withdrawn, ASIC may give the person a new infringement notice in relation to the alleged commission.

Example for subregulation (3)

An infringement notice given to a person in relation to the alleged commission of a particular offence may be withdrawn, and a new infringement notice given to the person in relation to that alleged commission, if the original infringement notice contained an error.

Alleged contravention of civil penalty provision

- (4) If ASIC has reasonable grounds to believe that a person has contravened the civil penalty provision in subitem 19 (1) of Schedule 2 to the Act, ASIC may give to the person an infringement notice relating to the alleged contravention.

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- (5) The infringement notice must be given within 12 months after the day on which the civil penalty provision is alleged to have been contravened.
- (6) If an infringement notice given to a person in relation to the alleged contravention of the civil penalty provision is withdrawn, ASIC may give the person a new infringement notice in relation to the alleged contravention.

Example for subregulation (6)

An infringement notice given to a person in relation to the alleged contravention of the civil penalty provision may be withdrawn, and a new infringement notice given to the person in relation to that alleged contravention, if the original infringement notice contained an error.

32 Contents of infringement notice

An infringement notice:

- (a) must be in accordance with Form 3 in Schedule 1 to the *National Consumer Credit Protection Regulations 2010*; and
- (b) may contain any other information that ASIC considers necessary.

33 Amount of penalty if infringement notice given

- (1) The penalty payable under an infringement notice for an alleged commission of an offence against the Act that is stated to be an offence of strict liability is:
- (a) for an individual — one-fifth of the maximum penalty that a court could impose on the person for that offence; and
- (b) for a body corporate — maximum penalty that a court could impose on an individual for that offence.
- (2) The penalty payable under an infringement notice for an alleged contravention of the civil penalty provision in subitem 19 (1) of Schedule 2 to the Act is:
- (a) for an individual — 50 penalty units; and
- (b) for a body corporate — 250 penalty units.

Note Under item 43 of Schedule 2 to the Act:

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- (a) the penalty for an offence against the Act that is stated to be an offence of strict liability must not exceed one-fifth of the maximum penalty that a court could impose on the person for that offence; and
 - (b) the penalty for a contravention of a civil penalty provision must not exceed one-fourtieth of the maximum penalty that a court could impose on the person for contravention of that provision.

34 Extension of time to pay penalty

- (1) Within 28 days after receiving an infringement notice, the recipient may apply, in writing, to the nominated person for a further period of up to 28 days in which to pay the penalty stated in the notice.
- (2) The application must:
 - (a) specify the infringement notice's unique identification code; and
 - (b) set out the reasons for the application.
- (3) Within 14 days after receiving the application, the nominated person must:
 - (a) grant or refuse a further period not longer than the period sought (but less than 28 days); and
 - (b) notify the recipient in writing of the decision and, if the decision is a refusal, the reasons for the decision.

35 Payment of penalty by instalments

- (1) Within 28 days after receiving an infringement notice, the recipient may apply, in writing, to the nominated person for permission to pay the amount of the infringement notice penalty by instalments.
- (2) The application must:
 - (a) specify the infringement notice's unique identification code; and
 - (b) set out the reasons for the application; and
 - (c) specify the amount and frequency of the instalments that the recipient proposes to pay.

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- (3) Within 14 days after receiving the application, the nominated person must:
 - (a) grant or refuse to grant permission for payment by instalments; and
 - (b) give the recipient written notice of the decision, including:
 - (i) if permission is granted — the amount and frequency of the instalments; and
 - (ii) if permission is refused — the reasons for refusal.

36 Time for payment of penalty

- (1) The penalty stated in an infringement notice must be paid within:
 - (a) 28 days after the day on which the notice is given to the recipient; or
 - (b) another period required by this regulation.
- (2) If the recipient applies for a further period of time in which to pay the penalty, and the application is granted, the penalty must be paid within the further period allowed.
- (3) If the recipient applies for a further period of time in which to pay the penalty, and the application is refused, the penalty must be paid within the later of:
 - (a) 7 days after the notice of the refusal is given to the recipient; and
 - (b) 28 days after the day on which the infringement notice was given to the recipient.
- (4) If the recipient applies for permission to pay the penalty by instalments, and permission is granted, the penalty must be paid in accordance with the permission.
- (5) If the recipient applies for permission to pay the penalty by instalments, and permission is refused, the penalty must be paid within the later of:
 - (a) 7 days after the notice of the refusal is given to the recipient; or
 - (b) 28 days after the day on which the infringement notice was given to the recipient.

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- (6) If the recipient applies for the notice to be withdrawn, and the application is refused, the penalty must be paid within 28 days after the notice of the refusal is given to the recipient.

37 Effect of payment of penalty

Alleged commission of offence against the Act

- (1) If:
- (a) an infringement notice is given in relation to an alleged commission of an offence against the Act that is stated to be an offence of strict liability; and
 - (b) the infringement notice is not withdrawn; and
 - (c) the recipient pays the penalty stated in the notice in accordance with regulation 36;
- the consequences mentioned in subregulation (2) apply.
- (2) The effects are:
- (a) any liability of the recipient for the alleged offence is discharged; and
 - (b) no prosecution may be brought against the recipient for the alleged offence; and
 - (c) the recipient is not taken to have admitted guilt in respect of the alleged offence; and
 - (d) the recipient is not taken to have been convicted of the offence.

Alleged contravention of civil penalty provision

- (3) If:
- (a) an infringement notice is given in relation to an alleged contravention of the civil penalty provision in subitem 19 (1) of Schedule 2 to the Act; and
 - (b) the infringement notice is not withdrawn; and
 - (c) the recipient pays the penalty stated in the notice in accordance with regulation 36;
- the consequences mentioned in subregulation (4) apply.

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- (4) The effects are:
- (a) any liability of the recipient for the alleged contravention is discharged; and
 - (b) no civil proceedings may be brought by the Commonwealth against the recipient for the alleged contravention; and
 - (c) the recipient is not taken to have admitted guilt in respect of the alleged contravention; and
 - (d) the recipient is not taken to have been found guilty of the contravention.

Note A consumer is not prevented from commencing a civil proceeding against the recipient under section 178 or 179 of the Act. ASIC is not prevented from applying for an order on behalf of a plaintiff in accordance with those sections.

38 Withdrawal of infringement notice by nominated person

- (1) Within 28 days after receiving an infringement notice, the recipient may apply, in writing, to the nominated person for the infringement notice to be withdrawn.
- (2) The application must:
 - (a) specify the infringement notice's unique identification code; and
 - (b) set out the reasons for the application.
- (3) Within 14 days after receiving the application, the nominated person must:
 - (a) withdraw or refuse to withdraw the notice; and
 - (b) notify the recipient in writing of the decision and, if the decision is a refusal, the reasons for the decision.
- (4) Without limiting subregulation (3), the nominated person may withdraw the infringement notice after taking into account the following matters:
 - (a) whether the recipient:
 - (i) has been previously convicted of an offence against the Act; or

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- (ii) has been previously found to have contravened a civil penalty provision;
 - (b) the circumstances in which the commission or contravention set out in the infringement notice offence specified in the notice is alleged to have occurred;
 - (c) whether an infringement notice has previously been given to the recipient in relation to an infringement notice offence of the same kind as the offence specified in the notice, and in relation to which the recipient paid the penalty under the notice;
 - (d) any other relevant matter.
- (5) If the nominated person has not withdrawn, or refused to withdraw, the notice within 14 days after receiving the application, the nominated person is taken to have refused to withdraw the notice.

39 Withdrawal of infringement notice by ASIC

- (1) ASIC may withdraw an infringement notice given by ASIC without an application under regulation 38 having been made.
- (2) Without limiting subregulation (1), ASIC may withdraw the infringement notice after taking into account a matter mentioned in paragraph 38 (4) (a), (b), (c) or (d).

40 Notice of withdrawal of infringement notices

- (1) A notice withdrawing an infringement notice must include the following information:
 - (a) the full name, or surname and initials, and address of the recipient;
 - (b) the date the infringement notice was given;
 - (c) the infringement notice's unique identification code.
- (2) The notice must also state that the notice is withdrawn.

41 Refund of penalty

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.

**Schedule 2 Amendments commencing on
1 July 2010**

(regulation 3)

[1] After regulation 4

insert

5 Application of new Credit Code to particular sale contracts

- (1) This regulation applies if:
- (a) a provision of credit was made before 29 May 2009; and
 - (b) the provision of credit was for a sale of land or goods by instalments under a contract; and
 - (c) immediately before commencement of the new Credit Code, an old Credit Code applies to the provision of credit.
- (2) For subsection 6 (2) of the Act, sections 10, 11 and 12 of the new Credit Code do not apply to the provision of credit.

Note Subsection 6 (2) of the Act provides that the regulations may prescribe matters of a transitional nature (including matters of an application or saving nature):

- (a) arising out of the enactment of the National Credit Act; or
- (b) relating to the transition from the application of provisions of the old Credit Codes, or related laws, of the referring States and the Territories to the application of provisions of the National Credit Act.

6 Treatment of proceedings brought under old Credit Code before commencement

- (1) This regulation applies if:

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- (a) a party to old proceedings under subitem 4 (1) of Schedule 1 to the Act was a Government Consumer Agency (within the meaning given by the old Credit Code of a referring State or Territory) of a State or Territory; and
 - (b) the party to the old proceedings had powers and functions under the old Credit Code that relate to the old proceedings; and
 - (c) the party to the old proceedings is a party to new proceedings under paragraph 4 (4) (a) of Schedule 1 to the Act; and
 - (d) under the National Credit Act, ASIC has equivalent powers and functions to the powers and functions mentioned in paragraph (b).
- (2) The party may continue to exercise the powers or perform the functions of the party under the old Credit Code for the purposes of the new proceedings, despite ASIC's equivalent powers and functions under the National Credit Act.

Note Paragraph 6 (2) (b) of the Act provides that regulations may prescribe matters of a transitional nature relating to the transition from the application of provisions of the old Credit Codes, or related laws, of the referring States and the Territories to the application of provisions of the National Credit Act.

[2] **Part 3, heading**

substitute

Part 3 **Application of the National
Credit Act and Schedule 2 to
the Act to contracts and other
instruments made before
commencement**

[3] **Part 3, before Division 3**

insert

Division 1 **Application of the National Credit
Act (other than Chapter 3) to
contracts and other instruments
made before commencement**

7 **Preliminary**

- (1) For subitem 18 (2) of Schedule 1 to the Act, this Division applies to a person who:
- (a) engages in credit activities within the meaning of:
 - (i) paragraph (a) of item 1 of the table in subsection 6 (1) of the National Credit Act; or
 - (ii) paragraph (a) of item 3 of the table in subsection 6 (1) of the National Credit Act; or
 - (iii) paragraph (a) of item 4 of the table in subsection 6 (1) of the National Credit Act; or
 - (iv) paragraph (a) of item 5 of the table in subsection 6 (1) of the National Credit Act; and
 - (b) engages in the credit activities after commencement in relation to a credit contract or consumer lease that is a carried over instrument.

Note Subitem 18 (2) of Schedule 1 to the Act provides that the regulations may provide for the application of all or specified provisions of the National Credit Act to a person (including the licensing of that person) in relation to credit activities engaged in after commencement in relation to a carried over instrument.

Subsection 6 (2) of the Act provides among other things that the regulations may prescribe matters of a transitional nature (including matters of an application or saving nature) arising out of the enactment of the National Credit Act.

- (2) The National Credit Act does not apply to the person other than as provided by this Division and Division 2.
- (3) This Division only applies in relation to a person to the extent that the person is engaging in the credit activities mentioned in subregulation (1).
- (4) Part 1-2 of the National Credit Act applies in relation to the person.

Note Part 1-2 of the National Credit Act sets out the definitions that apply to that Act.

8 Person may apply for a licence or automatically be granted a licence

- (1) Division 3 of Part 2-1 of the National Credit Act applies in relation to the person.

Note Division 2 of Part 2-1 of the National Credit Act states among other things that, from a specified date, a person must not engage in a credit activity if the person does not hold a licence authorising the person to engage in the credit activity. That Division does not apply to persons to whom this Division applies.

Division 3 of Part 2-1 of that Act provides prohibitions relating to the requirement to be licensed and to credit activities.

- (2) If:
 - (a) a person is registered under regulation 16; and
 - (b) the registration has not been cancelled;ASIC must grant a licence to the person no later than the transition end day.
- (3) If the person is not registered under regulation 16:

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- (a) the person may apply for a licence under section 36 of the National Credit Act; and
 - (b) if the person applies for a licence, ASIC must grant the licence, subject to subsection 40 (1) of that Act.

Note Section 36 of the National Credit Act provides how a person may apply for a licence.

Subsection 40 (1) of the Act provides that ASIC must not grant a licence to a person to engage in a credit activity if a banning order or disqualification order is in force against the person in relation to that credit activity.

- (4) If the person is not registered under regulation 16, and the person has not applied for a licence:
 - (a) ASIC may decide to automatically grant the person a licence; and
 - (b) if ASIC decides to automatically grant the person a licence, ASIC must, at least 28 days before granting the licence, give written notice of the decision to the person.
- (5) If ASIC grants a licence to a person under this regulation, ASIC must give written notice to the person of:
 - (a) the day on which the licence takes effect; and
 - (b) any conditions imposed on the licence under regulation 9.
- (6) The licence comes into force on the day specified in the notice, which must not be before:
 - (a) the day on which the decision to grant the licence was made; or
 - (b) commencement.
- (7) If the person is granted a licence, sections 35, 43 and 44 of the National Credit Act apply in relation to the licensee.

Note Section 35 of the National Credit Act provides that the licensee is authorised to engage in the credit activities that are specified in a condition of the licence as the credit activities that the licensee is authorised to engage in.

Section 43 of that Act relates to the allocation of an Australian credit licence number to a licence.

Section 44 of that Act provides the basis on which the licence is granted.

9 Conditions on the licence

- (1) If the person is granted a licence under regulation 8, Division 4 of Part 2-2 of that Act applies in relation to the licensee, subject to this regulation.

Note Division 4 of Part 2-2 of the National Credit Act relates to the conditions that ASIC may impose on a licence.

- (2) ASIC must not impose a condition on the licence if the condition would have the effect of preventing the licensee from collecting debts owing under the credit contract or consumer lease.
- (3) ASIC may impose a condition on the licence relating to the manner in which debts owing under the credit contract or consumer lease are collected.
- (4) Subsection 45 (6) of the National Credit Act applies so that if the licence was granted on the basis of the licensee only engaging in credit activities in relation to the credit contract or consumer lease mentioned in paragraph 7 (1) (b), ASIC must impose a condition on the licence that the licensee is only authorised to engage in those credit activities.

10 Obligations of licensees

- (1) If the person is granted a licence under regulation 8, Division 5 of Part 2-2 of the National Credit Act applies in relation to the licensee to the extent permitted by this regulation.

Note Division 5 of Part 2-2 of the National Credit Act relates to the obligations of licensees.

- (2) Section 47 the National Credit Act applies so that the licensee must:
 - (a) do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly; and
 - (b) comply with the conditions on the licence; and
 - (c) comply with the credit legislation, subject to section 336 of the National Credit Act; and

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- (d) take reasonable steps to ensure that the licensee's representatives comply with the credit legislation, subject to section 336 of the National Credit Act; and
 - (e) have in place adequate arrangements to ensure that clients of the licensee are not disadvantaged by any conflict of interest that may arise wholly or partly in relation to credit activities engaged in by the licensee or the licensee's representatives; and
 - (f) have an internal dispute resolution procedure that:
 - (i) complies with standards and requirements made or approved by ASIC in accordance with the regulations; and
 - (ii) covers disputes in relation to the credit activities engaged in by the licensee or by the licensee's representatives.

Note For paragraphs (c) and (d), section 336 of the National Credit Act provides that a provision of the Act does not apply to the extent that the operation of the provision would result in an acquisition of property from a person otherwise than on just terms.

- (3) Sections 49 to 53 of the National Credit Act apply in relation to the licensee.

Note Sections 49 to 53 of the National Credit Act relate to specific obligations of licensees, being the obligation to provide a statement or obtain an audit report if directed by ASIC, the obligation to give ASIC information required by the regulations, the obligation to provide ASIC with assistance if reasonably requested, the obligation to cite the licensee's Australian credit licence number, and the obligation to lodge an annual compliance certificate.

11 Suspension, cancellation and variation of licence

- (1) If the person is granted a licence under regulation 8, Division 6 of Part 2-2 of the National Credit Act applies in relation to the licensee to the extent permitted by this regulation.

Note Division 6 of Part 2-2 of the National Credit Act relates to when licences can be suspended, cancelled or varied.

- (2) Section 54 of the National Credit Act applies in relation to the licensee so that ASIC may suspend or cancel a licensee's licence if:

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- (a) the licensee does not engage, or ceases to engage, in credit activities; or
 - (b) any of the persons mentioned in subregulation (3) is:
 - (i) a natural person; and
 - (ii) incapable of managing his or her affairs because of physical or mental incapacity.
- (3) For paragraph (2) (b), the persons are:
- (a) the licensee; and
 - (b) if the licensee is a body corporate — a director, secretary or senior manager of the body corporate who performs duties in relation to credit activities; and
 - (c) if the licensee is a partnership or the trustees of a trust — a partner or trustee who performs duties in relation to credit activities.
- (4) Sections 57 to 62 of the National Credit Act apply in relation to the licensee.

Note Section 57 provides that ASIC may vary a person's licence to reflect a change in the name of the person.

Section 58 relates to the effect of a suspension of a licence.

Section 59 provides that ASIC may revoke the suspension of a licence.

Section 60 relates to the date of effect, notice and publication of a variation, suspension, revocation of a suspension or a cancellation of a licence.

Section 61 provides that a statement of reasons must be provided if a licensee is given notice of a suspension or cancellation of the licensee's licence.

Section 62 relates to the continuing in force of a licensee's licence despite cancellation or suspension of the licence.

12 Banning or disqualification of person from engaging in credit activities

- (1) If the person is not a licensee, Part 2-4 of the National Credit Act applies in relation to the person, subject to this regulation.

Note Part 2-4 of the National Credit Act relates to ASIC's power to make a banning order against a person, and ASIC's power to apply to the court for an order disqualifying the person from engaging in credit activities.

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- (2) If ASIC makes a banning order against the person under section 80 of the National Credit Act, the banning order does not have effect to the extent that it would prevent the collection of debts owing under the credit contract or consumer lease.
 - (3) If the court makes a disqualification order against a person under section 86 of the National Credit Act, the disqualification order does not have effect to the extent that it would prevent the collection of debts owing under the credit contract or consumer lease.

13 Application of Parts 2-5 and 2-6 of the National Credit Act

- (1) If the person is granted a licence under regulation 8, this regulation applies in relation to the licensee.
- (2) Part 2-5 of the National Credit Act, other than Division 3 of that Part, applies in relation to the person.

Note Part 2-5 of the National Credit Act (other than Division 3) deals with the requirement for licensees to keep certain financial records and how those records must be kept, and requirements relating to audit reports.

- (3) Part 2-6 of the National Credit Act applies in relation to the person.

Note Part 2-6 of the National Credit Act provides that ASIC and the regulations may provide exemptions from, or modifications to, particular provisions of that Act.

Division 2 Application of Chapter 3 of the National Credit Act to contracts and other instruments made before commencement

14 Application of Chapter 3 of the National Credit Act

- (1) For subitem 18 (2) of Schedule 1 to the Act, this Division applies to the following persons:
 - (a) a licensee who:

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- (i) provides credit assistance within the meaning of paragraph 8 (b), (c), (e) or (g) of the National Credit Act; and
 - (ii) provides the credit assistance in relation to a credit contract or consumer lease that is a carried over instrument;
- (b) a licensee who:
- (i) is a credit provider; and
 - (ii) engages in credit activities in relation to a credit contract that is a carried over instrument; and
 - (iii) proposes to increase the credit limit of the credit contract with a consumer who is the debtor under the credit contract.

Note Subitem 19 (3) of Schedule 1 to the Act provides that Chapter 3 of the National Credit Act does not apply in relation to a contract or other instrument that was made before commencement. Subitem 19 (5) of Schedule 1 to the Act provides that subitem 19 is subject to subitem 18 (2) (which deals with regulations that provide for the application of the National Credit Act to a person).

- (2) Chapter 3 of the National Credit Act applies to the person as provided by subitems 19 (1), (2) (other than paragraph (d)) and (4) of Schedule 1 to the Act.

Note Subitems 19 (1) and (2) of Schedule 1 to the Act provide when Chapter 3 applies to the person.

Subitem 19 (4) of Schedule 1 to the Act provides that certain sections in Chapter 3 will not apply to a person mentioned in this regulation because those sections only apply to a contract or other instrument made after the Chapter 3 start day.

Chapter 3 imposes obligations on licensees in relation to responsible lending conduct.

Note

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