



National Consumer Credit Protection (Transitional and Consequential Provisions) Amendment Regulations 2010 (No. 2)¹

Select Legislative Instrument 2010 No. 107

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 20 May 2010

QUENTIN BRYCE
Governor-General

By Her Excellency's Command

CHRIS BOWEN
Minister for Financial Services, Superannuation and Corporate
Law

1 Name of Regulations

These Regulations are the *National Consumer Credit Protection (Transitional and Consequential Provisions) Amendment Regulations 2010 (No. 2)*.

2 Commencement

These Regulations commence on 24 May 2010.

3 Amendment of *National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010*

Schedule 1 amends the *National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010*.

Schedule 1 Amendments

(regulation 3)

[1] Regulation 3

omit

In these Regulations:

insert

(1) In these Regulations:

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

insert

authorised contact has the meaning given by subregulation 3 (1) of the National Credit Regulations.

credit card has the meaning given by subregulation 3 (1) of the National Credit Regulations.

[3] Regulation 3, after definition of *financial counselling service*

insert

licensee has the meaning given by subsection 5 (1) of the National Credit Act.

National Credit Regulations means the *National Consumer Credit Protection Regulations 2010*.

[4] Regulation 3, after definition of *registered debt agreement administrator*

insert

unlicensed carried over instrument lender has the meaning given by modified section 5 of the National Credit Act as mentioned in item 2.4 of Schedule 2 to the National Credit Regulations.

unsolicited contact has the meaning given by subregulation 3 (1) of the National Credit Regulations.

[5] Regulation 3

insert

- (2) In these Regulations, a provision of the National Credit Act modified in accordance with Division 2 of Part 2-4 of the National Credit Regulations is referred to as *modified*.

[6] Part 4, heading

substitute

Part 4 Exemptions and modifications

[7] After Part 4, heading

insert

Division 1 Exemptions

Subdivision 1.1 Persons exempt from being registered

[8] Paragraph 11 (11) (c)

omit

[9] Paragraph 11 (11) (d)

after

become members

insert

acting on behalf of a licensee or registered person under a contract or agreement with the licensee or registered person

[10] Subparagraph 14 (3) (a) (i)

after

services

insert

(the *supplier*)

[11] Subparagraph 14 (3) (a) (ii)

substitute

(ii) a related body corporate of the supplier; or

[12] Subparagraph 14 (3) (a) (ii)

substitute

- (iii) engaging in a credit activity primarily on the premises of the supplier with the agreement of the supplier; and

[13] Paragraph 14 (3) (b) to (d)

substitute

- (b) the person is:
 - (i) on behalf of a relevant credit provider for a credit contract or proposed credit contract, performing the obligations or exercising the rights of the relevant credit provider in relation to the contract or proposed contract; or
 - (ii) on behalf of a relevant lessor for a consumer lease or proposed consumer lease, performing the obligations or exercising the rights of the lessor under the lease or proposed lease; or
 - (iii) on behalf of a relevant mortgagee for a mortgage or proposed mortgage, performing the obligations or exercising the rights of the mortgagee under the mortgage or proposed mortgage; or
 - (iv) on behalf of a relevant beneficiary of a guarantee or proposed guarantee, performing the obligations or exercising the rights of the beneficiary in relation to the guarantee; or
 - (v) providing credit services in relation to a credit contract or consumer lease offered or provided by a relevant credit provider or relevant lessor; and
- (c) if:
 - (i) the person is acting on behalf of the credit provider for a credit contract or proposed credit contract that is a loan contract or engaging in credit services in relation to a loan contract; and

- (i) the credit provided under the loan contract or the credit that would be provided if the loan contract were entered into will wholly or predominantly be used to pay for goods or services supplied by the supplier; and
- (d) if:
 - (i) the person is acting on behalf of the credit provider of a credit contract or proposed credit contract that is a continuing credit contract or engaging in credit services in relation to a continuing credit contract; and
 - (ii) the credit initially provided under the continuing credit contract or the credit that would be initially provided under the continuing credit contract if it were entered into will wholly or predominantly be used to pay for goods or services supplied by the supplier; and
- (e) if:
 - (i) the person is acting on behalf of a lessor for a consumer lease or proposed consumer lease or engaging in credit services in relation to a consumer lease; and
 - (ii) payments made under the lease or payments that would be made under the lease if the lease were entered into will wholly or predominantly be used to pay the lessor for the hire of goods supplied by the supplier.

[14] After subregulation 14 (3)

insert

- (3A) The person is not exempted if the person supplies goods or services to the consumer as a result of unsolicited contact with the consumer.

(3B) In this regulation:

relevant credit provider for a credit contract or proposed credit contract, means the credit provider for the contract or proposed contract if the credit provider is a:

- (a) licensee or registered person; and
- (b) linked credit provider or lessor of the supplier mentioned in subparagraph (3) (a) (i).

relevant lessor for a consumer lease or proposed consumer lease, means the lessor under the lease or proposed lease if the lessor is a:

- (a) licensee or registered person; and
- (b) linked credit provider or lessor of the supplier mentioned in subparagraph (3) (a) (i).

relevant mortgagee for a mortgage or proposed mortgage, means the mortgagee under the mortgage or proposed mortgage if the mortgagee is a:

- (a) licensee or registered person; and
- (b) linked credit provider or lessor of the supplier mentioned in subparagraph (3) (a) (i).

relevant beneficiary of a guarantee or proposed guarantee, means the beneficiary of the guarantee or proposed guarantee if the beneficiary is a:

- (a) licensee or registered person; and
- (b) linked credit provider or lessor of the supplier mentioned in subparagraph (3) (a) (i).

[15] Subregulations 14 (6) and (7)

omit

[16] After regulation 14

insert

14A Persons exempt from requiring a licence — providers of point of sale credit services for a credit card

- (1) For paragraph 42 (c) 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 mentioned in paragraph (a); and
 - (c) instruments made for the purpose of any of the provisions mentioned 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 the specified period unless the person is registered or holds a licence authorising the person to engage in the credit activity.

That item also provides that it is a defence if the person is a credit representative of the person who is registered or holds a licence authorising the person to engage in the credit activity.

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

- (a) is registered and has applied for a licence authorising the person to engage in the credit activity; or
- (b) holds a licence authorising the person to engage in the credit activity.

That item also provides 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 authorising the person to engage in the credit activity; or
- (b) holds a licence authorising the person to engage in the credit activity.

- (2) The person is exempted only to the extent that the person is engaging in the specified credit activity in relation to a continuing credit contract under which a credit card is provided.

Note If the person also engages in a credit activity that is not the subject of an exemption under the Act or the National Credit Act, the person is not exempted in relation to that credit activity.

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- (3) The person is exempted if:
- (a) the person is:
 - (i) a supplier of goods or services; or
 - (ii) a related body corporate of a supplier of goods or services; or
 - (iii) engaging in a credit activity primarily on the premises of a supplier of goods or services with the agreement of the supplier; and
 - (b) the person meets the requirements of subregulation (4) or (5).
- (4) For paragraph (3) (b), the requirements are that the person is performing the obligations or exercising the rights of a credit provider in relation to a credit contract or proposed credit contract:
- (a) on behalf of the credit provider who is a linked credit provider of the supplier and is a licensee or registered person; and
 - (b) in relation to a continuing credit contract under which a credit card is:
 - (i) provided or would be provided if the contract were entered into; and
 - (ii) branded or co-branded with the name of the supplier or a related body corporate of the supplier or any other words, phrase, initials or logo associated with the supplier or related body corporate.
- (5) For paragraph (3) (b), the requirements are that the person is providing credit services in relation to a continuing credit card contract under which a credit card is provided or would be provided if the contract were entered into and the:
- (a) credit provider for the continuing credit contract is a linked credit provider of the supplier and is a licensee or registered person; and
 - (b) credit card is branded or co-branded with the name of the supplier or a related body corporate of the supplier or any other words, phrase, initials or logo associated with the supplier or related body corporate.

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- (6) The person is not exempted if the person supplies goods or services to the consumer as a result of unsolicited contact with the consumer.
- (7) For paragraph 42 (c) of Schedule 2 to the Act, the definition of *linked credit provider* of a supplier in section 127 of the Code applies as if it were modified for the purposes of this exemption to provide that a *linked credit provider* of a supplier means a credit provider:
- (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 of supplying goods or services carried on by the supplier; or
 - (iii) the provision of credit:
 - (A) to persons to whom goods or services are supplied by the supplier; and
 - (B) for payment for the goods or services; or
 - (b) to whom the supplier, by arrangement with the credit provider, regularly refers persons for the purpose of obtaining credit; or
 - (c) whose:
 - (i) forms of contract; or
 - (ii) forms of application; or
 - (iii) offers for credit;are, by arrangement with the credit provider, 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;from the credit provider may be signed by persons at the premises of the supplier.

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- (8) For paragraph 42 (c) of Schedule 2 to the Act, the definition of *services* in subsection 204 (1) of the Code applies as if it were 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; 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 Act, or would be regulated under the Act if entered into, other than credit services within the meaning given by section 7 of the National Credit Act.

14B Persons exempt from registration — special purpose funding entity

- (1) For paragraph 42 (a) of Schedule 2 to the Act, this regulation applies to a special purpose funding entity engaging in a credit activity and exempts the special purpose funding entity 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 mentioned in paragraph (a); and
 - (c) instruments made for the purpose of any of the provisions mentioned 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 the specified period unless the person is registered or holds a licence authorising the person to engage in the credit activity.

That item also provides that it is a defence if the person is a credit representative of the person who is registered or holds a licence authorising the person to engage in the credit activity.

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

- (a) is registered and has applied for a licence authorising the person to engage in the credit activity; or

(b) holds a licence authorising the person to engage in the credit activity.

That item also provides 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 authorising the person to engage in the credit activity; or
- (b) holds a licence authorising the person to engage in the credit activity.

(2) The special purpose funding entity is exempted only to the extent that it is engaging in the specified credit activity.

Note If the special purpose funding entity also engages in a credit activity that is not the subject of an exemption under the Act or the National Credit Act, it is not exempted in relation to that credit activity.

(3) The special purpose funding entity is exempted if:

- (a) it is party to a servicing agreement; and
- (b) it is party to or has rights under an origination agreement; and
- (c) it is a member of an approved external dispute resolution scheme; and
- (d) if it is a body corporate — each director or secretary of the body corporate is not an inappropriate person; and
- (e) if it is a trust — each trustee of the trust is not an inappropriate person.

[17] Before regulation 15

insert

Subdivision 1.2 Exempt credit activities

[18] Subregulation 15 (1)

substitute

- (1) For paragraphs 42 (b) and (c) of Schedule 2 to the Act, this regulation:
 - (a) 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; and

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- (b) modifies specified provisions for the purposes of the exemption mentioned in paragraph (a).

[19] Subparagraph 15 (5) (a) (i)

omit

Part VIIA of the *Income Tax Assessment Act 1936*

insert

Part 2 of the *Tax Agent Services Act 2009*

[20] After subregulation 15 (9)

insert

- (10) For paragraph 42 (c) of Schedule 2 to the Act, the definition of *lawyer* in subsection 5(1) of the National Credit Act is modified for the purposes of this regulation to provide that *lawyer* means a duly qualified legal practitioner and, in relation to a person, means such a practitioner acting for the person.

[21] After regulation 16

insert

Division 2 Modifications

16A Purpose of Division

The purpose of this Division is to set out modifications of Schedule 2 to the Act.

Subdivision 2.1 Modifications — registered person party to servicing agreement with special purpose funding entity

16B Application of Subdivision

This Subdivision is made for paragraph 42 (c) of Schedule 2 to the Act and applies to a registered person who is party to a servicing agreement with a special purpose funding entity.

16C Modification of paragraph 14 (1) (a) of Schedule 2 to Act

Item 14, of Schedule 2 to the Act applies to the registered person as if it were modified by substituting the following paragraph for paragraph 14 (1) (a):

- (a) impose conditions or additional conditions on a registered person who is a party to a servicing agreement with a special purpose funding entity, including a condition requiring the registered person to cease engaging in a credit activity on behalf of the special purpose funding entity; and

Subdivision 2.2 Modifications — carried over instrument lender

16D Application of Subdivision

This Subdivision is made for paragraph 42 (c) of Schedule 2 to the Act and applies to a carried over instrument lender.

16E Modification of Schedule 2 to Act — carried over instrument lender

Schedule 2 to the Act applies to the carried over instrument lender as if it were modified by inserting the following Part 4A after Part 4 of the Schedule:

Part 4A Notification obligations — unlicensed carried over instrument lender**39A Obligation on unlicensed carried over instrument lender to give ASIC information**

- (1) In the period starting 24 May 2010 and ending 30 June 2010, an unlicensed carried over instrument lender must give ASIC the following information:
- (a) the lender's name (including the lender's principal business name if any);
 - (b) the name of:
 - (i) if the lender is a body corporate — each director or secretary of the body corporate; and
 - (ii) if the lender is a partnership or the trustees of a trust — each partner or trustee;
 - (c) the postal address of the lender;
 - (d) if the principal business address of the lender is different from the postal address — the principal business address;
 - (e) if the lender has an Australian Business Number — the Australian Business Number;
 - (f) the number of carried over instruments held by the lender and the total amount owed to the lender under the instruments;
 - (g) if the lender is a member of an approved external dispute resolution scheme — the name of the scheme;
 - (h) an estimate of the date on which the longest running instrument will be finalised, if payments are made in accordance with the terms of the instrument;
 - (i) if the lender will be required to engage in credit activities through a registered person or licensee under modified section 74 of the National Credit Act — the reason why the lender will be required to engage in the credit activities through the registered person or licensee;

(j) any other information requested by ASIC.

Civil penalty: 2,000 penalty units.

Offence

- (2) A person commits an offence if:
- (a) the person is subject to a requirement under subsection (1); and
 - (b) the person engages in conduct; and
 - (c) the conduct contravenes this requirement.

Criminal penalty: 25 penalty units, or 6 months imprisonment, or both.

Strict liability offence

- (3) A person commits an offence if:
- (a) the person is subject to a requirement under subsection (1); and
 - (b) the person engages in conduct; and
 - (c) the conduct contravenes this requirement.

Criminal penalty: 10 penalty units.

- (4) Subsection (3) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the Criminal Code.

[22] After Part 5

insert

Part 6 Carried over instruments

30 Purpose of Part

The purpose of this Part is to set out the requirements for registration, licensing or other statutory obligations applicable to a person who engages in a credit activity in relation to a carried over instrument.

31 Application of Part

This Part applies to a person who engages in a credit activity in relation to a carried over instrument.

32 Application of Chapter 2 of National Credit Act to credit provider or lessor for carried over instrument before 1 July 2010

For subitem 18 (2) of Schedule 1 to the Act, Chapter 2 (other than section 29) of the National Credit Act applies to the person in relation to credit activity engaged in in relation to the carried over instrument if the person:

- (a) was the credit provider, lessor, mortgagor or beneficiary of a guarantee in relation to the instrument immediately before 1 July 2010; and
- (b) applies for a licence under section 36 of the National Credit Act.

Note Under subitem 3 (2) of Schedule 1 to the Act, the National Credit Code applies in relation to a carried over instrument.

33 Application of Chapter 2 of National Credit Act if not credit provider or lessor for carried over instrument before 1 July 2010

For subitem 18 (2) of Schedule 1 to the Act, Chapter 2 of the National Credit Act applies to the person in relation to the credit activity engaged in in relation to the carried over instrument if the person was not the credit provider, lessor, mortgagor or beneficiary of a guarantee in relation to the instrument immediately before 1 July 2010.

Note Under subitem 3 (2) of Schedule 1 to the Act, the National Credit Code applies in relation to a carried over instrument.

34 Application of Schedule 2 to the Act if credit provider or lessor for carried over instrument before 1 July 2010

For subitem 20 (2) of Schedule 1 to the Act, Schedule 2 to the Act (not including items 4 and 6) applies to the person in relation to the credit activity engaged in in relation to the carried over instrument if the person:

- (a) was the credit provider, lessor, mortgagor or beneficiary of a guarantee in relation to the instrument immediately before 1 July 2010; and
- (b) applies for registration under item 11 of Schedule 2 to the Act.

Note Under subitem 3 (2) of Schedule 1 to the Act, the National Credit Code applies in relation to a carried over instrument.

35 Application of Schedule 2 to the Act if not credit provider or lessor for carried over instrument before 1 July 2010

For subitem 20 (2) of Schedule 1 to the Act, Schedule 2 to the Act applies to the person in relation to the credit activity engaged in in relation to the carried over instrument if the person was not the credit provider, lessor, mortgagor or beneficiary of a guarantee in relation to the instrument immediately before 1 July 2010.

Note Under subitem 3 (2) of Schedule 1 to the Act, the National Credit Code applies in relation to a carried over instrument.

36 Application of section 213 and modified Chapter 2 of National Credit Act

- (1) For subitem 18 (2) of Schedule 1 to the Act, this regulation applies to the person if the person:
 - (a) immediately before 1 July 2010, was a credit provider, lessor, mortgagor or beneficiary of a guarantee in relation to a carried over instrument; and
 - (b) on or after 1 July 2010, has been the credit provider or lessor in relation to the carried over instrument on a continuous basis; and

(c) is not any of the following persons:

- (i) a licensee;
- (ii) a registered person;
- (iii) a person who is exempt from a requirement to hold a licence under the National Credit Act or to be a registered person under the Act.

(2) Section 213 of the National Credit Act and modified Chapter 2 of the National Credit Act apply to the person in relation to a credit activity engaged in in relation to the carried over instrument.

Note Under subitem 3 (2) of Schedule 1 to the Act, the National Credit Code applies in relation to a carried over instrument.

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>.