
EXPLANATORY STATEMENT for
ASIC Credit (Financial Counselling Agencies) Instrument 2017/793

Prepared by the Australian Securities and Investments Commission

National Consumer Credit Protection Act 2009

The Australian Securities and Investments Commission (**ASIC**) makes *ASIC Credit (Financial Counselling Agencies) Instrument 2017/793 (the New Instrument)* under paragraphs 109(3)(a) and 109(3)(d) of the *National Consumer Credit Protection Act 2009 (National Credit Act)*.

Paragraph 109(3)(a) provides that ASIC may exempt a person or class of persons from all or specified provisions to which Part 2–6 of the National Credit Act applies.

Paragraph 109(3)(d) provides that ASIC may declare that provisions to which Part 2–6 of the National Credit Act applies apply in relation to a class of person as if specified provision were omitted, modified or varied as specified in the declaration

1. Background

In 2003, ASIC provided financial counselling agencies with a conditional exemption from the requirement to hold an Australian financial services licence under the *Corporations Act 2001* to enable them to provide certain types of financial product advice during a financial counselling service. The exemption was set out in [CO 03/1063]. [CO 03/1063] is being remade in a new legislative instrument *ASIC Corporations (Financial Counselling Agencies) Instrument 2017/792* to continue the exemption beyond its sunset date of 1 October 2017.

In addition to providing advice, a financial counsellor may be engaging in regulated credit activities by, for example, providing credit assistance if they:

- (a) suggest the consumer apply for, apply for an increase in, or remain in a particular credit contract; or
- (b) assist the consumer to apply for, or apply for an increase in, a particular credit contract.

To that end, the AFS licensing exemption in [CO 03/1063] was substantially replicated in in subregulation 20(5) of the National Credit Regulations. Subregulation 20(5) exempts financial counselling agencies from the requirement to hold an Australian Credit licence (credit licence) when engaging in a credit activity as part of the financial counselling service.

Subregulation 20(5) provides particular circumstances that provide for free and independent financial counselling services to minimise the risk of consumer detriment.

Rural financial counselling service providers

There was some uncertainty as to whether subregulation 20(5) extended to rural financial counselling services. Rural financial counselling services differ from other financial counselling services in that:

- (a) their target group is primary producers and rural small businesses; and
- (b) they principally focus on the viability of small rural businesses, including assisting them to analyse their financial position, apply for government grants and liaise with creditors.

In 2011, ASIC made ASIC Class Order [CO 11/926] to resolve this uncertainty. [CO 11/926] provides that a rural financial counselling service provider does not need to hold a credit licence to provide credit assistance in the context of a rural financial counselling service.

This exemption ensures that services can continue to be provided to primary producers and rural small businesses in financial difficulty. The credit assistance must be provided in particular circumstances that provide for free and independent rural financial counselling services to minimise the risk of consumer detriment.

Financial counselling agencies

Subregulation 20(5) was amended in 2015 due to the Business Services Wage Assessment Tool (BSWAT) Payment Scheme: see *ASIC Credit (Financial Counselling Agencies) Instrument 2015/992*. The changes enabled government funding for financial counselling services to specific client groups while maintaining the conditions intended to ensure independent and non-conflicted services. Allowing for a service fee that is payable by the Commonwealth or a State or Territory, and that is not dependent on the client's decisions, is unlikely to result in financial counsellors and agencies being subject to a conflict of interest.

It is noted there have been changes in the industry since [CO 11/926] and subregulation 20(5) were made. These include Standards for agencies employing financial counsellors and National standards for membership and accreditation. These standards include continuing professional development and supervision requirements.

Under the *Legislation Act 2003*, instruments such as [CO 11/926] and see *ASIC Credit (Financial Counselling Agencies) Instrument 2015/992* automatically cease to have effect, or 'sunset' after 10 years and were due to sunset on 1 April 2022 and 1 April 2026 respectively.

2. Purpose of the instrument

The purpose of the New Instrument is to continue the relief given in [CO 11/926] and *ASIC Credit (Financial Counselling Agencies) Instrument 2015/992*, with current drafting practice and without significant changes.

In continuing the relief, rural financial counselling services providers and financial counselling associations will remain exempt from the requirement to hold a credit licence when providing credit assistance in certain circumstances.

The limited circumstances in which the exemption apply ensures clients can have a high degree of confidence that when their rural financial counsellors or financial counsellors, provide them with credit assistance or advice, they do so free from any conflicts of interest, and with an acceptable level of skills, knowledge and professionalism.

3. Operation of the instrument

Part 2 — Exemption

Subsection 5(1) provides that rural financial counselling service providers are exempt from the requirement to hold a credit licence to provide of credit assistance.

Subsection 5(2) set out when the exemption is available. In order for the exemption apply:

- the credit assistance must be provided as part of the rural financial counselling service;
- no fees or charges are payable by or on behalf of the consumer for any aspect of the rural financial counselling service;
- no remuneration is payable to, or for the benefit of, the rural financial counselling service provider, by any person in relation to any action by or on behalf of the consumer.

In order for the exemption to apply, the relevant rural financial counselling service provider must take reasonable steps to ensure that representatives providing the credit assistance on their behalf have undertaken appropriate training to ensure they have adequate skills, knowledge and experience to satisfactorily provide the credit assistance and the broader rural financial counselling service.

Additionally, the rural financial counselling service provider and its representatives must not otherwise engage in credit activity (other than those covered by the exemption).

Part 3 — Declaration

Section 6 provides that Part 2-6 of the Credit Act applies as if the National Credit Regulations were modified or varied to:

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- reflect the new legislative instrument to replace Class Order [CO 03/1063] in regulation 3;
 - clarify the intended limitations on remuneration in regulation 20(5); and
 - facilitate Government schemes such as BSWAT in regulation 20(5).

4. Consultation

ASIC consulted publicly on its proposal to remake the exemptions in [CO 11/926] and *ASIC Credit (Financial Counselling Agencies) Instrument 2015/992* via [Consultation Paper 282 *Remaking ASIC class orders on financial counselling licensing relief*](#). ASIC received 10 responses which supported the proposal.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

ASIC Credit (Financial Counselling Agencies) Instrument 2017/793

ASIC Credit (Financial Counselling Agencies) Instrument 2017/793 is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview

ASIC Credit (Financial Counselling Agencies) Instrument 2017/793 provides for rural financial counselling service providers and financial counselling agencies, in certain circumstances, from the requirement to hold a credit licence when engaging in particular credit activities.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.

Australian Securities and Investments Commission