



National Consumer Credit Protection Amendment Regulations 2010 (No. 2)¹

Select Legislative Instrument 2010 No. 105

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 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 Amendment Regulations 2010 (No. 2)*.

2 Commencement

These Regulations commence on 24 May 2010.

3 Amendment of *National Consumer Credit Protection Regulations 2010*

Schedule 1 amends the *National Consumer Credit Protection Regulations 2010*.

Schedule 1 Amendments

(regulation 3)

[1] Subregulation 3 (1), after definition of *Australian ADI*

insert

authorised contact means contact with a consumer by a person in relation to the supply of goods or services by the person to the consumer, if the contact is made:

- (a) no later than 3 months after the consumer provided his or her contact details:
 - (i) to the person; and
 - (ii) for the purpose of being contacted about the supply of the goods or services; or
- (b) by posting to, or leaving at, a residential address written promotional material about goods or services; or
- (c) in relation to the possible return of goods supplied to the consumer or the possible provision of replacement goods to the consumer.

carried over instrument has the meaning given by subsection 4 (1) of the Transitional Act.

[2] **Subregulation 3 (1), after definition of *Corporations Act***

insert

credit card has the meaning given by subsection 12DL (5) of the *Australian Securities and Investments Commission Act 2001*.

[3] **Subregulation 3 (1), after definition of *foreign company***

insert

lawyer, for the purpose of regulation 24 has the meaning given by the modified definition of *lawyer* set out in subregulation 24 (10).

linked credit provider, for the purpose of regulation 23A, has the meaning given by the modified definition of *linked credit provider* set out in regulation 25C.

linked credit provider or lessor, for the purpose of regulation 23, has the meaning given by the modified definition of *linked credit provider* set out in regulation 25B.

[4] **Subregulation 3 (1), after definition of *registered person***

insert

services, for the purposes of regulations 23 and 23A, has the meaning given by the modified definition of *services* set out in regulation 25D.

[5] **Subregulation 3 (1), after definition of *substantial holding***

insert

unlicensed carried over instrument lender has the meaning given by modified subsection 5 (1) of the Act as set out in item 2.4 of Schedule 2.

unsolicited contact means contact:

- (a) with a consumer by a person in relation to the supply of goods or services; and
- (b) on or from business premises that are not physically separate from premises regularly used by consumers for purposes other than being contacted in relation to the supply of the goods or services; and
- (c) that is not authorised contact.

[6] Paragraph 3 (2) (c)

omit

(within the meaning of ***linked credit provider or linked lessor*** in subregulation 23 (4)) for the purposes of regulation 23

[7] After subregulation 3 (2)

insert

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

[8] After regulation 7

insert

7A When a licence may be granted — carried over instrument

For paragraph 37 (1) (e) of the Act, the person:

- (a) is a credit provider, lessor, mortgagee or beneficiary of a guarantee in relation to a carried over instrument (***engages in the first credit activity***) immediately before 1 July 2010 and
- (b) intends to engage in a credit activity other than the first credit activity (the ***second credit activity***) on or after 1 July 2010; and

-
- (c) has applied under section 36 of the Act to be licensed to engage in the first credit activity and the second credit activity.

[9] After regulation 9

insert

9A Conditions for unlicensed carried over instrument lender — credit register

- (1) For modified section 45 of the Act, an unlicensed carried over instrument lender 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 unlicensed carried over instrument lenders; and
 - (b) the change is not a direct consequence of an act by ASIC; the lender must lodge particulars of the change with ASIC, in the approved form, no later than 10 business days after the change occurs.
- (3) If the lender becomes aware of any change in control of the lender, the lender must lodge with ASIC particulars of the change, in the approved form, not later than 10 business days after the change.
- (4) For subregulation (3):
- (a) a change in control, in relation to a lender, includes a transaction, or a series of transactions in a period of 12 months, that results in a person having control of the lender, either alone or together with associates of the person; and

- (b) control, in relation to a lender, means:
 - (i) if the lender is a body corporate:
 - (A) 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 lender; or
 - (B) directly or indirectly holding more than one half of the issued share capital of the lender (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 lender's board or governing body; or
 - (iii) the capacity to determine the outcome of decisions about the lender's financial and operating policies.
- (5) For subparagraph (4) (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 lender'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 licensee's financial or operating policies (whether or not it involves a breach of an agreement or a breach of trust).
- (6) If:
 - (a) the lender is not a body regulated by APRA; and
 - (b) an event occurs that may make a material adverse change to the financial position of the lender by comparison with its financial position:
 - (i) at the time of the application for the Australian credit licence; or
 - (ii) as described in documents lodged with ASIC after the application for the Australian credit licence;

the lender must lodge with ASIC in the approved form a notice setting out particulars of the event as soon as practicable, and in any case not later than 3 business days, after the lender becomes aware of the event.

[10] Regulation 14

omit each mention of

CEO

insert

Chief Executive Officer

[11] Part 2-4 heading

substitute

Part 2-4 Exemptions and modifications

Division 1 Exemptions

Subdivision 1.1 Persons exempt from being registered

[12] Paragraph 20 (11) (c)

omit

[13] Paragraph 20 (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

[14] Subregulation 23 (1), except the note

substitute

- (1) For paragraph 110 (a) of the Act, this regulation exempts certain persons from:
- (a) section 29 of the Act; and
 - (b) definitions in the Act as they apply to references in the provision mentioned in paragraph (a); and
 - (c) instruments made for the purpose of any of the provisions mentioned in paragraphs (a) and (b).

[15] Subparagraph 23 (3) (a) (i)

after

services

insert

(the *supplier*)

[16] Subparagraph 23 (3) (a) (ii)

substitute

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

[17] After subparagraph 23 (3) (a) (ii)

insert

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

[18] Paragraphs 23 (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 proposed 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
 - (ii) 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 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.

[19] Subregulations 23 (4) to (7)

substitute

- (4) The person is not exempted if the person supplies goods or services to the consumer as a result of unsolicited contact with the consumer.
- (5) 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).

[20] After regulation 23

insert

23A Persons exempt from requiring a licence — providers of point of sale credit services for a credit card

- (1) For paragraph 110 (a) of the Act, this regulation exempts certain persons engaging in a credit activity from:
 - (a) section 29 of the Act; and
 - (b) definitions in the Act as they apply to references in the provision mentioned in paragraph (a); and
 - (c) instruments made for the purpose of any of the provisions mentioned in paragraphs (a) and (b).

Note Section 29 of the Act provides that 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.

- (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 Transitional Act, the person is not exempted in relation to that credit activity.

- (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, phrases, 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, phrases, 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.

[21] Before regulation 24

insert

Subdivision 1.2 Activities exempt from being credit activities under the Act

[22] Subregulation 24 (1), except the note

substitute

- (1) For paragraphs 110 (b) and (c) of 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 Transitional Act applies; and
 - (b) modifies specified provisions for the purposes of the exemption mentioned in paragraph (a).

[23] Subparagraph 24 (5) (a) (i)

omit

Part VIIA of the *Income Tax Assessment Act 1936*;

insert

Part 2 of the *Tax Agent Services Act 2009*;

[24] After subregulation 24 (9)

insert

- (10) For paragraph 110 (c) of the Act, the definition of *lawyer* in subsection 5 (1) of the 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.

[25] After regulation 24

insert

Division 2 Modifications**[26] After regulation 25A**

insert

25B Modification — meaning of *linked credit provider* or *linked lessor* for regulation 23

For paragraph 110 (c) of the Act and regulation 23, the definition of *linked credit provider* of a supplier in subsection 127 of the Code applies as if it were modified to provide that a *linked credit provider* or a *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 of supplying goods or services carried on by the supplier; or
 - (iii) the provision of a credit contract or consumer lease:
 - (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 or lessor, regularly refers persons for the purpose of obtaining credit or being provided with a consumer lease; or
- (c) whose:
 - (i) forms of contract; or
 - (ii) forms of application; or
 - (iii) offers for credit; or
 - (iv) offers to be provided with a consumer lease;

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- 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.

25C Modification — meaning of *linked credit provider* for regulation 23A

For paragraph 110 (c) of the Act and regulation 23A, the definition of *linked credit provider* of a supplier in subsection 127 (1) of the Code applies as if it were modified 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.

25D Modification — meaning of *services* for regulations 23 and 23A

For paragraph 110 (c) of the Act, the definition of *services* in subsection 204 (1) of the Code is modified for the purposes of regulations 23 and 23A 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 a credit contract or consumer lease that is regulated under the National Credit Code, or would be regulated under the National Credit Code if entered into, other than credit services.

25E Modifications — unlicensed carried over instrument lender

For paragraph 110 (c) of the Act, the provisions of the Act to which Part 2-6 of the Act applies, apply in relation to an unlicensed carried over instrument lender as if the provisions were modified as set out in Schedule 2.

Note ***Unlicensed carried over instrument lender*** is defined in modified section 5 of the Act as mentioned in item 2.4 of Schedule 2.

25F Modifications — ADI in relation to carried over instrument

For paragraph 110 (c) of the Act, section 38 of the Act applies to an ADI in relation to a carried over instrument as if it were modified by substituting the following section:

38 When a license may be granted—ADI in relation to *carried over instrument*

- (1) ASIC must grant a licence to an ADI in relation to a carried over instrument if (and must not grant a licence unless) the requirements mentioned in subsection (2), (3) or (4) are met.
- (2) For subsection (1), the requirements are, if the ADI:
 - (a) is a credit provider, lessor, mortgagee or beneficiary of a guarantee in relation to a carried over instrument (engages in the first credit activity) immediately before 1 July 2010; and
 - (b) intends to engage in a credit activity (the second credit activity) other than the first credit activity on or after 1 July 2010; and
 - (c) applies under section 36 for a licence to engage in the first credit activity and the second credit activity; and
 - (d) includes a statement in the application (in accordance with the requirements of the approved form) to the effect that the ADI will, if granted the licence, comply with its obligations as a licensee.
- (3) For subsection (1), the requirements are, if the ADI:
 - (a) is a credit provider, lessor, mortgagee or beneficiary of a guarantee in relation to a carried over instrument immediately before 1 July 2010; and
 - (b) does not intend to engage in a credit activity other than in relation to a carried over instrument on or after 1 July 2010; and
 - (c) applies under section 36 for a licence to engage in a credit activity in relation to a carried over instrument; and
 - (d) includes a statement in the application (in accordance with the requirements of the approved form) to the effect that the ADI will, if granted the licence, comply with its obligations as a licensee.

- (4) For subsection (1), the requirements are, if the ADI:
- (a) was not a credit provider, lessor, mortgagee or beneficiary of a guarantee in relation to a carried over instrument immediately before 1 July 2010; and
 - (b) applies under section 36 for a licence; and
 - (c) includes a statement in the application (in accordance with the requirements of the approved form) to the effect that the ADI will, if granted the licence, comply with its obligations as a licensee.
- (5) The license must only authorise the ADI to engage in credit activities that equate (as closely as possible) to the credit activities in relation to which the application was made.

[27] After regulation 30

insert

30A Credit register — unlicensed carried over instrument lender

- (1) For subsection 213 (2) of the Act, ASIC must include the following details for each unlicensed carried over instrument lender in a credit register for unlicensed carried over instrument lenders:
- (a) the lender's name (including the lender's principal business name, if any);
 - (b) the postal address of the lender;
 - (c) if the principal business address of the lender is different from the postal address — the principal business address;
 - (d) if the lender has an ABN — the ABN;
 - (e) if the lender is required to engage in credit activities through a registered person or licensee under section 74 of the Act:
 - (i) the reason why the lender is required to engage in the credit activities through the registered person or licensee; and
 - (ii) the name of the registered person or licensee;

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- (f) if the lender is a member of an approved external dispute resolution scheme — the name of the scheme.
- (2) For paragraph (1) (d), ASIC may include in the credit register an alternative address to the lender's principal business address if:
- (a) the lender's principal business address is the lender's residential address; and
 - (b) ASIC determines, in writing, that including the lender's residential address in the register would put at risk the personal safety of the lender or members of the lender's family; and
 - (c) the lender provides an alternative address:
 - (i) that is in Australia; and
 - (ii) that is not a post office box or an electronic address; and
 - (iii) that has a connection with the credit activities engaged in by the lender.
- (3) If ASIC includes a lender's alternative address in the register, the lender must, in the approved form, lodge with ASIC notice of:
- (a) the lender's residential address; and
 - (b) any change of the lender's address no later than 14 days after the change.
- (4) ASIC may give details of the lender's residential address to an officer of a court for the purposes of enforcing a judgement debt if:
- (a) ASIC includes the lender's alternative address in the register; and
 - (b) the court gives a judgement for payment of a sum of money against the person.

[28] Subregulation 78 (3)

omit

not for investment purposes.

insert

for personal, domestic or household purposes.

[29] Regulation 101

omit

[30] Schedule 1, Form 1

omit

(see section 208 of the Act).

insert

(see section 295 of the Act).

[31] Schedule 1, Form 12

substitute

**Form 12 Information about debtor's
rights after default**

**paragraphs 88 (3) (f) and (g) of the Code
regulation 86 of the Regulations**

If you cannot make a repayment:

1. Contact us immediately

Contact us [*insert telephone number or email address for dealing with financial hardship applications*] to discuss your situation. If there is a reason why you cannot make repayments we may be able to help you by agreeing to vary your contract. The sooner you contact us the easier it will be to assist you.

You have specific legal rights to request changes be made to your contract to help you repay the debt if:

- you cannot make repayments due to hardship (for example, illness, unemployment or some other good reason); and
- you expect to be able to make the repayments if the terms of your contract are changed; and
- you entered into your contract:
 - on or after 1 July 2010 and the amount you have borrowed is less than \$500 000; or
 - you entered into your contract before 1 July 2010 and the amount you have borrowed is less than the relevant threshold.*

You may request that we:

- extend the term of your contract and reduce repayments; or
- extend the term of your contract and delay payments for a set time; or
- delay payments for a set time without extending the term of your contract.

Alternatively, you may request that we negotiate with you to postpone any further action that we may take against you.

If you do not contact us **before** [*insert default notice period end date*], we may commence further action against you.

IMPORTANT

There is no guarantee that we will agree to change your contract or postpone any further action.

After we receive your application, we will provide you with a written notice within 21 days stating whether or not we agree to the change.

If we agree, you will receive a written notice detailing the agreement within 30 days.

If we refuse, we will provide you with reasons. You have the right to have the decision reviewed.

2. Right to review

If we refuse your request to change your contract, you can ask us to reconsider. If we still refuse, or if we do not respond to your request within 21 days, you can go to [*insert name of relevant external dispute resolution scheme*] by [*insert contact details and method(s) for lodging complaints*]. You should apply as soon as we refuse your request or fail to respond.

EXTERNAL DISPUTE RESOLUTION IS A FREE SERVICE ESTABLISHED TO PROVIDE YOU WITH AN INDEPENDENT MECHANISM TO RESOLVE SPECIFIC COMPLAINTS.

If we fail to respond, we may have breached our obligation to you. You can contact ASIC on 1300 300 630 or through ASIC's website at <http://www.asic.gov.au>.

Alternatively, if we refuse, you can ask a court to make changes to your contract.

You can also ask a court to delay enforcement action against you. You may wish to get legal advice, for example from a community legal centre or Legal Aid, on how to go about this.

There are other people, such as financial counsellors, who may be able to help.

* *You can find out what the relevant threshold is by contacting us or referring to ASIC's website at <http://www.asic.gov.au> or contacting ASIC on 1300 300 630.*

[32] **After Schedule 1**

insert

**Schedule 2 Modifications — carried over
instruments**

(regulation 25E)

2.1 Subsection 5 (1), after definition of *carried on in this jurisdiction*

insert

carried over instrument has the meaning given by subsection 4 (1) of the Transitional Act.

2.2 Subsection 5 (1), after definition of *prescribed State or Territory order*

insert

prescribed unlicensed carried over instrument lender has the meaning given by section 5A.

2.3 Subsection 5 (1), after definition of *registered company auditor*

insert

registered person has the meaning given by subsection 4 (1) of the Transitional Act.

2.4 Subsection 5 (1), after definition of *tribunal*

insert

unlicensed carried over instrument lender means a credit provider or lessor who:

- (a) was a credit provider or lessor in relation to a carried over instrument immediately before 1 July 2010; and

- (b) on and 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 exempt from the requirement to hold a licence under this Act or to be a registered person under the Transitional Act.

2.5 After section 5

insert

5A Meaning of *prescribed unlicensed carried over instrument lender*

- (1) A prescribed unlicensed carried over instrument lender means a person:
 - (a) for whom:
 - (i) a prescribed State or Territory order is in force; or
 - (ii) a banning or disqualification order under Division 8 of Part 7.6 of the *Corporations Act 2001* is in force; or
 - (iii) a judgement has been entered against as a result of a civil action taken by an agency of a State or Territory government under the old Credit Code in the last 10 years; or
 - (b) who is banned from engaging in a credit activity under:
 - (i) a law of a State or Territory; or
 - (ii) Part 2-4; or
 - (c) who is disqualified from managing a corporation under Part 2D.6 of the *Corporations Act 2001*; or
 - (d) who has been convicted of a serious fraud during the last 10 years; or
 - (e) who is incapable of managing his or her affairs because of physical or mental incapacity; or
 - (f) who is not a trustee of a trust and who is insolvent; or

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- (g) who is or has been registered to engage in credit activities under Schedule 2 to the Transitional Act and whose registration was suspended or cancelled under item 23 of Schedule 2 to the Transitional Act, other than under subitems 23(1) or (2); or
 - (h) who is or has been the holder of an Australian credit licence and whose licence is suspended or was cancelled under section 54, other than under paragraph 54(1)(a) or (b); or
 - (i) who is or has been the holder of an Australian financial services licence and whose licence is suspended or was cancelled under section 915B of the *Corporations Act 2001*, other than under any of the following paragraphs of that Act:
 - (i) paragraphs 915B(1)(a) and (e);
 - (ii) paragraphs 915B(2)(a) and (d);
 - (iii) paragraphs 915B(3)(a) and (d);
 - (iv) paragraphs 915B(4)(a) and (d).
- (2) In this section *person* means:
- (a) if the person is a natural person—that person; and
 - (b) if the person is a body corporate—each director or secretary of the body corporate; and
 - (c) if the person is a partnership or trust—each partner of the partnership or each trustee of the trust.

2.6 Chapter 2, heading

substitute

**Chapter 2—Unlicensed carried over
instrument lenders**

2.7 Part 2-1, Divisions 1 and 2

omit

2.8 Section 30

omit

2.9 Subsection 31 (1)

omit

A licensee

insert

An unlicensed carried over instrument lender

2.10 Sections 32 and 33

omit

2.11 Part 2-2, heading

substitute

Part 2-2—Obligations of unlicensed carried over instrument lenders

2.12 Part 2-2, Divisions 1 to 3

omit

2.13 Section 45

substitute

45 Conditions for unlicensed carried over instrument lender

- (1) This section applies to an unlicensed carried over instrument lender who engages in a credit activity in relation to a carried over instrument.
- (2) The lender in relation to the credit activity in relation to the instrument is subject to the conditions prescribed in the regulations.

2.14 Section 46

omit

2.15 Part 2-2, Division 5, heading

substitute

Division 5—General obligations**2.16 Section 47, heading**

substitute

47 General conduct obligations of unlicensed carried over instrument lender**2.17 Subsection 47 (1)**

substitute

- (1) An unlicensed carried over instrument lender must:
- (a) do all things necessary to ensure that the credit activities engaged in in relation to the carried over instrument are engaged in efficiently, honestly and fairly; and
 - (b) have in place adequate arrangements to ensure that its clients are not disadvantaged by any conflict of interest in relation to a carried over instrument that may arise wholly or partly in relation to credit activities engaged in by it or its representatives; and
 - (c) ensure that its representatives are adequately trained and competent to engage in the credit activities in relation to the carried over instrument; and
 - (d) maintain its competence to engage in the credit activities in relation to the carried over instrument; and
 - (e) have an internal dispute resolution procedure that:
 - (i) complies with standards and requirements made or approved by ASIC in accordance with section 48; and
 - (ii) covers disputes in relation to the credit activities the lender engages in in relation to the carried over instrument; and
 - (f) if the lender is not a member of an approved external dispute resolution scheme:

- (i) keep a register of complaints in relation to carried over instruments and include the information mentioned in subsection (1A); and
 - (ii) keep a register of applications by a debtor for changes to the terms a credit contract under section 72 of the National Credit Code and include the information mentioned in subsection (1B); and
 - (iii) keep a register of requests by a debtor, mortgagor or guarantor to negotiate a postponement of enforcement proceedings in relation to the credit contract, mortgage or guarantee under section 94 of the National Credit Code and include the information mentioned in subsection (1C); and
- (g) have adequate arrangements and systems to ensure compliance with its obligations under this section, and a written plan documenting those arrangements and systems; and
- (h) unless the unlicensed carried over instrument lender is a body regulated by APRA:
- (i) have adequate resources (including financial, technological and human resources) available so it can engage in credit activities in relation to the carried over instrument and to carry out supervisory arrangements; and
 - (ii) have adequate risk management systems.
- (1A) For the purposes of subparagraph (1)(f) (i), the information is:
- (a) the name of the person making the complaint; and
 - (b) the date the complaint was made; and
 - (c) details of the substance of the complaint; and
 - (d) details of the outcome of the complaint.
- (1B) For the purposes of subparagraph (1)(f)(ii), the information is:
- (a) the name of the person making the application; and
 - (b) the date the application was made; and
 - (c) details of the information included in the application; and
 - (d) details of the written notice given under subsection 72(3) of the National Credit Code.
- (1C) For the purposes of subparagraph (1)(f)(iii), the information is:
- (a) the name of the person making the request; and

-
- (b) the date the request was made; and
 - (c) details of the information included in the request; and
 - (d) details of the written notice given under subsection 94(2) of the National Credit Code.

2.18 Subsection 47 (2)

omit

For the purposes of paragraphs (1)(b), (g), (k) and (l),

insert

For the purposes of paragraphs (1)(b), (c), (g) and (h),

2.19 Subsection 47 (3), including subsection heading

omit

2.20 Section 48

substitute

48 Standards or requirements for internal dispute resolution approved or made by ASIC

- (1) ASIC must take the following matters into account when considering whether to approve standards or requirements for internal dispute resolution for an unlicensed carried over instrument lender:
 - (a) Australian Standard AS ISO 10002-2006:
 - (i) known as *Complaints Handling*; and
 - (ii) published by Standards Australia; and
 - (iii) as in force when this Act commences;
 - (b) any other matters ASIC considers relevant.
- (2) ASIC may vary or revoke:
 - (a) a standard or requirement that it has made in relation to an internal dispute resolution procedure; and
 - (b) the operation of a standard or requirement that it has approved in its application to an internal dispute resolution procedure.

2.21 Section 49, heading

substitute

49 Obligation to provide a statement or audit report

2.22 Subsections 49 (1) to (3)

omit each mention of

licensee

insert

unlicensed carried over instrument lender

2.23 After subsection 49 (3)

insert

Requirement to provide audit report

(3A) An unlicensed carried over instrument lender who is not a member of an approved external dispute resolution scheme must provide to ASIC an audit report, in accordance with subsection (10), about whether the lender has complied with the following requirements in relation to a carried over instrument for the lender:

- (a) if the carried over instrument is a credit contract—the requirements mentioned in section 17 of the National Credit Code;
- (b) if the carried over instrument is a consumer lease—the requirements mentioned in section 174 of the National Credit Code.

Civil penalty: 2,000 penalty units.

2.24 Subsections 49 (5) and (6)

omit each mention of

licensee

insert

unlicensed carried over instrument lender

2.25 After subsection 49 (9)

insert

When audit report due

- (10) For subsection (3A), the unlicensed carried over instrument lender must provide the audit report to ASIC on or before 31 December 2010. ASIC may extend the day by giving written notice to the lender.

2.26 Subsections 50 (1) and (2), including subsection headings and penalty

substitute

Requirement to give information

- (1) ASIC may request an unlicensed carried over instrument lender to give ASIC information about the registers the lender is required to keep under paragraph 47(1)(f).
- (2) If ASIC requests the lender give ASIC the information mentioned in subsection (1), the lender must give ASIC the information.

Civil penalty: 2,000 penalty units.

2.27 Section 52

substitute

52 Obligation to notify ASIC of certain matters

Requirement to give report of contravention or likely contravention

- (1) If an unlicensed carried over instrument lender is not a member of an approved external dispute resolution scheme and the lender becomes aware of a contravention, or a likely contravention, mentioned in subsection (2), the lender must give ASIC a written report on the matter:
- (a) as soon as practicable; and
 - (b) in any case no later than 10 business days after becoming aware of the contravention or likely contravention.

Civil penalty: 2,000 penalty units.

When there is a contravention or likely contravention

- (2) For the purposes of subsection (1), there is a contravention, or a likely contravention, if:
- (a) the unlicensed carried over instrument lender contravenes, or is likely to contravene, this Act, the Transitional Act or the ASIC Act; and
 - (b) the contravention, or likely contravention, is significant having regard to the following:
 - (i) the number and frequency of similar previous contraventions;
 - (ii) the impact of the contravention, or likely contravention, on the lender's ability to engage in the credit activities;
 - (iii) the extent to which the contravention, or likely contravention, indicates that the lender's arrangements to ensure compliance with its obligations under this Part are inadequate;
 - (iv) the actual or potential financial loss to consumers, or the lender itself, arising from the contravention, or likely contravention.
- (3) For the purposes of subsection (2), an unlicensed carried over instrument lender is likely to contravene an obligation referred to in that subsection if, and only if, the person is not longer able to comply with the obligation.

Offence

- (4) 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 the requirement.

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

Strict liability offence

- (5) 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 the requirement.

Criminal penalty: 10 penalty units.

- (6) Subsection (5) is an offence of strict liability.

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

2.28 Subsection 53 (1)

omit

A licensee must, no later than 45 days after the licensee's licence anniversary in each year,

insert

An unlicensed carried over instrument lender must, no later than 15 August in 2011 and each subsequent year,

2.29 Subsection 53 (1)

omit

to the licensee.

insert

to the unlicensed carried over instrument lender.

2.30 Paragraph 53 (3) (a)

omit each mention of

licensee

insert

unlicensed carried over instrument lender

2.31 Paragraph 53 (3) (b)

substitute

- (b) if the unlicensed carried over instrument lender is a body corporate—a kind of person mentioned in subsection 53(7);
or

2.32 Paragraph 53 (3) (c)

omit

licensee

insert

unlicensed carried over instrument lender

2.33 Subsection 53 (4)

omit

licensee

insert

unlicensed carried over instrument lender

2.34 Subsection 53 (7), including subsection heading

substitute

Kinds of persons

(7) For paragraph (3)(b), the *kinds of persons* are:

- (a) if the body corporate is not an ADI:
 - (i) the Chief Executive Officer of the body corporate; or
 - (ii) if the body corporate does not have a Chief Executive Officer—the person who:
 - (A) is responsible for managing the affairs of the body corporate; and
 - (B) has authority to make decisions in relation to the allocation of resources so that the body corporate complies with the Act; and

-
- (b) if the body corporate is an ADI:
- (i) the Chief Executive Officer of the body corporate; or
 - (ii) a person who satisfies the criteria to be a fit and proper person to hold a responsible person position under Prudential Standard APS 520.

Note: Prudential Standard APS 520 is in Schedule 1 to the Banking (prudential standard) determination No. 1 of 2006 — Prudential Standard APS 520 Fit and Proper.

2.35 Division 6, Part 2-2

omit

2.36 Part 2-3, heading

substitute

Part 2-3—Representatives of unlicensed carried over instrument lender

2.37 Part 2-3, Divisions 1 and 2

omit

2.38 Section 73, including the heading and subsection headings

omit each mention of

licensee

insert

unlicensed carried over instrument lender

2.39 Part 2-3, Division 4

substitute

Division 4—Appointment of licensee or registered person to act on behalf of prescribed unlicensed carried over instrument lender

74 Obligation for prescribed unlicensed carried over instrument lender to appoint licensee or registered person

- (1) This section applies to a prescribed unlicensed carried over instrument lender on or after 1 July 2010.
- (2) The prescribed unlicensed carried over instrument lender:
 - (a) must not engage in a credit activity in relation to a carried over instrument if the lender is engaging in the credit activity as the credit provider under a credit contract or the lessor under a consumer lease; and
 - (b) must appoint, in writing, a licensee or registered person as the lender's representative to engage in the credit activity in relation to the carried over instrument on behalf of the lender.

Civil penalty: 2,000 penalty units.

Offence

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

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

Strict liability offence

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

(c) the conduct contravenes the requirement.

Criminal penalty: 10 penalty units.

(5) Subsection (4) is an offence of strict liability.

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

75 Notification obligations for prescribed unlicensed carried over instrument lender

- (1) If a licensee or registered person is appointed by a prescribed carried over instrument lender to act on the lender's behalf, the lender must notify ASIC:
- (a) of the appointment no later than 15 business days after the appointment is made; and
 - (b) the reason why the licensee or registered person is required to engage in the credit activity on behalf of the lender; and
 - (c) the licensee's or registered person's name (including the licensee's or registered person's principal business name if any); and
 - (d) the postal address of the licensee or registered person; and
 - (e) if the principal business address of the licensee or registered person is different from the postal address—the principal business address.

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 the 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 the 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*.

76 Notification obligation for licensee or registered person acting on behalf of prescribed unlicensed carried over instrument lender

- (1) If a licensee or registered person is appointed by a prescribed carried over instrument lender to act on the lender's behalf, the licensee or registered person must notify ASIC of the appointment no later than 15 business days after the appointment.

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 the 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 the 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*.

2.40 Sections 87 and 88

omit each mention of

licensee

insert

unlicensed carried over instrument lender

2.41 Sections 90 to 92

omit each mention of

licensee

insert

unlicensed carried over instrument lender

2.42 Section 94, heading

substitute

94 Financial records taken to be made with unlicensed carried over instrument lender's authority**2.43 Section 94**

omit

licensee.

insert

unlicensed carried over instrument lender.

2.44 Subsection 95 (1)

omit

A licensee

insert

An unlicensed carried over instrument lender

2.45 Subsection 96 (2)

omit each mention of

licensee

insert

unlicensed carried over instrument lender

2.46 Part 2-5, Division 3

omit

2.47 Subsection 102 (1)

substitute

- (1) An auditor (the *auditor*) who prepares an audit report required under subsection 49(3) in relation to an unlicensed carried over instrument lender has a right of access at all reasonable times to the financial records or other credit books of the lender for purposes relating to the audit report.

2.48 Subsections 102 (2) and (3)

omit each mention of

licensee

insert

unlicensed carried over instrument lender

2.49 Section 103

omit each mention of

licensee

insert

unlicensed carried over instrument lender

2.50 Paragraph 104 (1) (b)*omit*

licensee

insert

unlicensed carried over instrument lender

2.51 Paragraph 104 (2) (a)*omit*

licensee to meet the licensee's obligations as a licensee; or

insert

unlicensed carried over instrument lender to meet its obligations under section 47 or the National Credit Code; or

2.52 Paragraph 104 (2) (b)*substitute*(b) constitutes or may constitute a contravention of Division 2;
or**2.53 Section 105***omit each mention of*

licensee

insert

unlicensed carried over instrument lender

2.54 After Section 106*insert***106A Eligibility to be auditor**

A person is eligible to be appointed as an auditor for an audit report mentioned in subsection 102(1) in relation to an unlicensed carried instrument lender if the person:

- (a) is a registered company auditor (within the meaning given by section 9 of the Corporations Act); and
- (b) is not an employee, director or partner of the lender; and
- (c) is not carrying on the business of engaging in credit activities.

106B Appointment as auditor

- (1) An unlicensed carried over instrument lender must:
 - (a) within 3 months of being required to open a trust account, appoint a person who meets the requirements of section 106 to be the lender's auditor; and
 - (b) notify ASIC of the appointment no later than 14 days after appointing the person.

Civil penalty: 2,000 penalty units.

- (2) A person who is appointed as a lender's auditor continues to be the lender's auditor until the first of the following events occurs:
 - (a) the lender is no longer required to keep a trust account;
 - (b) the auditor dies or otherwise ceases to engage in the business of being an auditor;
 - (c) the auditor is unable to perform his or her duties as the lender's auditor;
 - (d) ASIC approves the auditor's resignation;
 - (e) ASIC approves a request by the lender to replace the person as an auditor.
- (3) If a person ceases to be a lender's auditor under paragraph (2)(b), (c), (d) or (e), the lender must:
 - (a) no later than 28 days after the cessation of the appointment, appoint another person who meets the requirements of section 106A to be the lender's auditor; and

-
- (b) notify ASIC of the appointment no later than 14 days after appointing the person.

Civil penalty: 2,000 penalty units.

Offence

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

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

Strict liability offence

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

Criminal penalty: 10 penalty units.

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

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

2.55 Part 2-6

omit

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>.