

EXPLANATORY STATEMENT
Select Legislative Instrument 2010 No. 45

Subject - *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*

National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010

The *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Transitional Act) sets out the transitional and consequential arrangements to support the transfer of the regulation of credit from the states and territories to the Commonwealth.

Section 6 of the Transitional Act provides, in part, that the Governor-General may make regulations prescribing matters required or permitted by that Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to that Act.

Schedule 1 to the Transitional Act deals with the transition from the regime provided in the old state-based Credit Codes to the new consumer credit regime provided for in both the *National Consumer Credit Protection Act 2009* (Credit Act) and Schedule 2 to the Transitional Act, including:

- the application of the existing legislation or the legislation to legal proceedings that arose before the change;
- the rights or liabilities a person may have under the existing legislation; and
- the extent to which the existing legislation may continue to have effect under the Credit Act.

Schedule 2 to the Transitional Act sets out the requirement for persons engaging in credit activities to become registered with the Australian Securities and Investments Commission (ASIC), prior to applying for an Australian credit licence (ACL).

Schedule 3 to the Transitional Act includes consequential amendments to other laws.

The purpose of the Regulations is to deal with transitional matters such as the treatment of court proceedings; the application of the Credit Act and the Transitional Act to contracts made before commencement of the Credit Act (pre-commencement contracts); conditions of registration with ASIC; exemptions and infringement notices.

Details of the Regulations appear in the Attachment.

The Transitional Act does not specify any conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations would be a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations will commence as follows:

- regulations 1 to 5 will commence the day after they are registered;
- regulations 8 and 9, and Parts 3 to 5 will commence on 1 April 2010; and
- the remainder will commence on 1 July 2010.

Authority: Section 6 of the
*National Consumer Credit
Protection (Transitional and
Consequential Provisions) Act 2009*

Details of the *National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010*

Part 1 Preliminary

Regulation 1 – Name of Regulations

This regulation provides that the name of the Regulations is the *National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010* (Transitional Regulations).

Regulation 2 – Commencement

This regulation provides that specified parts of the Transitional Regulations commence on different dates.

Paragraph 2(a) provides that regulations 1 to 5 would commence the day after they are registered.

Paragraph 2(b) provides that regulations 8 and 9, Division 3 of Part 3, and Parts 4 to 6 would commence on 1 April 2010.

Paragraph 2(c) provides that the remainder of the regulations would commence on 1 July 2010.

Regulation 3 – Definitions

This regulation provides definitions for the terms used within the Transitional Regulations.

Regulation 4 – Meaning of Associate

Regulation 4 explains the circumstances under which a person will become an associate of a primary person. A person will become an associate of a primary person if the person's interests and the primary person's interests are linked by virtue of their being in a formal relationship (for example, that between a director and a company) or an informal relationship (for example, where the parties have not entered into an agreement but act together to pursue a common objective). The term 'associate' is defined comprehensively and is used to minimise avoidance of the relevant obligations such as those relating to registration and the provision of exemptions under the Credit Act.

Part 2 Transitional provisions

Regulation 5 – Transfer of assets or liabilities to ASIC

Regulation 5 provides that a transfer agreement may be entered into between ASIC (or on behalf of ASIC) and a referring state or territory. Regulation 5 provides that the transfer agreement may determine how assets or liabilities relating to the regulation of credit providers may be transferred to ASIC from a referring state or an authority of a referring state. In practical terms, the purpose of a transfer agreement is to provide for the transfer of administrative matters such as files and records by a referring state or Territory to ASIC; and to make arrangements for the take over of court proceedings and investigations begun by a state, where it is authorized under the Transitional Act.

Regulation 6 – Application of new Credit Code to particular sale contracts

This regulation provides that sections 10, 11 and 12 of the National Credit Code (which relate to the sale of land or goods by instalments) do not apply to the provision of credit, before 29 May 2009 (Start Date). This is to replicate the legal effect of section 187 of the Uniform Consumer Credit Code; that is, sections 10, 11 and 12 do not apply to the provision of credit, before the Start Date, for a sale of land or goods by instalments.

Regulation 7 – Treatment of proceedings brought under old Credit Code before commencement

This regulation provides that when a state or territory “Government Consumer Agency” is a party to an existing court proceeding, it is acting as an agent of the ASIC. This would allow the states and territories to continue to complete these existing proceedings and keep any compensation monies or damages awarded by a court in those old proceedings.

Regulation 8 – References to the National Consumer Credit Protection Regulations 2010

This regulation provides that from 1 April 2010 to immediately before 1 July 2010 the following would apply:

- the exemptions from the requirement to be registered in relation to specified credit activities; and
- the contents required to be included in the form that ASIC uses for infringement notices.

These exemptions from the requirement to be registered apply in respect of credit activities where the credit supplied is already largely, but not entirely, exempt from the requirements of the National Credit Code (Code). These exempt credit activities include pawnbroking, the provision of credit where the amount of credit to be provided does not exceed \$50, and the provision of credit by a higher educational institution to a student of the institution on the grounds of hardship or of an emergency.

Regulation 9 – Modification of the Act

This regulation provides for the modification of the Transitional Act.

Subsection 6(3) of the Transitional Act enables the making of regulations which provide that certain provisions of the Transitional Act are taken to be modified as set out in the regulations and that these provisions then have effect as if they were so modified.

Part 3 Registration

Regulation 10 – The conditions on the registration

Subsection 14(7) of the Transitional Act provides that the registration is subject to the conditions set out in the regulations.

This regulation requires a registered person to notify ASIC of specified matters including:

- changes to particulars entered in the Australian Credit Register established under Part 5-1 of the Credit Act (for example, changes in the name or contact details of the licensee) where the changes are not a direct result of an act by ASIC;

- changes to particulars in relation to the authorisation of a credit representative to engage in a credit activity on behalf of the registered person, and changes to authorisations, where the registered person has no obligation to notify ASIC under the provisions in section 71 of the Credit Act and the changes are not a direct result of an act by ASIC; and
- certain matters relevant to the registration, including changes in control and, except in respect of bodies regulated by Australian Prudential Regulation Authority, events that may have a material adverse impact on the financial position of the registered person.

This regulation imposes conditions in respect of a range of technical or practical arrangements that ensure registered persons provide ASIC with information that is current and relevant. This information would enhance ASIC's capacity to effectively carry out its regulatory functions in respect of supervising those licensees. It also would assist ASIC to ensure that when persons, both consumers and industry bodies, seek information from the Australian Credit Register that this data is current.

Subregulations 10(8), 10(9) and 10(13) require a registered person to:

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

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

Part 4 Exemptions

Section 42 of the Transitional Act allows regulations to exempt certain persons engaging in credit activities from the requirements to be registered. Regulations 11 to 16 provide for exemptions and modifications, so that persons meeting the criteria in these regulations do not need to comply with the registration requirements.

A person does not need to be registered where they are engaging in credit activities but are exempt under more than one provision. The reference, for example, in subregulation 11(2), to a person being exempted 'only to the extent that the person is engaging in the specified credit activity' is to be read with the word 'only' referring to the specific exemption rather than the person; it does not mean that a person can only rely on a single exemption but rather that they can rely on that exemption only to the extent it defines a person or activity that is exempted, and that if they engage in credit activities that are not subject to an exemption they will need to be registered.

Regulation 11 – Persons exempt from being registered – general

Subregulation 11(3) provides that the following persons are exempted from being a registered person where they engage in credit activities, while they perform functions, or exercise powers, in any of the following capacities or circumstances:

- an official receiver or trustee within the meaning of the *Bankruptcy Act 1966*;

- a receiver, receiver and manager, provisional liquidator or liquidator;
- a person appointed by a court to engage in a credit activity;
- the Public Trustee of a state or territory;
- an administrator of a body corporate;
- an administrator of a deed of company arrangement executed by a body corporate;
- a trustee or person administering a compromise or arrangement;
- a personal representative of a deceased person, other than a deceased registered person;
- a personal representative of a deceased registered person (with subregulation 11(4) limiting the period of the exemption until either six months have elapsed, the estate had been distributed or the personal representative has been removed);
- a person administering a bankrupt estate or the winding up of a body corporate or partnership; and
- registered debt agreement administrators, where they are preparing or administering debt agreements under Part IX of the *Bankruptcy Act 1966*.

These exemptions largely cover situations where a third party may be acting on behalf of a registered person (for example, where the registered person has become insolvent). Requiring these third parties to become registered would be unnecessary given that their function is to finalise the operation of the business. Nevertheless, these persons still need to comply with the Credit Act and the Transitional Act, as they are ‘standing in the shoes’ of the registered person, and acting on their behalf.

Subregulation 11(2) provides that a person is only exempted to the extent they are engaging in the specified credit activity. This means, for example, the exemption for registered debt agreement administrators would only apply to the extent they are preparing or administering debt agreements, and allows these persons to negotiate with credit providers on behalf of consumers in these specific circumstances, without needing to be registered.

Subregulation 11(5) provides an exemption for financial counselling agencies that may engage in credit activities in the course of providing their services. The proposed exemption would apply only where the agency meets certain conditions, including that:

- no fees or charges are payable by the client for any aspect of the activities provided;
- the financial counsellor is appropriately trained to engage in the activities; and
- the financial counsellor is a member of, or is eligible for membership of, a financial counselling association.

Regulation 3 defines *financial counselling association* to mean the peak bodies for financial counselors in Australia.

This exemption would allow financial counselling services, which are predominantly funded by government, to continue to provide advice and assistance to consumers in financial difficulty, without needing to meet the requirements applying to licence holders. The exemption is consistent

with that provided for financial counsellors under ASIC Class Order 03/1069, in respect of activities that would otherwise require them to hold an Australian financial services licence.

Subregulation 11(6) provides an exemption from the requirement to be registered where a person is:

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

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

The exemption applies where the related body corporate is engaging in credit activities on behalf of more than one registered person, provided that these bodies are all related bodies corporate. It applies irrespective of the nature of the credit activities the registered person is engaging in (including, for example, as a linked credit provider or linked lessor).

Subregulation 11(7) provides an exemption from the requirement to be registered where a person is a public body or authority or a local government body or authority, constituted under an Act of the Commonwealth or a state or territory.

Subregulation 11(8) provides an exemption from the requirement to be registered where a person is authorised:

- to engage in credit activities either by:
 - an Act of the Commonwealth or a state or territory; or
 - a licence or registration issued or granted under an Act of the Commonwealth or a State or Territory (other than an Australian credit licence issued under the Credit Act or a registration under the Transitional Act, or a licence issued under the *Finance Brokers Control Act 1975* (WA), the *Credit (Administration) Act 1984* (WA) or the *Consumer Credit (Administration) Act 1996* (ACT)); and
 - the person only engages in credit activities to the extent they are authorised by the Act of the Commonwealth or state, licence or registration.

The purpose of subregulation 25(8) is to provide for an exemption from the requirement to be registered where a person is authorised to engage in credit activities under legislation other than the Credit Act or the Transitional Act. It will usually be the case that such authorisations are limited or that the entity only engages in credit activities in a way incidental to other activities, given that the Credit Act and the Transitional Act are intended to be the primary sources of regulation for those engaging in credit activities. The references to licences issued under WA or ACT legislation are to

ensure that the exemption does not apply in the event that those licences are still in operation when the obligation to be registered commences.

Subregulation 11(9) provides that this exemption would not apply to debt collectors following the expiration of the 12 month period for the specific exemption for this class of persons in regulation 11.

Subregulation 11(10) provides an exemption from the requirement to be registered for persons where:

- the person is an organisation that provides services and makes benefits available to its members, and an incidental benefit is that members are eligible to apply to enter into a particular credit contract or consumer lease; and
- the person provides credit services in relation to the particular credit contracts or consumer leases, and does not otherwise provide credit services.

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

This exemption applies if the services and benefits are made available to persons who are members of either:

- the organisation; or
- a program or facility operated or conducted by or within the organisation (that is, a consumer may only become a member of the program or facility but not the organisation itself).

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

- the organisation provides services to its members;
- a benefit of membership is that members will become eligible to:
 - apply to enter into a particular credit contract or consumer lease (provided that the contract or lease is offered by a licensee or registered person); or
 - obtain services or benefits under a particular credit contract or consumer lease (again provided that the contract or lease is offered by a licensee or registered person).
- the person takes reasonable steps to provide the licensee or registered person with information relevant to deciding whether or not to enter the credit contract or consumer lease – for example, if a club banned one of its members from gambling venues, this information may be relevant in the credit provider or lessor deciding whether to enter into a contract and therefore should be available to the licensee.
 - this provision does not require the organisation to positively investigate whether the credit is unsuitable, but ensures that the exemption only applies in circumstances which ensure the licensee is properly informed or has access to information relevant to its decisions whether or not to provide credit or enter into a consumer lease.
- these benefits are incidental benefits provided by the organisation – that is, the organisation’s primary function is to provide other benefits to members;

- the person only provides credit services in relation to the particular credit contracts or consumer leases to members or persons likely to become members; and
- it would not ordinarily be the case that either:
 - the credit to be provided under the credit contract is provided predominantly for the payment of services or benefits provided by the organisation; or
 - the goods to be hired under any consumer lease are supplied by the organisation or an associate of the organisation.

It is intended that organisations would not be able to rely on the exemption, and would therefore need a licence or to be registered, in circumstances such as where:

- the sole or primary benefit of membership is the ability to apply to enter into a particular credit contract or consumer lease; or
- the organisation regularly arranges credit to pay for services that it is providing.

Subregulation 11(12) provides an exemption for charities which provide credit services to low income consumers or other organisations who provide credit services to low income consumers in conjunction with a licensed ADI. Generally, these low income consumers would not normally qualify for other credit products from mainstream lenders.

In relation to credit, these charities or other organisations perform not-for-profit credit services for the benefit of low income consumers in association with credit providers, usually an ADI, through programs designed specifically for low income consumers.

The credit provider or lessor will still need to be licensed in relation to providing credit or consumer leases to consumers under the Credit Act. For non-charity organisations, the program must be offered in association with a licensed ADI.

In order to qualify for the exemption, the charity or other organisation must not receive any payment for the service from the individual client or anyone related to the client.

Subregulation 11(13) provides an exemption for persons who only engage in credit activities by performing statutory obligations of a credit provider, lessor, mortgagee or the beneficiary of a guarantee. The exemption applies only in respect of a person who is performing obligations under either the *Privacy Act 1988* or the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* on behalf of the holder of a licence or a registered person.

Regulation 12 – Persons exempt from being registered – debt collectors

This regulation provides that persons are exempt from the need to be registered where they:

- engage in credit activities by acting on behalf of a credit provider or a lessor who is either the holder of a licence or a registered person by:
 - demanding and receiving payments from borrowers or guarantors under credit contracts or consumer leases; or
 - enforcing rights in relation to taking possession of property secured by a mortgage, or goods hired under a consumer lease;

- hold either a licence or authorisation to engage in debt collection activities under a State or Territory Act (as listed in subregulation 12(5)), and are not prohibited from engaging in these activities by an order of a court or a law of a State or Territory; and
- are authorised in writing by a registered person or a licensee to engage in the credit activities.

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

Debt collectors are already subject to licensing requirements in every state and in the Northern Territory. This exemption means that debt collectors are not subject to dual licensing regimes. The sunset period in the regulation requires Commonwealth and state and territory governments to consider which level of government should be responsible for licensing after this time.

Regulation 13 – Persons exempt from being registered – third parties

This regulation provides that persons are exempt from the need to be registered where they only engage in credit activities in a limited or minimal way on behalf of another person. The exemption would only apply where this person is:

- a credit provider, a lessor, a mortgagee or a person who is the beneficiary of a guarantee; and
- the holder of a licence or a registered person.

The exemption applies where the person engages in credit activities by:

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

The exemption in relation to giving or sending notices or documents will apply regardless of whether the notice is prepared by the holder of the licence or the registered person, or by the third party.

Regulation 14 – Persons exempt from being registered – providers of point of sale credit services

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

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

Subregulation 14(3) exempts persons from the need to be registered where they meet the following criteria:

- they are either a supplier of goods or services or a related body corporate of a supplier of goods or services;

- the person is engaging in credit activities either by performing obligations or exercising rights on behalf of a credit provider, lessor, mortgagor or the beneficiary of a guarantee or by providing credit services in relation to a particular credit contract or consumer lease;
- the credit provider or lessor is a linked credit provider or linked lessor with the supplier in respect of the particular credit contract or consumer lease;
- the linked credit provider or linked lessor is a licensee or registered person; and
- the consumer enters into the contract of lease wholly or predominantly for the purposes of payment for the goods or services supplied by the supplier. In the case of continuing credit contracts it is appropriate to test the predominant purpose for entering into the contract in relation to the purchases that are contemplated at that time. Any unspecified potential future use of the credit is not relevant in determining the intended purpose (consistent with the approach taken in section 5 of the Code).

The supplier will be exempt when engaging in these credit activities in respect of a proposed contract or lease where the transaction does not proceed.

Subregulation 14(4) extends the definition of linked credit provider in section 127 of the Code to also cover consumer leases. The effect of the subregulation is that a credit provider or lessor would be linked with the supplier where there is a commercial or business relationship between the two parties, including where:

- there is a contract, arrangement or understanding between them relating to the supply to the supplier of goods, or to the business carried on by the supplier; or
- the supplier;
 - regularly refers consumers to the linked credit provider or linked lessor; or
 - consumers can sign application forms or credit contracts or consumer leases at the premises of the supplier.

Subregulation 14(5) modifies the definition of services in subsection 204(1) of the Credit Act. The effect of the subregulation is that the supplier would be exempt if the services they provide fall within the definition. The definition of services is broad, and includes credit services that are provided to facilitate the supply of goods and services to the consumer.

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

- where the item being supplied is an interest in land – a supplier cannot rely on the exemption, for example, where they are a property developer arranging loans to finance the sale of units or town houses they had built; and
- where the services being supplied are services relating to credit or consumer leases regulated by the Credit Act (other than credit services within the meaning of section 7 of the Credit Act). The effect of this provision is that a supplier cannot rely on the exemption where the services being provided are, for example, debt reduction services advising consumers how to repay their home loan more quickly. However, they can rely on the exemption where they are only providing services by suggesting or assisting in respect of a particular credit contract or consumer lease (as specified in section 7 of the Credit Act).

Notwithstanding that a person otherwise satisfies the criteria for the exemption they will need to be registered where the supply of the goods or services is the result of contact with the consumer that is unsolicited. It is specifically provided that contact will be unsolicited where:

- after providing their name or contact details;
 - the consumer is contacted for another purpose; or
 - the consumer is not contacted within a reasonable period of time; or
- the consumer is contacted from physical premises not separate from other premises used by consumers for purposes other than being contacted in relation to the provision of those goods or services (for example, a stall or stand in a shopping mall where the person can approach or address consumers who are passing by).

In addition to these situations a supplier cannot rely on the exemption where the supply of the goods or services is the result of an unsolicited meeting or phone call to the consumer, within the ordinary meaning of that word, for example, where the goods or services are being provided as a result of door-to-door canvassing.

Regulation 15 – Activities exempt from being credit activities

This regulation exempts the following credit activities from the Transitional Act:

- credit assistance provided by a lawyer in the ordinary course of legal activities;
- credit activities undertaken by a registered tax agent in the ordinary course of the tax agent's business;
- where the only credit activities engaged in is engaging in communications that consist only of passing on factual information to the consumer;
- responding to requests for information in relation to the cost of a credit contract, or the terms or conditions of a credit contract; or
- activity done in the course of work of a kind ordinarily done by clerks or cashiers.

Activities undertaken by lawyers

The following conduct by lawyers would be exempted by subregulations 15(2) and (3):

- the provision of credit assistance in their professional capacity as a lawyer – this would encompass activities such as the provision of legal advice on credit contracts, consumer leases or mortgages and assisting a consumer in applying for a credit contract by completing a document on the client's instructions.
- engaging in credit activities on the instructions of a client where the credit activities is a necessary part of acting on those instructions (provided that the lawyer does not hold out or advertise that they are able to provide credit services).

These exemptions enable lawyers to act for either borrowers or licensees without needing to be registered, where their conduct comes within the ordinary course of the activities of a lawyer, or is otherwise within the exemption.

Activities undertaken by registered tax agents

Some activities undertaken by a registered tax agent in the ordinary course of the tax agent's business may constitute engaging in credit activities. This conduct would be exempted by subregulation 15(5) where:

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

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

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

Passing on prepared documents

Subregulations 15(6) and (7) provide exemptions in respect of conduct which consists only of passing on, publishing, distributing or otherwise disseminating a document on behalf of a registered person or licensee. This conduct would be excluded where it amounts to acting as an intermediary or, in some cases, providing credit assistance.

The exemption in subregulation 15(6) operates in the following circumstances:

- a person (person 1) engages in credit activities by passing on, publishing, distributing or otherwise disseminating a document that was provided by another person (person 2); and
- person 2 is either a registered person or a licensee, and is not acting on behalf of person 1;
- person 2 provides the document or approves its content;
- person 1 is not a registered person; and
- a consumer would reasonably understand that the credit activities are being engaged in by person 2, either because:
 - they are advised by person 1 that person 2 is the registered person or licensee, and, where person 2 is licensed they are provided with their licence number; or

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

- a reasonable person would not consider that person 1 is the registered person or licensee in relation to credit activities being engaged in by person 2.

The exemption in subregulation 15(7) applies in similar circumstances but with the following variations:

- the credit activity consists of a person (person 1) allowing another person (person 2) to use person 1's business name, logo or trade mark in relation to either the passing on, publishing, distributing or other dissemination of a document, or a credit contract, consumer lease, mortgage, guarantee or credit activity provided or offered by person 2; and
- person 1 will be able to rely on the exemption notwithstanding that they select or modify the content of the document or otherwise exercise control over the content of the document.

These exemptions are intended to cover situations such as:

- publishers and internet portal operators; or
- engaging in credit activities only by passing on a document that, for example, contains information about a particular credit contract or is an application for credit.

Example: subregulation 15(6)

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

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

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

Example: subregulation 15(7)

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

This conduct would not be exempted under subregulation 15(6) as Milo has exercised control over the content of the document. However, it would be exempted under subregulation 15(7) where either consumers are advised of the Rosie's Credit Cards' licence number or a reasonable person would assume that Rosie's Credit Cards was the lender in respect of the credit card.

Passing on some types of factual information

The purpose of subregulation 15(8) is to exempt communications in relation to the provision of information about the cost or terms of a contract. The exemption provides that this conduct does not, by itself, constitute engaging in credit activities where:

- the factual information is limited to information about either the cost or likely cost of a credit contract or lease, or the terms and conditions of a credit contract or lease;
- the credit contract or lease is provided by a person who is either the holder of a licence or registered;
- the information is only provided in response to a request by a consumer, rather than unsolicited conduct by the person; and
- the provider could have complied with the request by giving the other person information about one or more other credit contracts or leases, but elected not to do so.

Clerks and Cashiers

Subregulation 15(9) exempts an activity if it is done in the course of work of a kind ordinarily done by clerks or cashiers. If a consumer asks a person to assist him in filling in the application form for a credit product (for example, photocopying documents provided by the consumer or faxing a completed application form) the assistance provided by the person may be a credit activity as the person is assisting the consumer to apply for a credit contract. This would mean, for example, that a person undertaking these functions on behalf of a licensee or a credit representative would not need to be licensed.

This exemption ensures that conduct of this nature, which is more appropriately characterised as administrative, does not constitute engaging in a credit activity.

Regulation 16 – Activities exempt from being registered

This regulation exempts the following activities from the requirement to be registered:

- subregulation 16(2) exempts activities where a person's role is limited to being a referrer between a consumer and a licensee, a registered person or a representative; and
- subregulation 16(3) exempts credit activities where they are in relation to provisions of credit that have been largely, but not entirely, exempted from the requirements of the Code.

Referrer Exemptions

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

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

Exemption where credit largely excluded from the Code

Subregulation 16(3) exempts (from a requirement to be registered) a person who only engages in credit activities in relation to credit where the credit is already largely, but not entirely, exempt from the requirements of the Code.

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

The exemption applies to persons who engage in a credit activity in respect of the provisions of credit mentioned in subsection 6(9) or 6(11) of the Code; or regulations 52, 54, 55, 56, 57, 60, 61 or 63 of the *National Consumer Credit Protection Regulations 2010*.

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

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

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

Part 5 Infringement notices

Regulation 17 – Purpose of Part 5

This regulation provides an explanation of Part 5 which sets out an infringement notice scheme in accordance with item 43 Schedule 2 of the Transitional Act.

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

Regulation 18 – Definitions for Part 5

This regulation defines words and expressions that are used in proposed regulations 19 to 29.

Regulation 19 – When an infringement notice can be given

This regulation requires ASIC to have:

- reasonable grounds to believe that a person has committed an offence against the Transitional Act that is stated to be an offence of strict liability; or
- reasonable grounds to believe that a person has contravened a civil penalty provision in subitem 19(1) of Schedule 2 of the Transitional Act;

before giving the person an infringement notice.

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

Regulation 20 – Contents of infringement notice

This regulation provides that the form of an infringement notice is set out in Schedule 1 to the *National Consumer Credit Protection Regulations 2010*. The notice may include other information that ASIC considers necessary.

Regulation 21 – Amount of penalty if infringement notice given

This regulation sets the amounts of the penalty payable under an infringement notice by individuals and bodies corporate. The amounts would be consistent with the maximum amount permitted under proposed item 43 of Schedule 2 to the Transitional Act.

Regulation 22 – Extension of time to pay penalty

This regulation permits a recipient of an infringement notice to apply in writing to ASIC for a further period of up to 28 days in which to pay the penalty under the infringement notice. The application would need to be made within 28 days after receiving the infringement notice and include the reasons for the application.

ASIC would be able to grant or refuse such an application. If, after 14 days after receiving an application, ASIC had not granted, or refused to grant, the application, ASIC will be taken to have refused to grant the further period to pay the penalty.

Regulation 23 – Payment of penalty by instalments

This regulation permits a recipient of an infringement notice to apply in writing to ASIC for permission to pay a penalty under an infringement notice by instalments. Such an application must be made within 28 days after receiving the infringement notice and include the reasons for the application and details of the amount and frequency the recipient proposes to pay.

If, after 14 days after receiving an application, ASIC has not granted, or refused to grant, the application, ASIC is taken to have refused to grant permission to pay a penalty under an infringement notice by instalments.

Regulation 24 – Time for payment of penalty

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

Regulation 25 – Effect of payment of penalty

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

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

If a person pays a penalty under an infringement notice for the alleged contravention of a civil penalty provision, a consumer, or ASIC acting on behalf of a consumer would not be prevented from commencing a civil proceeding for compensation or other orders under section 178 or 179 of the Credit Act, for conduct the subject of the paid infringement notice.

Regulation 26 – Withdrawal of infringement notice by nominated person

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

Regulation 27 – Withdrawal of infringement notice by ASIC

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

- whether the recipient had previously been convicted of an offence under the Credit Act or previously been found to have contravened a civil penalty provision; and
- whether the recipient had previously been given an infringement notice for an infringement notice for an offence of the same kind.

Regulation 28 – Notice of withdrawal of infringement notices

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

Regulation 29 – Refund of penalty

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