

ASIC Corporations (Amendment) Instrument 2015/991

ASIC Credit (Financial Counselling Agencies) Instrument 2015/992

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

National Consumer Credit Protection Act 2009

The Australian Securities and Investments Commission (ASIC) makes:

- the *ASIC Corporations (Amendment) Instrument 2015/991* under paragraph 911A(2)(l) of the *Corporations Act 2001* (the Corporations Act). Paragraph 911A(2)(l) provides that ASIC may exempt a person from the requirement to hold an Australian financial services (AFS) licence.
- the *ASIC Credit (Financial Counselling Agencies) Instrument 2015/992* under paragraph 109(3)(d) of the *National Consumer Credit Protection Act 2009* (the National Credit Act). Paragraph 109(3)(d) provides that ASIC may declare that provisions to which Part 2-6 of the National Credit Act applies apply in relation to a class of persons as if specified provisions were modified or varied.

1. Background

Existing exemptions

Financial counselling agencies, and persons who provide financial counselling services as representatives of financial counselling agencies, are exempt from:

- the requirement in the Corporations Act to hold an AFS licence covering the provision of a limited range of financial services offered as part of a financial counselling service – this exemption is contained in ASIC Class Order [CO 03/1063]; and
- the requirement in the National Credit Act to hold an Australian credit licence (credit licence) in relation to credit activities provided as part of a financial counselling service-

this exemption is contained in subregulation 20(5) of the *National Consumer Credit Protection Regulations 2010* (National Credit Regulations).

These exemptions only apply where no fees or charges (however described) are payable by or on behalf of the client in relation to the financial service or credit activity or any other aspect of the financial counselling service.

Financial counselling requirements under statutory schemes for payment of benefits

The Commonwealth Government has recently put in place a statutory scheme (the BSWAT Payment Scheme) for payment of a lump sum to eligible persons under the *Business Services Wage Assessment Tool Payment Scheme Act 2015* (the BSWAT Payment Scheme Act).

An essential part of the BSWAT Payment Scheme is for eligible persons to only be able to accept the offer of a lump sum under the scheme after receiving both legal advice and financial counselling. In relation to the financial counselling requirement, the BSWAT Payment Scheme Act provides for:

- a register of financial counsellors (registered advisers) who will be available to provide financial counselling certificates for the purpose of the scheme; and
- registered advisers to make a claim to the Department of Social Services (the Department) for a service fee, up to a maximum of \$435, in relation to each financial counselling certificate. Paragraph 98A(1)(a) of the BSWAT Payment Scheme Act provides that the service fee is payable ‘in discharge of costs, expenses or other obligations incurred by a person’ in connection with obtaining a financial counselling certificate.

The fee payable to the registered adviser will be assessed by the Secretary of the Department to determine whether it is appropriate for the level of work undertaken in providing the financial counselling service. Payment of the fee is not dependent on the decision of the eligible person, and will be payable regardless of whether the eligible person decides to accept the lump sum offer.

The financial counselling requirement, and Commonwealth funding for these services, is a control included in the terms of the BSWAT Payment Scheme to increase the choices of the scheme’s target group (consumers who are vulnerable because of intellectual disability). For additional information see the Explanatory Statement to the Business Services Wage Assessment Tool Payment Scheme Bill 2014.

The ability of financial counselling agencies to rely on the existing licensing exemptions may be adversely affected by participating in the BSWAT Payment Scheme as a registered adviser and receiving a service fee.

2. Purpose of the instrument

The purpose of the *ASIC Corporations (Amendment) Instrument 2015/991* and the *ASIC Credit (Financial Counselling Agencies) Instrument 2015/992* is to modify the limitation in

the existing exemptions on fees or charges payable on behalf of the client in relation to a financial counselling service.

The modifications will permit fees or charges that are payable on behalf of the client by the Commonwealth, a State or a Territory.

These modifications will permit a fee or charge to be payable on behalf of the client to implement the Government's decision to include a Commonwealth funded financial counselling requirement as a consumer protection measure for the BSWAT Payment Scheme. Without this variation financial counsellors and agencies that participate in that scheme would lose the benefit of the existing exemptions, which may discourage participation in the BSWAT Payment Scheme.

Allowing for a service fee that is payable by the Commonwealth or a State or Territory, and that is not dependent on the client's decisions, is unlikely to result in financial counsellors and agencies being subject to a conflict of interest.

3. Operation of the instrument

Paragraph (c) of [CO 03/1063] requires that no fees or charges be payable by or on behalf of the client in relation to the financial service or any other aspect of the financial counselling service in order for the relevant licensing exemption to apply. Schedule 1 of the *ASIC Corporations (Amendment) Instrument 2015/991* amends paragraph (c) of [CO 03/1063] to permit fees or charges that are payable by the Commonwealth, a State or a Territory.

Paragraph 20(5)(e) of the National Credit Regulations requires that no fees or charges be payable by or on behalf of the client in relation to the credit activity or any other aspect of the financial counselling service in order for the licensing exemption in subregulation 20(5) to apply. Section 5 of the *ASIC Credit (Financial Counselling Agencies) Instrument 2015/992* modifies paragraph 20(5)(e) of the National Credit Regulations to permit fees or charges that are payable by the Commonwealth, a State or a Territory.

4. Consultation

Before making the legislative instruments, ASIC consulted with the Financial Counselling Association of Australia, together with the Department of Social Security as the Department responsible for the BSWAT Payment Scheme. ASIC considered that this level of consultation was appropriate given the limited extensions to the existing licensing exemptions for financial counselling services.

The Office of Best Practice Regulation advised that a RIS is not required in order to make the legislative instruments.

Statement of Compatibility with Human Rights

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

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ASIC Corporations (Amendment) Instrument 2015/991 and ASIC Credit (Financial Counselling Agencies) Instrument 2015/992 are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview

ASIC Corporations (Amendment) Instrument 2015/991 and ASIC Credit (Financial Counselling Agencies) Instrument 2015/992 amend existing exemptions for financial counsellors from the requirement to hold Australian financial services or Australian credit licences. These instruments allow financial counsellors to continue to rely on the existing exemptions if they receive fees or charges that are payable by the Commonwealth or a State or Territory.

Human rights implications

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

Conclusion

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