

National Consumer Credit Protection Amendment (Credit Reform Phase 2) Bill 2012

COMMENTARY IN RELATION TO NATIONAL CONSUMER CREDIT PROTECTION AMENDMENT REGULATIONS 2012

Regulations in relation to small business credit activities

The draft regulations introduce regulatory requirements in relation to the requirement for persons to obtain from ASIC a permit where they engage in credit activities in relation to a small business credit contract or a small business consumer lease (*small business credit activities*).

The regulations adapt or modify the existing requirements in Chapter 2 of the *National Consumer Credit Protection Act 2009* (Credit Act). The effect is that Chapter 2 only applies to small business credit activities as modified by the regulations. The regulations are set out in Schedule 4A in Item 18 of the regulations.

The main aspects of the requirements in modified Chapter 2 are:

- A person will be prohibited from engaging in small business credit activities unless they hold a permit (modified section 29 in Schedule 4A).
 - A permit system has been introduced to differentiate these credit activities from those currently regulated by the Credit Act. It is considered problematic, both legally and practically, to provide for two systems, one for holders of an Australian credit licence who also engage in small business credit activities and one for persons who only engage in small business credit activities.
 - It is therefore proposed that the procedures for obtaining a permit, and the obligations that apply to a person once they hold a permit, will be different from those that apply to holders of an Australian credit licence.
- In summary modified section 37 provides that an applicant will be able to obtain a credit permit from ASIC if they are able to confirm the following matters in the application form:
 - They are a member of an ASIC-approved external dispute resolution scheme.
 - That no disqualifying criteria apply in relation to the applicant (for example, the applicant is not insolvent or has not previously held an Australian credit licence which is currently suspended or cancelled). The disqualifying criteria are all questions of fact, and based on the criteria used to register persons during the transitional period under the Credit Act.
 - Modified section 39 will allow for a streamlined process for classes of applicants. It is proposed to use this to simplify the procedures for holders of an Australian credit licence who apply for a permit.

- Modified section 47 will impose an obligation on a permit holder to continue to be a member of an external dispute resolution scheme while they hold the permit.
 - The other general conduct obligations in section 47 of the Credit Act will not apply to persons engaging in small business credit activities (for example, the obligations to act efficiently, honestly or fairly or to have adequate resources). The use of a permit system gives certainty that these obligations do not apply to holders of an Australian credit licence where they engage in small business credit activities.
- Modified Division 6 sets out limited circumstances in which ASIC will be able to suspend or cancel a permit, as follows:
 - Without a hearing — if any of the disqualifying criteria set out above apply to the permit holder.
 - Only after a hearing — where the permit holder’s conduct demonstrate they are unable or unwilling to comply with the legislation, or where ASIC has reason to believe the permit holder is not a fit and proper person to engage in credit activities.

A more detailed summary of the key provisions in modified Chapter 2 is set out below.

Draft regulations in relation to modifying Parts 2-3, 2-4 and 2-5 of the Credit Act are still being considered.

<i>Provision</i>	<i>Commentary</i>
Modified sections 27 to 29	<p>The regulations introduce counterparts to the prohibition on engaging in credit activities without an Australian credit licence in section 29 of the Credit Act.</p> <p>Modified section 29 prohibits a person from engaging in credit activities in relation to a small business credit contract or a small business consumer lease unless they either:</p> <ul style="list-style-type: none"> • hold a permit; or • they are an employee, director or representative of a permit holder, and engaging in a credit activity within the authority of the permit holder.
Modified sections 30 and 31	<p>The regulations introduce counterparts to the prohibitions relating to the holding of an Australian credit licence in sections 30 and 31 of the Credit Act.</p> <p>The prohibitions are:</p> <ul style="list-style-type: none"> • In modified section 30 – prohibitions on conduct such as a person advertising or holding out that they hold a permit when they do not, or advertising that they can provide or arrange small business credit contracts or small business consumer leases when they do not hold a permit. • In modified section 31 – a prohibition on a permit holder conducting business with another person who does not hold a permit when they are required to do so.
Modified sections	The regulations introduce counterparts to the provisions relating to applying

35 to 44	<p>for an Australian credit licence in sections 35 to 44 of the Credit Act.</p> <p>In summary an applicant will obtain a permit from ASIC if they are able to confirm the following matters in the application form:</p> <ul style="list-style-type: none"> • They are a member of an ASIC-approved external dispute resolution scheme. • That none of the disqualifying criteria apply to the following persons: <ul style="list-style-type: none"> – where the applicant is a natural person — that person; – where the applicant is a body corporate — a director, secretary or senior manager who would perform duties in relation to the credit activities to be authorised by the permit; and – where the applicant is a partnership or trustee — a partner or trustee who would perform duties in relation to the credit activities to be authorised by the permit. • The disqualifying criteria are: <ul style="list-style-type: none"> – whether the person is currently the subject of a banning order or disqualification order under Part 2-4 of the Credit Act, under Division 8 of Part 7.6 of the <i>Corporations Act 2001</i>, or under a law of a State or Territory (in relation to credit activities); – whether the person’s Australian credit licence or permit is currently suspended or has been cancelled; – whether, if the person has held an Australian financial services licence, that licence has been suspended or cancelled in the last 7 years (either on substantive grounds or because of incapacity); – whether the person is currently insolvent (if they are not the trustees of a trust); – whether the person is currently disqualified from managing corporations under Part 2D.6 of the <i>Corporations Act 2001</i>; and – whether the person has been convicted of serious fraud in the last 10 years; and – whether the person is currently the subject of a prescribed State or Territory order (in relation to organised crime activities). <p>ASIC can also refuse an application for a permit, but only after a hearing, if the application is false or materially misleading or omits necessary information; modified subsection 37(6)).</p>
Modified sections 45 and 46	<p>The regulations introduce counterparts to the provisions in sections 45 and 46 of the Credit Act relating to the process for ASIC imposing, varying or revoking conditions on an Australian credit licence.</p> <p>In summary:</p>

	<ul style="list-style-type: none"> • Once a person holds a permit ASIC may at any time impose, vary or revoke conditions on a permit (but only after giving the permit holder an opportunity to make submissions and give evidence at a private hearing). • Where the permit holder is an entity regulated by the Australian Prudential Regulation Authority, special procedures apply in relation to conditions which would have the result of preventing the permit holder from being able to carry on any or all of its usual activities.
Modified section 47	<p>This provision imposes an obligation on a permit holder to continue to be a member of an external dispute resolution scheme.</p> <p>A permit holder does not need to meet, on a continuing basis, the other general conduct obligations that apply to holders of an Australian credit licence in section 47 of the Credit Act (for example, to act efficiently, honestly or fairly or to have adequate resources).</p>
Modified sections 49 to 53	<p>The regulations introduce counterparts to the provisions in sections 49 to 53 of the Credit Act, in relation to additional limited conduct obligations, to ensure the effective operation of the permit regime.</p> <p>These conduct obligations are:</p> <ul style="list-style-type: none"> • To provide ASIC with information about their credit activities, whether in response to a written notice from ASIC or where this is required by the regulations. • To give reasonable assistance to ASIC. • To cite the number of their permit. • To lodge an annual compliance certificate with ASIC.
Modified sections 55 to 62	<p>The regulations introduce counterparts to the provisions relating to the process for ASIC suspending, cancelling or varying an Australian credit licence in sections 55 to 62 of the Credit Act.</p> <p>In general terms:</p> <ul style="list-style-type: none"> • ASIC may suspend or cancel a permit without a hearing if any of the disqualifying criteria set out above apply to the permit holder. • ASIC may suspend or cancel a permit but only after a hearing if: <ul style="list-style-type: none"> – The permit holder has not complied with the credit legislation or the conditions, if any, on their permit. – The permit holder has not taken reasonable steps to ensure their representatives comply with the credit legislation. – ASIC has reason to believe the permit holder is not a fit and proper person to engage in credit activities. • Special procedures apply where the permit holder is regulated by APRA.

Regulations in relation to small business credit activities

The draft regulations provide an exemption for private individuals who are not in the business of providing credit from the requirement to hold an Australian credit licence. The model adopts the existing approach to the exemption for securitisation entities.

In general terms items 16 and 17 in the regulations implement this proposal by:

- Amending the definition of special purpose funding entity to include a 'credit activity investor'.
- Introducing a definition of credit activity investor as an individual (or other small entity) who only engages in credit activities as a credit provider or lessor in accordance with a servicing agreement with an intermediary.

The effect of these amendments, and the amendment to regulation 23B in Item 9, is that a credit activity investor would be exempt from the need to hold an Australian credit licence provided:

- They are a member of an ASIC-approved External Dispute Resolution scheme (so that they will be contractually obliged to comply with decisions of the scheme).
- The intermediary is the holder of an Australian credit licence.
- There is an agreement between the intermediary and the private credit providers and private lessors.