



## Rationalisation of Ending ASIC Instrument Measures

TREASURY LAWS AMENDMENT (RATIONALISING ASIC INSTRUMENTS) REGULATIONS 2022

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Treasury  
Legislation Policy and Delivery Branch  
Law Division  
Treasury

## About Financial Counselling

Financial counsellors provide advice and support to people experiencing or at risk of financial hardship. Working in community organisations, their services are free, confidential and independent.

Financial counsellors combine soft skills working with vulnerable people in a non-judgmental empowerment framework, with advocacy and technical skills based on an in-depth knowledge of consumer and credit law, debt related laws and practices, industry hardship processes and government supports and entitlements.

## Financial Counselling Australia

This is a joint submission from the peak bodies in the financial counselling sector.

- Financial Counselling Australia
- Financial Counsellors ACT
- Financial Counsellors Association of NSW
- Financial Counsellors Association of Queensland
- Financial Counsellors Association of Tasmania
- Financial Counsellors Association of Western Australia
- Financial Counselling Victoria
- South Australian Financial Counsellors Association (also covering the NT)

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## 1 Summary

- We support the intent of the Exposure Draft Regulations (the “Regulations”) to rationalise existing ASIC legislative instruments relevant to the financial counselling sector and instead include the relevant provisions in the primary legislation.

### **Generalist financial counsellors**

- The Regulations however should reflect the wording in the current ASIC exemptions, rather than introduce new concepts. Specifically, in relation to the AFSL and ACL exemptions applying to generalist financial counselling agencies:
  - “adequately trained” should be replaced with “appropriately trained”
  - references to “competency” should be removed.
- It is not clear how the existing insurance claims handling exemption in the Corporations Regulations (regulation 7.1.04CAA (9)) will interact with the proposed Regulations.
  - We note that the insurance claims handling exemption is drafted in different terms to the proposed Regulations – it applies to individual financial counsellors, not financial counselling agencies and requires financial counsellors to be members of a financial counselling association, rather than just “eligible” for membership.
  - We would appreciate Treasury’s advice about this issue.

### **Rural financial counsellors**

- Agencies offering rural financial counselling currently only have the benefit of an exemption from holding an ACL.
- Given the work rural financial counsellors undertake, it is important that they operate under an AFSL exemption as well. The type of financial advice covered by the AFSL exemption needs to reflect the scope of their role, including advice about forward contracts.
- As a matter of good public policy, the wording of the exemptions for generalist and rural financial counselling agencies should be the same in relation to their substantive terms.
  - In particular, the rural financial counselling agencies should ensure that their financial counsellors are members of, or eligible for membership of, a financial counselling agency.

### **Financial capability workers**

- We have identified similar issues with financial capability workers as identified earlier for generalist financial counsellors with respect to training and competency. The wording for the existing exemption should be retained in the new Regulations.

## 2 OVERVIEW OF THE EXEMPTIONS

### 2.1 Background

In the course of providing financial counselling services to people experiencing financial stress, financial counsellors sometimes provide advice to or advocate on behalf of clients on matters that would normally require a licence – either an Australian Financial Services Licence (AFSL) or an Australian Credit Licence (ACL). Recognising however that financial counselling is a valuable community service, provided by professionals required to be qualified, current in skills and knowledge, undertaking regular professional supervision, to work without conflicts and free of charge and under a strict code of ethical practice, in the employ of not-for-profit community organisations, the financial counselling sector has been exempted from having to apply for the relevant licences.

The exemptions have been drafted to apply differently to different branches of the profession, with separate exceptions for rural financial counsellors (who assist primary producers and rural small businesses), and generalist financial counsellors (who assist individuals and small businesses). This distinction reflects the historical development of the profession, the different target client groups and to some extent, the different sources of funding.<sup>1</sup>

We support the intent of the Exposure Draft Regulations (the “Regulations”) to rationalise the existing ASIC legislative instruments relevant to the financial counselling sector and instead include the relevant provisions in the primary legislation. This will make the exemptions easier to find and understand. It will also overcome the current automatic sunseting of these exemptions, recognising that they should be ongoing.

### 2.2 ASIC Licensing Exemptions

There are three different ASIC licensing exemptions and more recently, the government included a further licensing exception in the Corporations Law. The way these exemptions operate, including their differences, are described below as this background is relevant to the recommendations we make later in this submission.

At a broad level, the ASIC licensing instruments exempt:

- **generalist** financial counselling agencies from holding an AFSL<sup>2</sup> and ACL<sup>3</sup> as long as certain conditions are met;
- **rural** financial counselling agencies from holding an ACL<sup>4</sup> as long as certain conditions are met.

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<sup>1</sup> At a Federal level, rural financial counselling agencies were funded through the Department of Agriculture for many years and more recently by the National Recovery and Resilience Agency. Generalist financial counselling is funded through the Department of Social Services.

<sup>2</sup> ASIC Corporations (Financial Counselling Agencies) Instrument 2017/792.

<sup>3</sup> Subregulation 20(5) of the National Consumer Credit Protection Regulations 2010.

<sup>4</sup> ASIC Credit (Financial Counselling Agencies) Instrument 2017/793.

It is important to note the following:

- the exemptions apply to financial counselling agencies, rather than individual financial counsellors;
- the conditions for the ACL exemptions for generalist and rural financial counselling agencies have some similarities, but also one difference.
- the similar conditions require the agency to provide services that are free of charge and to ensure that their financial counsellors have appropriate training and adequate skills and knowledge.
- the difference is that the exception for generalist financial counselling agencies also requires that they ensure their financial counsellors are members of, or eligible for membership of, a financial counselling association.

There is no requirement for rural financial counselling agencies to ensure that the financial counsellors they employ are members of, or eligible for membership of, a financial counselling association (although a number of rural financial counsellors are actually members).

## 2.3 Insurance Claims Handling Exemption

In 2021 the Government introduced much-needed reforms to require organisations providing insurance claims handling services to obtain an AFSL.<sup>5</sup> A number of professions/businesses however were exempted from this requirement including the financial counselling sector as the laws were not targeted to them. These exemptions are contained in regulation 7.1.04CAA of the Corporations Regulations 2001.<sup>6</sup>

Key differences between the insurance claims handling exemption, and those contained in the ASIC instruments for generalist financial counselling agencies, are that the insurance claims handling exemption:

- applies to **individual** financial counsellors, rather than agencies
- requires that financial counsellors **must be** members of a financial counselling association, rather than just being “eligible” for membership.<sup>7</sup>

We make further comments about the existence of this exemption and implications in Section 4 below.

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<sup>5</sup> The amendments were contained in Financial Sector Reform (Hayne Royal Commission Response) (Claimant Intermediaries) Regulations 2021 - see Schedule 1.9 amending 7.1.04C of the Corporations Regulation 2001. (*Insurance Claims Regulations*).

<sup>6</sup> For financial counsellors the exemption is in regulation 7.1.04CAA (9).

<sup>7</sup> The wording in the regulations is that: “The circumstances are that the person is a member of one of the following bodies, acting in that capacity” followed by the same list of financial counselling associations in the ASIC instruments.

## 2.4 ASIC Exemption for Financial Capability Workers

Treasury is also planning to incorporate the ASIC exemption applying to financial capability workers into the primary law.<sup>8</sup> This exemption allows financial capability workers, working in agencies funded by the Federal Department of Social Services, to “provide financial product advice to a client in relation to a basic deposit product”. This allows these workers to suggest clients open fee-free accounts (basic bank accounts) offered by a number of financial institutions.

The issues we have identified for generalist financial counsellors in Section 3.2 and 3.3 below equally apply to financial capability workers.

## 3 GENERALIST FINANCIAL COUNSELLORS

### 3.1 Changes in drafting between the existing and proposed wording

The Exposure Draft does not mirror the wording in the existing ASIC licensing exemptions, but has introduced new concepts. This may create problems in the way the exemptions work. We therefore recommend that the existing wording be maintained. The wording in question relates to training and competency.

### 3.2 “Appropriate” Training

The current exemptions require financial counselling agencies to ensure that “each person who provides financial counselling services ... has undertaken ***appropriate training***” (our emphasis).<sup>9</sup>

“Appropriate” can be clearly understood by agencies as they can refer to the requirements for continuing professional development set out by financial counselling associations. Financial counsellors either have completed appropriate training or they have not. If they have not completed appropriate training, they will not be able to maintain their membership of a financial counselling association. See AFSL Reg Part 2 5 2 d.

The Exposure Draft however introduces the phrase “adequately trained”. The use of *adequate* creates a level of ambiguity compared to *appropriate* where there is clear usage and professional standards as to its application. The concept of *adequate* invites a broader interpretation of training, creating uncertainty in its application to financial counsellors and hence entitlement to the exemptions.

**Recommendation 1. That in both relevant sections of Schedule 1 the term “adequately trained” be replaced with “appropriately trained”.**

**This recommendation also applies with respect to financial capability works in the relevant sections of Schedule 1.**

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<sup>8</sup> ASIC Corporations (Commonwealth Financial Counselling—Financial Capability Services) Instrument 2022/221.

<sup>9</sup> See both Sch 1 (zb) (vii) and Sch (1) (5) (e) (i)

### 3.3 “Competent”

The Exposure Draft introduces the new concept that a financial counselling agency has to take all reasonable steps to ensure that each person who engages in the provision of financial product advice/credit activities is **competent** to provide the financial counselling service.

This requirement not in the current exemption and introduces undefined and unnecessary concepts to the operation of the exemption. The better approach is to revert to the current language in the exemptions where:

*“the financial counselling agency takes all reasonable steps to ensure that each person who provides the financial services on its behalf... has undertaken appropriate training to ensure that they have adequate skills and knowledge to satisfactorily provide the financial services and any other aspect of the financial counselling service”*

Financial counselling agencies discharge their oversight burden for the purposes of the exemption by ensuring financial counsellors have completed appropriate training.

**Recommendation 2. That both relevant sections of Schedule 1 of the Exposure Draft adopt the current wording in the exemptions and remove references to competency.**

**This recommendation also applies with respect to financial capability works in the relevant sections of Schedule 1, insofar as it removes reference to competency.**

## 4 AFSL Exemption – Insurance Claims

As noted earlier, the relatively new insurance claims handling exemption, in the Corporations Regulations has different wording to the existing ASIC licensing exemptions. These are that the exemption applies to individual financial counsellors who must be members of a financial counselling association.

We are not clear if the intent of the Exposure Draft is to repeal the existing insurance claims handling exemption and then replace them. If it remains there will continue to be a tension between that regulation and the new regulations.

Under the Exposure Draft our review suggests that the AFSL exemption will apply where:

*“ (v) the financial counselling agency does not carry on or otherwise participate in a financial services business involving the provision of a financial service, other than a financial service of the kind to which this paragraph applies **or a claims handling and settling service**; (vi) the financial counselling agency takes all reasonable steps to ensure that none of its representatives provides or participates in the provision of a financial service, other than a financial service of the kind to which this paragraph applies **or a claims handling and settling service**”*. See Sch 1 (zb) (v) and (vi)



This definition in turn is given the same meaning as set out in Chapter 7 of the Corporations Act where it is defined as (amongst other points) someone who makes recommendations:

*(i) the recommendation, or [statement](#) of opinion, is [made](#) in response to an inquiry by or on behalf of another [person](#) about an existing or a potential claim by the other [person](#) under an [insurance product](#) (ii) the recommendation, or [statement](#) of opinion, could reasonably be expected to influence a [decision](#) whether to continue with the existing claim or to [make](#) the potential claim;*

In reviewing the Exposure Draft it is unclear how the Exposure Draft Regulations repeal the Insurance Claims Regulations and replace them with the above.

**Recommendation 3 – that Treasury confirm how the existing insurance claims exemption in the Corporations Regulations will interact with the proposed changes.**

## 5 Rural Financial Counselling

### 5.1 Overview

The Exposure Draft only provides exemptions to rural financial counselling agencies from the requirement to hold an Australian Credit Licence. It does not provide an exemption to these agencies from the requirement to hold an AFSL, including an exemption in relation to insurance claims handling.

In doing this, the Exposure Draft represents the current position. This process however is an opportunity to revisit the current position and update it to reflect how both the rural and generalist financial counselling sectors have evolved.

While the rural financial counselling sector has its own network and consultation processes, we meet with them and stay in touch. We also understand that they will be providing a submission to Treasury about the Exposure Drafts. In that context, our view would be that:

- the rural financial counselling sector needs the benefit of an exemption from holding an AFSL in order to adequately provide rural financial counselling services
- the existing ACL exemption, and if there is an AFSL exemption, need to be drafted in the same way as those for the generalist financial counselling sector, including the requirement that rural financial counsellors be members of, or eligible for membership of, a financial counselling association.

There are further comments about both of these points below.

## 5.1 AFSL exemption for Rural Financial Counsellors

The AFSL exemption for generalist financial counsellors allows financial counsellors to provide financial product advice, within the scope of a financial counselling service. The exemption is limited to advice about:

- a deposit product (such as bank accounts)
- non-cash payment products (such as direct debit products)
- insurance
- retirement savings accounts
- superannuation.

As examples of some of the above, in the course of a financial counselling service, a financial counsellor might explore whether a client has access to a fee-free bank account, whether they can afford insurance and what type of insurance product would be suitable, or whether early access to superannuation could be an appropriate option to address financial difficulty.

While the focus of rural financial counsellors is in assisting primary producers, business and personal finances are often inter-mixed. It would be surprising if rural financial counsellors did not sometimes provide advice about bank accounts, non-cash payment facilities, insurance, retirement savings accounts and superannuation. In particular, it would be surprising if they did not provide advice about insurance products, including in claims management, within the scope of their roles.

In addition, many farmers manage the risks associated with the sale of their crops through financial instruments such as forward contracts, allowing them to lock in prices at a future date. More farmers are also involved in carbon markets. Rural financial counsellors in assisting farmers need to understand how these products work and will provide advice about them.

The reason that rural financial counsellors have not had the benefit of an AFSL exemption is unclear. It may have been based on a misunderstanding by the funding agency (at the time, this was the Department of Agriculture) that an AFSL exemption was somehow associated with the provision of “financial advice” in relation to investments. Of course, rural financial counsellors do not provide investment advice – any AFSL exemption will be limited to the financial products within the scope of a rural financial counselling service.

There may also have been a misunderstanding about the reference to the word “advice”. The use of this word does not mean that a financial counsellor tells a client what to do – the action they take will always be the client’s choice. Providing “advice” means that a financial counsellor needs to take into account the actual circumstances of their client and tailor what they say accordingly.

**Recommendation 4 – recognising that rural financial counsellors will be providing advice to their clients about certain financial products, the Regulations need to provide an appropriate AFSL exemption for rural financial counselling agencies. At a minimum, the exemption needs to cover the same products as for generalist financial counselling agencies, but will need to extend to cover other products as outlined above, such as forward contracts and carbon markets.**

## 5.2 Consistency of the Exemptions

Unlike the exemptions for generalist financial counsellors, the current ACL exemption for rural financial counselling agencies does not include the requirement that they ensure their financial

counsellors are members of, or eligible for membership of, a financial counselling association. The proposed Regulations however **do include this requirement**. We support this inclusion. We also assume it would apply to any AFSL exemption for rural financial counselling agencies.

It is a matter of good public policy, including consistency, that the wording in the exemptions applying to rural financial counsellors and generalist financial counsellors is the same. This would include that a condition of the licence exemptions includes rural financial counselling agencies ensuring that their financial counsellors are members of, or eligible for membership of, the relevant state/territory financial counselling association.

A key rationale for the provision of the licence exemptions is assurance as to the skill and professionalism of the financial counsellors providing the service. All financial counsellors (rural and generalist) are working with people experiencing some form of vulnerability, and engaged in work which requires considerable expertise across a range of skills. Consequently, it is critical that they be members (or eligible to be members) of their relevant professional body.

In practical terms, membership means they subscribe to a code of ethical practice, can be subject to professional conduct requirements, must satisfy annual professional development and professional supervision requirements, and their compliance with these things is checked on annual membership renewal, and other mechanisms such as random audit processes. Alongside these obligations, association members also have access to appropriate training and professional development, peer support and the other services that financial counselling associations offer their members.

Many, perhaps even most, rural financial counsellors are now members of their state/territory association, and many of the associations are working with their rural financial counselling members to ensure that any training, communities of practice and so on are tailored to their needs. With the greater use of virtual workshops, it has become much easier to provide these opportunities than in the past.

Without these kind of professional structures or assurances around rural financial counsellors, there is no way to independently attest or ensure they are being provided with adequate training, professional development and support. At the moment the only requirement on rural financial counselling agencies to ensure their staff are trained and supported is imposed through funding agreements - in practice the funder does not assess how well this occurs. In contrast, members of financial counselling associations must complete 20 points of continuing professional development per annum and access minimum annual hours of professional supervision. They also have access to up to date information and resources relevant to their jobs.