



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 208

# How ASIC charges fees for credit relief applications

December 2009

### **About this guide**

This guide is for applicants for credit relief and their advisers. It describes our approach to charging fees for relief applications, the principles we use to calculate fees and the fees we charge for standard applications.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Document history

This guide was issued on 18 December 2009 and is based on the credit legislation and regulations as at 18 December 2009.

### Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the credit legislation and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

At the date of issue of this guide, the regulations proposed to be made under the Credit Fees Act are in exposure draft form and therefore subject to change before being made final. Once the regulations are made final, we will update our guidance if necessary.

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## A Overview

### Key points

The fee that ASIC will charge for an application depends on the number of substantive matters raised in the application and heads of power involved.

Generally, we will charge a fee for each substantive matter raised and each head of power used.

Where we have published a pro forma instrument, we will generally charge one fee for an application for the instrument.

When making applications for relief, applicants must comply with the requirements set out in Regulatory Guide 51 *Applications for relief* (RG 51).

### Scope of this guide

- RG 208.1 The examples used in this guide refer to powers commonly exercised by ASIC, such as the powers under s109, 163, s6 of Sch 1 and Div 5, Pt 12 of Sch 1 of the *National Consumer Credit Protection Act 2009* (National Credit Act) and Pt 5 of Sch 2 of the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Transitional Act). However, the principles in this guide apply equally to our other discretionary powers.

### What principles do we apply in calculating fees?

- RG 208.2 Fees are payable to the Commonwealth for ‘chargeable matters’. An application to us to exercise our discretionary powers under the National Credit Act or the Transitional Act is a ‘chargeable matter’.
- RG 208.3 ASIC may collect the fees on behalf of the Commonwealth.
- RG 208.4 The fee that ASIC will charge for an application depends on the number of substantive matters raised in the application and whether the application requires the use of more than one head of power.
- RG 208.5 Generally, we consider that an application will involve as many substantive matters as it involves separate decisions to either exercise or refuse to exercise one of our discretionary powers.
- RG 208.6 We will apply the following principles when calculating fees payable for applications:

- (a) One fee will be charged for each substantive matter raised by an application.
- (b) However, where an application requires us to exercise two or more heads of power, the prescribed fee must be charged for each head of power.
- (c) In general, and subject to the principle in (b), additional fees will not be charged for relief which is merely ancillary to a substantive matter.

These principles are explained in more detail in Section B.

## Fees for standard applications

- RG 208.7 We may publish pro forma instruments for use in applications.
- RG 208.8 Generally, we will treat a standard pro forma instrument as relating to only one substantive matter. However, in accordance with the principle in RG 208.6(b), we will charge one fee for each head of power invoked by the pro forma instrument.
- RG 208.9 This is explained in more detail in Section C.

## How to apply for relief

- RG 208.10 Applications for relief must be lodged, accompanied by the prescribed fee and must set out all relevant information.
- RG 208.11 Further information about the requirements for applications for relief can be found in Section D and RG 51.

## B What principles do we apply in calculating fees?

### Key points

We charge a fee for each substantive matter raised in an application. A substantive matter is a matter requiring ASIC to make a separate decision.

Where an application requires us to exercise two or more heads of power, the prescribed fee must be charged for each head of power. If there are multiple substantive decisions to be made under one head of power, a multiple of the prescribed fee will be payable.

Generally, additional fees will not be charged for relief which is merely ancillary to a substantive matter.

### Applications must be in writing

- RG 208.12 Applications must be in writing. One written communication may contain more than one application. This section sets out the principles we rely on to calculate the fees we will charge.

### When are fees payable?

- RG 208.13 Fees are payable to the Commonwealth for ‘chargeable matters’ as defined in s4(1) of the *National Consumer Credit Protection (Fees) Act 2009* (Credit Fees Act). ‘Chargeable matter’ includes the making of an application to ASIC in relation to a matter arising under the National Credit Act or the Transitional Act: see para (g) of the definition of ‘chargeable matter’ in s4(1) of the Credit Fees Act.
- RG 208.14 ASIC may collect the fees on behalf of the Commonwealth under Pt 5-4 of the National Credit Act.
- RG 208.15 The fees to be charged are specified in Sch 1 of the National Consumer Credit Protection (Fees) Regulations 2010 (Credit Fees Regulations).
- RG 208.16 ASIC may refuse to undertake an act which requires payment of a fee until the fee has been paid: s233 of the National Credit Act. For the purposes of s5 and 6 of the Credit Fees Act, fees have been prescribed for applications made under numerous heads of powers, including for example, s109, 163, s6 of Sch 1 and Div 5, Pt 12 of Sch 1 of the National Credit Act: see Sch 1 of the Credit Fees Regulations.

## Fee for each substantive matter

- RG 208.17 As stated in RG 208.6, a fee will be charged for each substantive matter raised in an application. A substantive matter is a matter requiring us to make a separate decision. The one substantive matter may also involve one or more ancillary matters, but the defining feature of such groups of relief is that only one substantive decision is made.
- RG 208.18 To determine whether an application requires a separate decision, and is therefore a substantive matter, we consider whether that relief may stand by itself, without the need for additional relief. By contrast, a merely ancillary matter will, by itself, normally require additional relief to have the effect for which it is sought, and it would generally be insufficient or futile to grant the application in the ancillary respect only.

## Fee for each head of power

### Different powers

- RG 208.19 In general, an application to us to exercise powers under two provisions comprises two chargeable matters. One fee is prescribed for each matter. The applicant must pay, and we must collect, each of those prescribed fees. So, for example, if an applicant seeks relief under both s109 and 163 of the National Credit Act, they must pay the fee referable to each of those sections.

### Same power

- RG 208.20 When more than one exemption or modification is sought under the same power (for example, two or more modifications to Ch 2 under s109), one or more fees may be charged, depending upon the number of substantive decisions which arise from the application. If there are multiple substantive decisions to be made, a multiple of the prescribed fee will be payable.
- RG 208.21 If, however, there is only one substantive decision involved, and only one power invoked, then it will not matter how many provisions of the legislation may be affected by the instrument. So, for example, an application to modify several provisions of Ch 2 at the same time using the power in s109 may require us to make only one substantive decision, in which case only one fee will be charged.

## Ancillary matters

- RG 208.22 In many cases, an instrument affects more than one provision, although it deals with only one substantive matter. We will charge only one fee if a suite of exemptions or modifications is needed to deal with one substantive matter, however many merely ancillary matters may be involved (subject always to the principle in RG 208.6(b)).

## More than one credit licence

- RG 208.23 Where we receive a request to exercise one or more heads of power for more than one credit licence, a separate decision is needed for each head of power for each licence, to the extent that the decision is not for ancillary relief. The number of substantive matters raised (and therefore the number of fees charged) equals the number of heads of power to be exercised multiplied by the number of credit licences affected.
- RG 208.24 For example, if a group of credit licensees makes an application for the same relief in respect of each credit licensee (that is, where the application is made by a law firm for a number of licensees in the same group), the applicable fee would be the number of credit licensees multiplied by the prescribed fee for the exercise of that head of power.

## Revocations or variations

- RG 208.25 An instrument which varies or revokes a previous instrument is made under the same power as the original instrument: see s33(3) of the *Acts Interpretation Act 1901*. Therefore, the fee for a fresh application to vary or revoke an existing instrument will be assessed on the same principles as set out above.
- RG 208.26 When an instrument needs to be amended or revoked to deal effectively with the original application, no fee will be charged. This is because the fresh instrument is needed to deal with the original matter. An example is where, because of some misunderstanding or error on our part, the original instrument of relief contains some erroneous particular.
- RG 208.27 However, if a fresh instrument is needed because the original application was erroneous or deficient, or because the scope of the original application has changed, an additional fee will be charged. This is because a corrected or changed application will raise a new substantive matter.

## C Fees for standard applications

### Key points

From time-to-time, we may publish pro forma instruments for use in applications.

Where an application for a pro forma instrument only involves the use of one head of power, we will charge one fee for the application. Where it requires the exercise of powers under more than one head of power, we will charge a fee for each head of power.

- RG 208.28 The procedures we adopt for standard applications often involve instruments which give exemption from, or modify, more than one provision. This section deals with the fees for these instruments.

### Pro forma applications

- RG 208.29 We may publish policies on matters which commonly require us to use our discretionary powers. From time-to-time we may also publish pro forma instruments for use in applications consistent with these policies: see RG 51.
- RG 208.30 Some pro formas group together different exemptions and modifications. They are grouped this way for the convenience of ASIC and applicants. Some of them are grouped together because one commercial initiative can only be implemented with several exemptions from, or modifications to, various provisions.

### Fees for pro formas

- RG 208.31 Where we have published pro forma instruments, our view is that each pro forma relates to one substantive matter. This is so, even if a particular pro forma modifies or provides an exemption from several different provisions, or relates to the operation of one provision in different fact situations. Therefore, only one fee will be charged for an application for a pro forma instrument where that application only requires us to make an exemption or declaration under one head of power.
- RG 208.32 However, where a pro forma application requires the exercise of powers under more than one head of power, the prescribed fee will be charged for each head of power affected.

## D How to apply for relief

### Key points

Applications for relief must be lodged, accompanied by the prescribed fee and must set out all relevant information.

Further information about the requirements for applications for relief can be found in RG 51.

- RG 208.33 When applying for relief you need to:
- (a) lodge your application at any ASIC office;
  - (b) include the prescribed fee;
  - (c) ensure that your application complies with RG 51;
  - (d) specify and quantify any financial and other benefits and costs (including any loss of consumer protection) of the relief as far as you can;
  - (e) if you cannot quantify the benefits and costs, explain why this is so and how the scale of the effects of the relief can be estimated; and
  - (f) candidly set out all information that may be relevant to your application, including your commercial objectives and how you will address any loss of consumer protection.
- RG 208.34 Applications are not needed if a class order applies.
- RG 208.35 You can also contact ASIC's Infoline on 1300 300 630 for information and assistance.

## Key terms

Term	Meaning in this document
ancillary matter	A matter that, by itself, will normally require additional relief to have the effect for which it is sought
ASIC	Australian Securities and Investments Commission
Ch 2 (for example)	A chapter of the National Credit Act (in this example numbered 2), unless otherwise specified
Credit Fees Act	<i>National Consumer Credit Protection (Fees) Act 2009</i>
Credit Fees Regulations	Either: <ul style="list-style-type: none"> <li>• National Consumer Credit Protection (Fees) Regulations 2010; or</li> <li>• before these regulations are made final—Exposure Draft National Consumer Credit Protection (Fees) Regulations released by Treasury in November 2009</li> </ul>
credit legislation	Has the meaning given in s5 of the National Credit Act
credit licence	An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities
credit licensee	A person who holds an Australian credit licence under s35 of the National Credit Act
instrument	Either an ASIC class order or pro forma instrument (or both)
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
RG 51 (for example)	An ASIC regulatory guide (in this example, numbered 51)
s35 (for example)	A section of the National Credit Act (in this example numbered 35), unless otherwise specified
substantive matter	A matter requiring ASIC to make a separate decision
Transitional Act	<i>National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009</i>

## Related information

### Headnotes

fees, applications, chargeable matters, substantive matters, ancillary matters

### Regulatory guides

RG 51 *Applications for relief*

RG 104 *Licensing: General conduct obligations of licensees*

### Legislation

*Acts Interpretation Act 1901* s33(3); Credit Fees Act; Credit Fees Regulations; National Credit Act s109, 163, s6 of Sch 1 and Div 5, Pt 12 of Sch 1; Transitional Act Pt 5 of Sch 2