

Banking exemption No. 2 of 2018

EXPLANATORY STATEMENT

Prepared by the Australian Prudential Regulation Authority (APRA)

Banking Act 1959, subsection 11(1)

Under subsection 11(1) of the *Banking Act 1959* (**Banking Act**), APRA may, in writing, determine that any or all of the provisions of the Banking Act referred to in paragraphs 11(1)(a) to (e) do not apply to a person, or to a class of persons, while the determination is in force. Under subsection 11(4) of the Banking Act, APRA may, in writing, vary or revoke a determination made under subsection 11(1).

On 31 August 2018, APRA made Banking exemption No. 2 of 2018 (**2018 Exemption**) which replaces Banking exemption No. 1 of 2015 dated 18 March 2015 (**2015 Exemption**).

The 2018 Exemption commences on the date of its registration.

1. Background

The 2015 Exemption

In December 2012, the Australian Government announced a number of proposals to improve the regulation of corporations that issue debentures to retail investors. These proposals were designed to provide a clearer distinction between debentures offered by registered entities and deposit products offered by Authorised Deposit-taking Institutions (ADIs), which are licensed under the Banking Act and prudentially regulated by APRA. After consultation the proposals were actioned through the 2015 Exemption.

Under section 8 of the Banking Act, it is an offence for a body corporate to carry on banking business in Australia unless authorised as an ADI. As with the exemption that it replaced,¹ the 2015 Exemption granted relief from the operation of section 8 to *registered entities* as defined in section 5 of the *Financial Sector (Collection of Data) Act 2001* (FSCODA), provided that they met the conditions of the 2015 Exemption.

The conditions that needed to be met included:

- restricting the use of certain terms, including ‘deposit’ and ‘at-call’ by registered entities in connection with investment products offered, issued or sold;
- requiring all debentures offered, issued or sold by registered entities to have a minimum 31-day maturity;
- registered entities will not be allowed to provide certain ‘transactional banking facilities’, namely, Automatic Teller Machine (ATM) access, BPAY,

¹ Banking (Exemption) Order No. 96 dated 22 May 2003 - F2008B00061

Electronic Funds Transfer at Point of Sale (EFTPOS) and cheque account facilities; and

- provision of prudential supervision warnings.

The conditions only applied with respect to products offered to retail investors; there was no change with respect to products marketed to wholesale investors.

Change to the definition of registrable corporation

The *Treasury Laws Amendment (Banking Measures No. 1) Act 2018* (the Non-ADI Lenders Act) commenced on 5 March 2018. The Non-ADI Lenders Act amended the Banking Act to provide APRA with a reserve power to make rules and give directions relating to the provision of finance by corporations that are not ADIs (non-ADI lenders) and which APRA has identified may materially contribute to risks of instability in the Australian financial system. It also amended FSCODA to permit APRA to collect relevant data from non-ADI lenders. The Non-ADI Lenders Act significantly altered the definition of *registrable corporation* under section 7 of FSCODA, to better encompass the type of corporation considered likely to be of interest. Under FSCODA, a corporation cannot become a *registered entity* unless it satisfies the definition of *registrable corporation*.

The definition of registrable corporation was amended to encompass a broader range of corporations that engage in the provision of finance, while at the same time increasing limits on the size of operations caught, so that only the larger institutions would need to register and report. A provision which excluded corporations where the sum of the value of all assets of the corporation, and of every related corporation, did not exceed \$5 million, was removed. It was replaced by a new monetary threshold which essentially provided that non-ADI lenders that did not have at least \$50 million in debts due to the corporation were not registrable corporations. This means that corporations which were previously registrable corporations because they had greater than \$5 million in total assets, but which do not meet the new threshold of \$50 million in debts owed to the corporation, are now not registrable corporations.

There are estimated to be 30 to 40 corporations that fall within this group. All are currently registered entities, however under paragraph 10(c) of FSCODA, if a corporation whose name is entered in the Register² ceases to exist or ceases to be a registrable corporation, APRA must cause the corporation to be removed from the Register. This is significant because a corporation which has been removed from the Register will no longer be a registered entity as defined in subsection 5(3) of FSCODA and for that reason would no longer be covered by the 2015 Exemption. This consequence was unintended: it was not identified in the legislative development process for the Non-ADI Lenders Act and was not consulted on.

2. Purpose of making the instrument

The purpose of making the 2018 Exemption is to ensure that corporations which previously met the definition of ‘registrable corporation’ can continue to carry on their business of providing finance funded by retail investors without breaching section 8 of the Banking Act. They will be able to do so provided that they comply with the conditions of the 2018 Exemption, which are in substance the same as those that applied under the 2015 Exemption.

In the same way that the 2015 Exemption did, the 2018 Exemption applies to corporations that are ‘registered entities’ within the meaning of section 5 of FSCODA. However, the 2018 Exemption is expressed to also apply to a ‘corporation that meets

² Required to be kept by APRA under section 8 of FSCODA.

the definition of “registrable corporation” in section 7 of FSCODA as it existed immediately prior to amendment by the Non-ADI Lenders Act.

The only other departure from the terms of the 2015 Exemption has been the removal of redundant transitional provisions.

3. Consultation

At the time consultation was conducted for the Non-ADI Lenders Act there was no suggestion that a necessary consequence of the changes to the definition of registerable corporation would reduce the range of entities that would have the benefit of the 2015 Exemption. Those entities that are no longer registrable corporations have continued to carry on business with the protection of the 2015 Exemption as they have continued to be registered entities. Re-making the Banking Exemption to include those entities prior to APRA removing entities from the Register will seamlessly continue the protection previously afforded to them. The proposed class exemption continues the status quo and will reverse an unintended consequence of new legislation. For these reasons APRA considered that it was appropriate not to undertake consultation with industry.

4. Regulation Impact Statement

The Office of Best Practice Regulation advised that, as the proposal to make the 2018 Exemption would correct an unintended consequence of the passing of the Non-ADI Lenders Act, it was not likely to have a regulatory impact on business, community organisations or individuals and a Regulation Impact Statement was not required.

5. Statement of compatibility prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

A Statement of compatibility prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is provided at Attachment A to this Explanatory Statement.

Attachment A

Statement of Compatibility with Human Rights

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

Banking exemption No. 2 of 2018

This Legislative Instrument is 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 of the Legislative Instrument

Under section 8 of the *Banking Act 1959* (Banking Act), it is an offence for a body corporate to carry on banking business in Australia if the body corporate is not an authorised deposit-taking institution or the Reserve Bank, except where there is a determination in force that section 8 does not apply to the body corporate.

This Legislative Instrument ensure that corporations which met the definition of “registrable corporation” under the *Financial Sector (Collection of Data) Act 2001* prior to its amendment by the *Treasury Laws Amendment (Banking Measures No. 1) Act 2018* can continue to carry on their business of providing finance funded by retail investors without breaching section 8 of the Banking Act. This is possible only if they comply with a broad range of conditions including giving a prudential supervision warning to an investor in certain circumstances, restrictions on the nature of investment products and debentures that are offered, issued or sold, and any advertising or marketing in connection with such products.

Human rights implications

APRA has assessed this Legislative Instrument and is of the view that it does not engage any of the applicable rights or freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. Accordingly, in APRA’s assessment, the instrument is compatible with human rights.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.