

## **EXPLANATORY STATEMENT**

### **Issued by authority of the Treasurer**

*National Consumer Credit Protection Act 2009*

*National Consumer Credit Protection Amendment (Coronavirus Economic Response Package) Regulations 2020*

Section 329 of the *National Consumer Credit Protection Act 2009* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. Further, paragraph 164(a) of the Act provides that regulations may exempt a person or class of persons from all or specified provisions in Chapter 3 of the Act (dealing with responsible lending conduct).

Chapter 3 of the Act contains rules for responsible lending conduct (the responsible lending obligations) which are aimed at better informing consumers and preventing them from being in unsuitable credit contracts and consumer leases. The primary outcome sought by the obligations is to minimise the risk that consumers enter into, or are encouraged to enter into or remain in, an unsuitable credit product, or increase the credit limit of an existing credit product to a limit that is unsuitable.

The responsible lending obligations apply where, amongst other things, the credit is provided or intended to be provided wholly or predominantly for personal, domestic or household purposes. The predominant purpose for which credit is provided is the purpose for which more than half of the credit is intended to be used or if the credit is intended to be used to obtain goods or services for use for different purposes, the purpose for which the goods or services are intended to be most used.

The requirement for Australian credit licensees to assess whether a borrower is accessing credit or goods for a wholly or predominantly personal, domestic or household purpose can be complex and time consuming. This is especially so where the borrower's personal and business finances are intermingled. For example, where a borrower who operates a small business seeks credit for the purposes of their business but where some of the credit will likely be applied to household finances, licensees may have difficulty assessing the predominant purpose and, consequently, whether the responsible lending obligations apply. For operators of a small business, this can slow down access to credit which their business requires.

The purpose of the *National Consumer Credit Protection Amendment (Coronavirus Economic Response Package) Regulations 2020* (the Regulations) is to temporarily exempt licensees from certain responsible lending obligations. The exemption operates in limited situations where a consumer seeks credit or goods under a consumer lease for purposes that include a purpose of a small business operated by the consumer. The exemption is temporary and applies for a period of 6 months only.

To facilitate the timely flow of credit to small businesses, Australian credit licensees are temporarily exempted from responsible lending obligations in relation to certain lending activity to existing small business customers. The exemption applies:

- in relation to new credit, credit limit increases, variations and restructures, suggestions to remain in credit contracts, and the lease of consumer goods;
- where the consumer is a person who operates a small business and is an existing borrower customer (or was a borrower customer in the last year); and
- for all types of credit or leased goods which are in part used for business purposes.

The exemption applies for all kinds of credit products, including personal loans, credit cards and loans secured by the borrower's home.

Responsible lending obligations are an important protection – particularly for lending for household purposes – designed to promote credit quality and ensure that licensees do not extend credit to borrowers where it would be unsuitable. However, timely access to credit is particularly important for business in light of the rapidly-evolving challenges posed by the coronavirus pandemic. In response, the Regulations make a temporary and targeted adjustment to regulatory settings to provide the confidence necessary to enable licensees to extend credit to small businesses in a timely manner. The exemption complements other Government actions, ensuring such actions are not frustrated by impediments to the timely flow of credit to small business.

While this adjustment to the regulatory settings made by the Regulations is intended to enable licensees to extend credit to small businesses in a timely manner, it will be important for credit providers and lessors to act fairly and appropriately in relation to consumers who have entered contract in the circumstances and who subsequently find that they are in a position of financial hardship.

The Regulations don't apply to all obligations in Chapter 3 of the Act. Some obligations are unaffected by the Regulations including, for example, the requirements to provide a credit guide and product disclosure document, and to give quotes for the cost of credit assistance, to the extent that such obligations apply. Consumers whose purposes are entirely personal, household or domestic are not affected by this exemption. The responsible lending obligations continue to apply fully to those consumers.

The Regulations do not remove the need for credit providers and lessors to determine the purpose for the credit or hired goods. The purpose of the credit or hired goods continues to determine whether important protections for consumer apply, including provisions in the National Credit Code that require precontractual disclosure, terms of the contract, interest charges, hardship situations and enforcement of the contract.

Further, the exemption does not displace other measures that operate in conjunction with or otherwise complement responsible lending obligations. Credit providers that are authorised deposit-taking institutions are obliged to lend on a prudent basis under prudential standards established by the Australian Prudential Regulation Authority. Codes of practice, such as the Australian Banking Association *Banking Code of Practice*, continue to apply to code members. Also, the Australian Financial Complaints Authority has jurisdiction to hear and resolve complaints from consumers about credit, finance or loan products, and award compensation as appropriate.

Treasury conducted targeted stakeholder consultations with the Australian Securities and Investments Commission and select industry stakeholders. Feedback received was considered in the development of the Regulations.

Details of the Regulations are set out in Attachment A.

The Regulations commenced on the day after it was registered.

A statement of Compatibility with Human Rights is at Attachment B.

**Details of the National Consumer Credit Protection Amendment (Coronavirus Economic Response Package) Regulations 2020**

Section 1 – Name of the Regulations

This section provides that the name of the Regulations is the *National Consumer Credit Protection Amendment (Coronavirus Economic Response Package) Regulations 2020* (the Regulations).

Section 2 – Commencement

The Regulations commence on the day after the Regulations are registered on the Federal Register of Legislation.

Section 3 – Authority

The Regulations are made under the Act. In particular, paragraph 164(a) of the Act provides that regulations may exempt a person or class of persons from all or specified provisions in Chapter 3 of the Act (dealing with responsible lending conduct).

Section 4 – Schedule

This section provides that each instrument that is specified in the Schedule to the Regulations will be amended or repealed as set out in the applicable items in the Schedule, and any other item in the Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Amendments to the *National Consumer Credit Protection Regulations 2010*

Item 1

Item 1 inserts section 28RA into the *National Consumer Credit Protection Regulations 2010*. Section 28RA provides an exemption to the responsible lending obligations for a period of six months. Where certain conditions are met, the exemption operates in the circumstances set out in subsections 28RA(1) to (6).

*Subsection 28RA(1)*

Where conditions are met, a licensee that provides credit assistance for credit contracts is exempted from the responsible lending obligations in Divisions 4 and 6 of Part 3-1 of the Act (other than the obligations in subsection 115(2) and sections 119 and 124 of the Act). Accordingly, where the conditions are met, the licensee is:

- not required to, before providing credit assistance to a consumer in relation to a credit contract, make a preliminary assessment as to whether the contract will be unsuitable for the consumer. The licensee is not required to make inquiries and

verifications about the consumer's requirements, objectives and financial situation;

- not prohibited from providing credit assistance to a consumer in relation to a credit contract if the contract will be unsuitable for the consumer.

#### *Subsection 28RA(2)*

Where conditions are met, a licensee that provides credit assistance for credit contracts is exempted from the responsible lending obligations in subsection 115(2) and sections 119 and 124 of the Act. Accordingly, where the conditions are met, the licensee is:

- not required to assess whether remaining in a particular credit contract will be unsuitable for the consumer. The licensee is not required to make inquiries and verifications about the consumer's requirements, objectives and financial situation;
- not prohibited from suggesting that a consumer remain in an unsuitable credit contract.

#### *Subsection 28RA(3)*

Where conditions are met, a licensee or an exempt special purpose funding entity that is a credit provider under a credit contract is exempted from the responsible lending obligations in Divisions 3 and 4 of Part 3-2 of the Act. Accordingly, where the conditions are met, the licensee or exempt special purpose funding entity is:

- not required to assess whether the credit contract will be unsuitable for the consumer. The credit provider is not required to make inquiries and verifications about the consumer's requirements, objectives and financial situation;
- not prohibited from entering or increasing the credit limit of a credit contract that is unsuitable for a consumer.

#### *Subsection 28RA(4)*

Where conditions are met, a licensee that provides credit assistance for a consumer lease is exempted from the responsible lending obligations in Divisions 4 and 6 of Part 3-3 of the Act (other than the obligations in subsection 138(2) and sections 142 and 147 of the Act). Accordingly, where the conditions are met, the licensee is:

- not required to, before providing credit assistance to a consumer in relation to a consumer lease, make a preliminary assessment as to whether the lease will be unsuitable for the consumer. The licensee is not required to make inquiries and verifications about the consumer's requirements, objectives and financial situation;
- not prohibited from providing credit assistance to a consumer in relation to a consumer lease if the lease will be unsuitable for the consumer.

### *Subsection 28RA(5)*

Where conditions are met, a licensee that provides credit assistance for a consumer lease is exempted from the responsible lending obligations in subsection 138(2) and sections 142 and 147 of the Act. Accordingly, where the conditions are met, the licensee is:

- not required to assess whether remaining in a particular consumer lease will be unsuitable for the consumer. The licensee is not required to make inquiries and verifications about the consumer's requirements, objectives and financial situation;
- not prohibited from suggesting that a consumer remain in an unsuitable consumer lease.

### *Subsection 28RA(6)*

Where conditions are met, a licensee or an exempt special purpose funding entity that is a lessor under a consumer lease is exempted from the responsible lending obligations in Divisions 3 and 4 of Part 3-4 of the Act. Accordingly, where the conditions are met, the licensee or exempt special purpose funding entity is:

- not required to, before entering a consumer lease, assess whether the consumer lease is unsuitable for the consumer. The licensee or exempt special purpose funding entity is not required to make inquiries and verifications about the consumer's requirements, objectives and financial situation;
- not prohibited from entering a consumer lease that is unsuitable for a consumer.

### *Subsections 28RA(1) to (6)—Conditions*

The exemption is only available where:

- the credit, credit assistance, or consumer lease is to be provided or entered into in the 'exemption period';
- the credit to be provided, or intended to be provided, is partly for the purposes of a small business operated by the consumer, or the goods to be hired under a consumer lease are partly for the purposes of a small business operated by the consumer. Where credit has been provided and the licensee is advising whether the consumer should remain in a credit contract or consumer lease, the credit (including increased credit) or the goods hired were or will be partly for the purposes of a small business operated by the consumer;
- there is an existing or recent lending or lease relationship between the parties.

The 'exemption period' is defined in subsection 28RA(7) of the Regulations as the 6 month period that starts on the day that the Regulations commence. This reflects the temporary nature of the exemption.

The exemption requires that the credit contract or consumer lease is partly for the purposes of a small business operated by the consumer. This reflects the intention that the flow of credit to small businesses should not be affected by the requirement to assess the predominant purpose of the credit or lease and the resulting requirements to assess unsuitability of the credit contract or consumer lease. Rather, for the purposes of this exemption, the purpose of the credit or lease must be in part a small business purpose. This contemplates that—in circumstances where business and household finances are intermingled—the purpose can also be a household purpose, or predominantly a household purpose. Where a small business consumer maintains entirely separate household and business finances, the exemption does not cause the responsible lending obligations to not apply to the consumer in relation to a credit contract or a consumer lease obtained for entirely household purposes.

The small business operated by the consumer does not need to be solely operated by the consumer—it may be operated by the consumer along with others. For example, and where the other conditions are met, a licensee (or an exempt special purpose funding entity, where applicable) is exempt from responsible lending obligations with respect to a consumer seeking credit or goods under a consumer lease to be applied partly to household purposes and partly to a small business co-managed by the consumer and a business partner.

For the purposes of the exemption, a small business has the same meaning as in section 5 of the *Australian Small Business and Family Enterprise Ombudsman Act 2015*. Generally, this captures a business that has either:

- fewer than 100 employees; or
- revenue of \$5,000,000 or less.

The exemption also requires that there is an existing or recent contractual relationship between the parties, either in relation to the provision of credit or the lease of goods. This credit or lease does not need to be a contract or lease to which the responsible lending obligations were extended. Rather, it covers all business and personal lending relationships. In the case of a contract or lease that is not currently in force, the contract or lease needs to have been in force within the previous 12 months. This requirement for a current or recent borrowing relationship reflects the intention that the exemption only applies where the licensee (or an exempt special purpose funding entity, where applicable) has a degree of familiarity with the consumer.

#### *Subsection 28RA(7)*

Subsection 7 inserts definitions of the terms ‘exemption period’ and ‘small business’. These terms are described above.

#### *Subsection 28RA(8)*

The Regulations are repealed on the day after the end of the period of 12 months starting on the day of commencement. This reflects the temporary nature of the exemption, which is limited to the 6 month period starting on the day the Regulations commence.

**Statement of Compatibility with Human Rights**

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

**National Consumer Credit Protection Amendment (Coronavirus Economic Response Package) Regulations 2020**

The *National Consumer Credit Protection Amendment (Coronavirus Economic Response Package) Regulations 2020* (the Regulations) 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 of the Legislative Instrument**

The Regulations temporarily exempt certain credit providers from responsible lending obligations under the *National Consumer Credit Protection Act 2009* where particular conditions are met. The targeted adjustment to responsible lending obligations is intended to support the timely flow of credit to small businesses in light of the rapidly-evolving challenges posed by the coronavirus pandemic.

**Human rights implications**

The Regulations do not engage any of the applicable rights or freedoms.

**Conclusion**

The Regulations are compatible with human rights as they does not raise any human rights issues.