

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

National Consumer Credit Protection Act 2009

*National Consumer Credit Protection Amendment (Responsible Lending Obligations)
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 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. Further, timely access to credit is particularly important for business in light of the rapidly evolving challenges posed by the coronavirus pandemic.

In response to these challenges, in April 2020 the *National Consumer Credit Protection Amendment (Coronavirus Economic Response Package) Regulations 2020* (April 2020 Regulations) made 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 complemented other Government actions, ensuring such actions were not frustrated by impediments to the timely flow of credit to small business. The exemption made by the April 2020 Regulations was temporary and ceased to apply after 2 October 2020.

The timely flow of credit to small businesses continues to be a priority in the response to the economic challenges posed by the coronavirus pandemic. Accordingly, the *National Consumer Credit Protection Amendment (Responsible Lending Obligations) Regulations 2020* (the Regulations) make a further targeted adjustment to the regulatory settings pertaining to the responsible lending obligations. As with the April 2020 Regulations, the Regulations are temporary and the exemption is available for 6 months only. 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, alone or with others, operates a small business; and
- for 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. Unlike the April 2020 Regulations, the scope of the proposed Regulations extend to customers who are not existing customers. However, overall the proposed Regulations are more targeted than the April Regulations as they require that the purpose of the credit or lease includes a small business purpose that is both genuine and not minor or incidental in relation to the overall purpose.

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 into a contract and who subsequently find that they are in a position of financial hardship.

As with the April 2020 Regulations 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 exemption provided in these Regulations does not remove the need for credit providers and lessors to determine the purpose for the credit or hired goods – the purpose must include a genuine small business purpose and must not be minor or incidental in relation to the overall purpose. The purpose of the credit or hired goods continues to determine whether important protections for consumers apply, including provisions in the National Credit Code that require pre-contractual 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 consultation prior to making the Regulations. In particular, as part of its ongoing operations prior to the Coronavirus pandemic, Treasury engaged with financial system stakeholders regarding responsible lending obligations. Participants in the consultation included:

- the Australian Securities and Investments Commission (ASIC) and the Australian Financial Complaints Authority;
- industry bodies (the Australian Banking Association, the Customer Owned Banking Association);
- industry members (the major banks, various other banks and non-bank lenders); and
- consumer groups, including consultation regarding concerns of insufficient protections in relation to small business loans.

This consultation concerned, among other things, the impact of responsible lending obligations on lending and credit, as well as the adequacy of responsible lending obligations in ensuring that consumers were protected from unfair lending practices.

Following the making of the April 2020 Regulations, Treasury conducted further targeted consultation with industry stakeholders regarding the operation of the exemption. Participants in the consultation included a sample of major banks and smaller banks, the Australian Banking Association, the Council of Small Business Organisations Australia, the Australian Small Business & Family Enterprise Ombudsman, the Consumer Action Law Centre and the Consumer Credit Legal Service. As a result of consultation with consumer groups, a safeguard was included in the operation of the exemption to ensure that credit subject to the exemption is genuinely for a small business purpose and that the purpose is not merely minor or incidental to the overall purposes of the credit contract or consumer lease. This was in response to concerns raised about the potential for misuse of the exemption by some credit providers.

ASIC is the key regulator in relation to these amendments and has an expert knowledge of the responsible lending obligations and the *National Consumer Credit Protection Regulations 2010* generally. Accordingly, Treasury engaged with ASIC on policy implementation and development of the Regulations. ASIC provided feedback on draft legislation which provided Treasury with assurance that the draft legislation would achieve the policy intent.

Details of the Regulations are set out in [Attachment A](#).

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on 3 October 2020.

A statement of Compatibility with Human Rights is at [Attachment B](#).

Details of the *National Consumer Credit Protection Amendment (Responsible Lending Obligations) Regulations 2020*

Section 1 – Name of the Regulations

This section provides that the name of the Regulations is the *National Consumer Credit Protection Amendment (Responsible Lending Obligations) Regulations 2020* (the Regulations).

Section 2 – Commencement

The Regulations commence on 3 October 2020.

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 this instrument 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

Section 28RA contains the temporary exemption to certain responsible lending obligations inserted by the April 2020 Regulations. The exemption provided by section 28RA has no application beyond 2 October 2020 and is repealed.

In place of section 28RA, section 28RB provides an exemption to the responsible lending obligations for a period of 6 months. Where certain conditions are met, the exemption operates in the circumstances set out in subsections 28RB(1) to (6).

Subsection 28RB(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, and 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 28RB(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, and 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 28RB(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, and 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 28RB(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, and 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 28RB(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, and 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 28RB(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, and 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 28RB(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, including an increase in credit provided under an existing contract, is genuinely for the purposes of a small business operated by the consumer, or the goods to be hired under a consumer lease are genuinely 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 the remaining credit or increased credit, as the case may be) or the goods hired were or will be genuinely for the purposes of a small business operated by the consumer;
- those purposes are not merely minor or incidental to the overall purposes of the credit contract or consumer lease.

The 'exemption period' is defined in subsection 28RB(7) of the Regulations as the 6 month period that starts on 3 October 2020 and ends on 2 April 2021. This reflects the temporary nature of the exemption.

The exemption requires that the purpose of the credit or lease must be in part a small business purpose, provided that the part purpose is genuine. 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 exemption further requires that the small business purpose must not be minor or incidental relative to the overall purpose the loan or consumer lease. This is intended to remove access to the exemption where only a trivial or nominal proportion of the loan or consumer lease is intended to be applied to a small business purpose.

In combination, the requirement for a genuine purpose (in paragraph (c) of subsections 28RB(1) to (6)) and the requirement for a purpose that is greater than minor or incidental (in paragraph (d) of subsections 28RB(1) to (6)) form an important safeguard. The safeguard operates to ensure that the purpose, or part of the purpose, that is intended for the loan or lease of consumer goods is a small business purpose that is real and substantial. The safeguard ensures that the exemption is applied in relation to borrowers who are, at least in part, small business borrowers. The safeguard is intended to remove access to the exemption where, for example:

- the purpose of the loan or consumer lease is in fact an entirely consumer purpose but where a small business purpose is made up or concocted in order to obtain access to the exemption; or
- only a trivial or nominal proportion of the loan or consumer lease is intended to be applied to a small business purpose.

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.

Subsection 28RB(7)

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

Subsection 28RB(8)

The Regulations are repealed on 3 October 2021. 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 (Responsible Lending Obligations) Regulations 2020

The *National Consumer Credit Protection Amendment (Responsible Lending Obligations) 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.