EXPLANATORY STATEMENT

Issued by authority of the Assistant Treasurer and Minister for Financial Services

National Consumer Credit Protection Act 2009

National Consumer Credit Protection Amendment (Small Business Exemption) Regulations 2024

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.

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, which outlines the responsible lending obligations.

The *National Consumer Credit Protection Amendment (Small Business Exemption) Regulations 2024* (the Regulations) amends the *National Consumer Credit Protection Regulations 2010* (the Principal Regulations) to:

- extend the existing time-limited exemption from responsible lending obligations for small businesses for a further two years (Schedule 1 to the Regulations); and
- make minor and technical amendments (Schedule 2 to the Regulations).

Consumer credit laws, including the responsible lending obligations in Chapter 3 of the Act, apply to consumer lending but do not generally apply to business and commercial lending. However, these laws will apply to mixed-purpose loans (for example, where a small business or sole trader applies for a single loan to be used for both personal and commercial purposes) unless the ‘predominant’ purpose of the loan is business-related.

Many banks and credit providers take a cautious approach to this *predominant purpose test*, especially where it is difficult to quantify the exact proportion of credit that will be used for personal versus commercial purposes. This has led to uncertainty for both lenders and borrowers, and means that some small business mixed-purpose borrowers may be subject to slower and more burdensome processes in obtaining credit or have applications for credit rejected altogether.

In April 2020, a time-limited exemption was added to the Principal Regulations as a temporary measure to support timely access to finance for small businesses during the COVID-19 pandemic. The exemption provides that certain mixed-purpose small business loans are exempt from the responsible lending obligations so long as there is a ‘genuine’ business purpose that is not minor or incidental. This effectively replaced the *predominant purpose test* with a *genuine purpose test* for small businesses. The exemption means a mixed purpose small business loan is not subject to the responsible lending obligations where the loan has a real business purpose that is not insignificant or peripheral to the loan.

Moving from a *predominant purpose test* to a *genuine purpose test* for small business made it faster and simpler for lenders to determine whether or not the consumer-centric responsible lending obligations apply to mixed-purpose loans. For example, a small business borrower might apply for a loan to fund renovations of their home office. Under the *predominant purpose test*, the loan would be treated as a consumer loan (hence subject to responsible lending obligations) unless the lender was satisfied that more than 50 per cent of the expenditure was for the benefit of the small business. Under the *genuine purpose test*, the lender need only establish that there is a real business purpose that is not insignificant or peripheral to the loan.

For the purposes of the exemption, a small business is one that has fewer than 100 employees or revenue of $5 million or less in the previous financial year.

The exemption was initially put in place for a period of six months but has since been extended three times. This exemption is due to expire on 3 October 2024.

Although the exemption has been in place for nearly four years, that does not necessarily cover the full life of a business loan: short-term business loans may have terms of between six to 18 months, but longer-term loans are often for periods of five to seven years. Extending the exemption will provide an additional two years of data to inform a future decision on whether the exemption should be made permanent, allowed to expire, or modified to improve its effectiveness.

An exposure draft of Schedule 1 to the Regulations was released for public consultation between 12 August 2024 and 19 August 2024. Seven submissions were received, six of which supported extending the small business exemption. No changes were made to Schedule 1 following consultation. Public consultation on Schedule 2 was not undertaken as the amendments are minor and machinery in nature.

The Act does not specify any conditions that need to be satisfied before the power to make the Regulations may be exercised.

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

The Regulations are subject to disallowance under section 42 of the *Legislation Act 2003* and will be repealed automatically by section 48A of that Act.

The Regulations commenced on the day after the instrument was registered on the Federal Register of Legislation.

Details of the Regulations are set out in Attachment A.

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

The Office of Impact Analysis (OIA) has been consulted (ref: OIA24-07263) and agreed that an Impact Analysis is not required. The measure has no impact on compliance costs.

ATTACHMENT A

Details of the *National Consumer Credit Protection Amendment (Small Business Exemption) Regulations 2024*

Section 1 – Name

This section provides that the name of the regulations is the *National Consumer Credit Protection Amendment (Small Business Exemption) Regulations 2024* (the Regulations).

Section 2 – Commencement

This section provides that the Regulations commenced on the day after the instrument was registered on the Federal Register of Legislation.

Section 3 – Authority

The Regulations are made under the *National Consumer Credit Protection Act 2009* (the Act).

Section 4 – Schedules

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

Schedule 1—Small business exemption

For the purposes of exempting small business from the responsible lending obligations in Chapter 3 of the Act, paragraph 28RB(7)(b) of the *National Consumer Credit Protection Regulations 2010* (the Principal Regulations) defines the relevant ***exemption period*** as the period that ends at the earlier of:

i. the start of 3 October 2024; and

ii. immediately before Parts 1 and 2 of Schedule 1 to the *National Consumer Credit Protection Amendment (Supporting Economic Recovery) Act 2021* commence.

Item 1 of Schedule 1 to the Regulations amends this definition of ***exemption period*** so that the exemption period ends at the start of 3 October 2026.

Item 1 of Schedule 1 also removes the redundant reference to the *National Consumer Credit Protection Amendment (Supporting Economic Recovery) Act 2021* in subparagraph 28RB(7)(b)(ii). The National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020 was not enacted before Parliament was prorogued ahead of the 2022 election.

Schedule 2—Minor and technical amendments

Labelling inconsistences – items 1 to 8

Items 1 to 8 of Schedule 2 to the Regulations correct a labelling inconsistency within Chapter 3 of the Principal Regulations.

The Principal Regulations are divided into Chapters and Parts. With the exception of Chapter 3, the Principal Regulations adopt a ‘dash’ labelling convention for dividing a Chapter into Parts, e.g. Part 2-1. However, Chapter 3 adopts a ‘decimal’ labelling convention, e.g. Part 3.1.

Items 1 to 8 of Schedule 2 to the Regulations amend the labelling of Parts 3.1 to 3.9 of Chapter 3 of the Principal Regulations for consistency with the remainder of that instrument (noting that there is no Part 3.7 in the Principal Regulations).

Typographical errors – items 9 and 10

Items 9 and 10 of Schedule 2 to the Regulations correct typographical errors in the Principal Regulations.

Schedule 1 to the Principal Regulations contains various prescribed forms. Form 14 sets out the rights, obligations and some of the options available upon possession of mortgaged goods that subsection 102(1) of Schedule 1 to the Act (the National Credit Code) requires to be provided to a mortgagor by a credit provider that has taken possession of goods under a mortgage in the form prescribed by the Regulations. Under Subheading ‘**General’** within Form 14 of Schedule 1 to the Principal Regulations, the sentence relevantly provides:

> For example, if **your** are the debtor, you could ask the credit provider …
> [emphasis added]

Item 9 of Schedule 2 to the Regulations replaces ‘your’ with ‘you’ to correct the typographical error within the sentence.

Item 2.27 of Schedule 2 to the Principal Regulations amends section 52 of the Principal Regulations. It substitutes a new section 52 which establishes an obligation on an ‘unlicensed carried over instrument lender’ to lodge a report with the Australian Securities and Investments Commission (ASIC) where there is a contravention or likely contravention of the Act, the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* or the *ASIC Act 2001.* Subsection 52(3) of the Principal Regulations (as substituted by item 2.27 of Schedule 2 to the Principal Regulations) relevantly provides:

> (3) For the purposes of subsection (2), an unlicensed carried over instrument lender is likely to contravene an obligation referred to in that subsection if, and only if, the person is **not** longer able to comply with the obligation.
> [emphasis added]

Item 10 of Schedule 2 to the Regulations replaces ‘not longer’ with ‘no longer’ to correct the typographical error within the sentence.

ATTACHMENT B

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 (Small Business Exemption) Regulations 2024

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

The *National Consumer Credit Protection Amendment (Small Business Exemption) Regulations 2024* (the Regulations) amends the *National Consumer Credit Protection Regulations 2010* (the Principal Regulations) to:

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- make minor and technical amendments (Schedule 2 to the Regulations).

Consumer credit laws, including the responsible lending obligations in Chapter 3 of the Act, do not generally apply to business and commercial lending. However, these laws will apply to mixed-purpose loans (for example, where a small business or sole trader applies for a single loan to be used for both personal and commercial purposes) unless the 'predominant' purpose of the loan is business related.

In April 2020, a time-limited exemption was added to the Principal Regulations as a temporary measure to support timely access to finance for small businesses during the COVID-19 pandemic. The exemption provides that certain mixed-purpose small business loans are exempt from the responsible lending obligations so long as there is a 'genuine' business purpose that is not minor or incidental. This effectively replaced the *predominant purpose test* with a *genuine purpose test* for small businesses. The exemption means a mixed purpose small business loan is not subject to the responsible lending obligations where the loan has a real business purpose that is not insignificant or peripheral to the loan.

The exemption is due to expire on 3 October 2024. Extending the exemption will provide an additional two years of data to inform a future decision on whether the exemption should be made permanent, allowed to expire, or modified to improve its effectiveness.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

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