

# EXPOSURE DRAFT



EXPOSURE DRAFT (07/02/2023)

## **National Consumer Credit Protection Amendment (Financial Sector Reform) Regulations 2023**

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I, General the Honourable David Hurley AC DSC (Retd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations.

Dated 2023

David Hurley  
Governor-General

By His Excellency's Command

Stephen Jones [**DRAFT ONLY—NOT FOR SIGNATURE**]  
Assistant Treasurer  
Minister for Financial Services

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## 1 Name

This instrument is the *National Consumer Credit Protection Amendment (Financial Sector Reform) Regulations 2023*.

## 2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	At the same time as Parts 1 and 2 of Schedule 4 to the <i>Financial Sector Reform Act 2022</i> commence.	12 June 2023

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

## 3 Authority

This instrument is made under the *National Consumer Credit Protection Act 2009*.

## 4 Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

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## Schedule 1—Amendments

### *National Consumer Credit Protection Regulations 2010*

#### 1 Subregulation 3(1)

Insert:

*agreed price*: see subregulation 105AA(2).

#### 2 After regulation 28HA

Insert:

#### **28HB Obtaining and considering information to verify financial situation of consumers**

*Scope of this regulation—small amount credit contracts*

- (1) This regulation applies for the purposes of paragraph 117(1)(e) of the Act, to the extent that paragraph applies:
  - (a) for the purposes of paragraph 115(1)(d) of the Act; and
  - (b) in relation to credit assistance mentioned in subsection 115(1) of the Act that relates to a small amount credit contract.
- (2) This regulation also applies for the purposes of paragraph 130(1)(e) of the Act, to the extent that paragraph applies in relation to a credit contract mentioned in section 128 of the Act that is a small amount credit contract.

*Scope of this regulation—consumer leases for household goods*

- (3) This regulation also applies for the purposes of paragraph 140(1)(e) of the Act, to the extent that paragraph applies:
  - (a) for the purposes of paragraph 138(1)(d) of the Act; and
  - (b) in relation to credit assistance mentioned in subsection 138(1) of the Act that relates to a consumer lease for households goods.
- (4) This regulation also applies for the purposes of paragraph 153(1)(e) of the Act, to the extent that paragraph applies in relation to a consumer lease mentioned in section 151 of the Act that is a consumer lease for households goods.

*Required steps for licensees*

- (5) The licensee must take the steps set out in subregulation (6) and (if applicable) subregulation (7) to verify the consumer's financial situation.
- (6) The licensee must ascertain whether the consumer is receiving a payment (a *social security payment*) under the *Social Security Act 1991*.
- (7) If the licensee ascertains under subregulation (6) that the consumer is receiving a social security payment, then the licensee must obtain, and consider, the information contained in the following documents to verify the consumer's financial situation:

- 
- (a) an income statement for the consumer issued by Services Australia during the period of 21 days ending on the day on which the licensee considers the information contained in the income statement;
  - (b) a deduction statement for the consumer issued by Services Australia during the period of 21 days ending on the day on which the licensee considers the information contained in the deduction statement.

### **3 Regulations 28LCA to 28LCD**

Repeal the regulations, substitute:

#### **28LCA Small amount credit contracts—income requirements**

- (1) For the purposes of subsection 133CC(1) of the Act, this regulation prescribes a requirement for repayments that would be required under a small amount credit contract with a consumer who would be the debtor under the contract.
- (2) The requirement for a repayment that would be required during a repayment period under such a contract with a consumer is that the sum of:
  - (a) the amount of the repayment; and
  - (b) any other amounts the consumer is required to pay under any other small amount credit contracts during the repayment period;would be equal to or less than 10% of the available income the consumer is reasonably expected to receive during the repayment period.
- (3) In this regulation:

*available income*, for a consumer, means the consumer's income less any amount required to be withheld under Part 2-5 in Schedule 1 to the *Taxation Administration Act 1953* (Pay as you go (PAYG) withholding).

*income* means income within the ordinary meaning of that expression.

*repayment period*: each of the following is a *repayment period* in relation to a small amount credit contract:

- (a) the period:
  - (i) starting on the day the contract is entered into; and
  - (ii) ending on the first repayment date in relation to the contract;
- (b) a period:
  - (i) starting on the day after a repayment date in relation to the contract; and
  - (ii) ending on the subsequent repayment date in relation to the contract.

#### **28LCB Consumer leases for household goods—income requirements**

- (1) For the purposes of subsection 156B(1) of the Act, this regulation prescribes a requirement for the amount that would be required to be paid under a consumer lease for household goods with a consumer who would be the lessee under the lease.
- (2) The requirement for the amount is that, for any part of the amount that would be required to be paid during a repayment period under such a lease with a consumer, the sum of:

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- (a) that part of the amount; and
  - (b) any other amounts the consumer is required to pay under any other consumer leases during the repayment period;
- would be equal to or less than 10% of the available income the consumer is reasonably expected to receive during the repayment period.

- (3) In this regulation:

**available income**, for a consumer, means the consumer's income less any amount required to be withheld under Part 2-5 in Schedule 1 to the *Taxation Administration Act 1953* (Pay as you go (PAYG) withholding).

**income** means income within the ordinary meaning of that expression.

**lease repayment day**, in relation to a consumer lease for household goods, means the day on or by which a repayment is required to be made under the lease.

**repayment period**: each of the following is a **repayment period** in relation to a consumer lease for household goods:

- (a) the period:
  - (i) starting on the day the lease is entered into; and
  - (ii) ending on the first lease repayment day in relation to the lease;
- (b) a period:
  - (i) starting on the day after a lease repayment day in relation to the lease; and
  - (ii) ending on the subsequent lease repayment day in relation to the lease.

## 28LCC Constrained documents and constrained information

### *Constrained documents*

- (1) For the purposes of paragraph 160CA(1)(a) of the Act, the following documents are prescribed:
- (a) an income statement issued by Services Australia;
  - (b) a deduction statement issued by Services Australia.

### *Constrained information*

- (2) For the purposes of paragraph 160CA(1)(a) of the Act, information that a licensee has obtained as a result of taking the steps prescribed by subregulation 28HB(6) or (7) (obtaining and considering information to verify financial situation of consumers) is prescribed.

## 4 Part 3.7

Repeal the Part.

## 5 After Part 6-2

Insert:



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## Part 6-2A—Avoidance schemes

### 40 Avoidance purposes relating to contracts

- (1) This regulation is made for the purposes of paragraph 323B(1)(c) of the Act.

*Provision of credit to which the Code does not apply*

- (2) In determining, for the purposes of section 323A of the Act, whether it would be reasonable to conclude that a purpose of a person entering into or carrying out (to any extent) a scheme was an avoidance purpose relating to a contract, regard must be had to whether the provision of any credit under the scheme or contract is not, or would not be, a provision of credit to which the Code applies because of the operation of:
- (a) paragraph 5(1)(c) of the Code (which is about whether a charge is or may be made for providing the credit);
  - (b) subsection 6(1) of the Code (which is about short term credit); or
  - (c) subsection 6(5) of the Code (which is about credit for which only an account charge is payable).

*Provision of credit or financial accommodation—costs and complexity*

- (3) When having regard to a matter referred to in subparagraph 323B(1)(a)(i) or (ii) of the Act in relation to a scheme or contract, regard must be had to whether the scheme or contract does, or may do, any of the following:
- (a) requires a consumer to pay a fee or charge that could not have been imposed on the consumer under, or in relation to, a small amount credit contract;
  - (b) in relation to a person that has provided, or is to provide, credit or financial accommodation to a consumer under the scheme or contract (the ***principal scheme*** or ***principal contract***)—gives the person a right, if the consumer is in default in payment of an amount under the principal scheme or principal contract, to recover from the consumer an amount greater than the amount the person could have recovered in accordance with section 39B of the Code if:
    - (i) the person had been a credit provider under a small amount credit contract with the consumer; and
    - (ii) any credit or financial accommodation that has been, or is to be, provided to the consumer by the person under the principal scheme or principal contract had been, or was to be, provided to the consumer as credit under that small amount credit contract; and
    - (iii) the consumer had been in default in payment of an amount under that small amount credit contract;
  - (c) in relation to a person who has not provided, and will not provide, credit or financial accommodation to a consumer under the scheme or contract—gives the person a right to recover an amount if the consumer is in default in payment of an amount under the scheme or contract;
  - (d) requires a consumer to pay a fee or charge that a reasonable person would think is disproportionate in light of the amount of credit, or the extent of

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- the financial accommodation, provided to the consumer under the scheme or contract;
- (e) requires a consumer to pay a fee or charge that a reasonable person would regard as high;
  - (f) requires a consumer to pay a fee or charge (the *nominated fee or charge*), where it is reasonably likely that the consumer will, as a result of that requirement, become liable under the scheme or contract to pay one or more further fees or charges (other than interest fees or charges) in addition to the nominated fee or charge;
  - (g) requires a consumer to pay fees or charges to 2 or more persons.
- (4) When having regard to a matter referred to in subparagraph 323B(1)(a)(i) or (ii) of the Act in relation to a scheme, regard must also be had to the following matters:
- (a) whether the scheme involves, or relates to, 2 or more contracts;
  - (b) whether the scheme involves, or relates to, 2 or more contracts entered into at different times;
  - (c) whether the scheme involves, or relates to, a contract between a consumer and 2 or more other persons;
  - (d) whether the scheme involves, or relates to, separate contracts between a consumer and each of 2 or more other persons.

### *Dispute resolution*

- (5) In determining, for the purposes of section 323A of the Act, whether it would be reasonable to conclude that a purpose of a person entering into or carrying out (to any extent) a scheme was an avoidance purpose relating to a contract, regard must be had to the following matters:
- (a) whether the scheme or contract provides for an internal dispute procedure that satisfies the standards and requirements made or approved by ASIC for the purposes of subparagraph 47(1)(h)(i) of the Act;
  - (b) whether the scheme or contract provides for an independent external dispute resolution procedure;
  - (c) whether the person is a member of the AFCA scheme.

## **41 Avoidance purposes relating to product intervention orders**

- (1) This regulation is made for the purposes of subsection 323B(3) of the Act.

### *Changes in behaviour*

- (2) In determining, for the purposes of section 323A of the Act, whether it would be reasonable to conclude that a purpose of a person (the *assessed person*) entering into or carrying out (to any extent) a scheme was to avoid the application of a product intervention order made under Part 6-7A that applies to the assessed person or to an associate of the assessed person, regard must be had to whether the conditions in subregulation (3) or (4) are satisfied.

Note: For *associate*, see section 15A of the Act.

- (3) For the purposes of subregulation (2), the conditions in this subregulation are that:

- (a) the product intervention order applies to the assessed person; and
  - (b) before the order was made, the assessed person had engaged in conduct that would have contravened, or would be likely to have contravened, the order if it had been engaged in after the order was made; and
  - (c) the assessed person has not contravened, is not likely to have contravened, or purports not to have contravened, the order by:
    - (i) entering into or carrying out the scheme; or
    - (ii) any conduct engaged in after entering into or carrying out the scheme.
- (4) For the purposes of subregulation (2), the conditions in this subregulation are that:
- (a) the product intervention order applies to an associate of the assessed person; and
  - (b) before the order was made, the associate had engaged in conduct that would have contravened, or would be likely to have contravened, the order if it had been engaged in after the order was made; and
  - (c) the associate has not contravened, is not likely to have contravened, or purports not to have contravened, the order by any conduct engaged in by the associate after the assessed person entered into or carried out the scheme.

#### *Detrimental conduct*

- (5) In determining, for the purposes of section 323A of the Act, whether it would be reasonable to conclude that a purpose of a person (the **assessed person**) entering into or carrying out (to any extent) a scheme was to avoid the application of a product intervention order made under Part 6-7A of the Act that applies to the assessed person or to an associate of the assessed person, regard must also be had to whether the conditions in subregulation (6) or (7) are satisfied.

Note: For **associate**, see section 15A of the Act.

- (6) For the purposes of subregulation (5), the conditions in this subregulation are that:
- (a) the product intervention order was made in part on the basis that ASIC was satisfied that a credit product or proposed credit product (or class of credit products or proposed credit products) had resulted in, or would result in or would be likely to result in, significant detriment of a certain kind to consumers; and
  - (b) the order applies to the assessed person; and
  - (c) the assessed person has not contravened, is not likely to have contravened, or purports not to have contravened, the order by:
    - (i) entering into or carrying out the scheme; or
    - (ii) any conduct engaged in after entering into or carrying out the scheme; and
  - (d) any of the following conduct has resulted in, or will or is likely to result in, significant detriment to consumers that is of the same or of a similar kind to the detriment referred to paragraph (a) of this subregulation:
    - (i) conduct of the assessed person in entering into or carrying out the scheme;

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- (ii) conduct engaged in by the assessed person, or by an associate of the assessed person, after the assessed person entered into or carried out the scheme.
- (7) For the purposes of subregulation (5), the conditions in this subregulation are that:
- (a) the product intervention order was made in part on the basis that ASIC was satisfied that a credit product or proposed credit product (or class of credit products or proposed credit products) had resulted in, or would result in or would be likely to result in, significant detriment of a certain kind to consumers; and
  - (b) the order applies to an associate of the assessed person; and
  - (c) the associate has not contravened, is not likely to have contravened, or purports not to have contravened, the order by any conduct engaged in by the associate after the assessed person entered into or carried out the scheme; and
  - (d) any of the following conduct has resulted in, or will or is likely to result in, significant detriment to consumers that is of the same or of a similar kind to the detriment referred to paragraph (a) of this subregulation:
    - (i) conduct of the assessed person in entering into or carrying out the scheme;
    - (ii) conduct engaged in by the assessed person, or by an associate of the assessed person, after the assessed person entered into or carried out the scheme.

### *Definitions*

- (8) In this regulation:

*carry out*, in relation to a scheme, includes continuing to carry out the scheme.

*credit product* has the same meaning as in Part 6-7A of the Act.

### **6 After paragraph 38(2)(f)**

Insert:

- (fa) subsection 124B(1);

### **7 After paragraph 38(2)(i)**

Insert:

- (iaa) subsection 133CB(1);

### **8 After paragraph 38(2)(p)**

Insert:

- (pa) subsection 147A(1);

### **9 After paragraph 38(2)(s)**

Insert:

- (sa) subsection 156A(1);
- (sb) subsection 156C(1);

## **10 After paragraph 38(2)(x)**

Insert:

- (xa) subsections 175AA(1) and (2) of the Code;

## **11 After regulation 104**

Insert:

### **104A Disclosure of information in consumer leases for household goods**

- (1) For the purposes of paragraph 174(1A)(c) of the Code, other information a consumer lease for household goods must contain is as follows:
  - (a) an itemised list of each fee or charge (including any applicable taxes and any add-on fees) that forms part of the total amount payable by the lessee in connection with the consumer lease;
  - (b) for a consumer lease for a fixed term—sufficient information to enable the lessee to determine the amount of any fee or charge payable by the lessee to terminate the lease before the end of the fixed term;
  - (c) for a consumer lease for an indefinite period—sufficient information to enable the lessee to determine the amount of any fee or charge payable by the lessee to terminate the lease;
  - (d) in relation to the base price of the goods hired under the consumer lease, as stated in the consumer lease:
    - (i) a statement specifying whether that base price is the agreed price of the goods, the amount under subregulation 105AA(3) or the amount under subregulation 105AA(4); and
    - (ii) if that base price is the amount under subregulation 105AA(3)—a statement specifying which of the amounts referred to in that subregulation is stated in the lease as the base price; and
    - (iii) if that base price is the amount under subregulation 105AA(4)—a statement specifying which of the amounts referred to in that subregulation is stated in the lease as the base price.
- (2) For the purposes of paragraph (1)(a), and to avoid doubt, the total amount payable by the lessee in connection with the consumer lease includes the amounts of any fees or charges, or enforcement expenses, that are:
  - (a) of a kind referred to in subsection 175AA(4) of the Code; and
  - (b) payable by the lessee in connection with the lease.

## **12 After regulation 105**

Insert:

### **105AA Base price of goods**

- (1) For the purposes of subsection 175AA(6) of the Code, the base price of goods hired under a consumer lease is the lesser of:
  - (a) the agreed price of the goods; and
  - (b) either:
    - (i) for goods that are new on the day (the *lease day*) the consumer lease is entered into—the amount under subregulation (3); or

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- (ii) for goods that are not new on the lease day—the amount under subregulation (4).

### *Agreed price*

- (2) The **agreed price** of goods hired under a consumer lease is the price of the goods agreed under the consumer lease by the parties to that lease, plus any related goods and services tax (if the amount of such tax is not already included in the price of the goods agreed under the lease).

### *Goods that are new on the lease day*

- (3) The amount under this subregulation for goods hired under a consumer lease is:
  - (a) the lesser of the following amounts:
    - (i) if it is reasonably practicable for the lessor to determine what, on the lease day, was the recommended retail price of the goods—that price (including any related goods and services tax);
    - (ii) if the lessor bought the goods from a supplier who ordinarily sells goods of that kind to the public, and it is reasonably practicable for the lessor to determine what was the price that the lessor paid for the goods—that price (including any related goods and services tax); or
  - (b) if neither subparagraph (a)(i) nor subparagraph (a)(ii) applies—the market value of the goods on the lease day.

Note: For **market value**, see subregulation (7).

### *Goods that are not new on the lease day*

- (4) The amount under this subregulation for goods hired under a consumer lease is:
  - (a) the lesser of the following amounts:
    - (i) if the goods were new when they were acquired by the lessor or by a previous acquirer of the goods, and it is reasonably practicable for the lessor to determine what, on the day on which the goods were last acquired new, was the recommended retail price of the goods—that price (including any related goods and services tax), reduced in accordance with subregulation (5);
    - (ii) if the goods were bought (whether by the lessor or by a previous acquirer of the goods) from a supplier who ordinarily sells goods of that kind to the public, and it is reasonably practicable for the lessor to determine what, when the goods were last bought from such a supplier, was the price paid for the goods—that price (including any related goods and services tax), reduced in accordance with subregulation (5); or
  - (b) if neither subparagraph (a)(i) nor subparagraph (a)(ii) applies—the market value of the goods on the lease day.

Note: If the lessor was the manufacturer of the goods, see subregulation (6) for when the lessor is taken to have acquired the goods.

- (5) For the purposes of subregulation (4), the price referred to in subparagraph (4)(a)(i) or (ii) is to be reduced by:
  - (a) if the period:

- (i) starting on the day the goods were last acquired new as mentioned in subparagraph (4)(a)(i), or the goods were last bought as mentioned in subparagraph (4)(a)(ii), whichever is applicable; and
- (ii) ending on the lease day;  
is 12 months or less—12.5% of that price; or
- (b) if that period is more than 12 months but less than 24 months—25% of that price; or
- (c) if that period is more than 24 months but less than 36 months—37.5% of that price; or
- (d) otherwise—50% of that price.

*Other matters*

- (6) For the purposes of this regulation, if a lessor was the manufacturer of goods hired under a consumer lease, then the lessor is taken to have acquired the goods on the first day on which:
  - (a) the manufacturing process is complete; and
  - (b) the goods are ready for sale or lease.
- (7) In this regulation:

*market value*, of goods hired under a consumer lease, means fair market value including any goods and services tax.

## **13 After regulation 105E**

Insert:

### **105F Amount payable on termination of consumer lease by lessee**

- (1) For the purposes of paragraph 179(2)(b) of the Code, this regulation sets out principles in accordance with which the amount (the *termination amount*) referred to in that paragraph is to be determined, in relation to the termination of a consumer lease by a lessee under section 179 of the Code.

Note: The amount payable by the lessee on the termination of the lease is the lesser of the amount payable under the lease and the termination amount determined in accordance with the principles in this regulation: see subsection 179(2) of the Code.

*Where 90 days have elapsed and lessee is not in default*

- (2) If, at the time when the consumer lease terminates:
  - (a) 90 days or more have elapsed since the start of the day when the lessee entered into the lease; and
  - (b) the lessee is not in default in payment of an amount under the lease;then the termination amount is:
  - (c) if costs are chargeable to the lessee under subregulation (5) on the termination of the lease—the amount of those costs; or
  - (d) otherwise—nil.

*Where less than 90 days have elapsed or lessee is in default*

- (3) If:

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- (a) at the time when the consumer lease terminates:
  - (i) less than 90 days have elapsed since the start of the day when the lessee entered into the lease; or
  - (ii) the lessee is in default in payment of an amount under the lease; and
- (b) subregulation (4) (substantial hardship) does not apply in relation to the lease;

then the termination amount is the amount worked out by:

- (c) calculating the total amount that would have been payable by the lessee under the lease during the period of 90 days beginning on the day when the lessee entered into lease, if the lease had not terminated before the end of that period; and
- (d) subtracting any amounts that the lessee paid under the lease before the lease terminated; and
- (e) adding the amount of any costs that are chargeable to the lessee under subregulation (5) on the termination of the lease.

### *Substantial hardship*

- (4) If there are reasonable grounds to believe that:
  - (a) the lessee could not comply with the lessee's financial obligations under the lease; or
  - (b) the lessee could only comply with the lessee's financial obligations under the lease with substantial hardship;

then the termination amount is:

- (c) if costs are chargeable to the lessee under subregulation (5) on the termination of the lease—the amount of those costs; or
- (d) otherwise—nil.

### *Cleaning, repair or replacement costs*

- (5) For the purposes of paragraphs 2(c), 3(e) and (4)(c), if:
    - (a) there has been damage to, or deterioration of, goods hired under the lease that goes beyond fair wear and tear; and
    - (b) that damage or deterioration is a result of the lessee failing to take reasonable care of the goods; and
    - (c) the lessee has not paid the lessor:
      - (i) if the goods can be restored to good working condition (allowing for fair wear and tear) by cleaning or repair—the costs of such cleaning or repair at fair commercial prices; or
      - (ii) otherwise—the costs of replacing the goods at fair commercial prices;
- then the costs referred to in subparagraph (c)(i) or (ii) of this subregulation (whichever applies) are chargeable to the lessee on the termination of the lease.

## **14 Schedules 7 to 9**

Repeal the Schedules.

## **15 Part 7-11 (heading)**

Omit “**Saving**”, substitute “**Application, saving**”.



## 16 In the appropriate position in Part 7-11

Insert:

### **Division 3—Application provisions for the National Consumer Credit Protection Amendment (Financial Sector Reform) Regulations 2023**

#### **114 Verifying financial situation of consumers**

Regulation 28HB, as inserted by Schedule 1 to the *National Consumer Credit Protection Amendment (Financial Sector Reform) Regulations 2023*, applies in relation to a preliminary assessment, or assessment, referred to subsection 117(1), 130(1), 140(1) or 153(1) of the Act that occurs after the day that Schedule commences.