

# EXPOSURE DRAFT

## DRAFT 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 (Financial Sector Reform) Regulations 2023*

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.

The *National Consumer Credit Protection Amendment (Financial Sector Reform) Regulations 2023* (the Regulations) amend the *National Consumer Credit Protection Regulations 2010* to give effect to the Government's response to the Review of the Small Amount Credit Contract Laws (the Review).

The Review was established by the previous Government to consider and report on the effectiveness of the laws relating to SACCs, in accordance with a statutory requirement under the Act. The Review's final report (the Report) was released in March 2016.<sup>1</sup>

The Regulations work with the *Financial Sector Reform Act 2022* to enhance the consumer protection framework for small amount credit contracts (SACCs) and consumer leases, while ensuring these products can continue to fulfil an important role in the economy.

The matters addressed by the Regulations are as follows:

- adding an additional requirement that licensees verify the financial situation of consumers before entering into a contract with them;
- consumer income requirements for both SACCs and consumer leases for household goods;
- anti-avoidance measures targeted at avoidance purposes relating to credit contracts and product intervention orders;
- the prescription of new civil penalties subject to the Act infringement notice regime;
- disclosure of information requirements for consumer leases for household goods;
- the calculation method for the base price of goods hired under a consumer lease; and
- early termination fee principles for consumer leases for household goods.

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<sup>1</sup> The Report can be found at: [treasury.gov.au/consultation/review-of-small-amount-credit-contracts-final-report](https://treasury.gov.au/consultation/review-of-small-amount-credit-contracts-final-report)

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These matters are designed to ensure consumers of SACCs and consumer leases, many of whom are financially vulnerable, are not left unable to meet their basic needs or other financial commitments as a result of entering into inappropriate financial arrangements with SACC providers or consumer lessors. They also target persons engaging in avoidance schemes in relation to the consumer protections under the Act or the application of product intervention orders under the Act.

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

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 the later of:

- the day after the instrument is registered; and
- the day Parts 1 and 2 of Schedule 4 to the *Financial Sector Reform Act 2022* commence.

**Details of the National Consumer Credit Protection Amendment (Financial Sector Reform) Regulations 2022**

**Section 1 – Name of the Regulations**

This section provides that the name of the Regulations is the *National Consumer Credit Protection Amendment (Financial Sector Reform) Regulations 2023* (the Regulations).

**Section 2 – Commencement**

This section provides that the Regulations commence at the same time as Parts 1 and 2 of Schedule 4 to the *Financial Sector Reform Act 2022* commence. Those Parts will commence on 12 June 2023, and the Regulations are expected to be made before that date.

**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 the Schedules to this instrument will be amended or repealed as set out in the applicable items in the Schedules, and any other item in the Schedules to this instrument has effect according to its terms.

**Schedule 1 – Amendments to the National Consumer Credit Protection Regulations 2010**

Schedule 1 to the Regulations amends the *National Consumer Credit Protection Regulations 2010* to support the Government's reform of the Act to enhance the consumer protection framework for small amount credit contracts (SACCs) and consumer leases.

**Verifying financial information before entering into a small amount credit contract**

**Item 2 – Regulation 28HB**

**Obtaining and considering income and deduction statements for payments under the *Social Security Act 1991***

Item 2 of Schedule 1 to the Regulations requires a licensee to obtain and consider a consumer's income and deduction statements from Services Australia to verify their financial situation. This requirement applies if the consumer receives any payments under the *Social Security Act 1991*. If the consumer receives payments solely under another Act (such as the *A New Tax System (Family Assistance) Act 1999* or the *Veterans' Entitlements Act 1986*), then the requirement does not apply.

The requirement to obtain and consider a consumer's income and deduction statements is a prescribed step for the purposes of sections 117, 130, 140 and 153 of

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the Act. Among other things, these sections require licensees, before making a preliminary assessment in relation to a consumer, to take any steps prescribed by the regulations to verify any matter prescribed by the regulations. While these sections apply to credit licensees more broadly, the particular requirements contained in regulation 28HB only apply to SACCs and consumer leases for household goods. This recognises the increased risks that these credit products pose to consumers.

Sections 115 and 117 of the Act requires licenses to take certain steps to assess and verify a consumer's financial situation within a 90-day period preceding the 'assistance day', being the day that the licensee provides the relevant credit assistance to the consumer. Regulation 28HB prescribes some of these steps. Under regulations 28HB, licensees must first consider whether the consumer is receiving a social security payment under the *Social Security Act 1991*. If the licensee ascertains that the consumer is receiving a social security payment, then the licensee must obtain and consider the information contained in the income and deduction statements issued by Services Australia for the consumer. The statements must be issued by Services Australia during the period of 21 days ending on the day on which the licensee considers the information contained in the statements.

It is not necessary for the licensee to obtain and consider the original copies of the statements. It is sufficient for the licensee to obtain and consider the information contained in the statements. For example, a photocopy or screen capture of the statements would be sufficient. Further, if a consumer provides a consolidated document that contains information that would be contained in their income and deduction statements (for example, a Detailed Income and Assets Statement issued by Services Australia), then that document would also be sufficient.

Under regulation 28LCC, income and deduction statements, and the information contained in them, are types of constrained documents and information, respectively. This means that penalties under section 160CB of the Act may apply in the event of unauthorised use or disclosure of such documents and information.

### **Example 1: Requirement to verify a consumer's financial statements**

Sarah visits QuicknEasy Cash on 12 June 2023 to obtain a SACC. Before offering Sarah the contract, QuicknEasy Cash must determine whether Sarah is receiving a social security payment. If she is, they are required to consider the information contained in her income and deduction statements.

QuicknEasy Cash asks Sarah if she is receiving a social security payment. Sarah advises that she is. QuicknEasy Cash then asks Sarah to have Services Australia issue her a combined income and deduction statement. Sarah does so on 19 June 2023, and then passes on her combined income and deduction statement to QuicknEasy Cash on 21 June 2023.

QuicknEasy Cash must consider the information in the combined income and deduction statement within 21 days from the day they were issued (19 June 2023). QuicknEasy Cash considers the information and, on 21 June 2023, assess Sarah to be suitable for a SACC. QuicknEasy Cash have 90 days from 21 June 2023 to enter into a SACC with Sarah before they are required to obtain and consider updated information.

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### Item 3 - Regulations 28LCA to 28LCD

Item 3 of Schedule 1 to the Regulations repeals regulations 28LCA, 28LCB, 28LCC, 28LCD of the Credit Regulations. These provisions are redundant and lack a supporting regulation-making power as sections 124B and 133CB of the Act have been repealed and replaced.

#### **Income requirements**

In the place of the repealed regulations, new regulations 28LCA and 28LCB are inserted. These regulations prescribe new requirements for repayments under:

- a SACC for the purposes of subsection 133CC(1) of the Act; and
- a consumer lease for household goods for the purposes of subsection 156B(1) of the Act.

Subsection 133CC(1) of the Act provides that licensees are prohibited from entering into a SACC with a particular consumer if the total repayments under the contract would not meet the requirements prescribed by the regulations. Subsection 156B(1) of the Act imposes the same requirement on licensees entering into consumer leases for household goods. The explanation below of the income requirement in relation to SACCs also applies to the income requirement in relation to consumer leases for household goods.

It should be noted that section 133CD of the Act prohibits licensees from entering into a SACC where the repayment amounts and intervals under the SACC are not equal.

The regulations require that the total amount of repayments under a SACC (or a consumer lease for household goods) be equal to or less than 10% of the 'available income' the consumer is reasonably expected to receive during the 'repayment period'. The 10 per cent cap is separate for SACCs and consumer leases for household goods.

A consumer's 'available income' is defined as the consumer's income less any amount withheld under the pay as you go (PAYG) withholding system. The 'repayment period' is defined as the period starting on the day the contract is entered into and ending on the first repayment date under the contract, and then, subsequently, the period starting on a repayment date under the contract and ending on the subsequent repayment date under the contract.

'Income' is defined to mean income within the ordinary meaning of that expression. 'Income' is intended to only capture income according to ordinary concepts. Money received by the consumer from the sale of their property (where the sale of the property does not occur in the course of the carrying on of a business by the consumer) is not intended to be caught by the definition of income.

The income requirements ensure that financially vulnerable consumers do not enter into a SACC or consumer lease for household goods where doing so would require them to repay an amount that would put them at risk of significant financial distress.

#### **Example 2: Application of the SACC income requirement**

Zuva enters into a SACC with GetPaidFast for \$1,500 to be paid back over a year. The contract has maximum fortnightly repayments of \$96.92, including the cost of a \$300 establishment fee and \$720 in total monthly

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fees (calculated at 4 per cent each month). GetPaidFast also requires that Zuva pay an extra \$10 per day if she is overdue on a repayment.

Zuva available income per fortnight is \$1,200. As such, the maximum amount she can be required to pay GetPaidFast in repayments each fortnight is \$120 (10 per cent of \$1,200). As Zuva is only required to pay \$96.92 per fortnight, the contract complies with the income requirement. The default fee of \$10 per day is not included in the calculation.

### **Example 3: Application of the SACC income requirement**

Connie wishes to enter into a SACC with PayMeNow for \$1,000 to be repaid over three months. The contract includes a \$200 establishment fee and \$120 in monthly fees. She must repay \$188.57 a fortnight. However, her income is only \$1,500 a fortnight, and as such her available income is \$150 per fortnight (10 per cent of \$1,500). Because her repayments exceed her available income the contract is not compliant with the income requirements.

Connie and PayMeNow instead agree to a \$1,000 contract to be repaid over six months. The contract includes a \$200 establishment fee and monthly fees of \$240, and repayments of \$110.77 per fortnight. Because the fortnightly repayments are less than her available income, the contract is compliant with the income requirement.

The total amount of repayments under the contract is calculated by reference to the amount of any repayments due under the contract, in addition to any other amounts the consumer is required to pay under any other SACC. This requirement ensures that all SACCs to which the consumer is a debtor are recognised by the income requirement, and that the income requirement cannot be avoided through the creation multiple SACCs.

### **Example 4: Application of the income requirement when consumer under multiple SACCs/consumer leases for household goods**

Henry earns \$1,200 per fortnight. This means he has an available income of \$120 a fortnight for SACCs and an additional \$120 a fortnight for consumer leases (10 per cent of \$1,200).

Henry enters into a consumer lease for household goods for a 75-inch UHD Crystal LED Smart TV with AppliancesForYou for \$60 a fortnight over four years. Henry has previously entered into a consumer lease for household goods for a 500 litre French door refrigerator with Lease4Eva that he is still paying off. That lease has fortnightly repayments of \$50 over four years. Therefore, Henry's total lease repayments under both leases are \$110 per fortnight (\$50 + \$60), which is under his available income cap of \$120 a fortnight.

Henry now wants to lease a washer-dryer for \$20 a fortnight over four years. Because the sum of the leases of \$130 a fortnight (\$50 + \$60 + \$20) exceeds his available income, he is unable to lease the washer-dryer.

Henry instead tries to purchase a washer dryer with a \$1,000 SACC from MoneyToday repayable over 12 months. Henry is already a debtor under a \$1,000 SACC from a different company that charges the maximum repayments of \$64.23 per fortnight for 12 months, including the

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establishment and monthly fees. MoneyToday would also charge Henry the maximum fortnightly repayments of \$64.23. As such, the second \$1,000 SACC would put Henry's SACC repayments at \$128.46 per fortnight. This amount exceeds his available income amount of \$120 per fortnight, meaning he cannot take out the additional \$1,000 SACC from MoneyToday.

Henry decides instead to enter into a SACC with MoneyToday for \$800 repaid over 12 months, with maximum fortnightly repayments of \$51.69. This puts Henry's total SACC fortnightly repayments at \$115.92 (\$64.23 + \$51.69), which is less than his fortnightly available income of \$120.

The fact that Henry is already spending \$110 a fortnight on consumer leases for household goods does not prevent him from spending another \$115.92 a fortnight on SACC repayments.

The income requirements apply in relation to SACCs and consumer leases for household goods entered into, or offers made to enter into SACCs or consumer leases for household goods, on or after the day Parts 1 and 2 of Schedule 4 to the *Financial Sector Reform Act 2022* commence. This is consistent with the relevant application provision in item 6 of Schedule 19 to the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*, inserted by Part 7 of Schedule 4 to the *Financial Sector Reform Act 2022*.

### **Constrained documents and information**

Regulation 28LCC in item 3 of Schedule 1 to the Regulations prescribes income and deduction statements from Services Australia, and the information contained in those statements, as constrained documents and information for the purposes of paragraph 160CA(1)(a) of the Act.

Subsection 160CA(1) of the Act introduces new restrictions on the use and disclosure of constrained documents and information. Constrained documents and information generally include:

- an account statement (or the information contained in an account statement); or
- any other document or information prescribed by the regulations;

received or obtained by a licensee (or former licensee) in connection with a SACC or consumer lease for household goods, or a proposed SACC or consumer lease for household goods.

Since income and deduction statements are prescribed as a type of constrained document, unauthorised use or disclosure of those statements may attract penalties under section 160CB of the Act.

Penalties for unauthorised use or disclosure of income and deduction statements will only apply if the unauthorised use or disclosure occurred after the day Part 6 of the *Financial Sector Reform Act 2022* commences. This is consistent with the relevant application provision in item 9 of Schedule 19 to the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*, to be inserted by Part 7 of Schedule 4 to the *Financial Sector Reform Act 2022*.

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### Item 4 – Part 3.7

Item 4 of Schedule 1 repeals Part 3.7 of the *National Consumer Credit Protection Regulations 2010* as it is no longer needed. Part 3.7 prescribed the previous income requirements for licensees entering into SACCs, with no equivalent for consumer leases.

### **Anti-avoidance measures**

### Item 5 – Regulations 40 and 41

### **Avoidance purposes relating to contracts**

Item 5 of Schedule 1 inserts new regulation 40, which provides a list of mandatory considerations for a court to take into account when assessing whether a particular person entered into a scheme for an avoidance purpose (see section 323A of the Act) and provided a consumer with credit or financial accommodation in a particularly costly or complex manner (see section 323B of the Act).

These mandatory considerations cover areas such as:

- whether the scheme, or a contract offered to consumers as part of the scheme, is exempt from the application of Schedule 1 to the Act (the Credit Code);
- whether the scheme involves unreasonably high costs or fees, fees that are disproportionate to the amount of credit being offered, or fees that then make the consumer liable for other fees under the contract;
- whether the scheme is unnecessarily complex, such as by requiring the consumer to pay fees to multiple persons, involving multiple contracts, or requiring the consumer to pay fees and charges, including default fees, to a person who has not provided any financial or credit accommodation under the scheme;
- whether the scheme provides for adequate dispute resolution procedures that satisfy ASIC's standards in respect of credit contracts regulated by the Credit Code.<sup>2</sup>

All of these considerations are intended to assist the court in determining whether it would be reasonable to conclude that the purpose, or one of the purposes, of the person engaging in a scheme was an avoidance purpose under section 323A of the Act.

A particular scheme that satisfies many of these factors – for example, one that has disproportionately high fees, involves multiple contracts and makes fees payable to multiple people, and does not have any dispute resolution procedures (or one that is clearly unsatisfactory) – should be more likely to be assessed as having a purpose of avoiding the application of the Credit Code, as otherwise its protections would prevent the scheme from operating in that manner. In contrast, it may be reasonable to

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<sup>2</sup> ASIC's standards for internal dispute resolution procedures are set out in RG 271 - Internal dispute resolution: <https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-271-internal-dispute-resolution/>



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conclude that a scheme that operates using one of the exemptions from the Credit Code but still provides adequate consumer protections equivalent or similar to those in the Credit Code or is a relatively low fee product, is less likely to be entered into for an avoidance purpose as the credit provider is less likely to be providing a harmful credit product.

However, any assessment by a court of whether these factors point to an avoidance purpose will depend on the particular facts and circumstances of the scheme. It is not the intention that a scheme must enliven a particular number of these factors to be considered an avoidance scheme. Schemes generally change in response to legislative, regulatory and market settings. As a result, the presence of some factors, or even no factors, may still result in an avoidance purpose being established (depending on the facts and circumstances of a particular scheme).

### **Example 5: Application of the anti-avoidance provisions**

Following costly renovations to his kitchen and other expenses relating to his expected first child, Fitzzy needs \$300 urgently to pay arrears on his utility bill. He follows links to a website that offers ‘Emergency Loans for any purpose’. He arranges a loan for \$300 on the same day.

The lender does not hold an Australian Credit Licence (ACL) as it only charges low fees and seeks to rely on the exemption in subsection 6(1) of the Credit Code. However, the loan was in fact arranged by a third party, pursuant to an agreement between the third party and the lender. As a result, Fitzzy has also entered into a second contract with the third party, in addition to the contract with the lender.

Fitzzy is unable to make the payments due under the loans as he has multiple other debts. The lender charges Fitzzy \$20 each time he defaults in making a payment, and the third party also charges him \$80 each time he defaults. Soon, Fitzzy owes over \$900 in total under the loan contract and the third party contract, including over \$500 in default fees.

When Fitzzy realises how quickly the amount he owes is increasing, he decides to complain to the lender and see if he can reduce the repayments. He sends an email to the lender with this request but the lender refers him to the third party. The third party advises Fitzzy it is not responsible for complaints in relation to the loan. Fitzzy calls the Australian Financial Complaints Authority (AFCA), but they are unable to assist him as the lender, nor the third party, are AFCA members.

The following factors are relevant to assessing whether the loan has been structured for an avoidance purpose:

- whether the agreement between the lender and the third party means they are engaged in a scheme, plan, proposal, action, course of action or course of conduct;
- that the default fees charged by the lender and the third party are high compared to the amount of credit provided, with Fitzzy being charged a total of \$100 for each default when he had only borrowed \$300;

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- that Fitzzy has been charged default fees by two different entities, and that the total amount charged is substantially higher than \$600 or twice the amount lent (the maximum amount Fitzzy would be liable to pay if he had been provided with a SACC, in accordance with section 39B of the Credit Code);
- that Fitzzy has not been able to have either the lender or the third party consider his complaint, and he has then been unable to complain to AFCA.

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

Item 5 of Schedule 1 also inserts new regulation 41, which provides a list of mandatory considerations for a court when assessing whether a person has entered into a scheme to avoid the application of a product intervention order (PIO) made under Part 6-7A of the Act.

A PIO is an order made by ASIC in relation to specified persons, or persons more generally, in relation to a particular credit product or class of credit products. The order seeks to stop or reduce the risk those products can pose to consumers by preventing the persons from engaging in the specified conduct in relation to the product (see Part 6-7A of the Act).

The regulation sets out two broad types of behaviour that may indicate an avoidance purpose.

The first deals with the scenario where a person, or an associate of the person, is subject to a PIO and was engaging in conduct prior to the PIO being made that would likely have contravened the PIO, but since the PIO was made neither the person nor any of their associates are likely to have contravened (or purport not to have contravened) the PIO. This is not intended to capture persons who, after being subject to a PIO, have genuinely changed their scheme with the intention of stopping the behaviour that is now covered by the PIO. Rather, the provision is directed at persons who, after being subject to a PIO, make minor changes to their scheme to avoid the application of the PIO without substantively changing their behaviour.

The second deals with the scenario where the PIO was made because ASIC was satisfied that a particular scheme could cause significant detriment to consumers, and where a person, or their associate, who is subject to the PIO is likely not contravening the PIO, but their conduct will or is likely to result in significant detriment of the same or similar kind that ASIC sought to address when it made the PIO. The intention is to capture persons who change the way they operate an existing scheme to avoid the application of a PIO, but continue to engage in conduct that causes the same or similar harm to consumers. The intention is not to capture individuals who have altered their products or practices after the PIO was made so that they do not pose a similar risk of harm to consumers.

#### **Example 6: Application of the anti-avoidance provisions in relation to a PIO**

A number of lenders offer small amount loans for less than \$500 that cause detriment to consumers through:

- charging high fees;

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- requiring loans to be repaid in a short period of time, rather than setting the repayments according to what the consumer can afford; and
- lending to consumers who are unable to obtain credit from mainstream lenders and who will accept credit on the terms offered (often due to the urgent need for funds to pay urgent expenses or repay other debts).

ASIC makes a PIO that regulates the terms on which small amount loans for less than \$500 must be offered, to address this consumer detriment.

Lenders respond to the PIO in different ways:

- ABC Loans Pty Ltd complies with the PIO by continuing to offer loans for less than \$500 that comply with the requirements in the PIO.
- DEF Loans Pty Ltd responds to the PIO by including an establishment fee of \$200 or more in the amount borrowed, so that its loans are now for more than \$500. It has not made any other changes to its practices. It is not in breach of the PIO, but the loans continue to cause similar detriment to consumers.

DEF Loans Pty Ltd will be in breach of the anti-avoidance provision if it would be reasonable to conclude that its purpose, or one of its purposes, in introducing an establishment fee was to avoid the application of the PIO made by ASIC.

The reference to associates in regulation 41 is intended to cover a scenario where different persons engage in the relevant conduct before and after the PIO comes into force, where the persons are associates as set out in regulation 4 of the *National Consumer Credit Protection Regulations 2010*. The nature of avoidance schemes means that a number of different people or entities can be involved, undertaking different activities that can change over time.

The anti-avoidance provisions are intended to allow ASIC to take enforcement action against both persons who have changed their scheme to avoid the application of the PIO, and also those who have simply purported to do so but may actually be contravening the PIO. This will allow ASIC to consider whether to take enforcement action against these persons for breaches of the PIO under section 301P of the Act, and/or for breaches of the anti-avoidance provisions under section 323A of the Act. However, if a person is ordered to pay a pecuniary penalty under one of these provisions in relation to particular conduct, they cannot also be ordered to pay a pecuniary penalty under the other provision in relation to that conduct (see section 175 of the Act).

### **Penalties for contravention**

#### Items 6 to 10 – Infringement notices

Items 6-10 of Schedule 1 prescribe several additional civil penalty provisions for the purposes of paragraph 288K(1)(c) of the Act. Provisions prescribed in subregulation 38(2) of the *National Consumer Credit Protection Regulations 2010* are subject to the infringement notice scheme in the Act. The scheme allows a person who is alleged to

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have contravened a civil penalty provision to pay a penalty to the Commonwealth as an alternative to civil proceedings.

Items 6-10 of Schedule 1 amend subregulation 38(2) to prescribe the following new civil penalty provisions in the Act:

- subsection 124B(1) of the Act, which requires licensees who make representations about credit assistance in relation to SACCs to display and give certain information to consumers as determined by ASIC;
- subsection 133CB(1) of the Act, which requires licensees who represent they provide or are able to provide SACCs to display and give certain information to consumers as determined by ASIC;
- subsection 147A(1) of the Act, which requires licensees who make representations about credit assistance in relation to consumer leases for household goods to display and give certain information to consumers as determined by ASIC;
- subsection 156A(1) of the Act, which requires licensees who make representations about entering into, or being able to enter into, consumer leases for household goods to display and give certain information to consumers as determined by ASIC;
- subsection 156C(1) of the Act, which requires licensees of consumer leases for household goods to document in writing and in accordance with any requirements determined by ASIC:
  - any assessment that a consumer lease for household goods is not unsuitable for a consumer; and
  - the inquiries and verifications made in relation to that assessment;
- subsections 175AA(1) and (2) of the National Credit Code in Schedule 1 to the Act, which prohibit a lessor from entering into a consumer lease that breaches the new cap on costs.

These civil penalty provisions are suitable for an infringement notice scheme as they do not require proof of intent, and minor or straightforward contraventions are likely to occur, potentially in high volumes.

The availability of infringement notices will also allow ASIC to quickly address breaches of the new civil penalty provisions. In these circumstances, an immediate response from the regulator is essential, as the new provisions play an integral role in the enhanced consumer protection framework.

Establishing a contravention of a requirement to display or give information or a requirement to document certain assessments/inquiries will typically require a simple administrative assessment. For example, if ASIC has made a legislative instrument setting out when licensees must give or display information to consumers, ASIC will have to assess whether a licensee displayed or gave the information at the required time.

Likewise, assessing whether a licensee has maintained adequate written documentation of any assessment that a consumer lease for household goods is not unsuitable for a consumer will usually involve ASIC simply requesting the relevant

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documentation from the licensee and assessing whether the documentation they have kept is sufficient.

Establishing a contravention of the cap on costs for consumer leases will involve a straightforward, objective assessment. In these circumstances, ASIC will calculate the elements of the cap as it applies to the relevant lease and compare this figure with the terms of that lease.

Consistent with the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, ASIC will not need to consider the state of mind of the licensee or lessor as the civil penalty provisions to which the infringement notice scheme applies do not include fault elements.

### **Disclosure of information under consumer leases for household goods**

#### Item 11 – Regulation 104A

Paragraph 174(1A)(c) of the Credit Code allows the regulations to prescribe additional information that lessors are required to disclose in a consumer lease for household goods and the form the disclosure must take.

Item 11 of Schedule 1 to the Regulations inserts regulation 104A, which provides that a consumer lease for household goods must also contain the following information:

- an itemised list of each fee or charge (including applicable taxes and any add-on fees) that forms part of the total amount payable by the lessee in connection with the consumer lease; and
- 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;
- 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;
- a statement specifying how the base price of each good hired under the consumer lease was calculated using the requirements set out in regulation 105AA (see item 11 of Schedule 1 to the Regulations).

These requirements require licensees to provide sufficient information to any consumer looking to enter a consumer lease for household goods to help consumers to make an informed assessment as to the possible fees they may be required to pay under the contract. They also reduce the risk that licensees will intentionally hide or obscure certain fees (such as termination fees) to make it more difficult for the consumer to make that informed assessment.

The requirement that licensees specify how they calculated the base price of the goods hired under the consumer lease is intended to assist consumers by requiring increased transparency from licensees, reducing the risk of licensees artificially inflating the base price of the goods under lease. The requirement will also help ASIC streamline the enforcement process of other provisions in the regulations and the Credit Code. Rather than requiring ASIC to engage in its own inquiries to discover how the base price of a good was calculated, licensees must be upfront about the method used. This

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will allow ASIC to more easily confirm whether the licensee has complied with their obligations under the regulations (for example regulation 105AA) and the Credit Code.

The disclosure requirements only apply in relation to consumer leases for household goods entered into on or after the day Part 2 of Schedule 4 of the *Financial Sector Reform Act 2022* commences. This is consistent with the relevant application provision in item 12 of Schedule 19 to the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*, to be inserted by Part 7 of Schedule 4 to the *Financial Sector Reform Act 2022*.

### **Calculating the base price of goods under a consumer lease**

#### Item 1 – Subregulation 3(1)

Item 1 of Schedule 1 provides the definition for ‘agreed price’.

The term ‘agreed price’ has the meaning given by subregulation 105AA(2) and is used to determine the base price of goods hired under a consumer lease.

#### Item 12 – Regulation 105AA

### **Base price of goods hired under a consumer lease**

Item 12 of Schedule 1 sets out the calculation method for the base price of goods under a consumer lease (see section 175AA(6) of the Credit Code).

The Act provides that a lessor must not enter into or vary a consumer lease such that the total amount that would be payable by the lessee in connection with the lease (including any applicable taxes, such as GST (as defined in section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999*), and any add-on fees) is more than the permitted cap for the lease (see subsection 175AA(1) of the Credit Code). The ‘permitted cap’ is the sum of several variables, including the base price of the goods hired under the lease.

The calculation method is set out in the regulations because it includes significant technical detail and may require updating at short notice to respond to evolving market developments.

The calculation method provides that the base price of a good will be the lesser of several options, depending on whether the good is new at the time the lease is entered into. This approach provides flexibility in the assessment of a good’s base price, recognising that goods under consumer leases may have been obtained in a variety of different manners. The requirement that the base price comprise the lowest of the available values is also intended to stop avoidance behaviour by ensuring that lessors do not overcharge consumers by artificially inflating any value.

#### *Calculation of base price for new goods*

For goods that are new, the base price is the lesser of three options:

1. the agreed price of the goods;
2. the recommended retail price (RRP) of the goods (including any GST) on the lease day;
3. if the lessor bought the goods from a supplier who ordinarily sells goods of that kind to the public, and the lessor bought the goods at the same price or less for

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which the supplier sold those goods to the public – the price the lessor paid for the goods (including any GST);

If neither option 2 nor 3 apply or can be determined, then the base price is the lower of the agreed price and the market value of the goods on the lease day.

*Calculation of base price for goods that are not new at the time the lease is entered into*

For goods that are not new at the time the lease is entered into, the base price is the lesser of three options:

1. the agreed price of the goods;
2. if:
  - the goods were acquired new, and;
  - the lessor can reasonably determine what the RRP was on the day that they were purchased or acquired new (whether by the lessor or another person);that price reduced by 12.5% of that price for each period of 12 months between that day and the lease day (up to a maximum reduction of 50%);
3. if:
  - the goods were purchased from a supplier who ordinarily sells goods of that kind to the public, and;
  - the lessor can reasonably determine what the price paid for the goods was when they were last purchased from such a supplier;that price reduced by 12.5% for each period of 12 months between that day and the lease day (up to a maximum reduction of 50%).

If neither option 2 nor 3 apply or can be reasonably determined, then the base price is the lower of the agreed price and the market value of the goods on the lease day.

For example:

- A fridge purchased 15 months ago with a RRP of \$1,000 when it was purchased new would generally have a base price of \$750, having depreciated 25%.
- A fridge purchased 40 months ago with a RRP of \$1,000 would generally have a base price of \$500, as it has reached its maximum 50% reduction over 36 months.
- A fridge that was first purchased four years ago by a second-hand fridge retailer from a supplier who usually sells fridges to the general public for \$1,000, but was then purchased by the lessor 18 months ago from the second-hand retailer for \$600, would have a base price of \$450, having depreciated 25% from the price that it was last purchased for from a supplier (25 per cent of \$600 = \$150).

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- A fridge that the lessor acquired second hand and was unsure what the RRP was on the day on which it was acquired new would generally have a base price of whatever the market value was on the lease day.

However, in any of these cases if there had been a lower agreed price for the goods under the contract, then that would have been the base price.

It should be noted price reductions are determined by reference to periods of several months and that the rules in section 2G of the *Acts Interpretation Act 1901* (concerning months) are applicable.

The fixed depreciation formula is intended to provide certainty and simplicity for consumers and lessors when calculating the base price of second-hand goods. It is also intended to reduce the potential for manipulation of depreciation calculations.

### *If the lessor is the manufacturer of the goods*

To avoid confusion, if the lessor is the manufacturer of the goods under a consumer lease, then the lessor is taken to have acquired the goods when the manufacturing process is complete, and the goods are ready for sale or for lease – whichever is earlier.

### *Other important terms*

The agreed price is the price of the goods, including any related goods and services tax, agreed under the consumer lease by the parties to that lease. The parties to the lease are expected to include the lessee and either the lessor, the seller of the goods or the facilitator of the lease. For example, where a lessor provides leases through a third-party retailer, that retailer could agree with a consumer in store to a lower price than the RRP.

The agreed price does not refer to the price at which the lessor purchases a good from a supplier.

The term ‘market value’ is defined as the fair market value including any goods and services tax (see subsection 204(1) of the Credit Code in Schedule 1 to the Act).

### **Example 7: Working out the base price of a new good**

Anh enters into a consumer lease with Whitegoods-for-You to lease a refrigerator for two years. The refrigerator is new on the lease day, and has a RRP on the lease day of \$1,200 (including GST). However, Whitegoods-for-You purchased the refrigerator from a supplier who sells the same refrigerator to the general public a month previously.

The supplier usually sells the refrigerators for the RRP of \$1,200, but as Whitegoods-for-You had purchased several refrigerators in bulk, the supplier had sold the refrigerators to Whitegoods for You for only \$1,000 per unit. There is no agreed price of the refrigerator in the contract.

The base price of the refrigerator is \$1,000, being the lesser of the RRP on the lease day (\$1,200) and the price Whitegoods-for-You purchased the refrigerator for from the supplier (\$1,000).

### **Example 8: Working out the base price of a good that is not new on the lease day**

Tom enters into a consumer lease with Rent2Game to lease a PS4 for two years. This particular PS4 has been leased out since Rent2Game



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purchased it new 6 years ago from a gaming supplier for \$800, which was also the RRP at the time. The base price of the goods is 50 per cent of \$800 (50% x \$800 = \$400), as the goods were purchased more than 36 months ago.

### **Example 9: Working out the base price of a good using the market value**

Roopa enters into a consumer lease with OneStopWash to lease a washing machine for six months. OneStopWash did not buy the washing machine firsthand, but rather bought it from another consumer lease company after it had already been rented out for a number of years. However, the other company did not provide OneStopWash with any information about when or where the washing machine was purchased, and have since gone out of business.

As OneStopWash cannot reasonably ascertain the RRP of the washing machine on the day when it was purchased new, and do not know whether it was purchased from a supplier who usually sells washing machines to the general public, they will have to calculate the base price of the washing machine using its market value on the lease day which they determine based on research to be \$300.

However, Roopa is a savvy negotiator and thinks she can get a bargain. She negotiates with the consumer lessor and agrees with the consumer lessor that the washing machine is only worth \$200. Because the agreed price of the washing machine is \$200, which is less than the market value of \$300, the base price of the washing machine is \$200.

### **Example 10: Application of the permitted cap**

Louie leases a \$1,000 sound system. The maximum amount that Louie can be charged over the two-year lease is \$1,960, comprising the base price of \$1,000 and \$960 in monthly fees (\$1,000 x 24 months x 4 per cent). The lease contract requires Louie to make payments of \$5 per month to cover the risk of damage to the goods and \$15 per month for a consumer credit insurance policy provided by a third-party insurer. As these charges are not a permitted delivery fee or a permitted installation fee, the consumer lessor must include them within the permitted cap of \$1,960 in compliance with section 175AA of the Code.

The method for calculating the base price of goods under a consumer lease only applies in relation to consumer leases entered into or varied on or after the day Part 2 of Schedule 4 of the *Financial Sector Reform Act 2022* commences. This is consistent with the relevant application provision in item 12 of Schedule 19 to the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*, inserted by Part 7 of Schedule 4 to the *Financial Sector Reform Act 2022*.

### **Amount payable on termination of a consumer lease by the lessee**

#### Item 13 – Regulation 105F

Section 179(1) of the Credit Code provides that a lessee may terminate a consumer lease before the end of its fixed term by returning the goods under hire to the lessor. Section 179(2) then provides that the amount payable by a lessee on termination of a consumer lease before the end of its fixed term is the lesser of the amount payable

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under the lease on termination, or the amount determined in accordance with the principles set out in the regulations.

Regulation 105F sets out such principles for calculating the amount payable on termination. This amount is calculated differently depending on multiple factors. However, the intention behind these calculations is to provide a balance between the rights of the lessor under the contract, particularly in circumstances where there has been damage or deterioration in the value of their goods during the term of the contract, but also to ensure that if the lessee is in circumstances of substantial hardship then they are not required to pay high termination fees that could put them in significant financial jeopardy.

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

If, at the time that the consumer is seeking to terminate the lease, 90 days or more have elapsed since the day the lessee entered into the lease and the lessee is not in default of any payment amount under the lease, then the amount due on termination is nothing. However, if there are any cleaning, repair or replacement costs owed to the lessor, then those costs are still due on termination (see subregulation (5)). This is to ensure that the lessor is not unfairly prejudiced by the operation of the provision, such as to allow the consumer to cause damage to the property without compensation.

The effect of this calculation is to ensure that consumers are not trapped in unreasonably long or costly consumer leases after a reasonable period of time has passed. Provided a period of 90 days or more has passed since the commencement of the lease and the lessee has met all their payment obligations under the contract to date, consumers should not be met with unreasonable termination fees as punishment for ending the contract.

*Where 90 days have not elapsed, or the lessee is in default*

If, at the time that the consumer is seeking to terminate the lease, less than 90 days have elapsed since the day the lessee entered into the lease, or the lessee is in default of a payment amount under the lease, then the termination amount is calculated using the following method:

- Calculate 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 the lease, if the lease had not terminated before the end of that period;
- Then subtract the total amount of payments the lessee had already paid under the lease before it terminated;
- Then add any amounts due to the lessor if there are any cleaning, repair or replacement costs owed (see subregulation (5)).

If the lessee is in circumstances of substantial hardship, then the substantial hardship provisions in subregulation (4) apply instead.

The effect of this calculation is to balance the interests of the lessee and the lessor. In this case, the contract did not last for at least 90 days, or the lessee is in default, so the interests of the lessor are represented by requiring that the lessee pay some sort of termination amount to compensate the lessor. At the same time, capping the amount due to the lessor at the amount that would have been due if the lease had lasted for 90

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days also protects the interests of the lessee by ensuring they are not liable for an unreasonably large fee on termination of the lease.

### *Where the lessee is now in circumstances of substantial hardship*

If there are reasonable grounds to believe that the lessee could not comply with their financial obligations under the lease, or if doing so would cause them substantial hardship, then the termination amount due is nothing.

This calculation recognises that consumers should not be forced to comply with their payment obligations under a consumer lease if to do so would place them in serious financial distress. In such circumstances, a consumer should be allowed to discharge their obligations under the contract to focus on resolving their more immediate financial issues.

However, if there are any cleaning, repair or replacement costs owed to the lessor, then those costs are still due on termination (see subregulation (5)). This is to ensure that the lessor is not unfairly prejudiced against by the operation of the provision, such as to allow the consumer to cause damage to the property without due compensation.

### *Cleaning, repair or replacement costs*

If, during the operation of the lease, there has been damage to or deterioration of the goods hired under the lease that is the result of the failure of the lessee to take reasonable care of the goods, then there will be an amount due the lessor on termination of the lease.

This amount is calculated using the following method:

- If the goods can be restored to good working condition by cleaning or repair, then the lessee must pay the lessor the amount for these repairs at fair commercial prices.
- If the goods cannot be restored, then the lessee must pay the lessor the amount to replace the goods at fair commercial prices.

However, allowance is made for expected wear and tear of the good during its lifetime. This is to ensure that lessees are not required to pay repair/cleaning costs for goods which have deteriorated naturally and without fault of the lessee.

### **Example 11: Application of termination amount provisions**

Sam enters into a consumer lease with ElectronicsFast to lease a TV for twelve months. The contract requires him to pay ElectronicsFast \$300 every 30 days.

Sam pays the first instalment on time. However, he fails to pay the second instalment as he lost his job and no longer has the financial resources available to both pay his rent and continue to pay the instalments. He wants to now terminate the lease so he can focus on his immediate financial problems.

As Sam is in default of his payment obligations under the lease, ordinarily Sam would be required to pay ElectronicsFast the amount that would be payable under the lease during the first 90 day period, subtracting any

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amounts already paid by him. In this case, that would be \$600 (\$300 x 3 - \$300).

However, there are reasonable grounds to believe Sam cannot comply with his financial obligations under the lease without suffering substantial hardship, as it may mean becoming homeless if he cannot pay his rent. As such, the amount due on termination is nil.

However, if Sam has caused any damage to the TV that goes beyond general wear and tear, then he may be liable to pay to ElectronicsFast the cost of any repairs required to return the TV to good working condition.

### **Consequential amendments**

#### Item 14 – Schedules 7 to 9

Item 14 of Schedule 1 repeals Schedules 7 to 9 of the *National Consumer Credit Protection Regulations 2010*. This repeal is consequential to the repeal of regulations 28LCA and 28LCB.

#### Item 15 – Part 7-11 (heading)

Item 15 of Schedule 1 amends the heading of Part 7-11 of the *National Consumer Credit Protection Regulations 2010* from ‘Saving and transitional provisions’ to ‘Application, saving and transitional provisions’. This change reflects the fact that there are application provisions being inserted into the Part by item 14 of the Regulations, and thus the heading should be changed to reflect this inclusion.

### **Application provisions**

#### Item 16 – Division 3

Item 16 of Schedule 1 prescribes the application of regulation 28HB of the Regulations. The requirement for licensees to verify a consumer’s financial situation as a part of a preliminary assessment, or assessment, under subsection 117(1), 130(1), 140(1) or 153(1) of the Act applies to preliminary assessments, or assessments, that occur after the day the Regulations commence.