

EXPLANATORY STATEMENT

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

National Consumer Credit Protection Act 2009

*Treasury Laws Amendment (Measures for Consultation) Regulations 2023:
Rationalisation of ending ASIC instruments (Tranche 2)*

Section 16 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 purpose of the *Treasury Laws Amendment (Measures for Consultation) Regulations 2023: Rationalisation of ending ASIC instruments (Tranche 2)* (the Regulations) is to incorporate the effect of ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835 into the *National Consumer Credit Protection Regulations 2010*.

Section 16 of Schedule 1 to the Act (the National Credit Code) requires a credit provider to give debtors precontractual documents (a precontractual statement and an information statement) before entering into a contract.

The ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835 modifies the operation of the National Credit Code. It allows credit providers to give precontractual documents via electronic document retrieval, requires debtor consent and format requirements for giving precontractual documents by electronic communication, and sets conditions that must be met when precontractual documents are given other than personally (including via electronic communication).

The Regulations amend the *National Consumer Credit Protection Regulations 2010* to incorporate the effect of ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835.

First, by requiring that where the credit provider has given the precontractual documents in a way other than physically and personally (including by electronic communication), they must be reasonably satisfied that the debtor has received the precontractual documents before entering into a contract or offering to enter into a contract.

Second, the Regulations prescribe document format requirements and debtor consent requirements for giving precontractual documents by electronic communication (including electronic document retrieval).

Third, the Regulations allow for precontractual documents to be given via electronic document retrieval, provided the debtor is notified and the credit provider meets certain requirements for making the precontractual documents available.

The Regulations make minor technical amendments to regulation 26 and regulation 28L of the *National Consumer Credit Protection Regulations 2010*.

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

Part 1 of Schedule 1 to the Regulations commence on 1 October 2023.

Part 2 of Schedule 1 to the Regulations commence on the day after this instrument is registered on the Federal Register of Legislation.

**Details of the Treasury Laws Amendment (Measures for Consultation)
Regulations 2023: Rationalisation of ending ASIC instruments (Tranche 2)**

Commencement

Part 1 of Schedule 1 to the *Treasury Laws Amendment (Measures for Consultation) Regulations 2023: Rationalisation of ending ASIC instruments (Tranche 2)* (the Regulations) commences on 1 October 2023.

Part 2 of Schedule 1 to the Regulations commences on the day after this instrument is registered on the Federal Register of Legislation.

Schedule 1

Schedule 1 to the Regulations amend the *National Consumer Credit Protection Regulations 2010* to prescribe matters related to the giving of precontractual documents to debtors, as required by section 16 of Schedule 1 to the *National Consumer Credit Protection Act 2009* (the Act) (the National Credit Code).

Section 1 inserts a definition of precontractual document into subregulation 3(1) to support the application of these Regulations to precontractual statements, notices varying precontractual statements, and information statements, as required by section 16 of the National Credit Code.

Section 1 of the Regulations also inserts a definition for ‘electronic document retrieval system’ that refers to new regulation 72C.

Requirements when a precontractual document is given other than physically and personally to a debtor

Regulation 72A requires that when a credit provider gives a debtor a precontractual document indirectly, that is in a way other than when the credit provider personally and physically gives the document to the debtor (or to a person acting on the debtor’s behalf), they must be reasonably satisfied that the debtor has received the precontractual document prior to entering into a contract or offering to enter into a contract.

Where a document was given to the debtor via electronic document retrieval system, the credit provider may be reasonably satisfied only if the debtor tells the credit provider they have received the document.

In all other cases, the credit provider may be reasonably satisfied if the document was properly addressed to the debtor and sent to that address (including address). A document that is properly addressed to the debtor is one that has accurately been addressed according to the instructions of the debtor.

In all cases, a credit provider cannot be reasonably satisfied that the debtor has received the document if the debtor has told the credit provider they have not received the document. If this occurs, the credit provider can only be reasonably satisfied if and when the debtor subsequently tells the credit provider they have received the document.

For the avoidance of doubt, a person who is engaging in credit activities as defined under the National Credit Code, cannot be a person acting on the debtor's behalf in order to receive a precontractual document.

Requirements for giving precontractual documents using electronic communication

Regulation 72B sets out additional requirements for giving precontractual documents using electronic communication (including via email and via an electronic document retrieval system).

The credit provider must obtain the consent of a debtor, prior to giving precontractual documents via electronic communication. In order to obtain valid consent, the credit provider must first tell the debtor that the credit provider might no longer provide precontractual documents in a paper form, that the debtor should regularly check for electronic communications, and that the debtor may withdraw their consent at any time.

In addition, the credit provider must provide documents in a format that allows for them to be saved and printed.

Paragraph 6(2)(f) of the ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835 has not been incorporated into the Regulations. This provision provides that one or more precontractual documents may be combined with disclosure documents (within the meaning of regulations 26 of the Regulations) as long as all other requirements of the Act relating to the documents are met. This provision is not necessary, and its exclusion is not intended to prevent the combination of documents.

Making precontractual documents available via an electronic document retrieval system

Regulation 72C allows a credit provider to give precontractual documents to a debtor using an electronic document retrieval system. An electronic document retrieval system is generally a web page or online file sharing system which the credit provider can use to make documents available online for debtors to access and retrieve.

Section 1 of the Regulations inserts a definition for 'electronic document retrieval system' that refers to regulation 72C.

If a credit provider wishes to use an electronic document retrieval system to give precontractual documents to a debtor, sub-regulation 72C(1) provides that they must notify the debtor that the precontractual document is available for retrieval on the system and make the precontractual document available for a reasonable period after giving the debtor the notice. Subregulation 72C(3) requires that the notice provided to the debtor must state what type or types of precontractual document are available for retrieval and include any information that the debtor would need in order to retrieve the precontractual document from the system. Subregulation 72C(2) provides that the credit provider has not given the precontractual document to the debtor until the debtor has been notified and the precontractual document has been made available.

Minor technical amendments relating to requirements regarding disclosure documents

Section 2 of Part 1 of the Regulations and Part 2 of the Regulations incorporate provisions of ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835 that make minor technical amendments to regulation 28L and regulation 26 of the *National Consumer Credit Protection Regulations 2010*.

Section 2 of Part 1 of the Regulations repeals paragraph (e) of the definition of ‘disclosure document’ in Regulation 26 which erroneously defines precontractual documents as ‘disclosure documents’.

Part 2 of the Regulations repeal paragraph 28L(1)(m) which is a drafting error that erroneously applies Regulation 28L to credit provider’s contract documents under section 18 of the National Credit Code.

Part 2 of the Regulations makes an additional minor technical amendment to Paragraph 28L(3)(b) to insert a word so that the phrase “nature of document” is amended to be “nature of the document”.