



**Australian Government**

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Australian Government SME Recovery Loan Scheme

# **SME Recovery Loan Scheme Rules**

Dated 30 April 2021

**The Commonwealth of Australia**

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# General terms

## 1 Interpretation

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### 1.1 Commencement

These SME Recovery Loan Scheme Rules commence on the Effective Date.

### 1.2 Context

These SME Recovery Loan Scheme Rules are made in the following context:

- (a) On 30 March 2020, the Prime Minister, the Hon. Scott Morrison MP and the Treasurer, the Hon. Josh Frydenberg MP, announced the JobKeeper Payment program, which was developed in response to a steep deterioration in economic activity and employment caused by the coronavirus known as COVID-19 (**Coronavirus Pandemic**). JobKeeper had three objectives: supporting business and job survival; preserving the employment relationship; and providing needed income support.
- (b) On 21 July 2020, the Government announced it was extending the provision of JobKeeper Payments until 28 March 2021 and targeting the Payments to those businesses which continued to be significantly impacted by the Coronavirus Pandemic. Eligibility for the JobKeeper Payment was based on actual turnover in relevant periods, so only those eligible businesses which continued to face a downturn in turnover would receive a JobKeeper Payment.
- (c) On 11 March 2021, the Government announced that from 1 April 2021 it would establish the SME Recovery Loan Scheme, which would support the flow of credit to SMEs as they recover from the economic impact of the Coronavirus Pandemic. The SME Recovery Loan Scheme is open to those businesses that received the final quarter of the JobKeeper Payment between 4 January 2021 and 28 March 2021.
- (d) On 27 March 2021, the Government announced that the SME Recovery Loan Scheme would be extended to provide support to businesses affected by the Recent Floods.
- (e) The SME Recovery Loan Scheme is an extension of the Government's existing Coronavirus SME Guarantee Scheme, and has targeted enhancements that will provide even greater support to businesses that were impacted by the economic effects of the Coronavirus Pandemic or by the Recent Floods. The SME Recovery Loan Scheme is designed to assist businesses that are prepared to back themselves through the recovery.
- (f) Under the SME Recovery Loan Scheme, Participating Lenders may offer Eligible Borrowers a deferred repayment facility, following an appropriate credit assessment and in accordance with Relevant Laws and the requirements of these SME Recovery Loan Scheme Rules.
- (g) The Commonwealth of Australia (the **Commonwealth**) has executed a Deed of Guarantee which comes into effect on the Effective Date (**SME Recovery Loan Guarantee**).
- (h) Under the SME Recovery Loan Guarantee, the Commonwealth guarantees Guaranteed Liabilities.
- (i) These SME Recovery Loan Scheme Rules are referred to in the SME Recovery Loan Guarantee and govern access to protection under the SME Recovery Loan Guarantee.

- (j) By signing a SME Recovery Loan Participating Lender Agreement, each Participating Lender agrees to these SME Recovery Loan Scheme Rules and the SME Recovery Loan Guarantee.

### 1.3 Definitions

Unless a contrary intention appears, in this document these terms have the following meanings:

**ABN** means the eleven-digit identifier issued by the Australian Business Register which is administered by the Australian Taxation Office.

**Act** means the *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Act 2020* (Cth) and any rules created under its provisions.

**ADI** means an “authorised deposit-taking institution” (including a Foreign ADI) within the meaning of the *Banking Act 1959* (Cth).

**APRA** means the Australian Prudential Regulation Authority.

**APRA Report** means the APRA reporting form required to be provided by each Participating Lender in respect of each Scheme-Backed Loan in accordance with APRA Reporting Standard ARS 920.6 (*Australian Government Small and Medium Enterprise (SME) Recovery Loan Scheme*) as updated or amended from time to time.

**APRA Report Entry** means each entry in respect of a Scheme-Backed Loan made in the APRA Report last provided by the Participating Lender to the Commonwealth in accordance with the Scheme Documents to evidence the holding of a Scheme-Backed Loan by a Participating Lender.

**APRA Report Entry Form** has the meaning given in Rule 4.1(a) (“APRA Report Entries”).

**ATO JobKeeper Verification Service** means the service provided by the Australian Taxation Office in accordance with section 18A of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth).

**Audit** has the meaning given in Rule 6.1(a) (“Audit Requirements”).

**Bank Bill Swap Bid Rate** means:

- (a) the Australian Bank Bill Swap Reference Rate (Bid) administered by ASX Benchmarks Pty Limited (or any other person which takes over the administration of that rate) for the relevant period displayed on page BBSY of the Thomson Reuters Screen (or any replacement Thomson Reuters page which displays that rate);
- (b) if the rate described in paragraph (a) above is not available, the sum of:
  - (i) the Australian Bank Bill Swap Reference Rate administered by ASX Benchmarks Pty Limited (or any other person which takes over the administration of that rate) for the relevant period displayed on page BBSW of the Thomson Reuters Screen (or any replacement Thomson Reuters page which displays that rate); and
  - (ii) 0.05% per annum; or
- (c) if the rates described in paragraphs (a) and (b) above are not available, the rate determined by the Commonwealth to be the arithmetic mean of the buying rates quoted to the Commonwealth by Major Bank Lenders at or about 10.30am (Sydney time) on that day for bills of exchange accepted by leading Australian banks which have a term equivalent to the relevant period and, if any such rate is below zero, the Bank Bill Swap Bid Rate will be deemed to be zero. Rates will be expressed as a

yield percent per annum to maturity and, if necessary, will be rounded up to the nearest fourth decimal place.

**Borrower Hardship** means, in relation to a borrower and a Participating Lender, circumstances of financial or other hardship for the borrower, as recognised under Relevant Law or Lender Policies, that may affect the borrower's ability to service a relevant Scheme-Backed Loan and where the Participating Lender is required to assist the borrower as part of a forbearance process.

**Business Day** means a day (excluding Saturday and Sunday) on which banks are generally open in Sydney and which in the case of an individual Participating Lender can be amended by the relevant SME Recovery Loan Participating Lender Agreement with that Participating Lender.

**Business Group** means, in relation to a SME, either:

- (a) any group of two or more related bodies corporate as defined in section 50 of the Corporations Act; or
- (b) any group of two or more businesses which are under common management and control or ownership (directly or indirectly).

**Claim** means a valid claim made by a Participating Lender in respect of a Guaranteed Liability in accordance with the Claims Procedures.

**Claim Trigger** means, in relation to a Scheme-Backed Loan, an Impairment Event that occurs on or after the date of the making of an APRA Report Entry in respect of that Scheme-Backed Loan. For the avoidance of doubt, subject to the terms of the Scheme Documents, multiple Claim Triggers may occur with respect to a single Scheme-Backed Loan.

**Claims Procedures** means the procedures set out in Rule 10 ("Claims Procedures").

**Commencement Date** means, in relation to a Participating Lender, the date so designated in the applicable SME Recovery Loan Participating Lender Agreement entered into between the Commonwealth and that Participating Lender.

**Commonwealth** means the Commonwealth of Australia.

**Constitutional Corporation** means a corporation to which paragraph 51(xx) of the *Commonwealth of Australia Constitution Act* (Cth) applies.

**Controller** has the meaning given to that term in the Corporations Act.

**Coronavirus Pandemic** has the meaning given to it in Rule 1.2(a) ("Context").

**Corporations Act** means the *Corporations Act 2001* (Cth).

**Cth Rules** means the *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Rules 2020* (Cth).

**Deferral Period** means, in respect of an Eligible Loan, a period during which an Eligible Borrower is permitted to defer repayment of all principal and payment of accrued interest (but where such principal repayments and payments of interest are permitted to be made at any time during the period without fee or expense at the option of the Eligible Borrower) in accordance with the terms of the relevant facility agreement.

**Disputed Claim** has the meaning given in Rule 10.4 ("Disputed Claims or discrepancies in amounts payable").

**Effective Date** means 1 April 2021.

**Eligibility Criteria** means the requirements for:

- (a) persons to be Eligible Borrowers; and
- (b) forms of credit to be Eligible Loans,

in each case, for the purposes of the Scheme.

**Eligible Borrower** has the meaning given in Rule 3.1 (“Eligible Borrowers”).

**Eligible Loan** has the meaning given in Rule 3.2 (“Eligible Loans”).

**Excluded Borrower** means any of the following:

- (a) if the person is a company:
  - (i) a company to which a liquidator, provisional liquidator, or administrator has been appointed; or
  - (ii) a company for which a restructuring practitioner has been appointed under section 453B of the Corporations Act; or
  - (iii) a company over whose property a Controller has been appointed; or
- (b) if a person is an individual – an individual whose property is under the control of a registered trustee or an Official Trustee in bankruptcy.

**Existing Asset** means any personal or real property which:

- (a) has been leased or purchased before the Loan Agreement Date; and
- (b) is more than half way into its “effective life” as determined in accordance with sections 40-95 to 40-110 of the *Income Tax Assessment Act 1997* (Cth).

**Final Claim Date** means 30 March 2033 unless otherwise extended by the Commonwealth in its absolute discretion.

**Financial Product** has the meaning given in section 12BAA of the *Australian Securities and Investments Commission Act 2001* (Cth).

**Financial Year** means each period of 12 months commencing on 1 July in a calendar year and ending on 30 June in the following calendar year.

**Flood Affected Local Government Area** means a flood affected local government area as published on the Department of the Treasury website and updated by the Commonwealth from time to time for the purposes of the Scheme.

**Foreign ADI** means a “foreign ADI” within the meaning of the *Banking Act 1959* (Cth).

**Guaranteed Liability** has the meaning given to it in the SME Recovery Loan Guarantee.

**Guaranteed Percentage** means eighty percent (80%).

**Impairment Event** means either:

- (a) a Participating Lender:
  - (i) recognising an impairment to a Scheme-Backed Loan; or
  - (ii) writing-off of a Scheme-Backed Loan,

in accordance with Lender Policies as consistently applied in relation to loans and other forms of credit to SMEs of the Participating Lender (to the extent applicable to the relevant secured or unsecured Scheme-Backed Loan); or

- (b) any write down or forgiveness of the amount of any Scheme-Backed Loan in accordance with a decision of the Australian Financial Complaints Authority.

**Information** means all information, regardless of its form (including any form (whether visible or not) of storage from which the information can be reproduced and any form in which the information is embodied or encoded), relating to or developed in connection with the Scheme and the Scheme Documents, including, in the case of an Eligible Borrower, all information provided in any application materials to a Participating Lender and made available to the Commonwealth at any time before, on or after the date of these SME Recovery Loan Scheme Rules.

A person is **Insolvent** if:

- (a) it is (or states that it is) an insolvent under administration or insolvent (each as defined in the Corporations Act); or
- (b) it is in liquidation, in provisional liquidation, under administration, wound up or has had a Controller appointed to its property; or
- (c) it is subject to any arrangement, assignment, moratorium or composition, protected from creditors under any statute, or dissolved (in each case, other than to carry out a reconstruction or amalgamation while solvent on terms approved by the Commonwealth); or
- (d) an application or order has been made (and, in the case of an application, it is not stayed, withdrawn or dismissed within 14 days), resolution passed, or any other action taken, in each case in connection with that person, in respect of any of (a), (b) or (c) above; or
- (e) it is taken (under section 459F(1) of the Corporations Act) to have failed to comply with a statutory demand; or
- (f) it is the subject of an event described in section 459C(2)(b) or section 585 of the Corporations Act (or it makes a statement from which the secured party reasonably deduces it is so subject); or
- (g) it is otherwise unable to pay its debts when they fall due; or
- (h) something having a substantially similar effect to (a) to (g) happens in connection with that person under the law of any jurisdiction.

**Interest Rate Cap** means the percentage rate per annum which is, where the interest rate (or effective interest rate) is:

- (a) variable, the aggregate of:
  - (i) the Margin; and
  - (ii) the greater of:
    - (A) the Bank Bill Swap Bid Rate as published from time to time as of 10:30am (Sydney time) and for the period equal in length to the interest period of the relevant Scheme-Backed Loan; and
    - (B) 0%; or
- (b) fixed, 7.5%.



**Interest Rate Grace Period** means, where the interest rate (or effective interest rate) is variable, a period of 30 days from the date on which the Interest Rate Cap is exceeded by reason of a movement in the Bank Bill Swap Bid Rate. For the avoidance of doubt, there is no interest rate grace period where the interest rate (or effective interest rate) in respect of a credit arrangement is fixed.

**JobKeeper Payment** means, a jobkeeper payment made in accordance with the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth) and the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth).

**JobKeeper Scheme-Backed Loan** means a Scheme-Backed Loan in respect of which an Eligible Borrower satisfies the requirements of Rule 3.1(d)(i).

**Lender Policies** means, in relation to a Participating Lender, the policies and procedures of the Participating Lender which apply in the origination, administration and management of Scheme-Backed Loans including, without limitation, any credit lending, responsible lending, collections and arrears management, Borrower Hardship and enforcement policies.

**Loan Agreement Date** means, in relation to an Eligible Loan and a person, the date that person enters into a written agreement with the relevant Participating Lender for the Eligible Loan (which may not necessarily be the Loan Utilisation Date).

**Loan Application Date** means, in relation to a borrower and a Participating Lender, the date on which the borrower makes an application to the Participating Lender for an Eligible Loan.

**Loan Limit** means, in relation to an Eligible Loan, the total Outstanding Principal Amount that is committed (whether conditionally or unconditionally) to be advanced by the Participating Lender to the Eligible Borrower.

**Loan Utilisation Date** means, in relation to an Eligible Loan, the date of the first utilisation.

**Major Bank Lenders** means:

- (a) Australia and New Zealand Banking Group Limited (ACN 005 357 522);
- (b) Commonwealth Bank of Australia (ACN 123 123 124);
- (c) National Australia Bank Limited (ACN 004 044 937); and
- (d) Westpac Banking Corporation (ACN 007 457 141).

**Margin** means 7.5%.

**Net Amount Payable** means, in relation to a Claim, the amount calculated on the basis of the following formula:

$$N = C - CB$$

where:

- (a) **(C)** is the sum of the following:
  - (i) each Claim made by the Participating Lender and the total amount of such Claims less any payments in respect of such Claims received by the Participating Lender to date; plus
  - (ii) the sum of the amounts calculated pursuant to Rules 10.5(g) and 10.5(h); and
- (b) **(CB)** is the sum of the amounts calculated pursuant to Rules 10.5(e) and 10.5(f) ; and

- (c) (N) is a calculation of the net amount payable by a party such that where N is:
- (i) greater than zero, an amount equal to N is payable by the Commonwealth to the Participating Lender; or
  - (ii) less than zero, an amount equal to the absolute value of N is payable by the Participating Lender to the Commonwealth.

**Non-ADI Lender** means each person which is not an ADI which is designated as a Participating Lender under a SME Recovery Loan Participating Lender Agreement.

**Non-ADI Lender Criteria** means the criteria for the approval of a Non-ADI Lender as a Participating Lender as set out from time to time by the Commonwealth specified in Rule 5.1(c) ("Information and reporting requirements") as amended and notified by the Commonwealth on a website or in writing to prospective Participating Lenders from time to time.

**Official Trustee** has the meaning given to that term in the *Bankruptcy Act 1966* (Cth).

**Other (Non-Deferred Repayment) Facility** means a form of credit that does not allow for a Deferral Period and is identified in a Participating Lender Agreement as an "Other (Non-Deferred Repayment) Facility".

**Outstanding Principal Amount** means in respect of any Scheme-Backed Loan on any date, the total outstanding principal amount (or amount in the nature of principal) that is owed under the terms of that Scheme-Backed Loan on that date (including any capitalised interest and any fees, charges or other amounts payable (including without limitation, break costs) but exclusive of any capitalised enforcement costs).

**Participating Lender** means each person who:

- (a) is either:
  - (i) an ADI or Non-ADI Lender carrying on business in Australia who is either appropriately licensed under all Relevant Laws to engage in the credit activity of providing funding for business purposes to SME borrowers in Australia or who is exempt under such Relevant Laws from such licensing requirements; or
  - (ii) in the case of a Non-ADI Lender, approved under a SME Recovery Loan Participating Lender Agreement by the Commonwealth as an eligible lender having regard to the Non-ADI Lender Criteria; and
- (b) has entered into a SME Recovery Loan Participating Lender Agreement.

**Payment Date** means the date 30 Business Days following the receipt of the account referred in Rule 10.2 ("Accounts and remittances for final Claims").

**Permitted Transfer** means, in relation to a Scheme-Backed Loan, an assignment or transfer of that Scheme-Backed Loan made in accordance with Rule 9 ("Transfers of Scheme-Backed Loans").

**Phase 1 Scheme-Backed Loan** means a loan which was entered into between 23 March 2020 and 30 September 2020 (inclusive) and is the subject of a guarantee made by the Commonwealth under the 'Coronavirus SME Guarantee Scheme' announced on 22 March 2020 by the Prime Minister, the Hon. Scott Morrison MP, and the Treasurer, the Hon. Josh Frydenberg MP to support small and medium enterprises to get through the Coronavirus Pandemic.

**Phase 2 Scheme-Backed Loan** means a loan which was entered into between 1 October 2020 and 30 June 2021 (inclusive) and is the subject of a guarantee made by the

Commonwealth under the 'SME Guarantee Scheme 2.0' announced on 20 July 2020 by the Treasurer, the Hon. Josh Frydenberg MP, and the Minister for Employment, Skills, Small and Family Business, Senator the Hon. Michaelia Cash to enhance lenders' willingness and ability to provide up to \$40 billion in credit to small and medium enterprises to enable them to successfully adapt to the new COVID-safe economy and invest for the future.

**Prohibited Conduct** means any false declaration, misstatement, fraudulent or criminal act (including, without limitation, fraudulent misrepresentation).

**Recent Floods** means the flooding that occurred in March 2021 in the Flood Affected Local Government Areas.

**Recent Flood Scheme-Backed Loan** means a Scheme-Backed Loan in respect of which an Eligible Borrower satisfies the requirements of Rule 3.1(d)(ii).

**Relevant Laws** means all laws relating to the provision of credit, to SME borrowers in Australia (including any other Commonwealth, State or Territory law that covers conduct relating to credit activities (whether or not it also covers other conduct), but only insofar as it covers conduct relating to credit activities with SME borrowers).

**Representative** means:

- (a) in the case of a Securitisation Vehicle, which is a Participating Lender, any third-party ADI or Non-ADI Lender authorised by that Participating Lender to originate Eligible Loans, or to service Scheme-Backed Loans for the Participating Lender (including any back-up servicer); and
- (b) in any other case, any back-up servicer, agent or broker appointed to act for a Participating Lender in connection with Eligible Loans and notified to the Commonwealth in accordance with the Scheme Documents.

**Residential Property** means land or a building that is, or is capable of being, occupied as a residence for residential accommodation in whole or in part, other than:

- (a) a hotel, motel, inn, hostel or boarding house;
- (b) premises used to provide accommodation in connection with a school;
- (c) a ship that is mainly let out on hire in the ordinary course of a business of letting ships out on hire;
- (d) a ship that is mainly used for entertainment or transport in the ordinary course of a business of providing ships for entertainment or transport;
- (e) a marina at which one or more of the berths are occupied, or are to be occupied, by ships used as residences;
- (f) a caravan park or a camping ground; or
- (g) anything similar to property described in paragraphs (a) to (f).

**Scheme** means the Australian Government's SME Recovery Loan Scheme, established by the Commonwealth in accordance with the Act and section 60 of the *Public Governance, Performance and Accountability Act 2013* (Cth).

**Scheme-Backed Loan** means an Eligible Loan that is made by a Participating Lender in accordance with the Scheme Documents in respect of which the Participating Lender has made an APRA Report Entry, and includes JobKeeper Scheme-Backed Loans and Recent Flood Scheme-Backed Loans as applicable.

**Scheme Documents** means:

- (a) these SME Recovery Loan Scheme Rules;
- (b) the SME Recovery Loan Guarantee;
- (c) each APRA Report; and
- (d) as between the Commonwealth and a Participating Lender, the SME Recovery Loan Participating Lender Agreement entered into by that Participating Lender.

**Securitisation Vehicle** means a body corporate or trust which solely carries on the business of securitisation or the issuance of covered bonds in Australia for its Representative.

**Security Interest** means an interest in property provided for by a transaction that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property).

**SME** means an entity that meets both of the following criteria:

- (a) the entity carries on a “business” or is a “non-profit body” during the “current year” (as those terms are defined in section 5 of the Cth Rules); and
- (b) one or more of the following applies:
  - (i) the entity’s “annual turnover” (as defined in section 5 of the Cth Rules) in the 2019-20 financial year was less than \$250 million;
  - (ii) the entity’s “annual turnover” (as defined in section 5 of the Cth Rules) in the 2020-21 financial year is likely to be less than \$250 million;
  - (iii) the entity’s “annual turnover” (as defined in section 5 of the Cth Rules) in the 2021-22 financial year is likely to be less than \$250 million.

**SME Declaration** means a declaration made by a borrower to a Participating Lender covering one or more of the matters specified in Rule 3.3 (“Deemed Satisfaction of Eligibility Criteria”). The declaration may be in written, electronic, verbally recorded or other form, as is reasonable in the circumstances of the Coronavirus Pandemic.

**SME Recovery Loan Guarantee** means the Deed of Guarantee in respect of the SME Recovery Loan Scheme made by the Commonwealth in favour of Participating Lenders effective from the Effective Date and as amended, restated and/or supplemented from time to time.

**SME Recovery Loan Participating Lender Agreement** means an agreement between the Commonwealth and each person who agrees to be a “Participating Lender” for the purposes of the SME Recovery Loan Scheme.

**Specified Rate** means, in respect of any overdue amount and for each day that such amount remains unpaid (inclusive of the day on which it is paid), the general interest charge rate as determined in accordance with section 8AAD of the *Taxation Administration Act 1953* (Cth) on the first day the amount becomes overdue (expressed as a daily rate).

**Suspension Event**, in relation to a Participating Lender, has the meaning given in the SME Recovery Loan Participating Lender Agreement entered into by that Participating Lender.

#### 1.4 General interpretation

Headings are for convenience only and do not affect the interpretation of this document. Unless the contrary intention appears, a reference in this document to:

- (a) a group of persons is a reference to any 2 or more of them jointly and to each of them individually;

- (b) anything (including an amount) is a reference to the whole and each part of it;
- (c) the “**Rules**”, a “**Rule**” or a “**Schedule**” is a reference to the terms of or a term in, or a schedule to, these SME Recovery Loan Scheme Rules;
- (d) a document (including this document) and any code of practice includes any variation or replacement of or supplement to it;
- (e) a “**law**” includes common law, principles of equity, decree and any statute or other law made by any parliament (and statutes or other law made by parliament includes any regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of it from time to time);
- (f) “**Australian dollars**” or “**\$**” is a reference to the lawful currency of Australia;
- (g) a time of day is a reference to Sydney time;
- (h) the singular includes the plural and vice versa;
- (i) a “**party**” is a reference to the Commonwealth or a Participating Lender (as applicable);
- (j) a “**person**” includes an individual, corporation, company, firm, tribunal, undertaking, association, organisation, partnership, joint venture, trust, limited liability company, unincorporated organisation or government or any agency, instrumentality or political subdivision thereof; in each case whether or not being a separate legal entity;
- (k) a particular person includes a reference to the person’s executors, administrators, successors, substitutes (including persons taking by novation) and assigns;
- (l) the words “**including**”, “**for example**” or “**such as**” when introducing an example, do not limit the meaning of the words to which the example relates to that example or examples of a similar kind;
- (m) a notice or other communication that must be given within a certain period of days, the day on which the notice or communication is given, and the day on which the thing is to happen, are not be counted in calculating that period; and
- (n) a notice, report or other communication being provided in writing includes that notice, report or other communication being provided in an electronic form.

## **2 The Scheme**

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### **2.1 Scheme-Backed Loans**

- (a) Scheme-Backed Loans may only be:
  - (i) offered by a Participating Lender or its Representatives; and
  - (ii) made by a Participating Lender.
- (b) A person that is not, at the relevant time, appointed as a Participating Lender (or who is not a Representative of a Participating Lender) is not authorised by the Commonwealth to give any information or make any representation in connection with the Scheme or the Scheme Documents or the affairs of the Commonwealth.
- (c) Matters relating to the offer and administration of Scheme-Backed Loans by Participating Lenders may be set out under each SME Recovery Loan Participating Lender Agreement and otherwise notified in writing by the Commonwealth to each Participating Lender in respect of Eligible Loans entered into after the date of any such notification.

## 2.2 The SME Recovery Loan Guarantee

Matters relating to the application of the SME Recovery Loan Guarantee to Scheme-Backed Loans are subject to, and are governed by, the terms of the SME Recovery Loan Guarantee.

## 2.3 Scheme limit

A Participating Lender must submit an APRA Report Entry in respect of each Eligible Loan made, or to be made, by it in the APRA Report in accordance with Rule 4.1 (“APRA Report Entries”) to obtain a benefit under the SME Recovery Loan Guarantee in respect of a Scheme-Backed Loan.

## 3 Eligibility Criteria

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### 3.1 Eligible Borrowers

To be an **Eligible Borrower** under the Scheme, a person must, as at any Loan Agreement Date:

- (a) have an ABN;
- (b) be a SME which is an existing or new customer of the Participating Lender;
- (c) not be an Excluded Borrower; and
- (d) either:
  - (i) have received, or have been entitled to receive, a JobKeeper Payment in respect of one or more fortnights during the period from 4 January 2021 to 28 March 2021; or
  - (ii) have been adversely economically affected by the Recent Floods, and:
    - (A) be located in a Flood Affected Local Government Area; or
    - (B) operate in a Flood Affected Local Government Area.

### 3.2 Eligible Loans

An **Eligible Loan** under the Scheme may take any form of credit (including one or more overdrafts, working capital, term and revolving facilities but excluding a credit, debit, charge card or business card facility (however described)) and must:

- (aa) be offered in accordance with Rule 3.2A;
- (a) be a new credit arrangement (rather than an extension or increase of an existing credit arrangement) made by a Participating Lender which is a Constitutional Corporation directly to an Eligible Borrower under a written agreement;
- (b) not be secured by any Security Interest in favour of a Participating Lender other than in accordance with Rule 3.4 (“Security applying to Eligible Loans”);
- (c) be payable only in Australian dollars;
- (d) be for business purposes in respect of the Eligible Borrower’s business, other than purposes described in Rule 3.2(e);
- (e) not be used to:
  - (i) acquire an interest in Residential Property or a Financial Product;
  - (ii) refinance any existing financial indebtedness of the Eligible Borrower or any member of its Business Group with the Participating Lender or any third party

- lender, except as expressly permitted by Rule 8 (“Repayment of Scheme-Backed Loans”);
- (iii) provide a loan or other credit arrangement to an ‘associated entity’ within the meaning of section 50AAA of the Corporations Act; or
  - (iv) lease, rent, hire or hire purchase (however described) an Existing Asset;
- (f) be approved and unconditional (subject only to any standard market practice conditions precedent to utilisation) by 31 December 2021;
- (g) have a maximum term ending on a date on or before the first to occur of:
- (i) the date falling 10 years after the Loan Utilisation Date; or
  - (ii) the date falling 10 years and 3 months after the Loan Agreement Date;
- (h) subject to Rule 3.5 (“Interest rate cap”), be priced taking into account the benefit of the SME Recovery Loan Guarantee, and any other relevant factors from time to time, as determined by the Participating Lender;
- (i) have a Loan Limit (excluding fees (whether accrued or capitalised) and other amounts which may be capitalised after the Loan Agreement Date) that does not exceed \$5,000,000 when aggregated with the Loan Limits (excluding fees (whether accrued or capitalised) and other amounts which may be capitalised after the Loan Agreement Date) of all other Scheme-Backed Loans (excluding any Phase 1 Scheme-Backed Loan or any Phase 2 Scheme-Backed Loan) to the Eligible Borrower with the same ABN from any Participating Lender;
- (j) only provide, under the relevant agreement or otherwise, for the payment by the Eligible Borrower of:
- (i) principal and interest (including capitalised interest) or amounts in the nature of principal and interest; and
  - (ii) fees, charges or other amounts payable (such as establishment fees, administration charges or break costs), if any, where the quantum of the fees, charges or amounts so payable (as relevant):
    - (A) are consistent with the payment of fees, charges or other amounts payable under similar forms of credit (not being Scheme-Backed Loans) to SMEs by that Participating Lender; and
    - (B) do not comprise or include fees, charges or other amounts payable in respect of committed but undrawn amounts;
- (k) under the relevant agreement or otherwise and subject to the requirements of Rule 3.2A:
- (i) provide for a Deferral Period of a continuous period of twelve (12) months adjusted to allow for payments falling due on a day which is not a Business Day in accordance with the usual practices of the Participating Lender, commencing on and from the earlier of the Loan Utilisation Date and the date the Participating Lender establishes the Eligible Loan on its systems, unless:
    - (A) the form of credit is an Other (Non-Deferred Repayment) Facility; or
    - (B) the Eligible Borrower requests that no Deferral Period applies or requests a shorter Deferral Period (being a continuous period of between one (1) month and less than twelve (12) months); and

- (ii) require the Participating Lender to reasonably consider, in accordance with its Lender Policies, any request by an Eligible Borrower to extend the Deferral Period under Rule 3.2(k)(i) for a total continuous period of up to 24 months from the Loan Utilisation Date adjusted to allow for payments falling due on a day which is not a Business Day in accordance with the usual practices of the Participating Lender;
- (l) in respect of the relevant form of credit being provided, disclose to the Eligible Borrower, at the Loan Agreement Date:
  - (i) the effective interest rate (including whether variable or fixed);
  - (ii) if a variable interest rate applies, the relevant margin and the underlying base rate (where applicable);
  - (iii) whether the form of credit is an Other (Non-Deferred Repayment) Facility; and
  - (iv) the commencement date of any Deferral Period provided under Rule 3.2(k)(i); and
- (m) have a Loan Agreement Date on or after 1 April 2021.

### **3.2A Offer of, and making available, Scheme-Backed Loans**

Under the SME Loan Recovery Scheme, the Participating Lender (and/or its Representatives) must only offer and make available:

- (a) credit facilities which allow an Eligible Borrower or customer to obtain a Deferral Period in accordance with Rule 3.2(k); or
- (b) where an Eligible Borrower does not accept a credit facility containing a Deferral Period, Other (Non-Deferred Repayment) Facilities.

### **3.3 Deemed Satisfaction of Eligibility Criteria**

- (a) Subject to Rule 3.3(b), Participating Lenders are responsible for undertaking their own investigations and due diligence to verify that the criteria for an Eligible Borrower and Eligible Loan have been met. In the context of a person satisfying the criteria in Rule 3.1(d)(i), a Participating Lender may verify this requirement by:
  - (i) using the ATO JobKeeper Verification Service; or
  - (ii) obtaining a SME Declaration in accordance with Rule 3.3(b).
- (b) The criteria specified in the following Rules may each be conclusively evidenced by a SME Declaration obtained by the Participating Lender:
  - (i) Rule 3.1(d)(i) (“Eligible Borrower”), concerning the Eligible Borrower having received, or having been entitled to receive, a JobKeeper Payment;
  - (ii) Rule 3.1(d)(ii) (“Eligible Borrower”), concerning the Eligible Borrower being adversely economically affected by the Recent Floods, and:
    - (A) being located in a Flood Affected Local Government Area; or
    - (B) operating in a Flood Affected Local Government Area.
  - (iii) Rule 3.2(d) (“Eligible Loans”), concerning the purpose of the credit facility being for the Eligible Borrower’s business;



- (iv) Rule 3.2(e) (“Eligible Loans”), concerning the use, but in the context of Rule 3.2(e)(ii), only in respect of financial indebtedness with any third party lender; and
  - (v) Rule 3.2(i) (“Eligible Loans”), concerning aggregate Loan Limits of all Scheme-Backed Loans.
- (c) This Rule 3.3 does not limit the rights, power and discretions of the Commonwealth under the SME Recovery Loan Guarantee or at law.

### **3.4 Security applying to Eligible Loans**

- (a) An Eligible Loan may only be secured by either or both of the following in favour of a Participating Lender:
- (i) a guarantee; and
  - (ii) a Security Interest other than a Security Interest in respect of Residential Property.
- (b) For the avoidance of doubt, for the purposes of this Rule 3.4, a Participating Lender may enter into security arrangements (such as general security agreements) with an Eligible Borrower which include security over Residential Property provided that the Participating Lender does not apply amounts which are recovered in respect of a Residential Property in discharging any amounts owing to it under the Scheme-Backed Loan.

### **3.5 Interest rate cap**

- (a) The rate of interest on each Scheme-Backed Loan for each interest period (including any default interest rate) must not exceed the Interest Rate Cap.
- (b) If, in relation to any Scheme-Backed Loan and at any time after an Interest Rate Grace Period, a Participating Lender charges an interest rate greater than the Interest Rate Cap, the SME Recovery Loan Guarantee in respect of that Scheme-Backed Loan will be released in full without further action or notice in accordance with the provisions of SME Recovery Loan Guarantee and the form of credit will immediately cease to be an Eligible Loan.

## **4 APRA Report Entries**

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### **4.1 APRA Report Entries**

- (a) A Participating Lender must submit an APRA Report Entry in respect of each Eligible Loan made, or to be made, by it in the APRA Report to obtain a benefit under the SME Recovery Loan Guarantee in respect of a Scheme-Backed Loan. For the avoidance of doubt, the making of an APRA Report Entry is not a pre-condition for the SME Recovery Loan Guarantee to apply with respect to a Scheme-Backed Loan provided that an APRA Report Entry is made in respect of such Eligible Loan in good faith within 6 months of the Loan Agreement Date and before any Claim is made.
- (b) An APRA Report Entry may only be made in respect of Eligible Loans.
- (c) If, at any time after an APRA Report Entry has been made in respect of an Eligible Loan, the Participating Lender becomes aware, or has reason to suspect, that such APRA Report Entry is manifestly incorrect (including where the Participating Lender’s awareness or suspicion has arisen owing to a notice given to it by the Commonwealth or any other person), the Participating Lender must diligently investigate the relevant circumstances and notify the Commonwealth by resubmitting a corrected APRA Report Entry before any Claim is made in respect of the Scheme-Backed Loan.

## 4.2 General provisions for APRA Report Entries

- (a) If an APRA Report Entry:
- (i) is manifestly incomplete or incorrect;
  - (ii) in the Commonwealth's opinion, acting reasonably, includes manifestly inaccurate, misleading or inconsistent Information; or
  - (iii) is made in circumstances where there is no entitlement for the Participating Lender to submit an APRA Report Entry in respect of the proposed Eligible Loan under the Scheme Documents,
- the Commonwealth will notify the Participating Lender accordingly and the Participating Lender will have the opportunity to correct, complete or otherwise amend the APRA Report Entry Form.
- (b) The Commonwealth does not owe any duty or other obligation to a Participating Lender or any other person to review or inspect an APRA Report Entry to ensure it satisfies the Eligibility Criteria. The making of an APRA Report does not relieve a Participating Lender from, nor alter or affect, its responsibilities under the Scheme Documents.
- (c) Subject to Rule 4.2(a), each APRA Report Entry evidences the guarantee by the Commonwealth under the Scheme of the Scheme-Backed Loan to which the APRA Report Entry relates, subject to the Scheme Documents including without limitation clause 5.1.2 of the SME Recovery Loan Guarantee.

## 4.3 Details in APRA Report Entry

Each APRA Report Entry must comply with APRA Reporting Standard ARS 920.6 (*Australian Government Small and Medium Enterprise (SME) Recovery Loan Scheme*) as updated or amended from time to time.

## 5 Reporting

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### 5.1 Information and reporting requirements

The Participating Lender (including for the avoidance of doubt, any Non-ADI Lender) must:

- (a) ensure it complies in all respects with the requirements of the APRA Report, APRA Reporting Standard ARS 920.6 (*Australian Government Small and Medium Enterprise (SME) Recovery Loan Scheme*) and any other reporting standard issued by APRA in connection with the Scheme;
- (b) provide information reasonably requested by the Commonwealth regarding Scheme-Backed Loans (acknowledging that the Commonwealth will consult with the Participating Lender in relation to any such request);
- (c) in relation to any Non-ADI Lender, if requested at any time, whether on, before or after entry into a SME Recovery Loan Participating Lender Agreement, provide:
  - (i) copies of:
    - (A) each Lender Policy then in force;
    - (B) its financial statements, group structure, licences and registrations under Relevant Laws, and funding arrangements; and
    - (C) a legal opinion in relation to entry into the Scheme for review and approval by the Commonwealth; and

- (ii) details of any material changes to be made by it to information provided in Rule 5.1(c)(i) before any such change becomes effective;
- (d) notify the Commonwealth of any criteria (in addition to the criteria described in Rules 3.1 and 3.2) applied by the Participating Lender (and any third-party administrator or Representative engaged by it) where such criteria:
  - (i) are applied to determine the eligibility of, or whether to offer, a prospective borrower an Eligible Loan under the Scheme or to make available another a form of credit; and
  - (ii) either:
    - (A) as expressed, apply solely to Eligible Loans under the Scheme; or
    - (B) are not criteria that apply generally to similar forms of credit (not being Scheme-Backed Loans) to SMEs by that Participating Lender;
- (e) provide details of any material changes to be made by it to the criteria and any other information provided in accordance with Rule 5.1(d) before any such change becomes effective; and
- (f) provide copies of Audit reports prepared in accordance with Rule 6 (“Audit”).

## 5.2 Erroneous information

If the Participating Lender becomes aware of a material error in any of the Information, documents or materials provided by it to the Commonwealth, it must notify the Commonwealth of the erroneous information (and provide the corrected information to the Commonwealth) as soon as reasonably practicable.

## 6 Audit

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### 6.1 Audit Requirements

- (a) A Participating Lender must, if requested by the Commonwealth and following reasonable consultation with the Commonwealth, procure an audit of the activities of the Participating Lender under the Scheme (**Audit**). The Commonwealth may require the Audit to be undertaken by an external auditor or an internal audit team of the Participating Lender.
- (b) The Commonwealth must consult with the Participating Lender in relation to any proposed Audit.
- (c) Each Audit must test a reasonable statistical sample of Scheme-Backed Loans to provide confidence that:
  - (i) the Eligibility Criteria were satisfied at the date of the last APRA Report Entry and continue to be complied with (including, for the avoidance of doubt, by virtue of Rule 3.3 (“Deemed Satisfaction of Eligibility Criteria”)); and
  - (ii) the requirements of Rule 5 (“Reporting”) have been complied with.
- (d) No later than 20 Business Days after the request referred to in Rule 6.1(a), or such longer period as allowed by the Commonwealth, the Participating Lender must submit a written report to the Commonwealth describing (in reasonable detail) the findings of the Audit, the audit process undertaken and the evidence upon which the findings are based.

### 6.2 General

- (a) Any Audit will be based on such audit questions as the Commonwealth may consider to be appropriate.

- (b) Any Audit may be carried out by the Commonwealth, or the Australian National Audit Office or any of their agents, advisors or representatives from time to time.
- (c) If an Audit discloses a significant number of instances of non-compliance with these Rules or a SME Recovery Loan Participating Lender Agreement (including any of the circumstances specified in Rule 4.2(a) (“General provisions for APRA Report Entries”)):
  - (i) the Commonwealth (or any person acting on behalf of the Commonwealth) may produce a written report to the Participating Lender following that Audit; and/or
  - (ii) the Commonwealth may (in its absolute discretion) act in accordance with clause 8 (“Suspension Events”) of the relevant SME Recovery Loan Participating Lender Agreement.

## **7 Scheme Administration**

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- (a) The Commonwealth may, acting reasonably and in consultation with the Participating Lenders or the respective Representatives, establish protocols for administering the Scheme (and notify these to each Participating Lender).
- (b) The Commonwealth may in its discretion make available to each Participating Lender details of:
  - (i) the maximum amount of Scheme-Backed Loans that are then available to be guaranteed under the Scheme by the Commonwealth;
  - (ii) the aggregate balances of APRA Report Entries that have been received by the Commonwealth to date; and
  - (iii) the number and aggregate balances of Scheme-Backed Loans which are the subject of APRA Report Entries in the name of that Participating Lender in each relevant Financial Year.
- (c) The Commonwealth may have additional information published on a website (or if developed, a scheme portal), including but not limited to:
  - (i) the name of the Participating Lenders; and
  - (ii) any amendment or supplement to the Scheme Documents.
- (d) In accessing any website information provided by the Commonwealth, each Participating Lender:
  - (i) is entirely responsible for:
    - (A) managing its own users;
    - (B) any and all actions and activities that occur under any of its user names and passwords;
    - (C) maintaining the confidentiality of each of its user names and passwords; and
    - (D) taking reasonable steps to ensure any content uploaded to the Commonwealth on a website is legible and free from any computer virus; and
  - (ii) agrees:

- (A) not to use the website wrongfully or illegally; and
  - (B) that the Commonwealth is entitled to rely on any act, activity or omission that occurs under a username and password of a Participating Lender.
- (e) To the fullest extent permitted by law, the Commonwealth will not be liable to any person for any loss or damages (including, without limitation, direct or indirect, special, incidental or consequential damages, losses, costs or expenses) arising in connection with:
- (i) any website used to administer the Scheme;
  - (ii) any failure of, or the performance or any error, omission, interruption, defect, delay in operation or transmission, computer virus or line or system failure relating to, any website used to administer the Scheme.
- even if the Commonwealth is advised of the possibility of such damages, losses, costs or expenses.
- (f) To avoid doubt, all declarations, confirmations, representations and warranties made by a Participating Lender on or through a website or other information submitted under the administration protocols (if any) are made to the Commonwealth for the purposes of these Rules.

## **8 Repayment of Scheme-Backed Loans**

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### **8.1 Prohibition on Variations, Restructures, Refinancings and Repayments of Scheme-Backed Loans**

Unless the circumstances in Rule 8.2 (“Permitted Variations, Restructures, Refinancings and Repayments of Scheme Backed Loans”) or Rule 8.4 (“Refinancing of other Loans”) arise, any existing Scheme-Backed Loan which is:

- (a) varied or restructured such that the form of credit:
  - (i) no longer meets the requirements for an Eligible Loan; or
  - (ii) is varied to exceed the Loan Limit; or
- (b) repaid, refinanced or otherwise discharged,

will, to the extent that any of the above occur, cease to be a Scheme-Backed Loan.

### **8.2 Permitted Variations, Restructures, Refinancings and Repayments of Scheme-Backed Loans**

The following events are permitted for the purposes of Rule 8.1 (“Prohibition on Variations, Restructures, Refinancings and Repayments of Scheme-Backed Loans”):

- (a) a restructure or variation by agreement between the Participating Lender and the Eligible Borrower which:
  - (i) is undertaken no more than 10 years and 3 months after the Loan Agreement Date;
  - (ii) is undertaken, at least in part, to support an Eligible Borrower experiencing financial or payment difficulty, including where relevant Borrower Hardship;
  - (iii) results in an outcome where the Eligibility Criteria would have been met had such restructure been in place on the date of the last APRA Report Entry; and

- (b) a conversion no more than 10 years and 3 months after the initial Loan Agreement Date of the product type provided by the Participating Lender to an Eligible Borrower from one Scheme-Backed Loan to a different form of new Scheme-Backed Loan, so long as the Eligibility Criteria continue to be met in relation to all Scheme-Backed Loans between the Participating Lender and the same Eligible Borrower when considered in totality<sup>1</sup>.

### **8.3 Loan Limits and APRA Report Entries in connection with Variations, Restructures, Refinancings and Repayments of Scheme-Backed Loans**

- (a) In the case of Scheme-Backed Loan under which repayments may by its terms be redrawn (a **Revolving Facility**), the APRA Report Entry will continue in respect of the Loan Limit for that Scheme-Backed Loan from the Loan Agreement Date to the date (**Termination Date**) not more than 10 years and 3 months after the Loan Agreement Date in respect of the drawn amount from time to time.
- (b) The amount of any Scheme-Backed Loan which is repaid or otherwise discharged or cancelled (including in accordance with this Rule 8) must be notified in the subsequent APRA Report for a Participating Lender.

### **8.4 Refinancing of other Loans**

A Scheme-Backed Loan may be used to refinance any existing financial indebtedness of an Eligible Borrower with the same ABN, provided that:

- (a) the Loan Agreement Date is on or after 1 April 2021 but before 31 December 2021;
- (b) the Participating Lender has undertaken appropriate credit assessments of the Eligible Borrower (and including without limitation considering the impact and terms of that existing financial indebtedness) in accordance with its Lender Policies;
- (c) where the existing financial indebtedness to be refinanced is wholly or partly with the same Participating Lender, the Participating Lender must be satisfied that, as at the Loan Application Date, the Eligible Borrower is not (or will not be) in arrears by 30 days or more in respect of the payment of any monies due and owing to the Participating Lender under that existing financial indebtedness (excluding any arrears by reason only of a repayment deferral to the Eligible Borrower during the period 1 March 2020 to 31 March 2021 granted by the Participating Lender in response to the Coronavirus Pandemic); and
- (d) the requirements of Rule 3.2 are satisfied including that a Scheme-Backed Loan is not used to:
  - (i) refinance any existing financial indebtedness of an Eligible Borrower that includes security over Residential Property; or
  - (ii) lease, rent, hire or hire purchase (however described) an Existing Asset.

## **9 Transfers of Scheme-Backed Loans**

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### **9.1 Permitted Transfers**

A Scheme-Backed Loan (and any rights, obligations or interests in it or in the mortgage securing it) may only be assigned, made subject to a Security Interest by a Participating Lender or a Securitisation Vehicle or transferred by a Participating Lender to another person where:

- (a) the Commonwealth has given its prior written consent; or

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<sup>1</sup> For example, a six month initial overdraft facility or other product, followed by a replacement P&I facility can in principle meet the Eligibility Criteria.

- (b) the assignment or granting of a Security Interest (as applicable) is to a Securitisation Vehicle whereby funding is raised directly or indirectly on the equitable assignment or granting of security over any rights in respect of the Eligible Loan provided the conditions in Rule 9.2 (“Securitisation arrangements”) are satisfied; or
- (c) the transfer is made pursuant to the *Financial Sector (Business Transfer and Group Restructure) Act 1999* (Cth); or
- (d) the transfer is made as a result of a Non-ADI Lender being Insolvent and the transfer of the assets and business of that Non-ADI Lender to another person,

provided that no assignment or transfer is permitted at any time to any entity or undertaking which carries on the primary business of debt collection in respect of non-performing loans or other forms of credit.

## 9.2 Securitisation arrangements

Any Scheme-Backed Loan may be transferred or assigned to an approved Securitisation Vehicle consented to by the Department of Treasury (such consent not to be unreasonably withheld) provided in all circumstances the Department of Treasury may consider, at its discretion and as at the date the request for the consent is made:

- (a) whether a Participating Lender which is not a Securitisation Vehicle will continue to be the lender of record and whether it or a Representative will service the Scheme-Backed Loan;
- (b) whether the treatment of that Scheme-Backed Loan by the Participating Lender or such other person differs from the treatment of other loans or forms of credit by that Securitisation Vehicle; and
- (c) whether the internal assurance functions of the Participating Lender and the Commonwealth have full access to the information and documentation relating to the Scheme-Backed Loan in order to assess compliance by the Participating Lender with its obligations under the Scheme.

## 10 Claims Procedures

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### 10.1 When Claims may be made

Subject to Rule 10.5 (“Reconciliation of Claim payments”), a valid **Claim** is made by a Participating Lender in respect of any Guaranteed Liability if:

- (a) a Claim Trigger has occurred in respect of the relevant Scheme-Backed Loan;
- (b) the Claim Trigger has been notified to the Commonwealth in writing and such notification is made in accordance with any requirements specified by the Commonwealth and includes details of:
  - (i) the amount of the relevant Guaranteed Liability;
  - (ii) each APRA Report Entry to which the Claim Trigger relates; and
  - (iii) any other information reasonably requested by the Commonwealth;
- (c) the Claim is for an amount that is not greater than the Guaranteed Liability for each applicable APRA Report Entry;
- (d) the Claim is made on or before the Final Claim Date; and
- (e) the Participating Lender has provided any other information on reasonable request by the Commonwealth (acknowledging that the Commonwealth will consult with the Participating Lender in making any such requests under this Rule 10.1(e)).

## 10.2 Accounts and remittances for final Claims

- (a) No later than six (6) Months after the Final Claim Date each Participating Lender must submit to the Commonwealth an account detailing the Net Amount Payable.
- (b) A Participating Lender must, if requested in writing by the Commonwealth (in its absolute discretion), submit to the Commonwealth, no later than 30 September 2034, a further account detailing the Net Amount Payable.

## 10.3 Payments in respect of valid final Claims

- (a) All amounts determined, at the relevant time, to be payable under Rule 10.2 ("Accounts and remittances for final Claims") must be paid by the relevant party to the other on or before the Payment Date.
- (b) All payments by one party to the other under this Rule 10.3 must be made by or on behalf of the paying party to such bank account as the receiving party will have notified in writing to the paying party on or before the Commencement Date relating to the Participating Lender (or, in the event of a change, notified not less than 5 Business Days before the date on which the relevant payment is due).
- (c) If either party fails to make a payment due by the Payment Date, such party will be liable to pay interest to the other party on the outstanding amount at the Specified Rate on the Payment Date.

## 10.4 Disputed Claims or discrepancies in amounts payable

- (a) If, in relation to any Claim, the Commonwealth is not satisfied:
  - (i) that the requirements of this Rule 10 have been met; or
  - (ii) as to the determination of any amounts recovered,the Commonwealth may notify the Participating Lender of such fact, in which event the Claim will be a disputed Claim (**Disputed Claim**).
- (b) If the Commonwealth notifies the Participating Lender of a Disputed Claim on or before the 3rd Business Day before the Payment Date, the amount payable will:
  - (i) if payable by the Commonwealth – be adjusted to the amount which the Commonwealth considers to be payable; and
  - (ii) if payable by the Participating Lender – remain as calculated by the Participating Lender.
- (c) For the avoidance of doubt, nothing in these Rules prevents the Commonwealth notifying the Participating Lender of a Disputed Claim under Rule 10.4(a) after payment in relation to the Claim has been made.
- (d) If by written notice a party determines that an amount payable by one party to the other under Rule 10.2 ("Accounts and remittances for final Claims") is different from that actually paid, the parties must use reasonable endeavours to negotiate in good faith to determine the amount payable and the payment will be adjusted by the amount agreed between the parties accordingly.

## 10.5 Reconciliation of Claim payments

If:

- (a) an amount is recovered by a Participating Lender (other than under the SME Recovery Loan Guarantee) in respect of a Scheme-Backed Loan for which the Participating Lender holds a Security Interest, the Participating Lender must not apply amounts which are recovered from a Security Interest which is in respect of a



Residential Property in discharging any amounts owing to it under the Scheme-Backed Loan;

- (b) following a Claim, and subject to paragraph (a) above, an amount is recovered by a Participating Lender (other than under the SME Recovery Loan Guarantee) in respect of the Scheme-Backed Loan to which the Claim relates (including from a third party guarantor or security provider) and after deduction for the following amounts in order:<sup>2</sup>
- (i) firstly, enforcement costs in respect of that amount;
  - (ii) secondly, the amount of any payments clawed back or set aside under any laws relating to the insolvency or bankruptcy of an Eligible Borrower;
  - (iii) thirdly, if the Participating Lender holds a Security Interest applicable both to the Scheme-Backed Loan and to other financial indebtedness of the Eligible Borrower, amounts to discharge the other secured financial indebtedness due to the Participating Lender on a pro rata basis as between the Scheme-Backed Loan and the other secured financial indebtedness; and
  - (iv) fourthly, amounts to discharge other unsecured financial indebtedness due to the Participating Lender by the Eligible Borrower on a pro rata basis as between the Scheme-Backed Loan and the other unsecured financial indebtedness;

the remaining amount is:

- (v) greater than the remaining book value applied in determining the Guaranteed Liability for the purposes of the SME Recovery Loan Guarantee (**Excess Amount**); or
  - (vi) less than the remaining book value applied in determining the Guaranteed Liability for the purposes of the SME Recovery Loan Guarantee (**Deficiency Amount**); or
- (c) prior to a Participating Lender submitting the accounting under Rule 10.2 (“Accounts and remittances for final Claims”) any payment made by an Eligible Borrower to a Participating Lender under an Eligible Loan is clawed back from the Participating Lender under any laws relating to the insolvency or bankruptcy of that Eligible Borrower, except to the extent already deducted by the Participating Lender in accordance with Rule 10.5(b)(ii) (**Void Amounts**); or
- (d) the Participating Lender or the Commonwealth becomes aware that the Scheme-Backed Loan to which a Claim relates was entered into, or actions or omissions in relation to the Scheme Documents were taken or not taken in respect thereof, as a consequence of Prohibited Conduct on the part of the Participating Lender, its Representative, officers, employees or agents or any other person acting on behalf of the Participating Lender, in each case as finally determined by a court, an arbitrator or any relevant regulatory authority in Australia,

then that Participating Lender must include in the account provided pursuant to Rule 10.2 (“Accounts and remittances for final Claims”):

- (e) an amount equal to the Guaranteed Percentage of the Excess Amount (if any); plus

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<sup>2</sup> The order of deductions is to ensure consistency in the approach to calculating the deductions in order to determine the remaining amount, and is not an order of the relative priority of the amounts or the priority of the parties’ respective interests. Amounts applied to discharge non-Scheme-Backed Loan indebtedness are pro rated in order to cap deductions by reference to the Scheme-Backed Loan to which the amount recovered relates.

- (f) an amount paid by the Commonwealth in respect of any Claim pursuant to paragraph (d); less
- (g) an amount equal to the Guaranteed Percentage of any Void Amount; less
- (h) an amount equal to the Guaranteed Percentage of the Deficiency Amount (if any).

## **10.6 Application of the SME Recovery Loan Guarantee in the event of Prohibited Conduct**

If, after the relevant Loan Agreement Date, a borrower is found to have engaged in Prohibited Conduct, a Participating Lender will still be entitled to make a Claim in respect of that borrower's Scheme-Backed Loan provided that:

- (a) the Participating Lender has acted reasonably and in good faith in relation to the relevant Scheme-Backed Loan; and
- (b) the Participating Lender satisfies the Claims Procedures.

## **11 Changes to these SME Recovery Loan Scheme Rules**

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### **11.1 Changes to these Rules by the Commonwealth**

The Commonwealth may, at any time and in its absolute discretion, amend or supplement these Rules by publishing such amendment or supplement on a website or by notice in writing (and the Commonwealth will endeavour to notify each Participating Lender in writing of the publication), provided that such amendment or supplement does not:

- (a) reduce the Commonwealth's obligations to a Participating Lender under the SME Recovery Loan Guarantee or any Scheme-Backed Loan in a manner which is prejudicial to the interests of the Participating Lender in respect of any subsisting Guaranteed Liability or any existing Scheme-Backed Loan; or
- (b) have retrospective effect (unless it is to correct a manifest or proven error or an omission of a wholly technical nature and the correction is not (in the Commonwealth's opinion) prejudicial to the rights or interests of the Participating Lender under the SME Recovery Loan Guarantee or subsisting Scheme-Backed Loan).

The Commonwealth will use reasonable endeavours to consult (in such manner as the Commonwealth sees fit) with the Participating Lenders before making any such amendment or supplement, unless the Commonwealth determines that the proposed amendment or supplement should be implemented as a matter of urgency or for purposes of compliance by the Commonwealth with the requirements of the Act.

### **11.2 Changes required by the Federal Government or owing to law**

The Commonwealth may, at any time and at its absolute discretion, amend or supplement these Rules at the express written direction of the Minister or owing to a change in law or Commonwealth policy that affects any matters that are the subject of such document.

### **11.3 Date amendment or supplement becomes effective**

Except where the prior written consent of the Participating Lender is required, an amendment or supplement made in accordance with this Rule 11 does not take effect until the expiry of a period of 10 Business Days (or such longer period as specified by the Commonwealth) following the day on which notice of the amendment or supplement is first notified by the Commonwealth.

### **11.4 Modifications**

The Commonwealth may (in its absolute discretion, and with the written agreement of the Participating Lender), without amending or supplementing these Rules generally, modify the application of these Rules in relation to a particular matter, circumstance or thing, provided in all cases that such modification does not contravene the Act.

## **12 Notices in relation to the Scheme Documents**

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All notices, certificates, claims, demands, consents, approvals, waivers and other communications required to be provided in connection with a Scheme Document:

- (a) must be in the form and delivered as required by the Scheme Document; or
  - (b) if the Scheme Document does not include such provisions:
    - (i) must:
      - (A) be made in writing;
      - (B) delivered by hand, prepaid post or email to the address (as appropriate) as notified to the sender by the recipient from time to time;
      - (C) signed or submitted by or sent from the email account of a duly authorised officer of the sender; and
      - (D) marked for attention in the way notified to the sender by the recipient from time to time; and
    - (ii) will take effect from the time they are received unless a later time is specified in them, where:
      - (A) if submitted, published or otherwise notified, are taken to be received on the date they are so submitted, published or made available;
      - (B) if sent by post, are taken to be received five (5) Business Days after posting (or seven (7) Business Days after posting if sent across international boundaries);
      - (C) if sent by email, are taken to be received when the email is dispatched by the sender to each of the email addresses specified by the recipient, unless, for each of the addresses, the sender receives an automatic notification that the email has not been received (other than an out of office greeting for the named addressee) and it receives the notification before 2 hours after dispatch; or
      - (D) if given by hand, are taken to be received at the time of delivery,
- and, in all cases, if they are received after 5.00pm in the place of receipt or on a non-Business Day, they are taken to be received at 9.00am on the next Business Day.

## **13 General**

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### **13.1 Participating Lender indemnity**

A Participating Lender indemnifies the Commonwealth for any breach by such Participating Lender of the terms of the Scheme Documents attributable to fraud or criminality on the part of that Participating Lender, its Representative, officers, employees or agents or any other person acting on behalf of the Participating Lender, in each case as finally determined by a court, an arbitrator or any relevant regulatory authority in Australia.

### **13.2 Governing law and jurisdiction**

- (a) These Rules are governed by the laws of New South Wales.

- (b) The courts having jurisdiction in New South Wales have non-exclusive jurisdiction to settle any dispute arising out of or in connection with these Rules.
- (c) Notwithstanding Rule 13.2(b), the Commonwealth will not be prevented from taking proceedings relating to a relevant dispute in any other courts with jurisdiction. To the extent allowed by law, the Commonwealth may take concurrent proceedings in any number of jurisdictions.

### **13.3 Compliance with laws**

Nothing in these Rules requires the Commonwealth to contravene the Act nor any other law in the performance and compliance by it of its obligations under the Scheme Documents.