

**EXPLANATORY STATEMENT for**  
**ASIC Corporations (Concept Validation Licensing Exemption) Instrument**  
**2016/1175 and**  
**ASIC Credit (Concept Validation Licensing Exemption) Instrument**  
**2016/1176**

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

*National Consumer Credit Protection Act 2009*

The Australian Securities and Investments Commission (ASIC) makes ASIC Corporations (Concept Validation Licensing Exemption) Instrument 2016/1175 under section 926A(2)(a) of the *Corporations Act 2001* (Corporations Act). Paragraph 926A(2)(a) provides that ASIC may exempt a person, or class of persons, from all or specified provisions in Part 7.6 of that Act (except Divisions 4 and 8).

ASIC also makes ASIC Credit (Concept Validation Licensing Exemption) Instrument 2016/1176 under paragraph 109(3)(a) of the *National Consumer Credit Protection Act 2009* (National Credit Act). Paragraph 109(3)(a) of the National Credit Act provides that ASIC may exempt a class of persons from all or specified provisions in Chapter 2 of that Act.

## **1. Background**

ASIC is committed to facilitating innovation that is likely to produce good outcomes for investors and financial consumers. We have established an Innovation Hub to help new, financial technology (fintech) business navigate our regulatory frameworks.

Based on our work through the Innovation Hub, ASIC has identified three interconnected issues that affect new fintech businesses seeking to provide financial services or engage in credit activities. These issues are:

- a. ***speed to market*** – the time and cost of obtaining a licence from ASIC to demonstrate consumer interest in, and viability of, a new service can be a significant issue, particularly for new businesses with limited resources;
- b. ***organisational competence*** – founders of innovative businesses often have some experience in providing financial services or credit, but may not fully meet the required organisational competence standards by demonstrating the specific

qualifications, training and experience requirements set out in existing ASIC policies; and

- c. ***access to capital*** – a separate but related overarching concern is the difficulty new businesses face in attracting investment or finance, which exacerbates the other two issues as it drives new businesses to proceed to market quickly (to increase their chances of obtaining initial funding) but means there are limited funds to pay for experienced staff to satisfy the organisational competency requirements.

ASIC has concluded that, in some circumstances, allowing fintech businesses to test their new products and services before they obtain a licence can help alleviate these barriers to innovation by:

- a. allowing concepts to be validated and refined before businesses spend the time and money associated with obtaining an Australian financial services (AFS) or Australian credit licence; and
- b. providing increased opportunities for businesses to obtain investment that may assist with meeting the costs of complying with the law.

## 2. Purpose of the instrument

ASIC has made ASIC Corporations (Concept Validation Licensing Exemption) Instrument 2016/1175 (the ***AFS licence exemption***) and ASIC Credit (Concept Validation Licensing Exemption) Instrument 2016/1176 (the ***credit licence exemption***), which allow eligible businesses to test certain products and services for 12 months without needing to obtain an AFS licence or credit licence, respectively.

The AFS licence exemption and credit licence exemption allow concept validation of a business model without holding a licence in circumstances where many fundamental consumer protections still apply in some form, and the services being tested are limited in scope to minimise the risk of consumer losses, particularly where the business ceases operations following the end of the testing period. This is consistent with ASIC's work facilitating innovation, which has been guided by our broader strategic objectives of:

- a. promoting investor and financial consumer trust and confidence; and
- b. ensuring fair, orderly, transparent and efficient markets.

## 3. Operation of the instrument

The operation of the AFS licence exemption and the credit licence exemption is explained in Section C to E of Regulatory Guide 257 *Testing fintech products and services without holding an AFS or credit licence* (RG 257).

## **The licence exemptions**

Subsection 5(1) of the AFS licence exemption provides that a person does not need to hold an AFS licence to:

- a. provide financial product advice in relation to an eligible product;
- b. deal in an eligible product (other than by way of issuing or varying the eligible product).

Similarly, subsection 5(1) of the credit licence exemption provides that a person does not need to hold a credit licence to provide credit services in relation to an eligible credit contract.

## **Eligibility for the exemptions**

### *Eligible persons*

Both the AFS licence exemption and the credit licence exemption only apply to ‘eligible persons’ as defined in each instrument.

A person is eligible for the AFS licence exemption so long as they are not:

- an AFS licensee;
- a related body corporate of an AFS licensee; or
- an authorised representative authorised to provide financial services in relation to products covered by the exemption.

A person is eligible for the credit licence exemption so long as they are not:

- a credit licensee;
- a related body corporate of a credit licensee;
- a credit representative.

Under both instruments, a foreign company seeking to rely on the exemptions must register under Part 5B.2 of the Corporations Act. Foreign companies that do not register under those laws are not ‘eligible persons’ under either instrument.

### *Eligible products and contracts*

Both the AFS licence exemption and the credit licence exemption only apply to services that relate to specified types of eligible products or contracts.

An eligible person can rely on the AFS licence exemption to provide advice about, or deal in:

- non-cash payment facilities issued by an ADI (within the meaning of the *Banking Act 1959*);

- home contents insurance product or personal and domestic property insurance products (with the meaning of the *Corporations Regulations 2001*) where the sum insured under those products does not exceed \$50,000;
- managed investment products in relation to a simple managed investment scheme (with the meaning of the *Corporations Regulations 2001*); and
- quoted securities.

The value of the products (other than the insurance products listed above) must be below \$10,000: see subsection 6(3) of the AFS licence exemption.

In the credit context, an eligible person can rely on the credit licence exemption to provide credit services about credit contracts:

- that are not reverse mortgages, short-term credit contracts or small amount credit contracts;
- are not secured by a mortgage over residential property;
- where the credit limit of the contract does not exceed \$25,000; and
- the annual cost rate of the contract does not exceed 24% – this is lower than the statutory maximum annual cost rate of 48%.

### **ASIC powers to revoke exemption**

Subsection 5(2) of each instrument provides that ASIC can issue a notice to a person to the effect that that person cannot rely on the relevant licensing exemption.

### **Notifying ASIC**

Subsection 6(1) of each instrument provides that a person seeking to rely on the AFS licence exemption or credit licence exemption must notify ASIC before they begin to provide services without a licence. When providing notice to ASIC, the person must also provide information to ASIC. The information required is the same for each exemption and includes:

- the name of the legal person seeking to rely on the exemption;
- the person's Australian Business Number (ABN), Australian Company Number (ACN) or Australian Registered Body Number (ARBN) (if applicable);
- whether the person is a foreign company and whether they have registered under Pt 5B.2 of the Corporations Act;
- a key contact person and contact number;
- the principal business address;
- details of the website (if applicable);

- the names and dates of birth of all directors and controllers, as well as certified copies of bankruptcy checks and national criminal histories for each of those persons;
- whether or not there are any experts assisting the person (e.g. consultants), and if so, who they are;
- confirmation of the person's external dispute resolution scheme membership; and
- confirmation of adequate compensation arrangements (e.g. PI insurance arrangements).

### **Client numbers**

Paragraph 6(1)(b) of each instrument provides limits on the number of clients in relation to which services can be provided under the exemption. These limits are consistent with the intent of the exemptions: to test the viability of a business concept, and not to operate a substantial business without a licence.

Under the AFS licence exemption, a person relying on the exemption can provide services to up to 100 retail clients. There are no limits on the number of wholesale clients to whom services can be provided, although the value of all products in relation to which services are tested under the exemption is capped at \$5 million.

Under the credit licence exemption, a person relying on the exemption can provide credit services to up to 100 consumers.

### **Exemption term**

Each exemption applies for a period of 12 months. A person's exemption period starts 14 days after the person gives ASIC notice that they will rely on the relief. A person can only rely on each exemption once.

### **Conditions**

Section 7 of each instrument imposes broadly similar conditions on persons that rely on the AFS licence exemption and the credit licence exemption. The conditions are intended to limit the risk of poor conduct or outcomes affecting a large number of clients, assist consumers to understand the services being tested, and ensure that recourse is available in the event of a dispute.

#### *Disclosure conditions*

A person relying on the AFS licence exemption or the credit licence exemption must comply with the substance of the normal disclosure requirements. For the AFS licence exemption this will involve providing the type of information normally found in a Financial Services Guide. For the credit licence exemption, this includes the requirement to give a credit guide, a proposal document and/or a quote.

Persons relying on either exemption must also clearly disclose to their customers that they will receive services that are being tested without a licence (and that some of the normal protections will not apply).

#### *Other conditions*

Persons relying on either exemption must also:

- maintain the same dispute resolution processes as licensees (and maintain their external dispute resolution scheme membership for at least 12 months after the exemption ceases to apply to them); and
- maintain arrangements to compensate other persons for loss or damage resulting from contraventions of the relevant legislation or instruments.

A person providing credit assistance under the credit licence exemption also needs to comply with the responsible lending obligations that normally apply to licensees. The primary requirement is to conduct a preliminary assessment that the credit contract is ‘not unsuitable’ for the consumer. The credit contract will be unsuitable if:

- the contract does not meet the consumer’s requirements and objectives; or
- the consumer will be unable to meet their payment obligations, either at all or only with substantial hardship.

Where a person is relying on the AFS licence exemption to provide personal advice to retail clients, they will also need to comply with the best interests duty in Part 7.7A of the Corporations Act.

## **4. Consultation**

We published Consultation Paper 260 *Further measures to facilitate innovation in financial services* (CP 260) on our proposals to facilitate innovation, including conditional licensing relief to allow service testing. We received 29 submissions in response to our consultation paper; the main feedback in these submissions is summarised in Report 508 *Response to submissions on CP 260 Further measures to facilitate innovation in financial services* (REP 508).

We consulted with the Office of Best Practice Regulation (OBPR) about whether a Regulatory Impact Statement (RIS) was necessary for the AFS licensing exemption, credit licensing exemption, and other measures described in CP 260. OBPR confirmed that a RIS was not required because the measures were minor and machinery in nature.

# Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

## **ASIC Corporations (Concept Validation Licensing Exemption) Instrument 2016/1175 and**

## **ASIC Credit (Concept Validation Licensing Exemption) Instrument 2016/1176**

ASIC Corporations (Concept Validation Licensing Exemption) Instrument 2016/1175 and ASIC Credit (Concept Validation Licensing Exemption) Instrument 2016/1176 are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### **Overview**

ASIC Corporations (Concept Validation Licensing Exemption) Instrument 2016/1175 and ASIC Credit (Concept Validation Licensing Exemption) Instrument 2016/1176 allow eligible persons to test certain products and services for 12 months without needing to obtain an AFS licence or credit licence, respectively.

The intention of these instruments is to promote innovation in financial services and credit by facilitating unlicensed testing of certain types of services while maintaining many of the normal protections that apply to consumers.

### **Human rights implications**

The instruments requires that a person who relies on the relief provide information to ASIC in relation to the services they wish to test and the persons who will do the testing, including personal information about the testing person (if a natural person) or the directors and controllers of the testing person (if a body corporate) such as their name and dates of birth.

ASIC will make some information public on its website to promote transparency in the testing of services without a licence. This will include the person's name, some limited information about the service they will provide and the period during which they can provide that service without a licence.

The instruments may therefore engage the human right to privacy under Article 17 of the International Covenant on Civil and Political Rights. That Article prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. ASIC considers that the instruments are compatible with the right in Article 17.

The right in Article 17 is not absolute. The right has implied limitations ('unlawful' and 'arbitrary') and may be subject to a permissible limitation where that limitation aims to achieve a legitimate objective, there is a rational connection between the limitation and the objective and the limitation is reasonable, necessary and proportionate. Any limitation imposed on the right by the Instrument has a clear legal basis, in that it:

- (a) *Aims to achieve a legitimate objective* –The objective of ASIC in requiring the information to be made public is to:
  - (i) ensure that ASIC is aware of the identity of each person who relies on the instruments to facilitate appropriate supervision of the those activities in the context of the licensing exemptions; and
  - (ii) provide some protections to consumers by publically identifying the persons testing without a licence. We consider that transparency will encourage

compliance with the conditions associated with the exemptions ASIC has provided.

(b) *Is reasonable, necessary and proportionate* –The information is required to enable ASIC, consumers and prospective consumers to identify each person who seeks to rely on the licensing exemptions. ASIC requiring the name, address and date of birth of a person who is a relying on the instruments (or controls a body corporate that relies on the exemption) is necessary and proportionate to this objective. The Corporations Act requires equivalent information to be made publicly available by a person who is a director or secretary of a company.

The instruments do not otherwise engage any of the applicable rights or freedoms.

## **Conclusion**

The Instrument is compatible with human rights. Any interference with the human right to privacy is incidental to its primary operation. Where that interference occurs, it is reasonable, necessary and proportionate in order for the person relying on the relied to be transparent in its operations and to facilitate appropriate supervision of the services provided without a licence.

## **Australian Securities and Investments Commission**