

ASIC CREDIT (AMENDMENT) INSTRUMENT 2018/114

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

National Credit Code

The Australian Securities and Investments Commission (*ASIC*) makes the ASIC Credit (Amendment) Instrument 2018/114 under subsection 203A(3) of the National Credit Code (the *Code*).

Under subsection 203A(3) ASIC may exempt a class of persons, credit contracts or consumer leases from all or specified provisions of the Code.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

1. Background

The *Consumer Credit Legislation Amendment (Enhancements) Act 2012* (the *Amendment Act*) amended the *National Consumer Credit Protection Act 2009* (the *Credit Act*), including the Code, to introduce a number of reforms to the regulation of hardship variations. Where a consumer is experiencing financial difficulties in repaying their loan, a consumer may ask their credit provider to vary or change their loan repayments under the hardship provisions of the Credit Act.

The Amendment Act introduced changes to the pre-existing hardship application processes, with the relevant provisions in effect from 1 March 2013. The procedures for processing hardship variation applications require credit providers and lessors to record any changes to the contract and provide written notice to the debtor or lessee, even where the parties come to an agreement for a simple arrangement (that is, any agreement that defers or reduces the obligations of a debtor or lessee for a period of no more than 90 days).

Contracts that were entered into prior to 1 March 2013 remain subject to the pre-existing hardship variation provisions. This has the effect of creating two hardship systems.

To minimise the administrative burden on industry, the *National Consumer Credit Protection Amendment Regulations 2013 (No. 1)* (the *Amendment Regulations*) amended the *National Consumer Credit Protection Regulations 2010* (the *Principal Credit Regulations*). The new regulations 69A and 69B in the Principal Credit Regulations provided transitional exemptions for credit providers and lessors to:

- record the fact that the credit provider and debtor (or lessor and lessee) have agreed to change the contract (or consumer lease) in a hardship variation; and

- provide written notice setting out the particulars of any changes in the terms of the contract (or consumer lease) in the case of simple arrangements.

The exemptions lasted until 1 March 2014. They were extended for 12 months through ASIC Class Order [CO 14/41] (*CO 14/41*) and for a further 12 months through ASIC Class Order [CO 15/130] to 1 March 2016. Following this, the exemptions were extended for a further 24 months through ASIC Credit (Amendment) Instrument 2016/62 to 1 March 2018. The exemptions were extended to allow ASIC time to consult with stakeholders to develop a recommendation to Treasury regarding what obligations credit providers and lessors should have to record any contractual changes and provide written notice to debtors and lessors where the parties come to an agreement for a simple arrangement.

One key issue that emerged during ASIC's stakeholder consultations was the impact of recent changes to credit reporting under the *Privacy Act 1988 (Cth)* (Privacy Act), including how hardship arrangements should be reflected in the repayment history information in a consumer's credit report. This will have significant implications for consumers who have agreed to a hardship arrangement with their credit provider. ASIC considers that this issue should be settled before ASIC finalises its recommendation to Treasury regarding simple arrangements. The resolution of this issue may require changes to the Privacy Act.

2. Purpose of the legislative instrument

The purpose of this legislative instrument is to extend the relief given by CO 14/41 (which extended the transitional exemptions in regulations 69A and 69B) for a further interim period in order to allow:

- The issue of the reporting of repayment history information under a hardship arrangement to be resolved;
- Subject to the outcome of those discussions, ASIC to provide its recommendation to Treasury regarding the transitional exemptions;
- Treasury to consider ASIC's recommendations and reform the law if and as it considers appropriate; and
- Credit providers and lessors to update their systems in accordance with any amendments made.

As the issue relating to the reporting of repayment history information may require changes to the Privacy Act, we have extended the interim relief for a period of two years to provide sufficient time.

3. Operation of the legislative instrument

This legislative instrument amends CO 14/41 to extend the relief given by that instrument for two years. CO 14/41 as amended will provide continued relief from requirements in the Code for a credit provider or lessor to:

- record the fact that the credit provider and debtor (or lessor and lessee) have agreed to change the contract (or consumer lease) in a hardship variation; and
- provide written notice setting out the particulars of any changes in the terms of the contract (or consumer lease) in the case of simple arrangements.

The relief has effect to 1 March 2020.

4. Consultation

Treasury conducted extensive consultation with stakeholders (including ASIC, individual credit providers and industry bodies) as part of the development and implementation of the Amendment Act. The problems addressed by the Amendment Regulations were identified by industry stakeholders during this consultation process.

In 2014 and 2015 ASIC consulted with stakeholders (including industry bodies, individual credit providers and consumer advocates) in relation to the transitional exemptions included in the Amendment Regulations and in relation to the need for guidance on the hardship process outlined in section 72 of the Code.

During 2016 to 2018 ASIC has continued to consult with industry and affected stakeholders in relation to the hardship process and the interaction with credit reporting requirements. The Government announced on 2 November 2017 that it would legislate for a mandatory comprehensive credit reporting regime to come into effect by 1 July 2018, requiring the big four banks to participate fully in the credit reporting system. Draft exposure legislation and accompanying explanatory materials, implementing this measure were released for public comment on 8 February 2018.

ASIC has also consulted with Treasury on the need to extend further the relief provided by CO 14/41. Treasury agrees with the need to extend the relief.

Statement of Compatibility with Human Rights

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

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This instrument is 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 of the legislative instrument

This legislative instrument extends until 1 March 2020 the relief provided by ASIC Class Order [CO 14/41] from requirements in the National Credit Code for a credit provider or lessor to:

- record the fact that the credit provider and debtor (or lessor and lessee) have agreed to change the contract (or consumer lease) in a hardship variation; and
- provide written notice setting out the particulars of any changes in the terms of the contract (or consumer lease) in the case of simple arrangements.

Relief to the same effect was given regulations 69A and 69B of the *National Consumer Credit Protection Regulations 2010* until 1 March 2014 and has been since extended through various instruments.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.