

EXPLANATORY STATEMENT for ASIC Credit (Amendment) Instrument 2018/665

Prepared by the Australian Securities and Investments Commission

National Consumer Credit Protection Act 2009

The Australian Securities and Investments Commission (**ASIC**) makes *ASIC Credit (Amendment) Instrument 2018/665 (amending instrument)* under paragraph 163(3)(d) of *National Consumer Credit Protection Act 2009* (the **Credit Act**) and subsection 203A(3) of the National Credit Code (the **Credit Code**) in Schedule 1 to the Credit Act. Paragraph 163(3)(d) of the Credit Act relevantly provides that ASIC may, by legislative instrument, declare that Chapter 3 of the Credit Act applies to a class of persons as if specified provisions were modified or varied as set out in the declaration. Subsection 203A(3) of the Credit Code relevantly provides that ASIC may, by legislative instrument, exempt a class of persons, contracts, mortgages, guarantees or consumer leases from all or specified provisions of the Credit Code.

The amending instrument amends *ASIC Credit (AFCA transition) Instrument 2018/448* (the **primary instrument**). 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 *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Act 2018* (the **AFCA Act**) establishes a single financial services external dispute resolution scheme: the Australian Financial Complaints Authority (**AFCA**). AFCA will replace the two existing ASIC-approved external dispute resolution (**EDR**) schemes: the Financial Ombudsman Service and the Credit and Investments Ombudsman; and the statutory Superannuation Complaints Tribunal.

On 2 May 2018, the Minister announced the authorisation of Australian Financial Complaints Limited to operate the new AFCA scheme. The AFCA scheme will commence on 1 November 2018.

Under the Credit Act as amended by the AFCA Act, licensees and credit representatives must update their Credit Guides from 1 November 2018, to replace the contact details of predecessor EDR schemes with AFCA's contact details. Under the primary instrument, ASIC gave licensees and credit representatives transitional relief, until 1 July 2019, from the requirement to update their Credit Guides with AFCA's contact details.

Under the Credit Act and *National Consumer Credit Protection Regulations 2010* (**Credit Regulations**):

- A credit provider must not enter into a credit contract unless the credit provider has given the prospective debtor an information statement in the form required by Form 5 (**Form 5**) of the Credit Regulations of the debtor's statutory rights and statutory obligations (paragraph 16(1)(b) of the Credit Code and regulation 70 of the Credit Regulations). The statement must

be given before the contract is entered into or before the debtor makes an offer to enter into the contract, whichever first occurs (subsection 16(2) of the Credit Code).

- A credit provider must, before a guarantee is signed by a guarantor, give the prospective guarantor a copy of the contract document and a document in the form prescribed in Form 9 (**Form 9**) of the Credit Regulations explaining the rights and obligations of the guarantor (paragraph 56(1)(b) of the Credit Code and regulation 82 of the Credit Regulations).
- A lessor must, within 14 days after entering into a consumer lease, give to the lessee a copy of the consumer lease, together with a statement in the form prescribed in Form 17 (**Form 17**) of the Credit Regulations explaining the rights and obligations of a lessee (subsection 175(1) of the Code and regulation 105 of the Credit Regulations).

From 1 November 2018, the *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Regulations 2018* (the **AFCA Regulations**) amend Forms 5, 9 and 17 in the Credit Regulations to replace references to predecessor EDR schemes with references to the AFCA scheme (see regulations 28 and 49D of the AFCA Regulations).

2. Purpose of this instrument

The amending instrument extends the transitional relief in the primary instrument to the disclosures required by Forms 5, 9 and 17 of the Credit Regulations. The relief is subject to the credit provider or lessor making current information about the AFCA scheme available through other means. This will give credit providers and lessors time to amend their documentation and adapt to the significant changes in the dispute resolution environment introduced by the AFCA Act.

3. Operation of the instrument

New Part 3 - Exemption

Paragraph 8 of Schedule 1 to the amending instrument inserts a new Part 3 into the primary instrument. Under paragraph 7 of new Part 3 of the primary instrument, credit providers and lessors will not have to comply with paragraphs 16(1)(b), subsection 16(2), paragraph 56(1)(b) and subsection 175(1) of the Code to the extent those provisions require the credit provider or lessor to give disclosure in the form required by Forms 5, 9 and 17 as amended by the AFCA Regulations. The exemption will apply where the credit provider or lessor:

- complies with the requirements of paragraphs 16(1)(b), subsection 16(2), paragraph 56(1)(b) and subsection 175(1) of the Code that would have applied but for the amendments made to Forms 5, 9 and 17 by the AFCA Regulations, except that the Form continues to refer to the predecessor EDR scheme; and
- makes available on its website (if any) current information (the **AFCA information**) about the AFCA scheme and how that scheme may be accessed; and
- includes the AFCA information in any document (other than a document required to be given by or under the Credit Act) which:
 - purports to describe dispute resolution arrangements applicable in relation to the credit activities engaged in by the credit provider or lessor (whether or not it also includes other matters); and
 - is made available by the credit provider or lessor to other people in relation to whom the credit provider or lessor has engaged in or may engage in credit activities; and

- includes the AFCA information in documentation relating to the credit provider's or lessor's internal dispute resolution procedure.

Paragraph 8 of new Part 3 of the primary instrument provides for the new exemptions to apply from 1 November 2018 until 30 June 2019.

Consequential amendments

Paragraphs 1 to 7 of Schedule 1 to the amending instrument make consequential amendments to:

- section 3 of the primary instrument, to confirm that the relief in the primary instrument (as amended) is granted under both paragraph 163(3)(d) of the Credit Act and subsection 203A(3) of the Credit Code;
- section 4 of the primary instrument, to insert new definitions and interpretation provisions for the purposes of new Part 3 of the primary instrument;
- section 5 of the primary instrument, to clarify that references in that section are to provisions of the Credit Act (whereas references in new section 7 of the primary instrument are to provisions of the Credit Code).

4. Consultation

On 5 March 2018, ASIC issued draft updated RG 139: *Oversight of AFCA* for consultation. The linked consultation paper CP 298 discussed the obligation on firms to change the name and contact details of predecessor EDR schemes in disclosure documents to refer to AFCA. ASIC sought feedback on whether firms needed any transitional relief from these disclosure obligations.

28 submissions were made to CP 298. Of these, 17 made specific submissions on disclosure relief, but none specifically related to forms issued under the Credit Code.

After the primary instrument was registered, ASIC received a request for similar transitional relief from the requirement to update a number of forms issued under the Credit Code. ASIC consulted industry stakeholders about this request and formed the view that the provision of transitional relief in relation to Forms 5, 9 and 17 was consistent with the policy approach underpinning the primary instrument.

ASIC has assessed that a Regulation Impact Statement is not necessary for the amending instrument or primary instrument.

Statement of Compatibility with Human Rights

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

ASIC Credit (Amendment) Instrument 2018/665

ASIC Credit (Amendment) Instrument 2018/665 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

The *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Act 2018* establishes a single financial services external dispute resolution (**EDR**) scheme: the Australian Financial Complaints Authority (**AFCA**).

From 1 November 2018, firms must update mandatory disclosure documents to replace references to predecessor EDR schemes with references to AFCA. In *ASIC Credit (AFCA transition) Instrument 2018/448*, ASIC granted transitional relief so that firms have until 1 July 2019 to update some of these mandatory disclosure documents with references to AFCA, subject to the firm making current information about the AFCA scheme available through other means.

ASIC Credit (Amendment) Instrument 2018/665 extends that relief to the following forms issued under paragraph 16(1)(b), paragraph 56(1)(b) and subsection 175(1) of the Credit Code:

- Form 5 – Information statement – Things you should know about your proposed credit contract
- Form 9 – Information statement – Things you should know about guarantees
- Form 17 – Information statement – Things you should know about your consumer lease

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.

Australian Securities and Investments Commission