

EXPLANATORY STATEMENT for

ASIC Credit (Amendment) Instrument 2018/836

Prepared by the Australian Securities and Investments Commission

The Australian Securities and Investments Commission (ASIC) makes *ASIC Credit (Amendment) Instrument 2018/836* (the **amending instrument**) under subsection 109(3) of the *National Consumer Credit Protection Act 2009* (**National Credit Act**). The amending instrument amends *ASIC Corporations and Credit (Transition to AFCA) Instrument 2018/814* (the **principal instrument**)

Subsection 109(3) relevantly provides that ASIC may exempt a class of persons from specified provisions of Pt 2-6 of the **National Credit Act** and Pt 7.6 (other than Divisions 4 and 8) of the **Corporations Act** and declare that those parts apply as if modified or varied in the declaration.

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 is the operator of the AFCA scheme, which was given an authorisation under Part 7.10A of the Corporations Act on 23 April 2018. The AFCA scheme will replace the two existing ASIC-approved external dispute resolution (EDR) schemes: the Financial Ombudsman Service (FOS) and the Credit and Investments Ombudsman (CIO); and the statutory Superannuation Complaints Tribunal. The AFCA scheme will commence operation on 1 November 2018.

Part 3 of the AFCA Act makes amendments to s912A of the Corporations Act and s47, s64 and s65 of the National Credit Act, to provide that from 21 September 2018 Australian financial services licensees (AFSL) and Australian credit licensees (ACL) and authorised credit representatives (ACR) must be members of both an approved external dispute resolution scheme (i.e. FOS or CIO) the AFCA scheme. For credit representatives, failure to meet this requirement has the effect that the authorisation given to the credit representative ceases to have effect by operation of ss64 and 65.

Part 5 of the AFCA Act then makes further amendments to those provisions that take effect on 1 November 2018. The continuing operation of the CIO and FOS schemes until the date specified in the notifiable instrument made under Item 72 of Part 5 of the AFCA Act enables financial firms to satisfy their ongoing EDR obligations. That day cannot be earlier than the Part 4 application day (1 November 2018); or later than 12 months after the Part 4 application day.

These schemes are currently being operated by AFCA Ltd. As the approval for the previous operators (FOS and CIO) has not yet been revoked, membership of financial firms to those schemes means that membership to the schemes continues to be valid even if the member has not yet also become a member of AFCA Ltd.

2. Purpose of this instrument

We understand that some ACLs and authorised credit representatives:

- o have lodged an application with AFCA Ltd, but membership has not yet been approved; and
- o have not yet lodged an application with AFCA Ltd.

For credit representatives, the failure to obtain membership to the AFCA scheme by 21 September 2018 means that under the ordinary operation of the National Credit Act the person's authorisation to act as a credit representative becomes invalid.

The purpose of the amending instrument is to modify the National Credit Act to prevent credit representative authorisations from becoming invalid due to the credit representative not being a member of the AFCA scheme (provided they maintain membership to the CIO scheme).

These credit representatives will still need to progress their applications to the AFCA scheme to ensure membership to the AFCA scheme is in place as at 1 November 2018.

3. Operation of the instrument

The declaration in section 1 of the amending instrument amends the principal instrument to insert a new section 65A into the National Credit Act. That section of the amending instrument provides that Paragraphs 64(5)(c) and 65(6)(c) of the National Credit Act do not apply to a credit representative who:

- (a) as at 21 September 2018—is not a member of the AFCA scheme; and
- (b) between 21 September 2018 to 31 October 2018—is a member of an approved external dispute resolution scheme.

The declaration at section 2 of the amending instrument amends the principal instrument to stop the first declaration from applying as at 1 November 2018.

4. Consultation

No consultation has been undertaken as the amendments are minor and technical in nature and designed to support an efficient transition to the commencement of the AFCA scheme on 1 November 2018.

Statement of Compatibility with Human Rights

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

ASIC Credit (Amendment) Instrument 2018/836

ASIC Credit (Amendment) Instrument 2018/836 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 21 September 2018, firms must be members of the AFCA scheme. ASIC Credit (Amendment) Instrument 2018/836 amends *ASIC Corporations and Credit (Transition to AFCA) Instrument 2018/814*, which makes amendments to the National Consumer Credit Protection Act 2009.

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