



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (AFCA Scheme Regulatory Requirement) Instrument 2020/0433

This is the Explanatory Statement for *ASIC Corporations (AFCA Scheme Regulatory Requirement) Instrument 2020/0433*.

The Explanatory Statement is approved by the Australian Securities and Investments Commission (*ASIC*).

Summary

1. The *ASIC Corporations (AFCA Scheme Regulatory Requirement) Instrument 2020/0433* requires the operator of the AFCA scheme (Australian Financial Complaints Limited (ACN 620 494 340)) to amend the Australian Financial Complaints Authority Complaint Resolution Scheme Rules (**scheme rules**) on or before 13 May 2020 and without consultation, to include provisions consistent with subsections 10(2), (3), (4) (5) and (6) and subsections 11(2), (3), (4) and (5) of the *AFCA Scheme Authorisation 2018 (AFCA Authorisation)*.

Note: The *AFCA Scheme Authorisation 2018* is registered as a notifiable instrument on the Federal Register of Legislation. The Register may be accessed at www.legislation.gov.au.

2. Subsections 10(2), (3), (4) (5) and (6) and subsections 11(2), (3), (4) and (5) of the AFCA Authorisation are conditions imposed on AFCA's authorisation on 25 April 2020 by the *AFCA Scheme Authorisation (Additional Condition) Amendment 2020 (Additional Conditions)*. The Additional Conditions are described in more detail in paragraphs 10 – 17 below, and in summary relate to:
 - a. the way in which AFCA decision makers must consider complaints about loans covered by a guarantee granted by the Commonwealth under the *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Act 2020*; and
 - b. the exclusion of complaints or parts of complaints about repayment deferrals for business loans impacted by COVID-19.
3. The operator of the AFCA scheme must ensure the conditions of the AFCA Authorisation are complied with (see subsection 1051(5)(a)(i) of the *Corporations Act 2001*).

Purpose of the instrument

4. The constitution (**AFCA constitution**) of the operator of the AFCA scheme and the scheme rules require consultation with ASIC and individuals and organisations (including key consumer, community and industry organisations) on changes to the scheme rules before the scheme rules are amended. The consultation specified in the AFCA constitution and scheme rules does not apply where ASIC has utilised a statutory or regulatory power to require an amendment to the scheme rules.
5. The instrument is a statutory or regulatory power, and accordingly the provisions of the AFCA constitution and the scheme rules requiring consultation do not apply to the amendments to the scheme rules specified in the instrument.
6. The instrument does not affect the requirement that ASIC approve material changes to the AFCA scheme under s 1051(5)(b) of the Corporations Act 2001.

AFCA Authorisation sections 10 and 11

7. The instrument requires the operator of the AFCA scheme to amend the scheme rules on or before 13 May 2020, to include provisions consistent with subsections 10(2), (3), (4) (5) and (6) and subsections 11(2), (3), (4) and (5) of the AFCA Authorisation.
8. Subsection 10(2) of the AFCA Authorisation provides that subsections (3) and (4) (at paragraphs 9 and 10 below) apply to:
 - (a) loans (**SMEG Loans**) covered by a guarantee granted by the Commonwealth under the *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Act 2020 (SMEG Act)*; or
 - (b) loans a lender believes in good faith to be SMEG Loans; and
 - (c) a borrower makes a complaint to the AFCA scheme relating to a SMEG Loan or any other loan to the extent the loan is related to or connected with the SMEG Loan.
9. Subsection 10(3) of the AFCA Authorisation provides the matters AFCA and a person making an AFCA decision must not take into account in resolving a complaint to AFCA. Those matters are any decision made by a lender relating to a decision to provide a SMEG Loan or the amount of the SMEG Loan.
10. Subsection 10(4) of the AFCA Authorisation provides AFCA and a person making an AFCA decision must consider SMEG Loan complaints on the basis that:
 - (a) the lender was permitted to disregard the impact of COVID-19 when determining the financial situation of the borrower; and

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- (b) the purpose of the SMEG Act is to encourage the quick and efficient provision of loans to borrowers as a response to the economic impact of COVID-19 on individuals, businesses and the Australian economy; and
- (c) the lender is required to comply with the terms of the SMEG Act (and any instruments, rules or conditions made as a consequence of that Act) in providing SMEG Loans to borrowers; and
- (d) the considerations in paragraphs (a) to (c) must be given priority by AFCA and the AFCA Decision Maker over other matters when making any preliminary assessment or determination.
11. Subsection 10(5) of the AFCA Authorisation provides the AFCA scheme must not consider systemic issues relating to SMEG Loan decisions unless it becomes aware that a serious contravention of the law may have occurred.
12. Subsection 10(6) of the AFCA Authorisation requires the amendments to the scheme rules made as a result of the conditions in section 10 of the AFCA Authorisation must apply from 25 April 2020.
13. Subsection 11(2) of the AFCA Authorisation provides that subsection 11(3) of the AFCA Authorisation applies to:
- (a) a business loan (other than a SMEG Loan) made to a borrower on or before 1 January 2020. A business loan is a loan provided to a small business (as defined in the AFCA scheme rules) which was not regulated under Chapter 3 of the *National Consumer Credit Protection Act 2009* at the time the loan was made; and
- (b) a lender agrees to defer loan repayments in relation to the business loan at any time during the 12 month period starting on 25 April 2020, because the borrower has advised the lender of COVID-19 impacts on their business; and
- (c) a borrower makes use of the agreed deferral of loan repayments; and
- (d) the borrower (or the borrower's guarantor) makes a complaint to the AFCA scheme in relation to the agreed loan deferral.
14. Subsection 11(3) of the AFCA Authorisation provides that the AFCA scheme must exclude any complaint or part of a complaint about a decision to provide a repayment deferral described in paragraph 13 above, and any consequential change to amounts repayable or guaranteed under a deferred loan, or the duration of the loan or any guarantee of the deferred loan.
15. Subsection 11(4) of the AFCA Authorisation provides that the AFCA scheme must not consider any systemic issues about decisions to defer loans as described in paragraph 13 above, unless AFCA becomes aware that a serious contravention of the law may have occurred.

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16. Subsection 11(5) of the AFCA Authorisation requires the amendments to the scheme rules made as a result of the conditions in section 11 of the AFCA Authorisation must apply from 25 April 2020.

Consultation

17. The conditions imposed on the AFCA scheme by the Additional Conditions were part of the Government's COVID-19 economic response.
18. Given the urgency of the Government's COVID-19 economic responses, and the delay consultation on the instrument would occasion, the instrument has not been the subject of public consultation.
19. In circumstances where the AFCA operator must ensure it complies with the amendments made by the Additional Conditions, and the Additional Conditions apply to AFCA disputes from 25 April 2020, consultation was not undertaken, and the instrument overrides the consultation required by the AFCA constitution.
20. ASIC consulted the operator of the AFCA scheme before making the instrument.

Operation of the instrument

21. Section 5 of the instrument requires the AFCA operator to ensure it complies with the conditions of sections 10 and 11 of the AFCA Authorisation by amending the scheme rules on or before 13 May 2020, without consultation, to include provisions consistent with subsections 10(2), (3), (4) (5) and (6) and subsections 11(2), (3), (4) and (5) of the AFCA Authorisation.

Legislative authority

22. The source of power to make the instrument is section 1052A(a) of the *Corporations Act 2001*.
23. The instrument is a disallowable legislative instrument.

Statement of Compatibility with Human Rights

24. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is in the [Attachment](#).

Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

ASIC Corporations (AFCA Scheme Regulatory Requirement) Instrument 2020/0433 (the **instrument**).

Overview

1. The instrument requires the AFCA operator to ensure it complies with the conditions of sections 10 and 11 of the *AFCA Scheme Authorisation 2018* (**AFCA Authorisation**) by amending the scheme rules on or before 13 May 2020, without consultation, to include provisions consistent with subsections 10(2), (3), (4) (5) and (6) and subsections 11(2), (3), (4) and (5) of the AFCA Authorisation.

Note: The *AFCA Scheme Authorisation 2018* is registered as a notifiable instrument on the Federal Register of Legislation. The Register may be accessed at www.legislation.gov.au

2. Subsection 10(2) of the AFCA Authorisation provides that subsections (3) and (4) (at paragraphs 3 and 4 below) apply to:
 - (a) loans (**SMEG Loans**) covered by a guarantee granted by the Commonwealth under the *Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Act 2020* (**SMEG Act**); or
 - (b) loans a lender believes in good faith to be SMEG Loans; and
 - (c) a borrower makes a complaint to the AFCA scheme relating to a SMEG Loan or any other loan to the extent the loan is related to or connected with the SMEG Loan.
3. Subsection 10(3) of the AFCA Authorisation provides the matters AFCA and a person making an AFCA decision must not take into account in resolving a complain to AFCA. Those matters are any decision made by a lender relating to a decision to provide a SMEG Loan or the amount of the SMEG Loan.
4. Subsection 10(4) of the AFCA Authorisation provides AFCA and a person making an AFCA decision must consider SMEG Loan complaints on the basis that:
 - (a) the lender was permitted to disregard the impact of COVID-19 when determining the financial situation of the borrower; and
 - (b) the purpose of the SMEG Act is to encourage the quick and efficient provision of loans to borrowers as a response to the economic impact of COVID-19 on individuals, businesses and the Australian economy; and

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- (c) the lender is required to comply with the terms of the SMEG Act (and any instruments, rules or conditions made as a consequence of that Act) in providing SMEG Loans to borrowers; and
- (d) the considerations in paragraphs (a) to (c) must be given priority by AFCA and the AFCA Decision Maker over other matters when making any preliminary assessment or determination.
5. Subsection 10(5) of the AFCA Authorisation provides the AFCA scheme must not consider systemic issues relating to SMEG Loan decisions unless it becomes aware that a serious contravention of the law may have occurred.
6. Subsection 10(6) of the AFCA Authorisation requires the amendments to the scheme rules made as a result of the conditions in section 10 of the AFCA Authorisation must apply from 25 April 2020.
7. Subsection 11(2) of the AFCA Authorisation provides that subsection 11(3) of the AFCA Authorisation applies to:
- (a) a business loan (other than a SMEG Loan) made to a borrower on or before 1 January 2020. A business loan is a loan provided to a small business (as defined in the AFCA scheme rules) which was not regulated under Chapter 3 of the *National Consumer Credit Protection Act 2009* at the time the loan was made; and
- (b) a lender agrees to defer loan repayments in relation to the business loan at any time during the 12 month period starting on 25 April 2020, because the borrower has advised the lender of COVID-19 impacts on their business; and
- (c) a borrower makes use of the agreed deferral of loan repayments; and(d) the borrower (or the borrower's grantor) makes a complaint to the AFCA scheme in relation to the agreed loan deferral.
8. Subsection 11(3) of the AFCA Authorisation provides that the AFCA scheme must exclude any complaint or part of a complaint about a decision to provide a repayment deferral described in paragraph 7 above, and any consequential change to amounts repayable or guaranteed under a deferred loan, or the duration of the loan or any guarantee of the deferred loan.
9. Subsection 11(4) of the AFCA Authorisation provides that the AFCA scheme must not consider any systemic issues about decisions to defer loans as described in paragraph 7 above, unless AFCA becomes aware that a serious contravention of the law may have occurred.
10. Subsection 11(5) of the AFCA Authorisation requires the amendments to the scheme rules made as a result of the conditions in section 11 of the AFCA Authorisation must apply from 25 April 2020.

Assessment of human rights implications

11. The instrument does engage any of the applicable rights or freedoms.

Conclusion

12. The 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*.