



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Deferral of Design and Distribution Obligations) Instrument 2020/486

ASIC Credit (Deferral of Mortgage Broker Obligations) Instrument 2020/487

This is the Explanatory Statement for the:

- (a) *ASIC Corporations (Deferral of Design and Distribution Obligations) Instrument 2020/486* (the **DDO Deferral Instrument**); and
- (b) *ASIC Credit (Deferral of Mortgage Broker Obligations) Instrument 2020/487* (the **Mortgage Broker Deferral Instrument**).

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

Summary

1. The DDO Deferral Instrument and the Mortgage Broker Deferral Instrument provide relief in relation to two upcoming sets of reforms: the design and distribution obligations (**DDO**) and the mortgage broker reforms. This relief is provided in response to the significant effect of COVID-19 on the Australian economy, especially on the financial system, financial services providers and consumers.
2. The DDO Deferral Instrument provides a temporary exemption for six months from the DDO which will be found in Part 7.8A of the *Corporations Act 2001* (the **Corporations Act**).
3. The DDO will be inserted into the Corporations Act by the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* on 5 April 2021, and will apply from that date. The effect of the temporary exemption is that persons will only be required to comply with these obligations from 5 October 2021.
4. The Mortgage Broker Deferral Instrument provides temporary exemptions for six months from obligations under the *National Consumer Credit Protection Act 2009* (the **National Credit Act**) including:

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- (a) the duty to act in the best interests of the consumer in relation to credit assistance (the **best interests duty**);
 - (b) the requirement to prioritise consumers' interests when providing credit assistance (the **conflict priority rule**); and
 - (c) the ban on conflicted remuneration.
5. These reforms were inserted into the National Credit Act by Schedule 3 to the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020* (the **mortgage broker reforms**) and apply from 1 July 2020. The effect of the temporary exemptions is that persons will only be required to comply with these obligations from 1 January 2021.

Purpose of the instruments

6. These instruments facilitate industry participants focusing on immediate priorities and the needs of their customers during the COVID-19 pandemic period, by extending the time they have to prepare for the DDO and the mortgage broker reforms.
7. The purpose of these instruments is to ensure that, in response to COVID-19, persons do not need to comply with the DDO and the mortgage broker reforms for an additional six months. This is consistent with other Government announcements about the timeframes for implementing reforms that reflect the recommendations of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

Consultation

8. During ASIC's consultation on draft guidance for the DDO ([Consultation Paper 325](#) *Product design and distribution obligations*) ASIC heard from a number of stakeholders that work being undertaken to implement the obligations was being disrupted as a result of COVID-19 and that more time would be required to implement this reform.
9. During ASIC's consultation on draft guidance about the mortgage broker reforms ([Consultation Paper 327](#) *Implementing the Royal Commission recommendations: Mortgage brokers and the best interests duty*), many industry stakeholders advocated for a deferral to the start date of the obligations. These stakeholders suggested that COVID-19 has disrupted or delayed their preparatory training and compliance activities and it would be difficult to ensure compliance by the scheduled start date of 1 July 2020.
10. ASIC has also consulted with Treasury and the Treasurer about the exemptions in these instruments.
11. The Prime Minister has granted an exemption from the need to complete regulatory impact analysis in the form of Regulation Impact Statements for all Australian Government measures made in response to COVID-19.

Operation of the instruments

DDO Deferral Instrument

12. The DDO reform is intended to assist consumers to obtain appropriate financial products by requiring issuers and distributors to have a customer-centric approach to designing, marketing and distributing financial products.
13. The *design* obligations require issuers of financial products to:
 - (a) make a publicly available target market determination;
 - (b) to take reasonable steps so that retail product distribution conduct is consistent with the target market determination;
 - (c) review the target market determination as required to ensure it remains appropriate; and
 - (d) notify ASIC of any significant dealings in a product that are not consistent with the product's target market determination.
14. The *distribution* obligations require distributors of financial products:
 - (a) not to engage in 'retail product distribution conduct' in relation to a product unless a target market determination has been made;
 - (b) not to engage in retail product distribution conduct where a target market determination may no longer be appropriate;
 - (c) to take reasonable steps so that retail product distribution conduct is consistent with the target market determination;
 - (d) to collect information specified by the issuer and complaints related to a product and provide both to the issuer; and
 - (e) to notify the issuer of a product of any significant dealings in the product that are not consistent with the product's target market determination.
15. Section 5 of the instrument temporarily exempts regulated persons (essentially issuers and distributors of financial products), and any other person who is required to make a target market determination, from the DDO to be found in Part 7.8A of the Corporations Act until end of 4 October 2021. But for the exemption, these classes of persons would be required to comply with those obligations from 5 April 2021.
16. The instrument commences on the later of 5 April 2021 and the day after it is registered on the Federal Register of Legislation.

Mortgage Broker Deferral Instrument

17. The mortgage broker reforms impose the following obligations:

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- (a) mortgage brokers must act in the best interests of consumers and, where there is a conflict of interest, must give priority to consumers, when providing credit assistance in relation to credit contracts (see Division 2 of Part 3-5A of the National Credit Act);
 - (b) mortgage brokers and mortgage intermediaries must not accept conflicted remuneration, and employers, credit providers and mortgage intermediaries must not give conflicted remuneration to mortgage brokers or mortgage intermediaries (see Division 4 of Part 3-5A of the National Credit Act).
 18. Subsections 5(1) and 6(1) of the instrument respectively grant exemptions from:
 - (a) Division 2 of Part 3-5A of the National Credit Act in relation to the provision of credit assistance to a consumer before 1 January 2021; and
 - (b) Division 4 of Part 3-5A of that Act in relation to a benefit given before 1 January 2021 to a credit licensee or a representative of a credit licensee.
 19. Subsection 5(2) of the instrument specifies the classes of persons who may rely on the exemption from the best interests duty and conflict priority rule under Division 2 of Part 3-5A of the National Credit Act. But for the exemption, these classes of persons would be required to comply with those obligations from 1 July 2020.
 20. Subsection 6(2) of the instrument specifies the classes of persons who may rely on the exemption from the ban on accepting and giving conflicted remuneration under Division 4 of Part 3-5A of the National Credit Act. But for the exemption, these classes of persons would be required to comply with those obligations from 1 July 2020.
 21. These exemptions have the effect of delaying by six months the application of amendments to the National Credit Act to require mortgage brokers to act in the best interests of consumers and to address conflicted remuneration for mortgage brokers and mortgage intermediaries such as aggregators.
 22. The instrument commences on the day after it is registered on the Federal Register of Legislation.

Legislative instrument and primary legislation

23. The subject matter and policy implemented by these instruments is more appropriate for a legislative instrument rather than primary legislation. The instruments use powers given by Parliament to ASIC, which allow ASIC to exempt persons from specified provisions in the National Credit Act and Corporations Act. Use of these powers allows ASIC to respond quickly and temporarily to issues in connection with or arising from COVID-19.
24. A timely response is important to provide certainty to industry about the deferral before the scheduled commencement of these reforms.

Legislative authority

25. The DDO Deferral Instrument is made under subsection 994L(2) of the Corporations Act. From 5 April 2021, subsection 994L(2) will provide that ASIC may, by legislative instrument, exempt a class of persons from all or specified provisions of Part 7.8A of the Corporations Act. Even though the section that confers the power to make the instrument has yet to come into operation, ASIC can make the instrument as if it had come into operation: see subsection 4(1) of the *Acts Interpretation Act 1901* (as in force on 1 Jan 2005).
26. The Mortgage Broker Deferral Instrument is made under subsection 163(3) of the National Credit Act. Subsection 163(3) provides that ASIC may, by legislative instrument, exempt a class of persons from specified provisions in Chapter 3.
27. These instruments are disallowable legislative instruments.

Statement of Compatibility with Human Rights

28. 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*.

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Overview

1. Both of these instruments are made in response to the significant effect of COVID-19 on the Australian economy, especially on the financial system, financial services providers and consumers.
2. The *ASIC Corporations (Deferral of Design and Distribution Obligations) Instrument 2020/486* provides a temporary exemption for six months from the design and distribution obligations imposed on financial product issuers and distributors which will be found in Part 7.8A of the *Corporations Act 2001*. These reforms will apply from 5 April 2021. The effect of the temporary exemption is that financial product issuers and distributors will only be required to comply with these obligations from 5 October 2021.
3. The *ASIC Credit (Deferral of Mortgage Broker Obligations) Instrument 2020/487* provides temporary exemptions for six months from obligations under the *National Consumer Credit Protection Act 2009* to act in the best interests of the consumer in relation to credit assistance and to prioritise consumers' interests, and a ban on giving or accepting conflicted remuneration. These reforms will apply from 1 July 2020. The effect of the temporary exemptions is that credit businesses will only be required to comply with these obligations from 1 January 2021.

Assessment of human rights implications

4. These instruments do not engage any of the applicable rights or freedoms.

Conclusion

5. These instruments 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*.