



**ASIC**  
Australian Securities &  
Investments Commission

# Explanatory Statement

## ASIC Corporations (Amendment) Instrument 2020/635

This is the Explanatory Statement for *ASIC Corporations (Amendment) Instrument 2020/635* (the *Amending Instrument*).

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

### Summary

1. In response to the challenges caused by the bushfires, the Government provided funding to Financial Counselling Australia Ltd to provide financial counselling to small businesses.
2. Financial counselling agencies provide free and independent services to people in financial difficulty. In providing this assistance, a financial counsellor and their client may discuss matters relating to particular financial products. When discussing particular financial products with their clients, financial counsellors may provide financial product advice if the client receives recommendations or statements of opinion that are (or could reasonably be regarded as being) intended to influence the client in making a decision about a financial product or class of financial product: see section 766B of the Corporations Act. The advice may be personal advice in some circumstances: see subsection 766B(3).
3. In 2003, ASIC issued ASIC Class Order [CO 03/1063] to provide relief for financial counselling agencies from the requirement to hold an Australian financial services (AFS) licence when providing financial product advice as part of their financial counselling service. The exemption is available where advice relates to deposit, non-cash payments, insurance, retirement savings account product or superannuation products (or where the advice is to dispose of a security, an interest in a managed investment scheme or a government-issued debenture, stock or bond).
4. Without the relief in [CO 03/1063] a financial counsellor who provided clients with financial product advice would have been subject to the AFS licensing, conduct and disclosure obligations in Ch 7 of the Corporations Act. Depending on the nature of the advice, this could include the personal advice requirements in Division 3 of Part 7.7 of the Corporations Act.
5. [CO 03/1063] was made because it was considered that full compliance with Ch 7 of the Corporations Act in relation to certain kinds of advice may be unduly

---

burdensome and could affect the ongoing viability of some financial counselling agencies. The conditions associated with [CO 03/1063] are intended to minimise the risk of consumer detriment and ensure that advice provided under the exemption is free and independent.

6. There have been changes in the industry since [CO 03/1063] was made. These include Standards for agencies employing financial counsellors and National standards for membership and accreditation. These standards include continuing professional development and supervision requirements.
7. Under the *Legislation Act 2003*, instrument such as [CO 03/1063] automatically cease to have effect, or ‘sunset’ after 10 years. [CO 03/1063] was due to sunset on 1 October 2017. ASIC remade the [CO 03/1063] without significant changes to continue the relief beyond its sunset date. This was remade in *ASIC Corporations (Financial Counselling Agencies) Instrument 2017/792*.
8. *ASIC Corporations (Financial Counselling Agencies) Instrument 2017/792* provides relief to financial counselling agencies that provide financial counselling predominately for the purpose of assisting individuals who are in financial difficulty to resolve their problems. To avoid doubt as to whether that instrument covers financial counselling agencies who provide financial counselling to small businesses, ASIC makes the Amending Instrument. Without the Amending Instrument, financial counselling agencies that provide financial counselling services to small businesses may need an AFS licence. That requirement may be unduly burdensome and inconsistent with the relief provided to financial counselling agencies under *ASIC Corporations (Financial Counselling Agencies) Instrument 2017/792*.

### **Purpose of the instrument**

9. The purpose of the Amending Instrument is to amend *ASIC Corporations (Financial Counselling Agencies) Instrument 2017/792* to also give relief to financial counselling agencies, that provide financial counselling to small businesses, from the requirement to hold an AFS licence when providing advice on particular financial products.
10. The limited circumstances in which the exemption applies ensures clients can have a high degree of confidence that when their financial counsellors provide them with advice, they do so free from any conflicts of interest, and with an acceptable level of skills, knowledge and professionalism.
11. Providing financial counselling to small businesses is likely to also be provided by other financial counselling agencies.

### **Consultation**

12. ASIC consulted with Financial Counselling Australia Ltd before making the Amending Instrument.

### **Operation of the instrument**

- 
13. Section 4 provides that the Amending Instrument amends an existing legislative instrument as set out in Schedule 1.
  14. Item 1 of Schedule 1 amends *ASIC Corporations (Financial Counselling Agencies) Instrument 2017/792* by adding a definition of ‘small business’.
  15. Item 2 of Schedule 1 amends *ASIC Corporations (Financial Counselling Agencies) Instrument 2017/792* by amending the definition of ‘financial counselling service’ to relate to individuals or small businesses. Small business is defined as a business with less than 100 employees.
  16. These amendments provide that the exemption from the requirement to hold an AFS licence covering the provision of certain financial product advice (in limited circumstances), in *ASIC Corporations (Financial Counselling Agencies) Instrument 2017/792*, also applies where financial counselling services are provided to small businesses.
  17. The Amending Instrument commences on the day after it is registered on the Federal Register of Legislation.

#### Legislative instrument and primary legislation

18. The subject matter and policy implemented by the Amending Instrument is more appropriate for a legislative instrument rather than primary legislation because:
  - (a) the instrument utilises powers given by Parliament to ASIC that allow ASIC to modify or affect the operation of the Australian financial services licensing regime to provide a tailored and flexible regulatory environment that is fit for purpose for certain financial products; and
  - (b) the matters contained in the instrument are a specific amendment designed to ensure the application of primary legislation remained flexible to adapt to market developments and applies in a way consistent with the intended policy and the enabling provisions in the primary legislation.

#### **Legislative authority**

19. Paragraph 926A(2)(a) provides that ASIC may exempt a person or class of persons from Part 7.6 of the Corporations Act (other than Divisions 4 and 8 of that Part).
20. the Amending Instrument amends *ASIC Corporations (Financial Counselling Agencies) Instrument 2017/792*. Where an Act confers a power to make an instrument, the power is to be construed as including a power exercisable in the like manner and subject to the like conditions to amend the instrument: see subsection 33(3) of the Acts Interpretation Act 1901 (as in force as at 1 January 2005 and as applicable to the relevant powers because of section 5C of the Act).
21. The Amending Instrument is a disallowable legislative instrument.

---

## Statement of Compatibility with Human Rights

22. 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 (Amendment) Instrument 2020/635

#### Overview

1. ASIC Corporations (Amendment) Instrument 2020/635 (the ***Amending Instrument***) amends *ASIC Corporations (Financial Counselling Agencies) Instrument 2017/792* to provide that, in some circumstances, small business financial counselling agencies do not required an Australian financial services licence to provide certain types of advice in the context of small business financial counselling services.

#### Assessment of human rights implications

2. The Amending Instrument does not engage any of the applicable rights or freedoms.

#### Conclusion

3. The Amending 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*.