



**ASIC**  
Australian Securities &  
Investments Commission

# Explanatory Statement

## *ASIC Credit (Amendment) Instrument 2020/963*

This is the Explanatory Statement for *ASIC Credit (Amendment) Instrument 2020/963*.

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

### Summary

1. The *ASIC Credit (Deferral of Mortgage Broker Obligations) Instrument 2020/487* (the **Deferral Instrument**) is intended to provide a temporary exemption until 1 January 2021 from, among other obligations, the ban on giving or accepting conflicted remuneration under the *National Consumer Credit Protection Act 2009* (the **National Credit Act**). The application of the exemption depended on when the benefit was given (i.e. before 1 January 2021) rather than on when the credit service was provided.
2. To fully realise the intended effect of the exemption, the *ASIC Credit (Amendment) Instrument 2020/963* (the **Amending Instrument**) amends the terms of the exemption so that it applies in relation to a credit service provided before 1 January 2021, irrespective of when the benefit is given.

### Purpose of the instrument

3. “Conflicted remuneration” means any benefit that is:
  - (a) given to a credit licensee, or a representative of a licensee, who provides “credit assistance” to consumers that, because of the nature of the benefit or the circumstances in which it is given, could reasonably be expected to influence the credit assistance provided (including the choice of credit contract or credit provider or the choice of whether to provide credit assistance or not); or
  - (b) given to a credit licensee, or a representative of a licensee, who “acts as an intermediary” and because of the nature of the benefit or the circumstances in which it is given, could be reasonably expected to influence whether or how the licensee or representative acts as an intermediary: see section 158N of the National Credit Act.

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4. The activities of providing “credit assistance” to a consumer or “acting as an intermediary” are “credit services”: see section 7 of the National Credit Act.
  5. The purpose of the Amending Instrument is to ensure the deferral of the ban on conflicted remuneration is extended to benefits given in relation to “credit services” provided before 1 January 2021.

#### *The Deferral Instrument*

6. The Deferral Instrument provides temporary exemptions for six months from obligations in relation to mortgage brokers which commenced on 1 July 2020, including the ban on conflicted remuneration in Division 4 of Part 3-5A of the National Credit Act.
7. However, as originally worded, the exemptions in the Deferral Instrument apply to benefits given before 1 January 2021. As a result, from 1 January 2021, the requirements of Division 4 of Part 3-5A of the National Credit Act would apply to benefits given in relation to credit services provided from 1 July 2020.
8. The intended effect of the Amending Instrument aligns with the policy intention of the Deferral Instrument – to allow industry participants to focus on their immediate priorities and customers during the COVID-19 pandemic period.
9. ASIC considered that this intention would not be realised if benefits given in relation to credit services provided during the deferral period were subject to Division 4 of Part 3-5A of the National Credit Act.

#### **Operation of the instrument**

10. Section 2 of the Amending Instrument specifies that the instrument commences on the day after it is registered on the Federal Register of Legislation.
11. Section 1 of Schedule 1 to the Amending Instrument substitutes the current section 6(1) of the Deferral Instrument. The effect of the substitution is to extend the deferral to benefits given in relation to the provision of a credit service before 1 January 2021. This deferral applies regardless of whether the benefit is given before, on or after 1 January 2021.
12. The classes of persons to whom the deferral applies, listed in section 6(2) of the Deferral Instrument, is unchanged by the amendment.

#### **Consultation**

13. Given the scope of the Amending Instrument, ASIC did not undertake a formal consultation process. ASIC discussed the issue that led to the Amending Instrument with relevant industry stakeholders.

#### **Legislative authority**

14. This instrument is made under subsection 163(3) of the National Credit Act. Subsection 163(3) provides that ASIC may, by legislative instrument, exempt a

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class of persons from specified provisions in Chapter 3 of the National Credit Act.

15. Under subsection 33(3) of the *Acts Interpretation Act 1901*, 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 (if any) to amend any such instrument.
16. The Amending Instrument is a disallowable legislative instrument.

*Legislative instrument and primary legislation*

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

**Statement of Compatibility of Human Rights**

19. 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 Credit (Amendment) Instrument 2020/963***

#### Overview

1. The *ASIC Credit (Deferral of Mortgage Broker Obligations) Instrument 2020/487* is intended to provide a temporary exemption until 1 January 2021 from, among other obligations, the ban on giving or accepting conflicted remuneration under the *National Consumer Credit Protection Act 2009*. The application of the exemption depended on when the benefit was given (i.e. before 1 January 2021) rather than on when the credit service was provided.
2. To fully realise the intended effect of the exemption, the *ASIC Credit (Amendment) Instrument 2020/963* amends the terms of the exemption so that it applies in relation to credit services provided before 1 January 2021 irrespective of when the benefit is given.

#### Assessment of human rights implications

3. This instrument does not engage any of the applicable rights or freedoms.

#### Conclusion

4. This 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*.