



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (AFCA Scheme Regulatory Requirement) Instrument 2021/0002

This is the Explanatory Statement for *ASIC Corporations (AFCA Scheme Regulatory Requirement) Instrument 2021/0002*.

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

Summary

1. The *ASIC Corporations (AFCA Scheme Regulatory Requirement) Instrument 2021/0002* requires the operator of the AFCA scheme (Australian Financial Complaints Limited (ACN 620 494 340)) to amend Section E of the Australian Financial Complaints Authority Complaint Resolution Scheme Rules (**scheme rules**) on or before 15 January 2021 and without consultation.
2. Paragraph 5(1)(a) of the instrument sets out a new definition of Representative and paragraph 5(1)(b) sets out an amended definition of Financial Firm, each of which is to be inserted into Section E of the scheme rules. These amendments are described in more detail in paragraph 15 below, and in summary ensure that the scheme rules reflect the operation of the *Corporations Act 2001* (**Corporations Act**) and the *National Consumer Credit Protection Act 2009* (**NCCP Act**) provisions governing liability of licensees in relation to their representatives.
3. The change to the scheme rules required by the instrument ensures that the complaints mechanism under the AFCA scheme complies with the general considerations of accessibility and effectiveness of the AFCA scheme under the Corporations Act (see s1051A(a) and (f)).

Purpose of the instrument

4. Under section 1052A of the Corporations Act ASIC may, by legislative instrument, issue to AFCA regulatory requirements relating to compliance with the mandatory requirements for the AFCA scheme or any of the general considerations for the AFCA scheme (see sections 1051 and 1051A of the Corporations Act).

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5. On 26 November 2020, judgement in the New South Wales Supreme Court in the matter of *D H Flinders Pty Ltd v Australian Financial Complaints Authority Limited* [2020] NSWSC 1690 found that the scheme rules did not confer on AFCA authority, jurisdiction or power to deal with complaints against a licensee member, involving conduct of a corporate authorised representative of the licensee member acting without authority from the licensee. This was on the basis that the definition of Financial Firm in rule E.1.1 of the scheme rules was not capable of being read in the same way as s917B of the Corporations Act, to include a representative acting without authority.
 6. The DH Flinders judgement noted the statutory attribution of liability of licensees for their representatives, including where their representatives act without or outside authority (see ss917B-F of the Corporations Act and ss75-77 of the NCCP Act) but found that AFCA’s contractual authority as set out in the scheme rules did not operate in the same way.
 7. The DH Flinders judgement has exposed a jurisdictional gap in the scheme rules which causes a lack of access to remedies for consumers who have a complaint about the conduct of a representative of an AFCA member, where the conduct of the representative was without or outside authority.
 8. The purpose of this instrument is to require AFCA to promptly remedy this jurisdictional gap by requiring AFCA to amend the scheme rules as described in the instrument. This will ensure the AFCA scheme continues to comply with general considerations of accessibility and effectiveness of the AFCA scheme under the Corporations Act (see s1051A(a) and (f) of the Corporations Act).
 9. 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.
 10. This 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. This is to ensure that technical changes are made to the scheme rules as promptly as possible to remedy the jurisdictional gap.
 11. This instrument does not affect the requirement that ASIC approve material changes to the AFCA scheme under s 1051(5)(b) of the Corporations Act.

Amendments to the scheme rules

12. The instrument requires the operator of the AFCA scheme to amend the scheme rules on or before **15 January 2021**, without consultation, to:
 - (a) Insert a new definition of “Representative” in rule E.1.1 of the scheme rules. This new definition operates by reference to the definition of

representative in the Corporations Act, and the definition of credit representative in the NCCP Act; and

- (b) Replace a paragraph of the definition of “Financial Firm” in rule E.1.1 with a paragraph that expands the definition for specified provisions of the rules to include Representatives (as newly defined) and expressly referring to Representatives acting within or without authority.

Consultation

- 13. There is an urgent need to ensure that the AFCA scheme jurisdiction, as set out in the scheme rules, is consistent with the statutory attribution of liability regarding the conduct of representatives of licensees. The amendments to the scheme rules set out in this instrument are limited to achieving that purpose, and ensure the AFCA scheme is appropriately accessible and effectively performs its role as the single external dispute resolution scheme for financial services and credit complaints in Australia.
- 14. ASIC consulted the operator of the AFCA scheme before making the instrument. The public interest benefit in ensuring that the scheme rules are amended promptly, to ensure accessibility and effectiveness of the AFCA scheme, exceeds the benefit of consulting more broadly on the technical amendments to the scheme rules.

Operation of the instrument

- 15. Section 5 of the instrument requires the AFCA operator to amend the scheme rules on or before 15 January 2021, without consultation, as follows:
 - (a) Insert in the appropriate place in rule E.1.1: “**Representative** means any person or entity for whose conduct a Financial Firm is or may be liable, including but not limited to a representative within the meaning of the Corporations Act, and a credit representative within the meaning of the National Consumer Credit Protection Act 2009.” and
 - (b) omit paragraph 4 of the definition of Financial Firm in rule E.1.1 and substitute:

“4. For the purposes of rule B.2, A.7.1, A.7.2 and A.7.6 in relation to a complaint other than a Superannuation Complaint, “Financial Firm” also includes any employee, agent or contractor of the Financial Firm, any Representative of the Financial Firm regardless of whether the Representative’s conduct is within or without authority, and without limiting the foregoing, any other person who has actual, ostensible, apparent or usual authority to act on behalf of the Financial Firm or authority to act by necessity in relation to a financial service.”

Legislative authority

- 16. The source of power to make the instrument is section 1052A(b) of the Corporations Act.

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17. The instrument is a disallowable legislative instrument.

Statement of Compatibility with Human Rights

18. 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 2021/0002 (the instrument).

Overview

1. The instrument requires the operator of the AFCA scheme (Australian Financial Complaints Limited (ACN 620 494 340)) to amend Section E.1 of the Australian Financial Complaints Authority Complaint Resolution Scheme Rules (**scheme rules**) on or before 15 January 2021 and without consultation to:
 - a. Insert a new definition of Representative in rule E.1.1 of the scheme rules, which includes a representative within the meaning of the Corporations Act 2001 and the National Consumer Credit Protection Act 2009; and
 - b. Omit paragraph 4 of the definition of Financial Firm in rule E.1.1 of the scheme rules and substitute a new paragraph 4, which expands the definition to include Representatives acting within or without authority.

Assessment of human rights implications

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

Conclusion

- 3.. 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*.