



**ASIC**  
Australian Securities &  
Investments Commission

## Explanatory Statement

### *ASIC Credit (Breach Reporting— Prescribed Commonwealth Legislation) Instrument 2021/801*

This is the Explanatory Statement for *ASIC Credit (Breach Reporting— Prescribed Commonwealth Legislation) Instrument 2021/801* (the *instrument*).

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

#### Summary

1. The instrument provides temporary relief to limit the Commonwealth legislation in relation to which the breach reporting obligation in the *National Consumer Credit Protection Act 2009* (the *Credit Act*) applies. The instrument provides relief for a period of three years.
2. The relief is intended to be an interim measure to provide certainty to credit licensees ahead of legislative changes proposed to be made by the Government to give effect to the intended operation of the breach reporting obligation.

#### Purpose of the instrument

3. On 10 December 2020, the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* was passed (the *FSR Act*). The FSR Act introduced a breach reporting obligation for credit licensees into Division 5 of Part 2-2 of the Credit Act, which mirrors the breach reporting obligation in Part 7.6 of the *Corporations Act 2001* (the *Corporations Act*). The obligation commences on 1 October 2021.
4. Under the breach reporting obligation, credit licensees are required to report breaches or likely breaches (as well as investigations into breaches or likely breaches) of ‘core obligations’ that are significant. ‘Core obligations’ are set out in subsection 50A(3) of the Credit Act and include the obligation in subsection 47(1)(d) of the Credit Act to comply with the credit legislation, so far as it relates to Commonwealth legislation that covers conduct relating to credit activities (but only in so far as it covers conduct relating to credit activities).
5. On 6 September 2021, the Government announced its intention to make a number of technical amendments to give effect to the intended operation of the breach reporting reforms under the FSR Act. The proposed changes include an

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amendment to the Credit Act to limit the reporting of breaches of other Commonwealth laws relating to credit activities. The list of other Commonwealth laws in relation to which the Government proposes to retain the requirement to report relevant breaches under the breach reporting obligation in the Credit Act are:

- (a) *Banking Act 1959*;
  - (b) *Corporations Act 2001*;
  - (c) *Financial Sector (Collection of Data) Act 2001*;
  - (d) *Financial Sector (Shareholdings) Act 1998*; and
  - (e) *Financial Sector (Transfer and Restructure) Act 1999*.
6. The proposed amendment is intended to provide a more consistent approach between the breach reporting obligations in the Credit Act and Corporations Act in relation to reporting of breaches of other Commonwealth legislation. Specifically, it is intended to bring the core obligation in paragraph 50A(3)(c) of the Credit Act more closely into line with the corresponding core obligation in paragraph 912D(3)(c) of the Corporations Act, which is limited to the Commonwealth legislation specified in Regulation 7.6.02A of the Corporations Regulations 2001.
  7. The Government's announcement foreshadowed that ASIC, following a targeted consultation, would consider providing temporary breach reporting relief for breaches under subsection 50A(1) of the Credit Act for any other Commonwealth legislation that covers conduct relating to credit activities. It also noted that this interim relief would be provided in light of the Government's intention to make an amendment to the Credit Act to limit the breaches that are required to be reported under the breach reporting regime.
  8. Consistent with the Government's stated policy intention, the instrument provides temporary relief to limit the Commonwealth legislation covered by the core obligation in paragraph 50A(3)(c) of the Credit Act to those listed in paragraph 5 above.
  9. The instrument provides certainty to credit licensees in relation to the application of the breach reporting obligation in the Credit Act in the interim period before the Government's proposed legislative changes are made. It will avoid credit licensees being required to implement changes to business systems and processes to report breaches of Commonwealth legislation that are not intended to be caught by the obligation.
  10. The instrument provides relief for a period of three years. This period will provide Parliament with the necessary time to consider the relevant legislative amendments and regulations.

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## Consultation

11. ASIC consulted with a number of industry associations and consumer groups before making the instrument. None of the respondents to the consultation opposed the making of the instrument.

## Operation of the instrument

12. The instrument modifies the ‘core obligation’ set out in paragraph 50A(3)(c) of the Credit Act to limit the scope of that obligation to the following Commonwealth legislation:
  - (a) *Banking Act 1959*;
  - (b) *Corporations Act 2001*;
  - (c) *Financial Sector (Collection of Data) Act 2001*;
  - (d) *Financial Sector (Shareholdings) Act 1998*; and
  - (e) *Financial Sector (Transfer and Restructure) Act 1999*.
13. As a result, breaches or likely breaches (or investigations into breaches or likely breaches) of Commonwealth legislation that are not specifically referred to in subsection 50A(3) of the Credit Act will not give rise to a ‘reportable situation’ under subsection 50A(1) and, unless any of the situations in subsection 50A(2) apply, will not trigger:
  - (a) the obligation to lodge a report with ASIC under sections 50B and 50C;
  - (b) the obligation to notify affected consumers under section 51A; and
  - (c) the obligation to investigate the situation under section 51B.
14. The instrument commences on the later of 1 October 2021 and the day after it is registered on the Federal Register of Legislation. This commencement date is intended to align with the commencement date of the breach reporting obligation in the Credit Act of 1 October 2021.

## Legislative instrument and primary legislation

15. The subject matter and policy implemented by this instrument is more appropriate for a legislative instrument rather than primary legislation because the matters contained in the instrument are:
  - (a) a specific amendment designed to ensure that the application of primary legislation applies in a way consistent with the intended policy and enabling provisions in the primary legislation; and
  - (b) made on an interim basis ahead of the Government making the necessary legislative changes in the primary legislation to give effect to the intended policy in the primary legislation.

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**Legislative authority**

16. The instrument is made under subsection 109(3) of the Credit Act.
17. The instrument is a disallowable instrument under the *Legislation Act 2003*.

**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 Credit (Breach Reporting— Prescribed Commonwealth Legislation) Instrument 2021/801***

#### Overview

1. The instrument provides temporary relief to limit the Commonwealth legislation in relation to which the breach reporting obligation in the *National Consumer Credit Protection Act 2009* applies.

#### Assessment of human rights implications

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

#### Conclusion

3. 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*.