



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Product Intervention Order Extension—Continuing Credit Contracts) Instrument 2023/957

This is the Explanatory Statement for *ASIC Corporations (Product Intervention Order Extension—Continuing Credit Contracts) Instrument 2023/957* (the **instrument**).

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

Summary

1. The instrument is a declaration that [*ASIC Corporations \(Product Intervention Order—Continuing Credit Contracts\) Instrument 2022/648*](#) (the **Principal Instrument**), a product intervention order made under subsection 1023D(3) of the *Corporations Act 2001* (the **Act**), remains in force until it is revoked. The Principal Instrument commenced on 15 July 2022 and without this declaration would cease on 15 January 2024, having remained in force for 18 months.
2. The Principal Instrument prohibits continuing credit providers, their directors and associates from causing, authorising or providing credit to a retail client, and imposing or providing for certain fees and charges paid or payable by a retail client, in relation to a class of financial products, that ASIC was satisfied:
 - (a) was likely to be available for acquisition by issue to persons as retail clients; and
 - (b) had resulted in, and was likely to result in, significant detriment to retail clients.
3. Before ASIC made the instrument, ASIC provided a report to the Minister under subsection 1023H(3) of the Act on whether the instrument should be made. The Minister gave his written approval under subsection 1023H(4) of the Act for ASIC to make the instrument.

Purpose of the instrument

4. The purpose of this instrument is to declare under paragraph 1023H(1)(a) of the Act that the Principal Instrument remains in force until it is revoked. By doing so, the Principal Instrument can continue to reduce the risk of significant detriment to retail clients resulting from continuing credit contracts, where the continuing credit contract is provided:
 - (a) by the continuing credit provider to a retail client; and

- (b) in conjunction with a separate collateral contract (other than a collateral non-cash payment facility) between the retail client and an associate of the credit provider, pursuant to which the associate charges significant fees or other charges,

but that does not include a continuing credit contract that forms part of a buy now pay later arrangement.

Consultation

5. On 10 August 2023, ASIC issued [Consultation Paper 371 *Product intervention orders: Short term credit facilities and continuing credit contracts \(CP 371\)*](#). In CP 371, ASIC set out its analysis of the impact of the Principal Instrument and proposed to extend the Principal Instrument until it is revoked or sunsets on 1 October 2032 (***CP 371 Extension Proposal***). CP 371 showed our analysis of the effectiveness of the Principal Instrument in reducing the risk of significant detriment to retail clients following the implementation of the Principal Instrument.
6. Among other things, ASIC sought feedback on:
 - (a) the proposal to extend the Principal Instrument;
 - (b) the proposed period of the extension of the Principal Instrument;
 - (c) the effectiveness of the Principal Instrument in reducing the risk of significant detriment to retail clients;
 - (d) the effects of the Principal Instrument on competition in the financial system; and
 - (e) the alternative approaches (if any) that ASIC could take to address the significant detriment identified in CP 371.
7. ASIC received 5 submissions to CP 371, from:
 - (a) a joint submission from Consumer Action Law Centre, Financial Rights Legal Centre, Financial Counselling Australia, Indigenous Consumer Assistance Network, Westjustice, The Salvation Army, Consumer Credit Legal Service WA, Victorian Aboriginal Legal Service and Redfern Legal Centre;
 - (b) the Australian Financial Complaints Authority;
 - (c) the Consumer Credit Law Centre of South Australia;
 - (d) the Financial Counsellors' Association of Western Australia; and
 - (e) LawRight.
8. We did not receive any submissions from retail clients.

9. All respondents agreed about the effectiveness of the Principal Instrument and supported our proposal to extend it so that it would remain in force until it is revoked or sunsets on 1 October 2032.
10. The submissions to CP 371 are publicly available on ASIC's website.
11. The feedback to CP 371 was taken into account when making the instrument. Having considered the consultation feedback and having analysed data in relation to continuing credit contracts before and after the implementation of the Principal Instrument to assess its impact, ASIC is satisfied that the Principal Instrument is operating efficiently and effectively and that it is appropriate to declare under subsection 1023H(1) that the Principal Instrument remains in force until it is revoked. If the Principal Instrument is not revoked, then under the *Legislation Act 2003*, it will sunset on 1 October 2032.

Estimate of regulatory compliance burden

12. ASIC has reviewed and assessed the performance of the Principal Instrument and found that it is achieving its objectives effectively and efficiently and that therefore an Impact Analysis is not required for this instrument to be extended (OIA23-05380).

Legislative authority

13. The instrument is made under subsection 1023H(1) of the Act.
14. ASIC may, at any time before a product intervention order ceases to be in force, give the Minister a report on whether the declaration should be made. After considering the report, the Minister may give an approval in writing for the purposes of subsection 1023H(1) of the Act.
15. Before ASIC made the instrument, ASIC provided a report to the Minister under subsection 1023H(3) of the Act on whether the instrument should be made. The Minister gave his written approval under subsection 1023H(4) of the Act for ASIC to make the instrument.
16. Under subsection 1023H(1) of the Act, ASIC may, in accordance with an approval under subsection (4), by legislative instrument, declare that a product intervention order that is in force:
 - (a) remains in force until it is revoked; or
 - (b) remains in force for a specified period, unless it is revoked earlier.
17. A declaration under subsection 1023H(1) has the effect of overriding any provisions in a product intervention order about the duration of the order: see subsection 1023G(3).
18. The instrument is a disallowable legislative instrument.

Operation of the instrument

Name

19. Section 1 of the instrument provides that the instrument is the *ASIC Corporations (Product Intervention Order Extension—Continuing Credit Contracts) Instrument 2023/957*.

Commencement

20. Section 2 of the instrument provides that the instrument commences on the day after it is registered on the Federal Register of Legislation.

Authority

21. Section 3 of the instrument provides that the instrument is made under subsection 1023H(1) of the Act.

Terms of declaration

22. Section 4 of the instrument provides that the Principal Instrument remains in force until it is revoked.

Considerations relating to delegated and primary legislation

23. The effect of the instrument is to extend the operation of the Principal Instrument until the period ending at the end of 1 October 2032, unless it is revoked earlier. Although the instrument does not itself modify or exempt persons or entities from the operation of primary law, ASIC has assessed in consultation with Treasury:
 - (a) whether and why the extension of the measures in the Principal Instrument should be implemented by legislative instrument made under subsection 1023H(1) of the Act as opposed to amendment to primary legislation,
 - (b) the appropriate duration of the extension of the Principal Instrument; and
 - (c) whether any amendments to primary legislation may be pursued in future.
24. ASIC considers that the measures in the Principal Instrument should be extended by the instrument because:
 - (a) the instrument (and the Principal Instrument) utilises specific powers given to ASIC by Parliament that are intended to be used proactively to reduce the risk of significant detriment to retail clients resulting from financial products. Part 7.9A of the Act commenced in April 2019, and sets out a framework and the procedural requirements for ASIC to make, amend, extend, remake and revoke product intervention orders;
 - (b) the instrument is a timely way of extending the Principal Instrument before it expires on 15 January 2024. A product intervention order may remain in force for up to 18 months and may be extended by ASIC with the Minister's written

approval, following a report to the Minister from ASIC on whether the extension should be made; and

- (c) the product intervention powers in Part 7.9A of the Act allow ASIC to amend a product intervention order, should the need arise, to respond in a flexible and timely way to changes to product features, issuance and sales practices, consumer harm and international regulatory standards.

25. Following public consultation and having assessed that the Principal Instrument is operating efficiently and effectively, ASIC considers it is appropriate to declare under subsection 1023H(1) that the Principal Instrument remains in force until it is revoked. If the Principal Instrument is not revoked, then under the *Legislation Act 2003*, it will sunset on 1 October 2032. This period is appropriate because it:

- (a) allows the Principal Instrument to continue to operate to reduce the risk of significant detriment to retail clients resulting from continuing credit contracts when provided in the manner described at paragraph 4 above;
- (b) provides regulatory certainty for continuing credit contract providers and retail clients;
- (c) provides an adequate timeframe for consideration as to whether the protections should be extended further prior to the expiry of the Principal Instrument; and
- (d) balances the additional regulatory burden associated with more frequent data gathering and consultation on further extensions.

26. The Minister has considered and approved the duration of the extension provided for in this instrument.

27. It will be a matter for the Government and for Parliament as to whether any amendments to the Act may be made in future to include the measures in the Principal Instrument. ASIC notes the Government's commitment to consider the merits of making future amendments to the relevant enabling Acts and regulations as part of its review process for any delegated legislation within the Treasury portfolio prior to its sunsetting.

Statement of Compatibility with Human Rights

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 set out in [Attachment A](#).

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 (Product Intervention Order Extension—Continuing Credit Contracts) Instrument 2023/957.

Overview

1. This instrument is a declaration made under subsection 1023H(1) of the *Corporations Act 2001* (the *Act*) to extend a product intervention order so that it remains in force until it is revoked. This instrument extends [*ASIC Corporations \(Product Intervention Order—Continuing Credit Contracts\) Instrument 2022/648 \(Principal Instrument\)*](#) which prohibits continuing credit providers, their directors and associates from causing, authorising or providing credit to a retail client, and imposing or providing for certain fees and charges paid or payable by a retail client, in relation to a class of financial products, that ASIC was satisfied:
 - (a) was likely to be available for acquisition by issue to persons as retail clients; and
 - (b) had resulted in, and was likely to result in, significant detriment to retail clients.
2. If it is not revoked, it will sunset on 1 October 2032.
3. Before ASIC made the instrument, ASIC provided a report to the Minister under subsection 1023H(3) of the Act on whether the instrument should be made. The Minister gave his written approval under subsection 1023H(4) of the Act for ASIC to make the instrument.
4. By declaring that the Principal Instrument remains in force until it is revoked, the Principal Instrument can continue to reduce the risk of significant detriment to retail clients resulting from continuing credit contracts, where the continuing credit contract is provided:
 - (a) by the continuing credit provider to a retail client; and
 - (b) in conjunction with a separate collateral contract (other than a collateral non-cash payment facility) between the retail client and an associate of the credit provider, pursuant to which the associate charges significant fees or other charges,

but that does not include a continuing credit contract that forms part of a buy now pay later arrangement.

Assessment of human rights implications

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

Conclusion

6. 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*.