CONSULTATION PAPER 354

ASIC relief for simple arrangements following a hardship notice: [CO 14/41]

December 2021

About this paper

This consultation paper seeks feedback from interested stakeholders on whether ASIC should:

- extend until 1 April 2024 the relief available for simple arrangements following a hardship notice under Class Order [CO 14/41] *Extension of transitional credit hardship provisions*, without significant changes; or
- allow this relief to expire if it is no longer a useful part of the regulatory framework.

Class Order [CO 14/41] is due to expire on 1 March 2022.

> Note: The draft ASIC instrument attached to this paper is available on our website at www.asic.gov.au/cp under CP 354.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This paper was issued on 8 December 2021 and is based on the National Credit Act and National Credit Code as at the date of issue.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

Contents

The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information. We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on the written notification requirements for hardship variations under the National Credit Code. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section D, 'Regulatory and financial impact'.

Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous, we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our privacy policy at www.asic.gov.au/privacy for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by 1 February 2022 to:

Susanne Noack, Senior Manager, Credit & Banking
Australian Securities and Investments Commission
Level 7, 120 Collins Street,
Melbourne VIC 3000
email: susanne.noack@asic.gov.au

What will happen next?

Stage 1	8 December 2021	ASIC consultation paper released
Stage 2	1 February 2022	Comments due on the consultation paper
Stage 3	1 March 2022	[CO 14/41] is due to expire (if it is not extended)

A Background

Key points

When considering whether to extend the operation of a legislative instrument or allow it to expire, ASIC will carefully consider the continuing regulatory and financial impact of the instrument and whether it retains its effectiveness in addressing an identified issue or problem.

We will consult affected stakeholders on all ASIC legislative instruments that have more than a minor or machinery regulatory impact.

ASIC's approach to extending legislative instruments

1 ASIC will consult affected stakeholders on all ASIC legislative instruments that have more than a minor or machinery regulatory impact, and are subject to sunsetting, to ensure:

(a) we carefully consider the continuing regulatory and financial impact of the instrument; and

(b) the instrument retains its effectiveness in addressing an identified issue or problem.

2 If it is necessary to extend a legislative instrument, our focus is on making it clear and user friendly. We will also, where possible, simplify and rationalise its content and conditions. For example, we will remove or reduce an obligation or burden in a legislative instrument if we are able to do so without undermining ASIC's vision of a fair, strong and efficient financial system for all Australians.

3 Generally, a Regulation Impact Statement (RIS) is required for new and amended policy that has a significant regulatory impact: see the Australian Government's Impact Analysis Framework.

4 If an instrument no longer serves a regulatory purpose, we are of the view that it should be repealed or allowed to expire. This is because we hope to ensure that only instruments that serve a regulatory purpose are maintained.

B ASIC relief for simple arrangements in [CO 14/41]

Key points

ASIC currently provides relief for simple arrangements following a hardship notice in Class Order [CO 14/41] *Extension of transitional credit hardship provisions*.

Under this relief, a credit provider does not need to give a consumer written notice that they have agreed to change a credit contract (in response to a hardship notice) and details of the change if the contract variation is a simple arrangement.

Changes to the credit reporting obligations, including reporting of financial hardship information, may affect how credit providers use this relief.

Financial hardship and simple arrangements

Hardship notice under the National Credit Code

5 If a credit provider is given 'notice' by a consumer that they are or will be unable to meet their obligations under a credit contract (i.e. a hardship notice), the credit provider must decide whether to agree to change the contract.

Note 1: See s72–73 and s177B–177C of the National Credit Code at Sch 1 of the *National Consumer Credit Protection Act 2009* (National Credit Act).

Note 2: In this paper, the term 'credit provider' includes a lessor under a consumer lease and the term 'credit contract' or 'contract' includes a consumer lease.

6 This decision will have one of two outcomes:

(a) *The credit provider agrees to change the contract*—If this occurs, the credit provider must give the consumer written notice stating that the change has been agreed and setting out the details of the change (see s72(4)(a), 73(1), 177B(4)(a) and 177C(1) of the National Credit Code).

(b) *The credit provider does not to change the contract*—If this occurs, the credit provider must give the consumer written notice that includes reasons for their decision, contact details for the Australian Financial Complaints Authority (AFCA) scheme and the consumer's rights under that scheme (see s72(4)(b) and 177B(4)(b)).

What is a simple arrangement?

7 For the purposes of [CO 14/41], a 'simple arrangement' is defined as an agreement that defers or reduces the obligations of a credit provider for a period of no more than 90 days.

8 If a credit provider agrees to change the contract (as described in paragraph 6(a)) and the contract variation is a simple arrangement, [CO 14/41] relieves the credit provider from the requirement to give the consumer written notice that they have agreed to change the contract with details of the change.

9 Relief having the same effect as [CO 14/41] was originally provided by regs 69A and 69B of the *National Consumer Credit Regulations 2010* until 1 March 2014. Relief was extended through [CO 14/41] until 1 March 2015 to allow time for consultation with industry on a permanent solution that would reduce administrative burdens on credit providers and make it easier for consumers to seek contract variations. The period for this relief was extended several times, most recently by the *ASIC Credit (Amendment) Instrument 2020/148* (ASIC Instrument 2020/148).

10 ASIC Instrument 2020/148 was made to continue relief for simple arrangements while the Government progressed legislation to implement the mandatory comprehensive credit reporting regime and to introduce financial hardship information as a new category of information in credit reporting. ASIC considered it was desirable for these matters to be settled before we consulted on whether [CO 14/41] should continue to be part of the regulatory framework.

11 When [CO 14/41] was previously extended, ASIC undertook targeted consultation with industry and consumer representative groups on how the relief operated. The most recent feedback we received (before making ASIC Instrument 2020/148) included the following:

(a) Credit providers relied on [CO 14/41] as part of their hardship practices and procedures to differing extents.

(b) Some consumer representative groups told us that credit providers often wish to confirm hardship arrangements in writing with customers and therefore, they were of the view that [CO 14/41] was unnecessary.

(c) Some consumer representative groups suggested that the definition of simple arrangements should be changed to arrangements of less than 30 days (rather than of 90 days or less).

Changes to credit reporting obligations

Amending Act

12 On 3 February 2021, Parliament passed the *National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Act 2021* (Amending Act). A key feature of the Amending Act is to introduce reporting of financial hardship information into the credit reporting system under the *Privacy Act 1988* (Privacy Act).

13 Reporting of financial hardship information will occur where a credit provider reports repayment history information for an account and a financial hardship arrangement is entered into between the credit provider and the consumer. These changes come into effect in the credit reporting system from 1 July 2022.

14 Financial hardship information is either information about repayment(s) affected by a financial hardship arrangement that is:

(a) a permanent variation to the terms of the consumer credit; or

(b) providing temporary relief or deferral of an individual's obligation in relation to the consumer credit.

Note: See s6QA(4) of the Privacy Act in Sch 2, item 4 of the Amending Act.

15 The Explanatory Memorandum to the N*ational Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Bill 2019* (2019 Bill) describes a financial hardship arrangement as follows:

> Within the credit reporting system, a 'financial hardship arrangement' is any kind of agreement, arrangement or understanding that defers or reduces the obligations of a debtor for a temporary period, such as 'simple arrangements' within the meaning of ASIC Order CO 14/41, indulgences, forbearances and waivers. This broad definition is intended to recognise the diversity of arrangements that may exist between consumers and their credit providers which take into account individual circumstances.

Note: See the Explanatory Memorandum to the 2019 Bill, paragraph 2.28.

Changes to the Credit Reporting Code

16 On 6 September 2021, the Australian Retail Credit Association (ARCA) applied to the Australian Information Commissioner to vary the Privacy (Credit Reporting) Code 2014 (Credit Reporting Code).

17 Among other things, the application proposes that the Credit Reporting Code require credit providers to take reasonable steps to provide consumers with information that describes the repayment history information and, if relevant, the financial hardship information that may be disclosed to a credit reporting body as a result of the type of arrangement put in place (i.e. permanent variation (including simple arrangements), temporary relief or deferral or promise-to-pay).

The role of [CO 14/41] in the regulatory framework

Simple arrangements and temporary arrangements

18 As noted in paragraph 11, based on previous feedback ASIC has received, we understand that credit providers rely on [CO 14/41] to differing extents.

19 In recent years, it has become apparent to ASIC that credit providers enter into a range of agreements and/or arrangements with consumers when responding to their financial difficulties.

20 We understand that credit providers may offer assistance to consumers experiencing financial difficulty in the form of 'temporary' or 'informal' arrangements, such as a 'promise-to-pay' or 'indulgence', under which the terms of the credit contract have not been changed.

> Note: ASIC considers that where a credit provider acknowledges or represents to the consumer that they will not enforce their rights under the contract if the temporary arrangement is complied with, there is likely to be a change to the credit contract for the purpose of the National Credit Code provisions. Conversely, if the credit provider reserves its right to enforce the terms of the contract, notwithstanding a temporary arrangement that allows non-compliance with the contract, it is less likely that the contract has been changed.

21 Credit providers have not, to date, expressly explained in what circumstances simple arrangements (as referred to in [CO 14/41]) or other kinds of temporary or informal arrangements are used, and how this interacts with the decision steps that are required under s72 and 177B of the National Credit Code (collectively referred to as 's72' in this paper).

22 However, we have inferred from our discussions with industry that informal temporary arrangements (that do not involve a change to the contract, and so are not 'simple arrangements' affected by the relief) may be offered to consumers in circumstances where:

(a) a 'hardship notice' under s72 of the National Credit Code has not been given by the consumer; or

(b) a 'hardship notice' has been given by the consumer, but the credit provider and consumer have not agreed to change the contract (the scenario as described in paragraph 6(b)).

23 We have gained the impression that it is not uncommon for a credit provider to respond to a consumer experiencing financial difficulties by offering the consumer some form of informal temporary arrangement, rather than a change to the terms of the credit contract. As informal temporary arrangements can have a similar duration to simple arrangements (i.e. 90 days or less), we think it is likely that some affected stakeholders may view these arrangements as being the same as simple arrangements affected by [CO 14/41].

24 However, in ASIC's view:

(a) the requirements in s72(4)(a), 73(1), 177B(4)(a) and 177C(1) of the National Credit Code only apply where there is an agreement to change the credit contract. Accordingly, the relief for 'simple arrangements' only has effect where the credit provider is entering into an arrangement with a consumer *and* changing the terms of the contract; and

(b) if the credit provider does not agree with the consumer to change the credit contract in response to a hardship notice, but will instead offer an informal arrangement, the credit provider would be required by s72(4)(b) and 177B(4)(b) of the National Credit Code to provide the consumer with written notice that a change to the contract has not been agreed, the reasons why they have not agreed and details about the consumer's rights to complain to AFCA.

25 We are seeking feedback on how, in practice, credit providers respond to consumers in financial difficulty, the kinds of arrangements that are offered and how credit providers purport to comply with the requirements in s72 of the National Credit Code and rely on [CO 14/41].

26 This feedback will help us to understand the circumstances in which the relief in [CO 14/41] is relied upon, and whether it is effective in meeting the regulatory objective of making it easier for consumers in financial difficulty to seek changes to their credit contracts by reducing administrative burdens on credit providers.

Interaction between [CO 14/41] and financial hardship information

27 We anticipate that the commencement on 1 July 2022 of the obligation to report financial hardship information may have implications for how credit providers rely on [CO 14/41]. In particular, the proposed obligation in the Credit Reporting Code discussed at paragraph 16 relates to information that a credit provider will need to provide to a consumer when a financial hardship arrangement is put in place.

28 A consumer's ability to understand how their credit report will change when a financial hardship arrangement is put in place will depend on the nature and terms of the agreement reached between a credit provider and consumer (which may include a simple arrangement). Accordingly, we are seeking feedback on how the commencement of the obligation to include financial hardship information may interact with relief provided by [CO 14/41].

C Proposal to extend ASIC relief or allow it to expire

Key points

ASIC relief for simple arrangements in [CO 14/41] is due to expire on 1 March 2022.

We will either:

- extend this relief until 1 April 2024, without significant changes, if it continues to be a useful part of the regulatory framework; or
- allow this relief to expire on 1 March 2022 if it no longer serves a regulatory purpose.

ASIC is seeking feedback from credit providers and other stakeholders to help us form a view on whether to extend the relief or allow it to expire.

Two options: Extend relief in [CO 14/41] or allow it to expire

Proposal

C1 We propose to either:

(a) extend the relief for simple arrangements in Class Order [CO 14/41] *Extension of transitional credit hardship provisions* until 1 April 2024, without significant changes, if it continues to be a useful part of the regulatory framework; or

(b) allow the relief in [CO 14/41] to expire on 1 March 2022 if it no longer serves a regulatory purpose.

Your feedback

C1Q1 How do simple arrangements fit into your broader practices relating to hardship and the solutions offered to consumers experiencing financial difficulty including different kinds of arrangements? Please explain.

Extend relief in [CO 14/41]

C2 If ASIC forms the view that [CO 14/41] remains a useful part of the regulatory framework, we propose to extend, without significant changes, the relief available under this class order until 1 April 2024 (being the sunset date for the class order if extended).

Your feedback

C2Q1 Do you consider that ASIC relief for simple arrangements in [CO 14/41] is currently operating effectively and efficiently and should be extended? Please give reasons for your view.

C2Q2 If you rely on this relief, what proportion of arrangements entered into with consumers (in response to financial difficulties) involve a change to the terms of the credit contract?

C2Q3 Of these arrangements, how often do you rely on [CO 14/41] to obviate the requirement to provide a consumer with notice:

(a) that you have agreed to change the credit contract; and/or

(b) setting out particulars of the change in the terms of the credit contract.

C2Q4 If you vary a consumer's credit contract and rely on [CO 14/41], what steps do you take to ensure that the consumer understands the terms of their arrangement, specifically:

(a) the duration of the arrangement;

(b) their repayment obligations during the arrangement; and

(c) their repayment obligations at the end of the arrangement?

C2Q5 To what extent is reliance on [CO 14/41] likely to change after 1 July 2022 when the obligation to report financial hardship information is introduced? Please explain your view.

C2Q6 If [CO 14/41] continues to be relied on after 1 July 2022, could this adversely affect a consumer's ability to understand the information in their credit report. If so, why?

C2Q7 What regulatory or commercial benefits do you derive from relying on [CO 14/41]? What would be the cost of complying with the requirements in s72(4)(a), 73(1), 177B(4)(a) and 177C(1) to give written notice? Please quantify these costs if possible.

C2Q8 How will the reporting of financial hardship information affect the regulatory impacts or costs detailed in question C2Q7? Please provide details.

C2Q9 If you think [CO 14/41] should be extended, how long do you think it should remain in force? Please give reasons for your view.

Allow relief in [CO 14/41] to expire

C3 If ASIC forms the view that [CO 14/41] is no longer a useful part of the regulatory framework, we propose to allow the class order to expire on 1 March 2022. This would mean that relief from written notices for simple arrangements would no longer be available after 1 March 2022.

Your feedback

C3Q1 If ASIC does not provide relief for simple arrangements in [CO 14/41] after 1 March 2022, will this change the nature of the arrangements that credit providers offer consumers?

C3Q2 If simple arrangements are offered less frequently, what kind of arrangement(s) is likely to be offered instead and what impact (if any) might this alternative have on consumers?

C3Q3 What regulatory or commercial impacts or costs might credit providers incur if ASIC does not provide relief for simple arrangements in [CO 14/41] after 1 March 2022? Please provide details and quantify costs if possible.

Rationale

29 At this stage, we propose to either extend [CO 14/41] until 1 April 2024, without significant changes, or allow the class order to expire on 1 March 2022 if it is no longer a useful part of the regulatory framework. We note that 1 April 2024 is the date on which the instrument will, if extended, sunset under the *Legislation Act 2003*.

Extend relief in [CO 14/41]

30 ASIC is likely to form the view that relief should continue beyond 1 March 2022 if responses indicate that:

(a) credit providers are using simple arrangements and relying on the written notification relief in [CO 14/41]; and

(b) the operation of this relief is not having a detrimental impact on consumers.

31 If we consider that the relief in [CO 14/41] continues to be a useful part of the regulatory framework, the continuation of the relief until 1 April 2024 will maintain the status quo while allowing time for recommendations to be made to Treasury to consider permanent modifications to the requirements of the National Credit Code.

32 If we consider that changes should be made to the scope or other terms of the relief, ASIC will make recommendations to Treasury on changes that we consider would be appropriate.

Allow relief in [CO 14/41] to expire

33 ASIC may form the view that [CO 14/41] is not operating efficiently and effectively and is not a necessary and useful part of the regulatory framework if responses received to this consultation indicate that:

(a) the extent to which credit providers are currently relying on and meeting the conditions of the relief are at such a low level that relief is not warranted; or

(b) the operation of this relief is having a detrimental impact on consumers and would likely continue to do so beyond 1 July 2022.

34 In this case, the class order would expire on 1 March 2022. This means that relief from written notices for simple arrangements would no longer be available after 1 March 2022

D Regulatory and financial impact

35 In forming a view on the options presented in this paper, we will carefully consider their regulatory and financial impact to strike an appropriate balance between:

(a) reducing business costs; and

(b) promoting a fair, strong and efficient financial system for all Australians.

36 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:

(a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;

(b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and

(c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a RIS.

37 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

38 To ensure that we are in a position to properly complete any required RIS, please give us as much information as you can about our proposals or any alternative approaches, including:

(a) the likely compliance costs;

(b) the likely effect on competition; and

(c) other impacts, costs and benefits.

See 'The consultation process', p. 4.

Key terms

Term	Meaning in this document
2019 Bill	*National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Bill 2019*
AFCA	Australian Financial Complaints Authority
Amending Act	*National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Act 2021*
ARCA	Australian Retail Credit Association
ASIC	Australian Securities and Investments Commission
ASIC Instrument 2020/148	*ASIC Credit (Amendment) Instrument 2020/148*
[CO 14/41] (for example)	An ASIC class order (in this example numbered 14/41) Note: Legislative instruments made from 2015 are referred to as ASIC instruments.
Credit Reporting Code	Privacy (Credit Reporting) Code 2014
credit provider	For ease of reference, in this paper, the term 'credit provider' includes credit providers under credit contracts and lessors under consumer leases
National Credit Act	*National Consumer Credit Protection Act 2009*
National Credit Code	The *National Credit Code* at Sch 1 to the *National Consumer Credit Protection Act 2009*
OBPR	Office of Best Practice Regulation
Privacy Act	*Privacy Act 1988*
RIA	Regulatory Impact Assessment
RIS	Regulation Impact Statement
s25 (for example)	A section of the National Credit Code (in this example numbered 25), unless otherwise specified

List of proposals and questions

Proposal	Your feedback
C1 We propose to either: (a) extend the relief for simple arrangements in Class Order [CO 14/41] until 1 April 2024, without significant changes, if it continues to be a useful part of the regulatory framework; or (b) allow the relief in [CO 14/41] to expire on 1 March 2022 if it no longer serves a regulatory purpose	C1Q1 How do simple arrangements fit into your broader practices relating to hardship and the solutions offered to consumers experiencing financial difficulty including different kinds of arrangements? Please explain.
C2 If ASIC forms the view that [CO 14/41] remains a useful part of the regulatory framework, we propose to extend, without significant changes, the relief available under this class order until 1 April 2024 (being the sunset date for the class order if extended).	C2Q1 Do you consider that ASIC relief for simple arrangements in [CO 14/41] is currently operating effectively and efficiently and should be extended? Please give reasons for your view. C2Q2 If you rely on this relief, what proportion of arrangements entered into with consumers (in response to financial difficulties) involve a change to the terms of the credit contract? C2Q3 Of these arrangements, how often do you rely on [CO 14/41] to obviate the requirement to provide a consumer with notice: (a) that you have agreed to change the credit contract; and/or (b) setting out particulars of the change in the terms of the credit contract. C2Q4 If you vary a consumer's credit contract and rely on [CO 14/41], what steps do you take to ensure that the consumer understands the terms of their arrangement, specifically: (a) the duration of the arrangement; (b) their repayment obligations during the arrangement; and (c) their repayment obligations at the end of the arrangement? C2Q5 To what extent is reliance on [CO 14/41] likely to change after 1 July 2022 when the obligation to report financial hardship information is introduced? Please explain your view. C2Q6 If [CO 14/41] continues to be relied on after 1 July 2022, could this adversely affect a consumer's ability to understand the information in their credit report. If so, why?

Proposal	Your feedback
	C2Q7 What regulatory or commercial benefits do you derive from relying on [CO 14/41]? What would be the cost of complying with the requirements in s72(4)(a), 73(1), 177B(4)(a) and 177C(1) to give written notice? Please quantify these costs if possible. C2Q8 How will the reporting of financial hardship information affect the regulatory impacts or costs detailed in question C2Q8? Please provide details. C2Q9 If you think [CO 14/41] should be extended, how long do you think it should remain in force? Please give reasons for your view.
C3 If ASIC forms the view that [CO 14/41] is no longer a useful part of the regulatory framework, we propose to allow the class order to expire on 1 March 2022. This would mean that relief from written notices for simple arrangements would no longer be available after 1 March 2022.	C3Q1 If ASIC does not provide relief for simple arrangements in [CO 14/41] after 1 March 2022, will this change the nature of the arrangements that credit providers offer consumers? C3Q2 If simple arrangements are offered less frequently, what kind of arrangement(s) is likely to be offered instead and what impact (if any) might this alternative have on consumers? C3Q3 What regulatory or commercial impacts or costs might credit providers incur if ASIC does not provide relief for simple arrangements in [CO 14/41] after 1 March 2022? Please provide details and quantify costs if possible.