

## **EXPLANATORY STATEMENT for ASIC Corporations (Wholly-owned Companies) Instrument 2016/785**

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (ASIC) makes ASIC Corporations (Wholly-owned Companies) Instrument 2016/785 under section 341 of the *Corporations Act 2001* (the Corporations Act).

Section 341 of the Act provides that ASIC may make an order in writing in respect of a specified class of companies, registered schemes or disclosing entities, relieving any of the directors, the companies, registered schemes or disclosing entities themselves, or the auditors of the companies, registered schemes or disclosing entities from all or specified requirements of Parts 2M.2, 2M.3 and 2M.4 (other than Division 4) of the Act. This includes regulations made for the purposes of those Parts. These provisions relate to financial reporting.

### **1. Background**

Part 2M.3 of the Corporations Act requires companies (except most small proprietary companies), disclosing entities and registered managed investment schemes (registered schemes) to prepare and lodge a financial report, directors' report and auditor's report for a financial year.

The costs of preparing a financial report and having it audited are significant. Where entities are wholly owned within a group of companies, and there are deeds of cross-guarantee within the group, the information needs of creditors and other stakeholders may be sufficiently met by the consolidated financial statements for the group, rather than individual financial statements for each of the wholly owned entities.

### **2. Purpose of the instrument**

The instrument relieves a wholly owned company from its obligations under Part 2M.3 of the Corporations Act.

### 3. Operation of the instrument

A wholly-owned company is relieved of its obligations under Part 2M.3 of the Corporations Act provided it enters into a deed of cross-guarantee with its holding entity and other wholly owned entities of the group, and meets certain other conditions. Entities that are not wholly owned may be a party to the deed but are not relieved from the requirements in Part 2M.3.

The deed of cross-guarantee is an instrument under which each entity enters into a covenant with the trustee to guarantee payment in full of any debt to creditors of each party to the deed by each other entity.

The deed of cross-guarantee is required as a protection for creditors of the company that will not have access to the company's financial report in order to assess its financial position. One of the conditions of relief is that the directors of the holding entity state that there are reasonable grounds to believe the parties to the deed will be able to meet any obligations or liabilities to which they are, or may become, subject.

The financial statements of the holding entity must include the disclosure of consolidated financial information relating to all parties to the deed, except where all parties to the deed are exempt from lodging a financial report. In the latter circumstances, the identities of the parties to the deed still need to be disclosed in the financial statements of the holding entity.

A consequence of remaking Class Order [CO 98/1418] as an ASIC instrument is that in order to join a company to a deed of cross guarantee executed before the commencement of *ASIC Corporations (Wholly-owned Companies) Instrument 2016/785* a new deed will need to be executed or the pre-existing deed varied to reflect the revised Pro forma 24.

### 4. Consultation

ASIC consulted with stakeholders through Consultation Paper 267 which was issued for comment on 15 August 2016 and open for comment to 12 September 2016.

The Office of Best Practice Regulation has assessed that a Regulatory Impact Statement is not necessary for this instrument.

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **ASIC Corporations (Wholly-owned Companies) Instrument 2016/785**

ASIC Corporations (Wholly-owned Companies) Instrument 2016/785 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*.

#### **Overview**

The instrument relieves a wholly-owned company from the obligation to prepare a financial report and have it audited provided the company enters into a deed of cross guarantee with its holding entity and other wholly owned entities of the group to protect its creditors, and meets certain other conditions.

#### **Human rights implications**

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

#### **Conclusion**

This legislative instrument is compatible with human rights as it does not raise any human rights issues.

**Australian Securities and Investments Commission**