



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Amendment and Repeal) Instrument 2021/799

This is the Explanatory Statement for *ASIC Corporations (Amendment and Repeal) Instrument 2021/799* (the *Hawking Amendment Instrument*).

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

Glossary

The following definitions are used:

Corporations Act means the *Corporations Act 2001*.

FSRC Reform Act means the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020*

Background

1. On 10 December 2020, the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (the *FSRC Reform Act*) was passed, which consolidated the hawking prohibitions set out in sections 736, 992A and 992AA of the *Corporations Act* into a single prohibition in section 992A, with a consumer remedy provision in section 992AA. This prohibition now applies to all financial products (within the meaning of section 761A of the *Corporations Act*).

Purpose of the instrument

2. The *Hawking Amendment Instrument* is intended to provide consequential amendments to a number of existing *ASIC* legislative instruments by updating statutory references to the prohibition on the hawking of financial products. The *Hawking Amendment Instrument* will also repeal two *ASIC* legislative instruments the function of which are made redundant by the new amendments made by the *FSRC Reform Act* and amendments made to the *Corporations Regulations 2001*.
3. The *Hawking Amendment Instrument* does not affect the duration of the instruments to be amended, nor does it make any substantive change to the policy settings of each of those instruments.

Consultation

4. ASIC had previously also conducted a 4-week public consultation about updates to its guidance reflecting the new obligations imposed by the FSRC Act in respect of the hawking of financial products between July and August 2021.
5. Given that the Hawking Amendment Instrument neither impacts upon policy settings of the instruments to be amended, nor changes their duration, ASIC did not consider it necessary to engage in further consultation before making the Hawking Amendment Instrument.

Operation of the instrument

6. Section 2 of the Hawking Amendment Instrument provides that the instrument commences on the later of 5 October 2021 (the date the changes to the hawking provisions made by the FSRC Reform Act commence) and the day after it is registered on the Federal Register of Legislation.
7. The following legislative instruments set out in Schedule 1 to the Hawking Amendment Instrument are amended as set out that schedule:
 - a. *ASIC Class Order [CO 13/763]*
 - b. *ASIC Class Order [CO 14/1000]*
 - c. *ASIC Class Order [CO 14/1001]*
 - d. *ASIC Corporations (Avia Syndicate) Instrument 2015/825*
 - e. *ASIC Corporations (Employee redundancy funds relief) Instrument 2015/1150*
 - f. *ASIC Corporations (Horse Schemes) Instrument 2016/790*
 - g. *ASIC Corporations (School Enrolment Deposits) Instrument 2016/812*
 - h. *ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813*
 - i. *ASIC Corporations (Serviced Apartment and Like Schemes) Instrument 2016/869*
 - j. *ASIC Corporations (Property Rental Schemes) Instrument 2016/870*
 - k. *ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968*
 - l. *ASIC Corporations (Managed Investment Schemes: Interests Not For Money) Instrument 2016/1107*

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- m. *ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156*
 - n. *ASIC Corporations (Mortgage Investment Schemes) Instrument 2017/857*
 - o. *ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547*
 - p. *ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38*
8. The amendments to those instruments are minor and technical changes to reflect changes to the hawking provisions made by the FSRC Reform Act. In particular, the amendments to those instruments include the following:
 - a. amendments to reflect the fact that following the changes made by the FSRC Reform Act, the hawking prohibition will be contained in section 992A of the Corporations Act rather than there being separate hawking prohibitions in sections 736, 992A and 992AA of the Corporations Act;
 - b. amendments to reflect changes made by the FSRC Reform Act to the wording of the statutory hawking prohibition.
 9. None of these changes affects the policy settings or the duration of any of the above legislative instruments. As such, each of these instruments will be subject to a separate review process prior to their relevant sunseting dates.
 10. Schedule 2 of the Hawking Amending Instrument repeals two legislative instruments:
 - a. *ASIC Corporations (Securities and Managed Investment Scheme Hawking Relief) Instrument 2017/184*; and
 - b. *ASIC Corporations (Life Risk Insurance and Consumer Credit Insurance) Instrument 2019/839*.

These repeals are consequential as their purpose or function is now achieved by the revised hawking prohibition imposed by the FSRC Reform Act and amendments made to the *Corporations Regulations 2001* by the *Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021*.

Legislative authority

11. The source of the power to make the Hawking Amendment Instrument is subsections 741(1) and 992B(1) of the Corporations Act.
12. Under subsection 33(3) of the *Acts Interpretation Act 1901* (as in force as at 1 January 2005 and as applicable to the relevant powers because of section 5C of the Corporations Act), where an Act confers a power to make any instrument, the power is to be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to amend any such instrument.
13. The amending instrument is a disallowable legislative instrument.

Statement of Compatibility with Human Rights

14. 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 (Amendment and Repeal) Instrument 2021/799

Overview

1. This instrument repeals two ASIC legislative instruments and makes consequential amendments to a number of ASIC legislative instruments to preserve their operation in light of amendments made to the hawking provisions contained in the *Corporations Act 2001* by Schedule 5 to the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020*.

Assessment of human rights implications

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

Conclusion

4. 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*.