

ASIC CLASS ORDER [CO 11/1277]

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes ASIC Class Order [CO 11/1277] under paragraphs 911A(2)(l), 951B(1)(a) and 1020F(1)(a) of the *Corporations Act 2001* (the **Act**).

Paragraph 911A(2)(l) provides that a person is exempt from the requirement to hold an Australian financial services licence for a financial service they provide in circumstances where the provision of the service is covered by an exemption specified by ASIC in writing and published in the Gazette. Paragraph 951B(1)(a) provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.7 of the Act. Paragraph 1020F(1)(a) provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.9 of the Act.

1. Background

Before 1 July 1999 credit unions (and other specific types of financial institutions) were registered and regulated under the respective Financial Institutions Code of each State and Territory.

On 1 July 1999 the registration and regulation of credit unions as financial institutions were transferred to the then Corporations Law. These financial institutions are referred to as “transferring financial institutions” in Schedule 4 to the Act.

Chapter 7 (“Financial services and markets”) of the Act prescribes a licensing regime for persons who provide financial services and also regimes for financial services and product disclosure. Transferring financial institutions, including credit unions, were subject to these requirements because their issue of “member shares” to successful applicants for membership was considered to amount to the provision of financial services.

A “member share” for the purposes of the Act has the characteristics set out in subregulation 12.8.03(2) of the *Corporations Regulations 2001* (the **Regulations**), namely:

(a) it is not an ED (“enhanced disclosure”) security; and

(b) it has a fixed value; and

- (c) it is held by a single person, or 2 or more persons jointly; and
- (d) it entitles the holder, or joint holders, to use services provided by the financial institution ; and
- (e) it is not transferable or transmissible, or is only transferable or transmissible to a person or body specified in the rules or constitution of the financial institution in circumstances stated in the rules or constitution.

ASIC Class Order [CO 02/1176] gives a series of exemptions to transferring financial institutions that are permitted to use the expression “credit union”, “credit society” or “credit co-operative” under section 66 of the *Banking Act 1959* (the ***Banking Act***).

The class order exempts these institutions, in relation to their dealings in member shares, from the requirement to hold an Australian financial services licence, the financial services disclosure requirements in Part 7.7 of the Act and the requirement to confirm transactions under section 1017F of the Act.

The exemptions under the principal class order were provided because of the unique nature of member shares and the circumstances in which they are offered and issued to successful applicants for membership. When a person becomes a member of a credit union, a single member share is issued to that person for a nominal price, and the member share entitles the person to use the services of the credit union and generally to vote on member resolutions. Member shares are withdrawable upon cessation of a person’s membership of a credit union, in which case the nominal price paid for the member share is generally repaid.

Under Division 2 of Part 2 of Schedule 4 to the Act, any withdrawable shares of a transferring financial institution on issue immediately before 1 July 1999 were deemed to become a type of redeemable preference shares, and any provisions in the Act (including relevant provisions in Chapter 7) that apply to redeemable preference shares also apply to member shares that were deemed to be redeemable preference shares. Any member shares issued on or after 1 July 1999 are also classified as such. Regulation 6D.2.01 of the Regulations provides an exemption from the fundraising disclosure provisions in Part 6D.2 of the Act in relation to an offer of member shares. Although these characteristics of member shares are somewhat different to those of redeemable preference shares, the credit union, as issuer of those shares, is required to comply with the same licensing and disclosure obligations as if the member shares were redeemable preference shares, a type of financial product under Chapter 7 of the Act. The principal class order was made because ASIC considered that the application of certain provisions in Chapter 7 of the Act to member shares would be disproportionately burdensome.

The Australian Prudential Regulation Authority (***APRA***), from time to time, assesses applications by certain qualifying credit unions under section 66 of the *Banking Act* to

use the term “bank” or “mutual bank” in their company or business names. A condition of approval is that the successful applicant may no longer use the term “credit union”, “credit co-operative” or “credit society” in its name. The effect of this approval condition is that a credit union that was previously able to rely on the principal class order will no longer be able to rely on the class order and would be in breach of the relevant provisions of Chapter 7 of the Act despite the operations of that credit union remaining the same. ASIC considers this to be an unintended consequence of APRA’s approval condition.

2. Purpose of the class order

The purpose of this amending class order is to enable those companies that were relying on the exemptions in the principal class order to continue to rely on the exemptions, including those qualifying credit unions for which APRA has conditionally permitted to use the term “bank” or “mutual bank” in their company or business names.

3. Operation of the class order

The class order amends the principal class order by amending the description of the class of transferring financial institutions that qualify for the exemptions, but without changing the scope of that class.

4. Consultation

ASIC consulted with APRA before making this class order. APRA did not object to the making of this class order.