

ASIC CLASS ORDER [CO 12/340]

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 12/340] under subsection 601YAA(1) of the *Corporations Act 2001* (the *Act*).

Subsection 601YAA(1) of the Act provides that ASIC may declare that Chapter 5D of the Act applies to a person or class of persons as if specified provisions were omitted, modified or varied as specified in the declaration.

1. Background

Chapter 5D of the Act implements the transfer of certain regulatory responsibilities from the States and Territories to the Commonwealth in relation to trustee companies that provide “traditional trustee company services”, including performing estate management functions, preparing wills, applying for probate of a will and establishing and operating common funds.

The Chapter created a national licensing system for trustee companies. These trustee companies are required to hold an Australian financial services licence covering the provision of traditional trustee company services.

The trustee companies to which Chapter 5D of the Act applies are those companies listed in Schedule 8AA to the *Corporations Regulations 2001*.

The list of companies included in that Schedule was originally determined at the time of enacting Chapter 5D of the Act. Subsection 601RAB(2A) of the Act enables new entries to be added to the list of companies in the Schedule.

The Minister must be satisfied of certain matters before a regulation can be made to add a company to the list in the Schedule. Among other things, the Minister must be satisfied that an “unacceptable control situation” as defined in section 601VAA of the Act (essentially, a limit on a person’s voting power in the company) does not exist in relation to the company in relation to any person.

Part 5D.5 of the Act (which deals with the limits on control of licensed trustee companies) as currently drafted applies only to a “licensed trustee company”. Section 601RAA of the Act defines a “licensed trustee company” to mean a trustee company that holds an Australian financial services licence covering the provision of one or more traditional trustee company services.

2. Purpose of the class order

The purpose of the class order is to ensure that the provisions dealing with limits on control of licensed trustee companies in Part 5D.5 of the Act also apply to “proposed licensed trustee companies”.

A “proposed licensed trustee company” is a company that wishes to be included in the list of trustee companies in the Schedule and is proposing to make an application to ASIC for an Australian financial services licence covering the provision of traditional trustee company services.

The changes resulting from this class order, in relation to a proposed licensed trustee company, will enable the Minister to properly consider:

- whether the company should be added to the list in the Schedule, having regard to the matters of which the Minister must be satisfied; and
- an application by a person under section 601VBA of the Act to exceed the statutory voting power limit in relation to the company.

3. Operation of the class order

This class order extends the application of Part 5D.5 of the Act to proposed licensed trustee companies by:

- inserting a new notional Division 1A in Part 5D.5 entitled “Application of Part to proposed licensed trustee companies”, comprising notional section 601VAAA, which has the effect of extending that Part so that it also applies to a “proposed licensed trustee company”; and
- inserting consequential definitions of “proposed licensed trustee company” and “proposed trustee company” in section 601RAA of the Act.

Certain provisions of Part 5D.5 of the Act (namely sections 601VAB, 601VAC, 601VAD and 601VCC) have been excluded from the extended application of the Part to ensure that the effect of the extended application:

- does not inadvertently bring about a result that a person’s conduct may constitute the commission of an offence where it would not otherwise amount to an offence; and
- does not confer powers on courts that they would not otherwise have under the Part.

4. Statement of Compatibility with Human Rights

This statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

This legislative 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* because it does not engage any of the applicable rights or freedoms.

5. Consultation

ASIC consulted with the Department of the Treasury before making this class order. ASIC did not further consult with industry because the effect of the class order is considered to be of a minor and technical nature to ensure the legislation operates in the way intended by Parliament.