
EXPLANATORY STATEMENT for

ASIC Corporations (Amendment) Instrument 2015/963

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes ASIC Corporations (Amendment) Instrument 2015/963 (**Amending Instrument**) under subsections 111AT(1), 655A(1), 673(1), 761EA(9) and 1020F(1) of the *Corporations Act 2001* (the **Act**).

Subsection 111AT(1) provides that ASIC may exempt specified persons from all or specified disclosing entity provisions.

Subsections 655A(1) and 673(1) provide that ASIC may exempt a person from Chapters 6 and 6C respectively or declare that specified provisions apply as if omitted, modified or varied.

Subsection 761EA(9) provides that ASIC may declare that a particular kind of facility is not a margin lending facility.

Subsection 1020F(1) provides that ASIC may exempt a person or a financial product (or class of persons or financial products) from all or specified provisions of Part 7.9 or declare that Part 7.9 applies as if specified provisions were omitted, modified or varied.

The Amending Instrument is to amend the following instruments:

- ASIC Class Order [CO 02/608]: Warrants: Relief from PDS requirements for secondary sales
- ASIC Class Order [CO 03/957]: ASX managed investment warrants – disclosure and reporting exemptions
- ASIC Class Order [CO 10/1034]: Relief from margin lending facility requirements
- ASIC Class Order [CO 13/526]: Relevant interest relief.

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 Act), where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

1. Background

Chi-X Australia Pty Ltd (**Chi-X**) holds an Australian market licence which enables it to provide secondary trading services in securities and managed investment scheme interests that are listed, quoted and traded on the financial market operated by ASX Limited (**ASX**).

Chi-X is expanding its services to include trading in warrants that have been admitted to quotation on the Chi-X market. This service is broadly equivalent to that offered by the ASX in relation to warrants that have been admitted to quotation on the financial market operated by ASX.

To facilitate the trading of these warrants on the ASX market it was necessary for ASIC to grant relief from the requirements of certain provisions of the Act. The relief was granted in relation to the ASX market and resulted in the class orders listed above.

As the service to be provided by Chi-X for Chi-X warrants is broadly equivalent to that offered by ASX for ASX warrants, the same relief is required to facilitate the quotation and trading of warrants on the Chi-X market.

On this basis, ASIC has decided to extend the existing relief to Chi-X warrants.

2. Purpose of the Amending Instrument

The purpose of the Amending Instrument is to extend the existing relief in the following class orders to facilitate the quotation and trading of warrants on the Chi-X market:

- ASIC Class Order [CO 02/608]: Warrants: Relief from PDS requirements for secondary sales
- ASIC Class Order [CO 03/957]: ASX managed investment warrants – disclosure and reporting exemptions
- ASIC Class Order [CO 10/1034]: Relief from margin lending facility requirements
- ASIC Class Order [CO 13/526]: Relevant interest relief.

Class Order [CO 02/608] Warrants: relief from PDS requirements for secondary sales

Part 7.9 of the Act contains the product disclosure requirements for the issue, sale and purchase of a financial product. These requirements apply to warrants that come within the definition of a “derivative” under the Act and therefore constitute a financial product for the purposes of Part 7.9.

In granting the relief in Class Order [CO 02/608], ASIC recognised that the sale of a warrant on a licensed market, being a secondary sale, should not be treated as the issue of a financial product. As a result, issuers of certain warrants are not subject to

the requirement to provide a product disclosure statement (**PDS**) to a retail investor, unless the warrant is issued for the purpose of resale.

Class Order [02/608] provides the relief by modifying subsection 761E(3) of the Act so that the warrant is not “issued” when a person enters into the legal relationship that constitutes the financial product. Under the Act, this would otherwise constitute the issue of a derivative.

At the time the relief in Class Order [CO 02/608] was provided, the only licensed market that warrants could be traded on was the market operated by ASX. Accordingly, [CO 02/608] only applied when the warrant came within the definition of a:

- (a) 'derivative' in s761 of the Act; and
- (b) 'warrant' under the ASX Operating Rules.

The Amending Instrument extends the existing relief to include Chi-X warrants. This ensures the same relief will be available to warrant issuers regardless of whether the warrant is quoted and traded on the ASX market or the Chi-X market.

Class Order [CO 03/957] *ASX managed investment warrants – disclosure and reporting exemptions*

Class Order [CO 03/957] exempts issuers of ASX-traded instalment warrants over managed investment products from complying with certain PDS content and procedural requirements and, with respect to retail clients, providing periodic statements. These requirements are contained in Part 7.9 of the Act and would otherwise apply because of the characterisation of the warrants as “managed investment products”.

Specifically, Class Order [CO 03/957] exempts such issuers from Part 7.9 requirements concerning:

- (a) PDS content;
- (b) PDS lodgement; and
- (c) periodic reporting.

The exemption is provided on the condition that the warrant issuer complies with the ongoing disclosure obligations under s1017B of the Act.

This class order also clarifies that where a managed investment warrant might be characterised as an enhanced disclosure security (**ED Security**) as defined under s111AFA of the Act, the issuers of such warrants are exempt from the Chapter 2M reporting requirements and the Chapter 6CA continuous disclosure requirements for listed disclosure entities but are still subject to the continuous disclosure requirements under Part 7.9.

In granting the relief in [CO 03/957], ASIC addressed the inconsistent treatment of warrants over managed investment products, compared to share warrants and stapled

securities, by removing additional disclosure requirements that only applied to warrants over managed investment products. ASIC recognised that this was consistent with the legislative objective of promoting regulatory neutrality for functionally similar products and services and that warrants are distinct and separate products from the underlying investment product.

At the time the relief was granted, instalment warrants could only be traded on the one licensed market operated by ASX. Accordingly, [CO 03/957] only applied when the warrant came within the definition of:

- (a) a 'derivative' in s761 of the Act;
- (b) a 'warrant' under the ASX Operating Rules; and in certain cases,
- (c) an 'enhanced disclosure' security in s111AD of the Act.

The Amending Instrument extends the existing relief to issuers of Chi-X-traded managed investment warrants on the same basis that it is available to issuers of ASX-traded managed investment warrants.

Class Order [CO 10/1034] *Relief from margin lending facility requirements*

Subsection 761EA of the Act contains the meaning of a margin lending facility. If a facility comes within that meaning, an issuer of that facility is subject to certain additional obligations that are found in Division 4A of Part 7.8 of the Act.

There are two primary additional obligations for issuers of a margin lending facility. One concerns ensuring that the margin loan is suitable for the client and that the client can service the loan. The second concerns providing notification of margin calls to the client or to the client's agent.

In granting the relief in Class Order [CO 10/1034], ASIC recognised that ASX-traded instalment warrants might technically come within the meaning of a "margin lending facility" under the Act and if so, it was unlikely that issuers of such warrants would be able to comply with the additional obligations, particularly where an investor was buying the warrant on the secondary trading market where timing is critical. ASIC also recognised that the intention of Parliament in enacting the margin lending provisions was to regulate traditional margin loans rather than ASX-traded instalment warrants. It was also recognised that the warrants already received some consumer protection and that investors' liability under them was limited.

At the time the relief was granted, the only licensed financial market that warrants could be traded on was the market operated by ASX and so the relief was restricted to warrants that were admitted to quotation on that market.

ASIC has decided to extend the relief to warrants that are admitted to quotation on the Chi-X market as the policy considerations for granting the relief under Class Order [CO 10/1034] apply equally to that market.

ASIC Class Order [CO 13/526] *Relevant Interest*

In certain cases, a person who issues, holds or acts as a trustee in relation to a warrant that relates to an underlying security (such as an interest in a managed investment scheme) can have a 'relevant interest' in the underlying security as a result of the warrant. A relevant interest typically arises when a person holds securities, can control voting rights attached to the securities or can control the disposal of the securities. This is set out in section 608 of the Act.

Relevant interests of this kind need to be taken into account when determining a person's obligations under the Act in relation to a number of provisions including the takeover provisions in Chapter 6 and the substantial holdings provisions in Chapter 6C.

In Class Order [CO 13/526], ASIC reissued relief from the relevant interest provisions in these Chapters that had historically been embodied in:

- ASIC Class Order [CO 02/94] *Call warrant holder takeover relief*
- ASIC Class Order [CO 02/925] *Call warrant takeovers relief*
- ASIC Class Order [CO 02/926] *Put warrant takeovers relief*
- ASIC Class Order [CO 02/927] *Warrant trustees takeovers relief*

In doing so, ASIC recognised that the relief underlying these class orders continued to be both necessary and appropriate. Warrants may confer rights and obligations with respect to the underlying security of the warrant. However, these rights and obligations are sufficiently remote or tenuous that they are unlikely to be used as a means of gaining control of a company.

Class Order [CO 13/526] provides relief to issuers and holders of call warrants, issuers of put warrants and where applicable, warrant trustees. The relief allows these entities to disregard, in some cases, a “relevant interest” in underlying securities arising from warrants quoted on the financial market operated by ASX.

As the relief is limited to warrants that are admitted to quotation on the ASX market, ASIC has decided to extend the relief to include warrants that are admitted to quotation on the Chi-X market.

3. Operation of the instrument

Class Order [CO 02/608] *Warrants: relief from PDS requirements for secondary sales*

The legislative instrument amends the first paragraph and the section entitled “Interpretation” of Class Order [CO 02/608]. The amendments have the effect of including a definition of “Chi-X traded warrant” and applying the relief in the class order to Chi-X traded warrants.

Class Order [CO 03/957] *ASX managed investment warrants – disclosure and reporting exemptions*

The legislative instrument amends paragraphs 1 and 2 and the section entitled “Interpretation” of Class Order [CO 03/957]. The amendments have the effect of including a definition of “Chi-X traded managed investment warrant” and extending the relief in the class order to issuers of Chi-X traded managed investment warrants.

Class Order [CO 10/1034] *Relief from margin lending facility requirements*

The legislative instrument amends subparagraph 4(a) of Class Order [CO 10/1034] to extend the application of the declaration in that Class Order to instalment warrants that are in a class of financial products that are admitted to quotation on the licensed market operated by Chi-X.

Class Order [CO 13/526] *Relevant Interest*

The legislative instrument amends the definitions of *call warrant* and *put warrant* in notional section 609(6F) of the Act to include warrants that are admitted to quotation on the financial market operated by Chi-X. The relief in this Class Order is thus extended to warrants that are admitted to quotation on the financial market operated by Chi-X.

4. Consultation

ASIC released Consultation Paper 235 *Proposed amendments to ASIC market integrity rules and instruments for the Chi-X investment product market (CP 235)* on 20 August 2015.

CP 235 contained a number of ASIC's proposals in relation to the quotation and trading of warrants on the Chi-X market.

One of the proposals was to extend the existing relief in ASIC Class Orders [CO 02/608], [CO 03/957], [CO 10/1034] and [CO 13/526] to warrants that are quoted on the Chi-X market.

The relief under the Amending Instrument is considered as minor and machinery.

Statement of Compatibility with Human Rights

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

ASIC Corporations (Amendment) 2015/963

ASIC Corporations (Amendment) 2015/963 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

Chi-X Australia Pty Ltd (**Chi-X**) holds an Australian market licence which enables it to provide secondary trading services in securities and managed investment scheme interests that are listed, quoted and traded on the financial market operated by ASX Limited (**ASX**).

Chi-X is expanding its services to include trading in warrants that have been admitted to quotation on the Chi-X market. This service is broadly equivalent to that offered by the ASX in relation to warrants that have been admitted to quotation on the financial market operated by ASX.

To facilitate the trading of these warrants on the ASX market it was necessary for ASIC to grant relief from the requirements of certain provisions of the *Corporations Act 2001* (the **Act**). The relief was granted in relation to the ASX market and resulted in ASIC making the four class orders listed below.

- (a) ASIC [Class Order 02/608]: Warrants: Relief from PDS requirements for secondary sales.

This Class Order removes the product disclosure requirements that might otherwise apply to warrants traded on the ASX market that come within the definition of a “derivative” under the Act. In granting the relief, ASIC recognised that the sale of a warrant on a licensed market should not be treated as the issue of a financial product.

- (b) ASIC [Class Order 03/957]: ASX managed investment warrants – disclosure and reporting exemptions

This Class Order exempts the issuers of ASX traded warrants over managed investment products from complying with certain Product Disclosure Statement content and procedural requirements. The exemption is provided on the condition that the warrant issuer complies with the ongoing disclosure obligations under s1017B of the Act.

In granting the relief in [CO 03/957], ASIC addressed the inconsistent treatment of warrants over managed investment products, compared to share warrants and stapled securities, by removing additional disclosure requirements that only applied to

warrants over managed investment products. ASIC recognised that this was consistent with the legislative objective of promoting regulatory neutrality for functionally similar products and services and that warrants are distinct and separate products from the underlying investment product.

(c) ASIC [Class Order 10/1034]: Relief from margin lending facility requirements

This Class Order exempts instalment warrants traded on the ASX market from certain obligations which apply to margin lending facilities.

In granting the relief in Class Order [CO 10/1034], ASIC recognised that ASX-traded instalment warrants might technically come within the meaning of a “margin lending facility” under the Act. ASIC also recognised that the intention of Parliament in enacting the margin lending provisions was to regulate traditional margin loans rather than ASX-traded instalment warrants.

(d) ASIC [Class Order 13/526]: Relevant interest relief.

Class Order [CO 13/526] provides relief to issuers and holders of call warrants, issuers of put warrants and where applicable, warrant trustees. The relief allows these entities to disregard, in some cases, a “relevant interest” in underlying securities arising from warrants quoted on the financial market operated by ASX.

In certain cases, a person who issues, holds or acts as a trustee in relation to a warrant that relates to an underlying security (such as an interest in a managed investment scheme) can have a “relevant interest” in the underlying security as a result of the warrant. A relevant interest typically arises when a person holds securities, can control voting rights attached to the securities or can control the disposal of the securities.

Relevant interests of this kind need to be taken into account when determining a person's obligations under the Act in relation to a number of provisions including the takeover provisions in Chapter 6 and the substantial holdings provisions in Chapter 6C.

In granting the relief, ASIC recognised that warrants may confer rights and obligations with respect to the underlying security of the warrant. However, these rights and obligations are sufficiently remote or tenuous that they are unlikely to be used as a means of gaining control of a company.

As the service to be provided by Chi-X for Chi-X warrants is broadly equivalent to that offered by ASX for ASX warrants, the same relief that was granted to ASX is required to facilitate the quotation and trading of warrants on the Chi-X market.

On this basis, ASIC has decided to extend the relief in these four class orders to Chi-X warrants.

ASIC Corporations (Amendment) Instrument 2015/963 extends the relief in the class orders listed above to warrants that are quoted and traded on the financial market operated by Chi-X.

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