

EXPLANATORY STATEMENT for

ASIC CORPORATIONS (DISREGARDING TECHNICAL RELIEF) INSTRUMENT 2016/73

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes ASIC Corporations (Disregarding Technical Relief) Instrument 2016/73 (**Instrument**) under sections 741 and 1020F of the *Corporations Act 2001* (the **Act**).

Subsection 741(1) of the Act provides that ASIC may exempt a person from a provision of Chapter 6D of the Act or declare that the Chapter applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

Subsection 1020F(1) of the Act provides that ASIC may:

- (a) exempt a person or financial product or a class of persons or financial products from all or specified provisions of Part 7.9 of the Act; or
- (b) declare that Part 7.9 of the Act applies in relation to a person or financial product, or a class of persons or financial products, as if specified provisions were omitted, modified or varied as specified in the declaration.

1. Background

Chapter 6D of the Act establishes the statutory regime applying to fundraising through the offer of securities for issue or sale in Australia. It addresses the circumstances in which a person offering securities for issue or sale must lodge a disclosure document with ASIC and the relevant form, content and procedural requirements applying to those disclosure documents. Chapter 6D also sets out certain prohibited conduct in relation to fundraising activity and outlines the circumstances in and extent to which persons may be liable for defective disclosure documents. Chapter 6D also provides certain statutory remedies for investors.

The statutory regime applying to fundraising through the offer of securities for issue or sale was substantially rewritten in March 2000 by the *Corporate Law Economic Reform Program Act 1999* (the **CLERP Act**). The CLERP Act amended the *Corporations Law* (the **Law**) by repealing Part 7.12—which previously contained the fundraising provisions—and inserting new Chapter 6D. Chapter 6D of the Law was retained in substantially the same form with the enactment of the Act in 2001.

Since the implementation of the CLERP Act, ASIC has made a number of exemptions from, and modifications to, the fundraising provisions in Chapter 6D with a view to addressing certain technical issues and anomalies in relation to their operation. This relief includes Class

Orders [CO 01/1455] *Continuously quoted securities*, [CO 04/672] *Extension of on-sales exemption* and [CO 07/571] *Disclosure exemption for rights issues*.

Transaction-specific disclosure

Sections 713 and 1013FA permit a disclosing entity to prepare a disclosure document or product disclosure statement (**PDS**) with specified limited content (“transaction-specific disclosure”) for continuously quoted securities. Transaction-specific disclosure is predicated on the fact that such entities are subject to the continuous disclosure requirements of the Act and that the market generally should have all information necessary to reach an informed view about those securities.

Section 9 of the Act defines “continuously quoted securities”. Securities and financial products will only satisfy the definition of “continuously quoted securities” where, among other things, no order covered the entity, its directors or auditor, during the shorter of the period during which the class of securities were quoted and the period of 12 months before the date of the prospectus or PDS.

Class Order [CO 01/1455] allows an entity to use transaction-specific disclosures even where the entity, its directors or auditor are covered by:

- (a) certain ASIC instruments made under section 741 relating to a disclosing entity provision; or
- (b) certain ASIC orders made under section 341 which give technical accounting and financial reporting relief,

that do not detract from the level of information available to the market.

Cleansing notice regime

The Act requires a person to prepare a disclosure document or PDS for an offer to sell securities or financial products where:

- (a) the offer is made within 12 months of issue;
- (b) there was no disclosure at the time of issue; and
- (c) certain other criteria set out in sections 707 and 1012C are satisfied.

A prospectus or PDS is not required for securities or financial products that are quoted and for which a “cleansing notice” under sections 708A and 1012DA has been lodged with the relevant operator of the financial market. This “cleansing notice” exemption is only available where, among other things, no order under section 340 or 341 covered the entity, its directors and auditor, at any time during the shorter of the period during which the class of securities or financial products were quoted and the period of 12 months before the day on which the relevant securities or products were issued.

Class Order [CO 04/672] allows an entity to rely on the “cleansing notice” exemption even where the entity, its directors or auditor are covered by certain ASIC orders made under section 341 which give technical accounting and financial reporting relief and do not detract from the level of information available to the market.

Rights issue of quoted securities and quoted financial products

Sections 708AA and 1012DAA of the Act permit an entity to make a rights issue of quoted securities and quoted financial products without a disclosure document or Product Disclosure Statement, provided certain requirements are satisfied.

One requirement is that no order under section 340 or 341 of the Act covered the entity, or any person as director or auditor of the entity, at any time during the shorter of the period during which the class of securities or financial products were quoted and the period of 12 months before the day on which offers under the rights issue are made.

Class Order [CO 07/571] ensures that orders made under section 341 of the Act which give technical accounting and financial reporting relief and do not detract from the level of information available to the market, are disregarded for the purposes of the disclosure exemption for rights issues.

ASIC’s review of fundraising policy

ASIC has recently reviewed the policy underlying these class orders as part of a wider review of class orders relating to the fundraising provisions in Chapter 6D and considers that the relief in these class orders is still both necessary and appropriate. Accordingly, ASIC has decided to reissue the relief available in the three class orders in ASIC Corporations (Disregarding Technical Relief) Instrument 2016/73.

The *Legislation Act 2003* (the **LA**) provides for the periodic expiry of legislative instruments (“sunsetting”) to ensure that they are kept up to date and only remain in force for as long as they are needed. The three class orders are legislative instruments and were scheduled to eventually expire under the sunsetting provisions of the LA.

ASIC’s review of the policy underlying Class Orders [CO 01/1455], [CO 04/672] and [CO 07/571]—and subsequent decision to reissue the relief—has provided an opportunity to deal with this imminent expiry and ensure that the relevant relief will continue to be available.

Under ASIC Corporations (Repeal) Instrument 2016/171, ASIC has repealed Class Orders [CO 01/1455], [CO 04/672] and [CO 07/571] effective from the date that ASIC Corporations (Disregarding Technical Relief) Instrument 2016/73 commences.

2. Purpose of the instrument

ASIC Corporations (Disregarding Technical Relief) Instrument 2016/73 incorporates and consolidates the relief previously provided in Class Orders [CO 01/1455], [CO 04/672] and [CO 07/571]. The purpose of this instrument is to:

- (a) identify specific ASIC instruments, the reliance upon which ASIC considers does not detract from the level of information available to the market; and
- (b) allow entities that rely on such relief to use transaction specific disclosures and rely on “cleansing notice” exemptions and exemptions applying to rights issues.

Further, the instrument allows entities that have the benefit of individual relief from the requirements of s323D(3) to use transaction specific disclosures and rely on “cleansing notice” exemptions and exemptions applying to rights issues, which was consulted on in ASIC Consultation Paper 239 *Disclosure documents: Update to ASIC instruments and guidance (CP 239)*. ASIC considers that this relief does not detract from the level of information available to the market.

3. Operation of the instrument

Section 9 of the Act contains a dictionary of defined terms used in the Act.

Paragraph 5(a) of the instrument inserts into section 9 a definition of ***technical relief instrument*** to mean any of the following instruments, as in force from time to time:

- (a) ASIC Corporations (Disregarding Technical Relief) Instrument 2016/73;
- (b) ASIC Class Order [CO 01/1455], ASIC Class Order [CO 04/672] ASIC Class Order [CO 07/571] (each as in force as at the day immediately before the day those class orders were repealed);
- (c) ASIC Class Order [CO 98/100];
- (d) ASIC Class Order [CO 98/101];
- (e) ASIC Class Order [CO 98/104];
- (f) ASIC Class Order [CO 98/1418];
- (g) ASIC Class Order [CO 98/2395];
- (h) ASIC Class Order [CO 99/90] (as in force as at the day immediately before the day the class order was repealed);
- (i) ASIC Class Order [CO 00/2449];
- (j) ASIC Corporations (Stapled Group Reports) Instrument 2015/838;
- (k) ASIC Class Order [CO 05/642] (as in force as at the day immediately before the day the class order was repealed);
- (l) ASIC Corporations (Post Balance Date Reporting) Instrument 2015/842;
- (m) ASIC Class Order [CO 05/644] (as in force as at the day immediately before the day the class order was repealed);
- (n) ASIC Corporations (Related Scheme Reports) Instrument 2015/839;

- (o) ASIC Class Order [CO 06/441] (as in force as at the day immediately before the day the class order was repealed);
- (p) ASIC Class Order [CO 09/425];
- (q) ASIC Class Order [CO 10/321] (as in force as at the day immediately before the day the class order was repealed);
- (r) ASIC Corporations (Sale Offers: Securities Issued on Conversion of Convertible Notes) Instrument 2016/82;
- (s) ASIC Class Order [CO 10/322] (as in force as at the day immediately before the day the class order was repealed);
- (t) ASIC Class Order [CO 10/654];
- (u) ASIC Class Order [CO 13/1050];
- (v) ASIC Class Order [CO 14/757]; and
- (w) an order under section 340 to the extent it relieves the entity, or any person as director or auditor of the entity, from the requirements of subsection 323D(3).

The instruments listed in paragraphs (a) to (u) above contain relief under paragraph 741 relating to a disclosing entity provision or technical accounting and financial reporting relief under section 341. The instruments listed above reflect the definition of ***technical relief instrument*** inserted by this Instrument on the day it is made—note that ASIC may, by subsequent legislative instrument, vary this Instrument to include in that definition other technical relief instruments which it considers do not detract from the level of information available to the market.

Section 9 of the Act defines ***continuously quoted securities***. In order for securities to be ***continuously quoted securities***, the securities must satisfy certain criteria, including that no relief under paragraph 741 relating to a disclosing entity provision, and no order under section 340 or 341, covered the entity, or director or auditor of the entity for a period of 12 months before the date of the prospectus or PDS.

Paragraph 5(b) of the instrument modifies the definition of ***continuously quoted securities*** so that reliance by an entity, or director or auditor of the entity on a ***technical relief instrument*** does not disqualify the entity's securities from being ***continuously quoted securities*** (provided the other criteria of the definition are met).

Sections 708AA and 708A of the Act contain exemptions from the disclosure requirements that generally apply to offers of securities under Chapter 6D. These exemptions apply to certain rights issues and to certain sale offers of securities. In order for the exemptions to apply, the securities and issuer must satisfy certain conditions, including that no order under section 340 or 341 covered the issuer, its directors and auditor, at any time during the shorter of the period during which the class of securities were quoted and the period of 12 months before the day on which the offer is made (or the day on which the relevant securities were issued).

Sections 1012DAA and 1012DA of the Act contain disclosure exemptions for offers of financial products that are similar to those applying to offers of securities under sections 708AA and 708A.

Paragraph 5(c) modifies sections 708AA, 708A, 1012DAA and 1012DA so that a ***technical relief instrument*** is disregarded for the purposes of determining whether an order under section 340 or 341 covered the issuer, or director or auditor of the issuer during the relevant period.

4. Consultation

On 17 September 2015 ASIC released CP 239 seeking feedback on proposals to update and consolidate a number of regulatory guides relating to Chapter 6D of the Act. CP 239 also sought feedback on proposals to reissue the legislative instruments associated with ASIC's updated guidance (including Class Orders [CO 01/1455], [CO 04/672] and [CO 07/571]) and to make legislative instruments addressing some discrete policy issues. The consultation period closed on 27 November 2015.

ASIC received four submissions in response to CP 239. Details of the submissions are contained in REP 473 *Response to submissions on CP 239 Disclosure documents: updates to ASIC instruments and guidance* which is available on ASIC's website at www.asic.gov.au.

Notwithstanding ASIC's consultation, ASIC considers that ASIC Corporations (Disregarding Technical Relief) Instrument 2015/73 is of a minor or machinery nature and does not substantially alter existing arrangements.

Statement of Compatibility with Human Rights

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

ASIC Corporations (Disregarding Technical Relief) Instrument 2016/73

ASIC Corporations (Disregarding Technical Relief) Instrument 2016/73 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 gives relief to ensure that the ability of entities to use transaction specific disclosures and rely on “cleansing notice” exemptions and exemptions applying to rights issues is not adversely affected by certain technical relief instruments defined in the Instrument.

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