

EXPLANATORY STATEMENT for

ASIC CORPORATIONS (MINIMUM SUBSCRIPTION AND QUOTATION CONDITIONS) INSTRUMENT 2016/70

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes ASIC Corporations (Minimum Subscription and Quotation Conditions) Instrument 2016/70 under section 741 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.

1. Background

Chapter 6D of the Act sets out the legislative framework for the offer of securities for issue or sale under a disclosure document. Sections 723 and 724 of the Act impose certain requirements on issuers in relation to offers that contain a minimum subscription condition and/or quotation condition.

Minimum subscription condition

A minimum subscription condition is a statement in a disclosure document that securities will not be issued or transferred unless the issuer receives applications for a minimum number of securities or raises a minimum amount: s723(2).

If a disclosure document contains a minimum subscription condition, the issuer cannot issue or transfer any securities until that condition is satisfied: s723(2).

If the minimum subscription condition is not satisfied within four months of the date of the disclosure document (s724(1)(a)), the issuer must deal with any applications received in accordance with s724(2) of the Act.

Quotation condition

The quotation condition comprises two parts. If an issuer states or implies in a disclosure document that the offered securities are to be quoted on a financial market (whether in Australia or elsewhere), then the issuer must:

- (a) apply to the financial market for permission to admit securities to quotation within seven days after the date of the disclosure document (the ***seven-day application condition***): s723(3)(a); and

- (b) have the securities admitted to quotation within three months after the date of the disclosure document (the ***three-month quotation condition***): s723(3)(b).

If either part of the quotation condition is not satisfied within the relevant time period (s724(1)(b)), the issuer must deal with any applications received in accordance with s724(2) of the Act.

Individual relief

The minimum subscription and quotation conditions impose time limits within which an issuer is required to satisfy the relevant condition.

Where an issuer forms the view that it is unlikely to satisfy a minimum subscription or quotation condition before the relevant time period expires, the issuer may seek a declaration from ASIC under s741 of the Act extending the relevant time period (***individual relief***).

These applications for individual relief:

- (a) impose costs on issuers (who incur an application fee together with any costs for preparation of the application by legal or other professional advisers); and
- (b) are required to be made by issuers, and considered by ASIC, in a short period of time (as in many cases, issuers will not be able to determine whether the relevant conditions are likely to be satisfied until very close to the expiry of the relevant time periods).

Provided an application is made before the relevant time period expires, ASIC routinely grants such relief, and has done so in excess of 70 times between 2011 and 2015. Relief is typically granted subject to conditions, including that the issuer:

- (a) lodge a supplementary or replacement disclosure document which:
 - (i) updates the minimum subscription and/or quotation condition time periods; and
 - (ii) discloses certain basic information about the status of the offer (for example, the number of securities for which applications have been received). While this disclosure is a condition of the relief, we consider this information would also be required under s710 of the Act; and
- (b) offer withdrawal rights to applicants. As existing applications were made based on the original minimum subscription and quotation condition time periods, we consider the offer of withdrawal rights would also be required under s724 of the Act.

Calculation of time periods

Sections 719(4)–(5) of the Act provide that, once lodged, a replacement disclosure document (or supplementary disclosure document, together with the original) is the ‘disclosure document’ for the application of Chapter 6D to events that occur after lodgement.

In relation to applications, where an offer is subject to a minimum subscription or quotation condition, s719(4)–(5) of the Act operate so that:

- (a) the minimum subscription and quotation condition time periods are calculated based on the date of the original disclosure document for applications received in response to an offer under the original disclosure document; and
- (b) the minimum subscription and quotation condition time periods are calculated based on the date of any supplementary or replacement disclosure document for applications received in response to an offer under that supplementary or replacement disclosure document.

As a result, the time periods under s723(2)–(3) and 724 of the Act would apply inconsistently to applicants when a supplementary or replacement disclosure document was lodged before the expiry of the relevant time period (and applications were received in response to both the original and that supplementary or replacement disclosure document).

The practical operation of s719, 723 and 724 of the Act can cause uncertainty for issuers and investors. ASIC is aware that current market practice is for issuers to calculate the minimum subscription and quotation condition time periods for all applicants by reference to the date of the original disclosure document, even where supplementary or replacement disclosure documents have been lodged. This practice is inconsistent with the operation of the Act.

The exception to this practice is where the issuer has sought, and ASIC has provided, individual relief to reset (or ‘refresh’) the relevant time periods so they commence on the date a supplementary or replacement disclosure document is lodged, and apply consistently to applicants under both the original and supplementary or replacement disclosure documents.

2. Purpose of the instrument

If, during the offer period, an issuer considers it is unlikely to satisfy the minimum subscription and quotation conditions in the relevant time periods, it may seek to refresh those time periods to continue with the offer.

ASIC Corporations (Minimum Subscription and Quotation Conditions) Instrument 2016/70 provides a way for issuers to extend the minimum subscription and quotation condition time periods (or remove or vary those conditions) for all applicants, without seeking individual relief—by lodging a ‘refresh document’ which sets out prescribed information and statements, and providing applicants with withdrawal rights (similar to the conditions typically imposed by ASIC when granting individual relief). A refresh document can only be lodged if an issuer has not issued or transferred securities under the offer.

The instrument also clarifies how the time periods in s723(2)–(3) apply to supplementary and replacement disclosure documents generally, and how they apply differently to refresh documents. The relief operates so that the time periods applying to applications are synchronised and operate consistently, promoting certainty for issuers, investors and operators of any prescribed financial market on which the issuer seeks quotation of the securities that are the subject of the offer.

3. Operation of the instrument

Relief to provide refresh documents

ASIC Corporations (Minimum Subscription and Quotation Conditions) Instrument 2016/70 modifies s723 by inserting notional subsections (2A) and (3A) and 724 by inserting notional subsections (3A) to (3H) (and making related amendments to s724(1)) to put in place a mechanism for issuers to extend the minimum subscription and quotation condition time periods, or remove or vary those conditions, by lodging a ‘refresh document’.

Subsection 724(3G) sets out the procedure for an issuer to lodge a refresh document.

Under the modified provisions, an issuer who wishes to extend the minimum subscription condition or three-month quotation condition time periods (or remove or vary those conditions) must, before those time periods expire:

- (a) lodge with ASIC a supplementary or replacement document that sets out the prescribed information and statements; and
- (b) give applicants the refresh document, accompanied by a one-month period in which applicants may withdraw their application and be repaid: s723(3G) and (3H).

If the issuer does not do so, and the minimum subscription condition or three-month quotation condition time periods expire before those conditions are met, subsections 724(3A) and 724(3C) require the issuer to repay the money received from applicants as soon as practicable after the end of the relevant period.

The instrument inserts new subsection 724(3E) so that the seven-day application period may be extended by the issuer lodging a refresh document and offering withdrawal rights before that period expires. If the issuer does not do so, and has not applied for quotation within seven days after the date of the disclosure document, the issuer must either:

- (a) if they wish to continue with the offer—lodge a refresh document changing the seven-day application period and offering withdrawal rights; or
- (b) repay the money received from applicants as soon as practicable.

The seven-day application period cannot be extended after the three-month quotation condition time period has expired.

Under the provisions as modified by the instrument:

- (a) a single refresh document can change both the minimum subscription and quotation condition time periods;
- (b) a refresh document can remove or vary the minimum subscription and quotation conditions (that is, vary the offer to which the refresh document relates, so that it is no

longer subject to a minimum subscription or quotation condition, or subject to a different minimum subscription condition);

- (c) a further refresh document can be used to extend the minimum subscription and quotation condition time periods, where those time periods have been previously extended by an earlier refresh document (up until the expiry date of the prospectus, which may be no later than 13 months after the date of the original prospectus: s711(6)); and
- (d) a refresh document can also contain other information that would ordinarily be included in a supplementary or replacement disclosure document.

In each of the above cases, s723(3G) requires that the refresh document be accompanied by a one-month period in which applicants may withdraw their application and be repaid. The instrument modifies the Act so that all applicants get an opportunity to withdraw each time an issuer lodges a refresh document.

Relief for calculating time periods

ASIC Corporations (Minimum Subscription and Quotation Conditions) Instrument 2016/70 modifies s723 by inserting subsections 723(2A) and (3A) to make it clear that the minimum subscription and quotation condition time periods are calculated for all applicants based on the date of the original disclosure document, even where those applicants have applied under a supplementary or replacement disclosure document. This is the default position, and applies unless a refresh document has been lodged.

The instrument also modifies s723 and 724 to differentiate a refresh document from all other supplementary or replacement disclosure documents, and ensures that only refresh documents restart the time periods in s723(2)–(3) for both existing applications and subsequent applications: s723(2A) and (3A), s724(3G)(c) and (d).

Where a refresh document has been lodged, the minimum subscription and quotation condition time periods for all applicants are based on the date of the refresh document: s724(3G)(c) and (d). The refresh document must be provided to all applicants each time a refresh document is lodged with ASIC: s724(3G)(b)(i).

Where a refresh document is subsequently supplemented or replaced, the minimum subscription and quotation condition time periods for all applicants are based on the date of the most recent refresh document: s723(2A) and (3A).

As a result, once a refresh document has been lodged, the following statutory protections apply to all applicants consistently—whether they applied under the original disclosure document (including as supplemented or replaced) or the refresh document—and relevant time periods are calculated by reference to the date of the refresh document:

- (a) section 723(2), which provides that where an offer is subject to a minimum subscription condition, the issuer cannot issue or transfer any securities until that condition is satisfied; and

- (b) section 723(3), which provides that where an offer is subject to a quotation condition and the relevant time period for meeting that condition has expired, any issue or transfer of securities is void, and the issuer must return the money it has received from applicants as soon as practicable.

Prescribed information and statements that must be included in a refresh document

ASIC Corporations (Minimum Subscription and Quotation Conditions) Instrument 2016/70 modifies s724 by inserting s724(3H), which sets out the prescribed information and statements which must be included in a refresh document.

The purpose of this prescribed disclosure is to ensure investors are provided with not only the new dates by which the minimum subscription or quotation conditions must be met, but also particular information regarding the progress of the offer to enable them to make an informed decision about whether to exercise their withdrawal rights.

Paragraphs 723(3H)(c) and (d) require that all refresh documents must include statements to the effect that:

- (a) applicants have one month to withdraw their application and be repaid, and set out the means by which this may be done; and
- (b) the offer will remain open until at least the expiration of this one-month period.

Paragraph s723(3H)(a) requires that, where the offer was subject to a minimum subscription condition, the following information and statements must be included in the refresh document:

- (a) the number of securities for which applications have been received as at the date of the refresh document;
- (b) details of any changes to the minimum subscription condition (including whether the terms of the offer are no longer subject to the condition); and
- (c) if the terms of the offer remain subject to a minimum subscription condition (the new minimum subscription condition), the date by which the new minimum subscription condition must be satisfied (this must be no later than four months after the date of the refresh document).

Paragraph s723(3H)(b) requires that, where the offer was subject to a quotation condition, the following information and statements must be included in the refresh document:

- (a) whether an application for admission to quotation of the securities was made within seven days after the date of the original disclosure document for the offer (and, if no application was made, that an application will be made within seven days after the date of the refresh document);
- (b) whether the securities have been admitted to quotation as at the date of the refresh document;

- (c) whether the operator of the financial market has indicated that securities will not be admitted to quotation, or will be admitted to quotation subject to certain conditions being satisfied (in which case, a summary of the conditions that have not yet been satisfied must also be included);
- (d) details of any changes to the quotation condition (including whether the terms of the offer are no longer subject to the condition);
- (e) if the terms of the offer remain subject to a quotation condition (the new quotation condition), the date by which the new quotation condition must be satisfied (this must be no later than three months after the date of the refresh document); and
- (f) the number of securities for which applications have been received as at the date of the refresh document.

4. Consultation

On 17 September 2015 ASIC released CP 239 *Disclosure documents: Update to ASIC instruments and guidance (CP 239)* seeking feedback on proposals to update and consolidate a number of regulatory guides relating to Ch 6D of the Act. CP 239 also sought feedback on proposals to reissue the legislative instruments associated with ASIC's updated guidance, and to make legislative instruments addressing some discrete policy issues (including ASIC Corporations (Minimum Subscription and Quotation Conditions) Instrument 2016/70). 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 (Minimum Subscription and Quotation Conditions) Instrument 2016/70 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 (Minimum Subscription and Quotation Conditions) Instrument 2016/70

ASIC Corporations (Minimum Subscription and Quotation Conditions) Instrument 2016/70 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

This legislative instrument modifies s723 and 724 of the Act to provide a mechanism for issuers to vary the minimum subscription and quotation conditions which may apply to an offer of securities under a disclosure document, including by extending the relevant time periods by which these conditions must be satisfied.

This legislative instrument also modifies s723 and 724 of the Act to clarify how these time periods are calculated where a supplementary or replacement disclosure document, or a refresh document, has been lodged.

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