

EXPLANATORY STATEMENT for
ASIC CORPORATIONS (DEBENTURE PROSPECTUSES)
INSTRUMENT 2016/75

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes ASIC Corporations (Debenture Prospectuses) Instrument 2016/75 under section 741 of the *Corporations Act 2001* (the *Act*).

Paragraph 741(1)(b) of the Act provides that ASIC may declare that Chapter 6D of the Act 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 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. These class orders include Class Order [CO 00/173] *Debenture prospectuses: Incorporation of information on application forms* and Class Order [CO 00/174] *Debenture prospectuses: updating of interest rate and term information*. The relief provided in these two class orders was previously set out in Superseded Class Order [SCO 93/15], which was subsequently replaced by Superseded Class Order [SCO 95/887].

ASIC has recently reviewed the policy underlying Class Orders [CO 00/173] and [CO 00/174] 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 underlying Class Order

[CO 00/173] and Class Order [CO 00/174] in ASIC Corporations (Debenture Prospectuses) Instrument 2016/75.

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. Class Orders [CO 00/173] and [CO 00/174], each being legislative instruments, were scheduled to expire eventually under the sunsetting provisions of the LA.

ASIC's review of the policy underlying Class Orders [CO 00/173] and [CO 00/174]—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 Order [CO 00/173] and Class Order [CO 00/174] effective from the date that ASIC Corporations (Debenture Prospectuses) Instrument 2016 commences.

2. Purpose of the instrument

An offer of securities for issue or sale needs—unless a relevant statutory exception applies—disclosure under Chapter 6D of the Act. A debenture is a 'security' in accordance with section 9 of the Act. Accordingly, debenture issuers are required to comply with the fundraising provisions of Chapter 6D of the Act and must prepare and lodge a disclosure document with ASIC in relation to an offer of debentures.

A prospectus prepared in accordance with sections 710, 711 and 713 of the Act must include all information investors reasonably require to make an informed assessment of the offer. These provisions generally require the issuer to state in the prospectus or accompanying application form particulars of all of the essential terms of the offer and the resulting contract—which would include the interest rates applicable and the term of the debenture.

For continuous debenture issuers (bodies which issue debentures in the ordinary course of their business), the requirement that all material information be included in the body of the prospectus creates difficulties where the interest rate and term of the debenture being offered is constantly changing. It would be unduly burdensome for debenture issuers who raise funds on a continuous basis through the issue of debt securities (such as finance companies) to be required to reissue a prospectus for each offering of debentures simply due to a change in interest rate or term of the debenture being offered, where all other underlying information remains the same.

Section 712 of the Act allows a short form prospectus to incorporate documents into a prospectus by reference, provided the documents are lodged with ASIC with the prospectus. However, this section does not allow incorporation by reference of documents lodged from time to time with ASIC. In addition, it is not possible under section 712 of the Act for essential terms of the offer to be incorporated by reference into a prospectus by making this information available to potential investors by other means (for instance, on an offeror's website or by contacting the offeror for a copy of the latest interest rate and term information).

ASIC Corporations (Debenture Prospectuses) Instrument 2016/75 modifies the Act to allow a prospectus to incorporate interest rate and term information set out in application forms

lodged with ASIC from time to time, or easily accessible to potential investors by other means (and involves no charge), throughout the life of the prospectus.

3. Operation of the instrument

This instrument modifies Chapter 6D of the Act by:

- (a) inserting subsections 712(7) – (10) and subsection 727(2A) to allow interest rate and term information to be included on an application form lodged with ASIC from time to time, rather than in the prospectus itself, provided that:
 - (i) the prospectus:
 - A. makes it clear that the interest rate and term is subject to change from time to time;
 - B. states that the current interest rate and term at any time will be set out in the application form most recently lodged with ASIC; and
 - C. explains that the applicant may have rights to a refund if the application is made on an out-of-date application form (under section 725A); and
 - (ii) the body does not make an offer of debentures or distribute the prospectus for the offer unless the offer or prospectus is accompanied by a copy of the most recent application form lodged with ASIC.
- (b) inserting section 712A to allow a prospectus and accompanying application form to be silent on the interest rate and term of the debenture provided that:
 - (i) the prospectus clearly and prominently:
 - A. explains how applicants can ascertain the relevant interest rate and term information;
 - B. advises the applicant to confirm the currency of any interest rate prior to completing the application; and
 - C. explains that an applicant may have rights to a refund if the application form does not specify an interest rate, an amount or a term or specifies an interest rate which is not the current interest for debentures of the amount and term specified by the applicant (under section 725A);
 - (ii) the application form makes provision for the applicant to specify or select the applicable interest rate and term when applying for debentures;
 - (iii) the means by which the interest rate and term information can be ascertained is easily accessible and involves no charge to the applicant; and
 - (iv) any change in the interest rate or term of an available debenture is advertised in appropriate media.

In accordance with subsection 712(7) and subsection 712A(1) respectively, these sections only apply to an offer of a body's debentures for issue in the ordinary course of its business and in the case of subsection 712A(1), where the debentures have a term of no more than five years. Accordingly, the relief provided by this instrument only applies to bodies which raise funds on a continuous basis through the issue of debt securities (such as finance companies).

ASIC Corporations (Debenture Prospectuses) Instrument 2016/75 also modifies or varies Chapter 6D of the Act by inserting section 725A, which provides applicants with rights to a refund when an out-of-date, incorrect or incomplete application form is used to apply for debentures. Under this provision, the body must:

- (a) repay the money received by the applicant; or
- (b) give the applicant a notice that informs them of the error in their application and provides them with the correct information or a copy of the correct application form (as the case may be) and allow the applicant one month to withdraw their application and be repaid; or
- (c) issue the debentures to the applicant at the current interest rate and give them the notice referred to above and 1 month to withdraw their application and be repaid (subsection 725A(3)).

Alternatively, if the interest rate specified in the incorrect application form is higher than the current interest rate, the body can elect to issue the debentures to the applicant at that higher rate (subsection 725A(4)).

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 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 00/173] and [CO 00/174]) 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 (Debenture Prospectuses) Instrument 2016/75 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 (Debenture Prospectuses) Instrument 2016/75

ASIC Corporations (Debenture Prospectuses) Instrument 2016/75 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 addresses discrete minor and technical issues arising in relation to the operation of the prospectus content and incorporation by reference provisions of Chapter 6D of the *Corporations Act 2001* in circumstances where a particular form of offer is made: to an offer of a body's debentures for issue in the ordinary course of its business. The instrument provides relief from the prospectus content requirements set out in Chapter 6D in relation to offers of debentures by a body in the ordinary course of its business to allow the interest rate and term information relating to the offer to be set out in the most recent application form lodged with ASIC from time to time or to be easily accessed by applicants by other means free of charge, rather than in the prospectus itself.

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