

# **EXPLANATORY STATEMENT for**

## **ASIC Corporations (Amendment) Instrument 2018/1098**

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (ASIC) makes *ASIC Corporations (Amendment) Instrument 2018/1098 (Amending Instrument)* under subsections 601QA(1), 926A(2), 951B(1) and 992B(1) of the *Corporations Act 2001 (Corporations Act)*.

Paragraph 601QA(1)(a) provides that ASIC may exempt a person from a provision of Chapter 5C of the Act. Paragraph 601QA(2)(b) provides that the exemption may apply to all persons, specified persons, or a specified class of persons.

Paragraph 926A(2)(a) provides that ASIC may exempt a person or class of persons from all or specified provisions of Part 7.6 of the Act other than Divisions 4 and 8.

Paragraph 951B(1)(a) provides that ASIC may exempt a person or a class of persons from all or specified provisions of Part 7.7 of the Act.

Paragraph 992B(1)(a) provides that ASIC may exempt a person or class of persons from all of specified provisions of Part 7.8 of the Act.

The Amending Instrument amends *ASIC Corporations (Group Purchasing Bodies) Instrument 2018/751 (Principal Instrument)*.

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**

Chapter 7 (“Financial services and markets”) of the Corporations Act prescribes a licensing regime for persons who provide financial services, and regimes for financial services disclosure and other conduct obligations. Chapter 5C (“Managed investment schemes”) of the Corporations Act prescribes a regime for the regulation of managed investment schemes.

Group purchasing bodies are persons who arrange or hold cover under risk management products (for example, insurance products) for other persons but neither issue such products nor provide any financial product advice.

The activities of group purchasing bodies may constitute providing financial services under Chapter 7 of the Corporations Act (through providing a custodial or depository service or arranging for persons to acquire a risk management product, and providing certain general information– which may constitute financial product advice). The arrangements that group purchasing bodies enter may also in some cases constitute a managed investment scheme under Chapter 5C (because some of the contributions they receive from persons to obtain cover are pooled or used in a common enterprise to produce financial benefits for contributors, in the form of access to cheaper or better cover).

The Principal Instrument gives exemptions to eligible group purchasing bodies from the obligations to hold an Australian financial services (AFS) licence for these limited financial services and to register a risk management scheme as a managed investment scheme. For group purchasing bodies that are AFS licensees (other than licensees that provide ‘limited financial services’ as referred to in regulation 7.8.12A of the Corporations Regulations 2001), or authorised representatives, the exemptions are limited to where the body provides the relevant services to its officers, employees or their relatives. The exemptions are more limited in this scenario to reduce the risk of the exemptions being used to establish an unlicensed financial services business other than as contemplated by the exemptions.

ASIC provided the exemptions in the Principal Instrument (and its predecessor, Class Order [CO 08/1] *Group purchasing bodies*) because it considers compliance with Chapters 5C and 7 of the Corporations Act is disproportionately burdensome for eligible group purchasing bodies, which are acting more in the nature of a purchaser of risk cover than a seller.

Section 7 of the Principal Instrument provides that a group purchasing body cannot rely on the exemptions if ASIC has given a notice to the body stating that the body cannot rely on the instrument and ASIC has not withdrawn the notice. The notice may be given by sending it to the body’s address last known to ASIC. But for the Amending Instrument, a decision made by ASIC under section 7 would not have been subject to merits review by the Administrative Appeals Tribunal (AAT).

## **2. Purpose of the instrument**

The purpose of the Amending Instrument is to amend the Principal Instrument so that a decision made by ASIC under section 7 of the Principal Instrument to give a notice and also a decision made by ASIC not to withdraw a notice given under section 7 is subject to merits review by the AAT.

## **3. Operation of the instrument**

The Amending Instrument inserts a new section 9 to expressly permit an ‘affected person’ in relation to a group purchasing body to apply to the AAT for:

- review of a decision made by ASIC to give a notice under section 7 of the Principal Instrument; and
- review of a decision made by ASIC not to withdraw a notice given under section 7.

‘Affected person’ in relation to a group purchasing body is defined in the Amending Instrument to refer to the group purchasing body (for incorporated bodies) and, in the case of unincorporated bodies, the body and each office bearer and employee of the body whose interests are affected by the decision.

The Amending Instrument also requires ASIC, if, on application by an affected person, it makes a decision not to withdraw a notice given under section 7, to take such steps as are reasonable in the circumstances to give the affected person notice in writing or otherwise of the making of the decision. For such decisions not to withdraw a notice, and also decisions to give a notice in the first place under section 7, ASIC must take such steps as are reasonable in the circumstances to give the affected person notice in writing or otherwise of the right to have the decision reviewed by the AAT.

#### **4. Consultation**

ASIC has not consulted publicly on its proposal to include merits review rights in relation to section 7 of the Principal Instrument. Such rights are only enlivened in the event that ASIC gives a notice disentitling a group purchasing body from relying on the relief in the Principal Instrument. Accordingly, the inclusion of such rights is likely to involve only minor and machinery impacts on business, individuals and/or community organisations.

## Statement of Compatibility with Human Rights

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

### ASIC Corporations (Amendment) Instrument 2018/1098

*ASIC Corporations (Amendment) Instrument 2018/1098 (Amending 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.*

#### Overview

The Principal Instrument gives exemptions to eligible group purchasing bodies from the obligations to hold an Australian financial services (AFS) licence for these limited financial services and to register a risk management scheme as a managed investment scheme. ASIC provided the exemptions in the Principal Instrument because it considers compliance with Chapters 5C and 7 of the Corporations Act is disproportionately burdensome for eligible group purchasing bodies, which are acting more in the nature of a purchaser of risk cover than a seller.

Section 7 of the Principal Instrument provides that a group purchasing body cannot rely on the exemptions if ASIC has given a notice to the body stating that the body cannot rely on the instrument and ASIC has not withdrawn the notice. The notice may be given by sending it to the body's address last known to ASIC. A decision made by ASIC under section 7 is not subject to merits review by the Administrative Appeals Tribunal (AAT). A decision by ASIC not to withdraw a notice given under section 7 also is not subject to merits review by the AAT.

The Amending Instrument amends *ASIC Corporations (Group Purchasing Bodies) Instrument 2018/751* (Principal Instrument) by inserting a new section 9 to expressly permit affected persons in relation to a group purchasing body (i.e. the group purchasing body if it is incorporated – or the body, its office bearers or employees if it is not incorporated) to apply to the AAT for review of a decision made by ASIC to give a notice under section 7 of the Principal Instrument or a decision not to withdraw a notice given under section 7 following an application to ASIC that the notice be withdrawn. The Amending Instrument also requires ASIC, if it makes a decision not to withdraw a notice given under section 7 of the Principal Instrument, to take such steps as are reasonable in the circumstances to give the group purchasing body notice in writing or otherwise of the decision and of the right to have the decision reviewed by the AAT. Where ASIC makes a decision under section 7 to issue a notice, ASIC must take such steps as are reasonable in the circumstances to give the group purchasing body notice in writing or otherwise of the right to have the decision reviewed by the AAT. (Notice of the decision in the latter scenario will have already been given by the issuing of the notice under section 7.)

#### 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**