



**ASIC**  
Australian Securities &  
Investments Commission

## Explanatory Statement

### *ASIC Corporations (Amendment) Instrument 2020/721* *ASIC Corporations (IPO Communications) Instrument 2020/722*

This is the Explanatory Statement for *ASIC Corporations (Amendment) Instrument 2020/721* and *ASIC Corporations (IPO Communications) Instrument 2020/722*.

The Explanatory Statement is approved by the Australian Securities and Investments Commission (*ASIC*).

#### Summary

1. *ASIC Corporations (Amendment) Instrument 2020/721* (the **amending instrument**) and *ASIC Corporations (IPO Communications) Instrument 2020/722* (the **principal instrument**) implements measures aimed at reducing the costs for issuers undertaking an initial public offer (**IPO**) of securities without compromising investor protection and market integrity. The relief provided under the instruments removes the need for an issuer to seek the following types of relief from the *Corporations Act 2001* (the **Act**):
  - (a) relief to disregard the relevant interests of the issuer, underwriter or lead manager for the purposes of the takeover provisions in Chapter 6 of the Act where those relevant interests arise because of voluntary escrow arrangements with security holders; and
  - (b) relief from the advertising restrictions in the Act to enable bodies to communicate certain limited information about an IPO to their security holders, and current and former employees, before the disclosure document is lodged with ASIC.
2. The amending instrument amends ASIC Class Order [CO 13/520] (**CO 13/520**) so that an issuer, professional underwriter or lead manager that enters into a voluntary escrow arrangement with a holder of securities in connection with an IPO does not have a relevant interest in securities merely because the voluntary escrow arrangement applies restrictions on the disposal of securities. The amending instrument also amends CO 13/520 so that the exception does not apply for the purposes of the substantial holding requirements.
3. The principal instrument provides relief from subsection 734(2) of the Act by allowing the issuer to communicate certain types of matters about a planned IPO to its security holders, and its current and former employees before the issuer lodges a disclosure document with ASIC in certain circumstances.

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## **Purpose of the instrument**

### *Background*

4. Issuers proposing to undertake an IPO of securities often apply to ASIC for relief so that they can enter into voluntary escrow arrangements with security holders. These arrangements might result in a contravention of section 606 of the Act, which prohibits the acquisition of a relevant interest in voting shares under a transaction if a person's voting power in the body increases from under 20% to over 20%, or from a starting point that is above 20% and below 90%.
5. Issuers also often apply for relief so that they can communicate with their security holders and employees about the IPO before lodging a disclosure document with ASIC. These communications are restricted by section 734 of the Act.
6. ASIC considers these types of relief applications to be minor and technical. That is, they are within the scope of the Act or existing ASIC policy but involve the application of existing policy to new situations. Accordingly, ASIC routinely grants relief to allow:
  - (a) issuers, underwriters or lead managers to enter into voluntary escrow arrangements in connection with an IPO; and
  - (b) issuers to communicate with their security holders, current and former employees about an IPO before the disclosure document is lodged.
7. In making these applications, issuers must pay ASIC fees and are also likely to incur legal fees to prepare relief applications. The applications may delay the IPO, or at least need to be factored into the IPO timetable.
8. The policy outcome of the legislative instruments is:
  - (a) to formalise ASIC's policy on the most common circumstances where ASIC has granted relief to permit voluntary escrow arrangements and certain types of low-risk pre-prospectus communications; and
  - (b) to reduce compliance costs for businesses.

### *Escrow arrangements create relevant interests in securities*

9. Escrow delays the time in which a security holder can realise the value of its securities by imposing restrictions on the ability of the holder to dispose of its securities in the issuer. Under an escrow arrangement, the holder agrees not to dispose of its securities, or rights or interests connected with the securities, for the duration of the arrangement.
10. The takeovers provisions are set out in Chapter 6 of the Act. Among other things, they define when a person has a relevant interest in securities. A person who enters into an escrow arrangement with a security holder has a relevant interest in those securities. This is because, under the arrangement, that person

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has the power to control the disposal of the securities: see paragraph 608(1)(c) of the Act. The same result flows through to Chapter 6A of the Act, which deals with compulsory acquisitions and buy-outs.

11. A person with a substantial holding must make certain disclosures about that holding under Chapter 6C of the Act. Issuers and other counterparties to the escrow arrangement must account for their relevant interest in the securities held in escrow when considering their obligations under the takeovers and substantial holding provisions.
12. ASIC currently provides relief to listed companies to facilitate 'listing rule escrow' under CO 13/520. ASIC considers the objectives and benefits of voluntary escrow in relation to an IPO to be similar to listing rule escrow because both facilitate a fair, orderly and transparent market by aligning the interests of the particular parties to the escrow arrangement with the interests of the incoming security holders.

*Voluntary escrow relief*

13. When undertaking an IPO, issuers often engage a lead manager and/or an underwriter to coordinate the IPO process, advise on the structuring and marketing of the IPO, and manage the offer so as to ensure the IPO will be successful. If the IPO is underwritten, the lead manager guarantees the underwriter will acquire, or place, any securities which are not taken up. The underwriter is contractually obliged under the underwriting agreement to apply for any securities which are not subscribed for in the IPO, subject to certain termination events.
14. The issuer, underwriter or lead manager may require certain security holders of the company to enter into voluntary escrow arrangements to make it easier to market the IPO. Voluntary escrow with certain existing security holders may promote investor confidence and an orderly market for securities.
15. The amending instrument provides relief to issuers, underwriters and lead managers to facilitate voluntary escrow arrangements in relation to IPOs. In order to balance the benefits of escrow with the possible defensive effect of an escrow against any potential takeover, the relief is only available where the escrow agreement meets the following requirements:
  - (a) the escrow agreement must restrict disposal and not voting;
  - (b) the escrow agreement must allow the holder to accept into a successful takeover bid and allow the securities to be transferred or cancelled as part of a merger by scheme of arrangement;
  - (c) the escrow must terminate no later than:
    - (i) for an escrow arrangement with the issuer – two years after the date that the parties enter into the escrow agreement;

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- (ii) for an escrow arrangement with the underwriter or lead manager – one year after the date the parties enter into the escrow agreement;
  - (d) where the escrow securities are beneficially-held, the holder may only transfer the escrow securities to another holder where certain requirements are met – that is, no change in beneficial ownership, no change to the duration under the escrow agreement, and no change to the restrictions on voting and disposal as under the escrow agreement; and
  - (e) where the escrow agreement allows the holder to create a security interest in favour of a bona fide third-party financial institution for a loan or other financial accommodation, the holder must not create the security interest unless the bona fide third-party financial institution agrees in writing that no escrow securities may be transferred to the financial institution in connection with the security interest until the expiry of the escrow period.
16. The relief is available to issuers proposing to undertake an IPO because this is consistent with the rationale of allowing the time value of securities to become sufficiently established following listing. The relief is also available to underwriters and lead managers that underwrite or manage offers of securities in the ordinary course of their business because it promotes capital raising and reorganisation by allowing underwriters and lead managers to protect themselves from an early sell-down, which may depress the price of securities.
17. Similar to the relief for listing rule escrow, the voluntary escrow relief applies to the takeovers and compulsory acquisition provisions in Chapters 6 and 6A respectively, but not to the substantial holding provisions in Chapter 6C of the Act. This is to ensure that security holders, and potential investors, continue to have access to information relating to securities held in escrow — including the terms of restriction and details of the relevant agreements which apply to restrict disposal of the securities held in escrow.

*Restrictions on advertising offers of securities that require a disclosure document*

18. There is a general prohibition on the advertising or publicity of offers of securities that require a disclosure document: see section 734 of the Act. Under subsection 734(2) of the Act, if an offer or intended offer of securities needs a disclosure document, a person must not:
- (a) advertise the offer or intended offer; or
  - (b) publish a statement that:
    - (i) directly or indirectly refers to the offer or intended offer; or
    - (ii) is reasonably likely to induce people to apply for the securities.
19. The Act recognises that an absolute prohibition on advertising may impose unreasonable and uncommercial constraints on issuers. The Act provides certain statutory exceptions to this general prohibition: see subsections 734(5)-(7) of the

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Act. These exceptions only permit very basic information about an offer of securities that requires a disclosure document to be advertised or published.

*IPO communications relief*

20. When preparing for an IPO, issuers often need to communicate in a timely manner to their security holders and employees about various changes relating to the offer that may affect them. These communications may form part of the ordinary and necessary preparatory work before an IPO. The purpose of the relief under the principal instrument is to enable issuers to communicate certain types of information about a planned IPO to employees and security holders before the issuer lodges a disclosure document (e.g. a prospectus) with ASIC.
21. The principal instrument restricts the type of information that may be disclosed to each class of recipient. The type of matters that an issuer is allowed to communicate under the principal instrument represents the most common types of matters for which relief for pre-prospectus communications was previously sought from ASIC in respect of each class of recipient.
22. The relief is only available where the issuer does not communicate any advantages, benefits or merits of the planned offer under the IPO. This ensures that issuers only communicate non-promotional, factual information to their security holders and employees. The relief is conditional on the issuer having appropriate arrangements in place to ensure that any advertisement or statement published in reliance on the relief under the principal instrument is kept up to date to minimise the risk of misinformation.
23. The policy underlying the principal instrument balances the need for investors and potential investors to be protected from issuers attempting to induce them into investing in proposed offers of securities without adequate disclosure being made, and the commercial need for issuers to be able to conduct ordinary and necessary preparatory work for an IPO.

**Consultation**

24. On 24 February 2020, ASIC released Consultation Paper 328 *Initial public offers: Relief for voluntary escrow arrangements and pre-prospectus communications (CP 328)*, which sought feedback from stakeholders on ASIC's proposal for the amending instrument and the principal instrument. The consultation period closed on 6 April 2020.
25. ASIC received four submissions in response to CP 328. Most of the submissions were supportive of ASIC's proposal to grant relief to facilitate voluntary escrow arrangements and pre-prospectus communications in relation to an IPO. Details of the submissions are contained in REP 667 *Response to submissions on CP 328 Initial public offers: Relief for voluntary escrow arrangements and pre-prospectus advertising communications* which is available on ASIC's website at [www.asic.gov.au](http://www.asic.gov.au).

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## Operation of the instrument

27. Each legislative instrument commences on the day after it is registered on the Federal Register of Legislation.

### *The amending instrument*

28. Chapter 6 of the Act deals with takeovers. Chapter 6A of the Act deals with compulsory acquisitions and buy-outs. Chapter 6C of the Act deals with information about ownership of listed companies, listed registered schemes and listed notified foreign passport funds.
29. The declarations in the amending instrument have effect in relation to:
- (a) references to ‘substantial holding’ in Chapters 6, 6A and 6C of the Act, as defined in section 9 of the Act;
  - (b) section 609 of the Act, which specifies the situations that do not give rise to having a relevant interest in securities; and
  - (c) subsection 671B(7) of the Act, which sets out the types of information about substantial holdings that must be given to the company, responsible entity, fund operator and relevant market operator.
30. The amending instrument affects the operation of section 609 of the Act by declaring the following:
- (a) an issuer undertaking an IPO does not have a relevant interest in its securities held in escrow merely because of an escrow agreement (see notional section 609(13A));
  - (b) an underwriter or lead manager does not have relevant interest in the securities held in escrow merely because of an escrow agreement entered into in the ordinary course of their business as an underwriter or lead manager (see notional subsection 609(13B)); and
  - (c) the permitted terms of the escrow agreement, including restrictions on the disposal of escrow securities but not in relation to voting rights, the duration of the escrow agreement and permitted transfers of escrow securities under the escrow agreement (see notional subsection 609(13C)).
31. The relief in the amending instrument only applies in relation to an IPO where all of the following are satisfied:
- (a) the securities held in escrow must be in the same class as the securities offered under the IPO;
  - (b) the terms of the escrow agreement must restrict disposal and not voting;
  - (c) in the case of a takeover bid, the escrow agreement must allow the holder to accept into a takeover bid where the holders of at least half of the bid class of securities that are not subject to escrow have accepted into the

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- bid, or requires that the escrow securities to be returned to escrow if the bid does not become unconditional;
- (d) the escrow agreement must allow the securities to be transferred or cancelled as part of a merger by scheme of arrangement under Part 5.1 of the Act;
  - (e) the escrow must terminate no later than:
    - (i) for an escrow arrangement with the issuer – two years after the date that the parties enter into voluntary escrow; or
    - (ii) for an escrow arrangement with an underwriter or lead manager – one year after the date that the parties enter into the voluntary escrow;
  - (f) where the escrow agreement allows the holder to create a security interest in favour of a bona fide third-party financial institution, the holder must not create a security interest in favour of the financial institution unless the financial institution has agreed in writing to take or acquire the security interest in the escrow securities subject to the terms of the escrow agreement; and
  - (g) where the escrow agreement allows the holder to transfer the escrow securities, the holder must not transfer the escrow securities to another person if:
    - (i) the transfer would result in a change in the beneficial ownership of the escrow securities; or
    - (ii) the transfer would result in an extension in the period of the escrow agreement; or
    - (iii) the transferee does not agree to be subject to the same restrictions on disposal of escrow securities under the escrow agreement.
32. The amending instrument also notionally modifies the definition of a ‘substantial holding’ in section 9 of the Act, and subsection 671B(7) of the Act, to ensure that the relevant interests of an issuer, underwriter or lead manager in the securities arising from restrictions on disposal under an escrow agreement are counted for the purposes of Chapter 6C (substantial holdings) notwithstanding that the relevant interests are not counted for the purposes of Chapters 6 (takeovers) and 6A (compulsory acquisitions).

#### The principal instrument

33. Chapter 6D of the Act deals with capital raisings. The principal instrument exempts bodies that intend to offer securities under an IPO from the operation of subsection 734(2) of the Act in relation to an advertisement or statement published to security holders, or current or former employees of the body.

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34. The principal instrument sets out the content of the permitted communications to security holders, employees and former employees of the body.
35. Communications to holders of the body's securities must be limited to:
- (a) the fact that the body will be undertaking the IPO, including any impending announcements about the offer;
  - (b) the timetable, structure and offer period for the IPO, including any changes or updates;
  - (c) where the IPO is or includes a sale IPO — any sell-down facility, including the process and implications of participating in the sell-down facility, and the expected price range of the securities to be transferred through the sell-down facility;
  - (d) any proposed escrow arrangements that will apply to the securities in the body after the IPO is complete; and
  - (e) matters that require the approval of security holders in connection with the IPO, including the appointment of officers and directors of the body, and employee incentive schemes.
36. Communications to employees of the body must be limited to:
- (a) the fact that the body will be undertaking the IPO, including any impending announcements about the offer;
  - (b) the timetable, structure and offer period for the IPO, including any changes or updates;
  - (c) changes associated with the body intending to be a listed body, including changes to personnel and employment arrangements, internal management and proceedings of the body, and the financial, business and operations of the body;
  - (d) any employee incentive plans, including the treatment of existing securities and option plans and any associated changes;
  - (e) any employee priority offers under the IPO.
37. Communications to former employees of the body must be limited to:
- (a) the fact that the body will be undertaking the IPO;
  - (b) the treatment of existing securities and options plans, and any associated remuneration arrangements relating to the former employee's outstanding remuneration.
38. The relief under the principal instrument is only available to a body that is seeking to be admitted on the official list of a prescribed financial market.



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39. A body cannot rely on the exemption if it advertises or publishes any statement to any of the specified classes of recipients that communicates the advantages, benefits or merits of the IPO. The exemption is conditional on the body having adequate arrangements in place to ensure that any advertisement or statement published is kept up to date.

#### Legislative instrument and primary legislation

40. The subject matter and policy implemented by the instruments is more appropriate for a legislative instrument rather than primary legislation because the matters contained in each of the legislative instruments are tailored policy adjustments designed to ensure the application of primary legislation remain flexible to adapt to market developments and applies in a way that is consistent with the overall intended policy of the primary legislation.

#### **Legislative authority**

41. The amending instrument is made under subsections 655A(1), 669(1) and 673(1), having regard to section 602 of the Act where required, and subsection 33(3) of the *Acts Interpretation Act 1901* (the *AIA*).
42. Subsection 655A(1) of the Act provides that ASIC may declare that Chapter 6 of the Act (takeovers) applies to all persons as if specified provisions were modified or varied as specified in the declaration. Subsection 655A(2) of the Act states that in deciding whether to give the declaration, ASIC must consider the purposes of Chapter 6 of the Act as set out in section 602 of the Act.
43. Subsection 669(1) of the Act provides that ASIC may declare that Chapter 6A of the Act (compulsory acquisitions and buy-outs) applies to all persons as if specified provisions were modified or varied as specified in the declaration.
44. Subsection 673(1) of the Act provides that ASIC may declare that Chapter 6C of the Act (information about ownership of listed companies) applies to all persons as if specified provisions were modified or varied as specified in the declaration. Subsection 673(2) of the Act states that, in deciding whether to give the declaration, ASIC must consider the purposes of Chapter 6 of the Act as set out in section 602 of the Act.
45. Under subsection 33(3) of the *AIA*, where an Act confers a power to make an instrument, the power is to be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to amend the instrument.
46. The principal instrument is made under subsection 741(1) of the Act. The subsection provides that ASIC may exempt a class of specified persons from specified provisions of Chapter 6D of the Act (capital raisings).
47. The instruments are disallowable legislative instruments.

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## **Statement of Compatibility with Human Rights**

48. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is in the Attachment.

## **Statement of Compatibility with Human Rights**

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

***ASIC Corporations (Amendment) Instrument 2020/721***

***ASIC Corporations (IPO Communications) Instrument 2020/722***

### Overview

1. *ASIC Corporations (Amendment) Instrument 2020/721* facilitates issuers, underwriters or lead managers to enter into certain voluntary escrow agreements in relation to an initial public offer (IPO) of securities. The effect of the amendments is that the entering into of such agreements are disregarded for the purposes of the takeovers and compulsory acquisition laws in the *Corporations Act 2001* (the *Act*) but still counted for the purposes of the substantial holding laws in the Act.
2. *ASIC Corporations (IPO Communications) Instrument 2020/722* provides relief from the advertising restrictions in the Act to enable bodies to communicate certain limited information about an IPO to their security holders, and current and former employees, before the disclosure document is lodged with ASIC.

### Assessment of human rights implications

3. This instrument does not engage any of the applicable rights or freedoms

### Conclusion

4. This 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*.