



**ASIC**  
Australian Securities &  
Investments Commission

## Explanatory Statement

***ASIC Corporations (Land Holding for Primary Production Schemes)  
Instrument 2024/15***  
and  
***ASIC Corporations (Repeal) Instrument 2024/19***

This is the Explanatory Statement for *ASIC Corporations (Land Holding for Primary Production Schemes) Instrument 2024/15* (the **Land Holding Instrument**) and *ASIC Corporations (Repeal) Instrument 2024/19* (the **Repeal Instrument**).

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

### Summary

1. The Land Holding Instrument specifies minimum standards that a responsible entity must meet in relation to the holding of interests in land required for the operation of a registered managed investment scheme to ensure the land holding arrangements enable the scheme to be operated efficiently, honestly, and fairly.
2. The Land Holding Instrument replaces ASIC's previous legislative instrument ASIC Class Order [\[CO 13/1406\]](#) (the **Class Order**), which was due to sunset on 1 April 2024 and is repealed by the Repeal Instrument.
3. The *Legislative Instruments Act 2003* (the **LIA**) provides for the periodic expiry of legislative instruments ('sunsetting') to ensure that they are kept up to date and only remain in force for so long as they are needed. In addition to the Class Order, the Repeal Instrument also repeals the following legislative instruments that were due to sunset on 1 April 2024 and that are being remade:
  - a. ASIC Class Order [\[CO 13/1200\]](#) - *Periodic statements relief for AQUA quoted and listed managed investment scheme managed investment scheme issuer*;
  - b. ASIC Class Order [\[CO 13/1409\]](#) - *Holding assets: Standards for responsible entities*;
  - c. ASIC Class Order [\[CO 13/1410\]](#) - *Holding assets: Standards for providers of custodial and depository services*; and
  - d. ASIC Class Order [\[CO 13/1621\]](#) - *Exemption and declaration for the operation of mFund*.

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## Purpose of the Land Holding Instrument

4. In many primary production schemes, the underlying land is the property of the responsible entity or its associate or an unrelated third party rather than scheme property. ASIC considers that exposing the scheme to risks of failure due to inadequate protection of interests in land needed by the scheme for the scheme's expected duration is inconsistent with the responsible entity's duties to do all things necessary to ensure that it operates a registered scheme efficiently, honestly and fairly. ASIC considers that the interests in land should be held in a way that protects members from risks outside the scheme's scope, such as the landowner's insolvency.
5. The Land Holding Instrument contains the minimum standards that a responsible entity must meet in relation to the holding of interests in land required for the operation of a registered managed investment scheme to ensure the land holding arrangements enable the scheme to be operated efficiently, honestly and fairly.
6. We consider that the requirements in the Land Holding Instrument are consistent with the responsible entity's duties under paragraph 601FC(1)(c) of the Corporations Act 2001 (the Act) and its duties as a financial services licensee under paragraph 912A(1)(a) of the Act. The purpose of the Land Holding Instrument is to reduce the risks of the scheme's ability to operate being affected by the rights of other parties outside the scheme.
7. Section E of ASIC's *Regulatory Guide 133 Funds management and custodial services: Holding assets* ([RG 133](#)) provides guidance for responsible entities of registered schemes in respect of their obligations in relation to the holding of interests in land. The guidance in section E of RG 133 is based upon the provisions of this Instrument.

## Purpose of the Repeal Instrument

8. The purpose of the Repeal Instrument is to repeal the Class Order and also ASIC Class Orders [CO 13/1200], [CO 13/1409], [CO 13/1410], and [CO 13/1621], to ensure there is no overlap between these instruments and those that replace them.

## Consultation

9. Before making the Land Holding Instrument, ASIC consulted publicly. One submission was received, which agreed that the Class Order has operated effectively.

## Operation of the Land Holding Instrument

10. The Land Holding Instrument modifies or varies Division 3 of Part 7.6 of the Act in relation to a responsible entity by notionally inserting section 912AAB.
11. Notional subsection 912AAB(1) stipulates that the section applies to a financial services licensee that is authorised to operate a registered managed investment

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scheme that involves primary production activities listed in paragraphs 912AAB(1)(a) to (d). It is the objective of this subsection that ‘primary production’ captures a broad range of income producing activities for which the use of land is reasonably required.

12. Notional subsection 912AAB(2) of the Act stipulates the requirements for a financial services licensee offering interests in a registered managed investment scheme as explained in the following paragraphs.

The property interest must be registered on the land title register

13. Notional paragraph 912AAB(2)(a) of the Act requires the financial services licensee to take reasonable steps to ensure that any regulatory approvals that are necessary to carry out the primary production activities are obtained and maintained.
14. Notional paragraph 912AAB(2)(b) of the Act requires the financial services licensee to lodge for registration under State or Territory land title laws one or more instruments in registrable form that it reasonably believes will be registered. This would require the financial services licensee to ensure that the instruments creating or transferring the interests in land are properly executed in accordance with the State and Territory land title laws.
15. Notional paragraph 912AAB(2)(c) of the Act requires that each instrument is lodged for registration immediately after the financial services licensee accepts any contribution from a scheme member.
16. Notional paragraph 912AAB(2)(d) of the Act stipulates that the financial services licensee must also do all things that it can do that are necessary to ensure that each instrument is registered promptly after it is lodged. This would require, for example, the financial services licensee to promptly respond to any requisition from the land title registrar.
17. Notional paragraph 912AAB(2)(e) of the Act stipulates that the financial services licensee must not accept any contributions from members whose interests in the scheme will be affected by the use of the primary production land, unless it reasonably believes that the instrument will be registered promptly after it is lodged and any regulatory approvals that are outstanding will be obtained promptly after the contributions are accepted.

The interest holder

18. The financial services licensee must ensure that the property interest is held either by the members collectively, each member in relation to their portion, a custodian engaged by the responsible entity, the responsible entity, or a company controlled by the scheme members. Notional paragraph 912AAB(2)(g) of the Act stipulates which entity can hold the property interest and the requirements for holding the property interest.

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Protecting the property interest from any existing and subsequent interests in the same land

19. The financial services licensee must do all things it can do that are necessary to ensure that any other existing and subsequent interests in the same land cannot have an adverse effect on the property interest in a way that is material to the scheme's operation.
20. Notional paragraph 912AAB(2)(h) of the Act stipulates the obligations that need to be satisfied before registration of the land instruments to protect the property interest from any existing interests in the same land. This includes the obligation to do all things the financial services licensee can do that are necessary to ensure that the property interest is protected from existing interests in the same land and to reasonably believe that it will be able to effect that protection. To form this reasonable belief, the financial services licensee would be required to search the land title register and may need to enter into arrangements with the holders of existing interests in the same land. For example, if there is an existing registered security interest in land of the landowner's mortgagee, then the financial services licensee may need to obtain the mortgagee's written consent to postpone the priority of the mortgagee's interests in land to those of the scheme members and register the consent in accordance with State and Territory land title laws.
21. The exercise of any statutory interests in land created or conferred under a law that applies generally to land in the State or Territory in which the primary production land is located could be beyond the services licensee's control. Notional paragraph 912AAB(2)(h) of the Act would require the financial services licensee to make reasonable inquiries before the registration of the land instruments to determine whether existing statutory interests are being exercised or are proposed to be exercised in a way that may deprive the scheme members of a substantial part of the benefits intended to be produced by the scheme. For example, the financial services licensee may need to search the noticeboards of the State or Territory government or newspapers for any public notice of proposal or plan of road closures, development or installations that may affect the primary production land.
22. Notional paragraph 912AAB(2)(i) of the Act stipulates the obligation to do all things necessary to ensure that, after the registration of the land instruments, the property interest cannot be adversely affected by any subsequent interests in the same land. For example, the financial services licensee may need to lodge a private caveat and the trust deed with the land title registrar to protect the scheme members' interest in land. The obligation in notional paragraph 912AAB(2)(i) of the Act does not apply to an interest or a right that is created, conferred or consented to by the licensee, as long as the licensee did so in accordance with its duties as responsible entity of the scheme. It also does not apply to an interest or a right that may be created or conferred under a law that applies generally to land in the State or Territory in which the primary production land is located.

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### The scheme's constitution must facilitate the holding of the property interest

23. The financial services licensee must ensure that the scheme's constitution gives the licensee the power to require members to make payments to, or as directed by, the licensee to satisfy the payment obligations in relation to the primary production land. In particular, the registered proprietor of the land is generally required to pay for council rates and land tax. Meanwhile, the lessee or sublessee is generally required to pay for utility expenses. In addition, the financial services licensee must hold, or cause its agent to hold, the payments on trust for the paying scheme members or the collective scheme members, as relevant, until they are used to meet the relevant payment obligations.
24. Notional paragraph 912AAB(2)(j) of the Act stipulates the content requirement of the scheme's constitution if the land instrument is not an instrument of transfer of a freehold estate or interest in land, such as a lease or a sublease.
25. Notional paragraph 912AAB(2)(k) of the Act stipulates the content requirement of the scheme's constitution if the land instrument is an instrument of transfer of a freehold estate or interest in land, such as property purchase agreement.
26. Notional paragraph 912AAB(2)(l) of the Act stipulates the holding requirements for amounts paid by scheme's members under the scheme's constitution affected by paragraph (j) or (k).

### The terms of the land instrument

27. Notional paragraph 912AAB(2)(f) of the Act stipulates the obligation to ensure that the interest holder has the rights required for the scheme's purposes under the terms of the land instrument conferred either by the instrument or by registration of the instrument. In particular, the financial services licensee must ensure that the rights conferred on the interest holder include, where relevant for the scheme's purposes, rights of access, cultivation, transmission, maintenance, protection, repair, refurbishment and harvesting in relation to the primary production land.
28. Notional paragraphs 912AAB(2)(m) and (n) of the Act set out the obligations the financial services licensee must comply with if the land instrument is not an instrument of transfer of a freehold estate or interest in land. In particular, the financial services licensee must:
  - a. ensure that the terms of the instrument are not less favourable to the lessee, sublessee or other interest holder than they would be if the terms had been negotiated on an arm's length basis between the other parties to the instrument and the financial services licensee acting in accordance with its duties; and
  - b. ensure that the terms of the instrument prohibit any action taken by the other party to the instrument that would have a materially adverse effect on the interest holders' property interests without giving the financial services licensee at least 3 months' notice in writing; and

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- c. on receipt of that notice, promptly notify in writing the members whose benefits may be affected about the potential action by the other party to the instrument and about the members' rights to requisition a meeting.
  29. Notional subsection 912AAB(3) of the Act stipulates that a financial services licensee that complies with notional subsection 912AAB(2) is taken to comply with any condition in its Australian financial services licence that requires the lodgement of an instrument relating to the primary production land.

#### The Repeal Instrument

30. The Repeal Instrument repeals the following ASIC legislative instruments which are otherwise scheduled to sunset on 1 April 2024:
  - a. ASIC Class Order [CO 13/1200]; and
  - b. ASIC Class Order [CO 13/1406]; and
  - c. ASIC Class Order [CO 13/1409]; and
  - d. ASIC Class Order [CO 13/1410]; and
  - e. ASIC Class Order [CO 13/1621].

#### **Legislative instrument and primary legislation**

31. The Land Holding Instrument contains technical detail which would otherwise introduce unnecessary complexity to the primary legislation. The Land Holding Instrument operates to supplement a more comprehensive regulatory framework that sits alongside the primary law and applies in a way consistent with the intended policy and the enabling provisions in the primary legislation.
32. The Land Holding Instrument preserves the effect of ASIC Class Order [CO 13/1406], which is otherwise due to sunset on 1 April 2024, until 1 October 2024. Following consultation, ASIC considered that CO 13/1406 was operating effectively and efficiently to achieve its objectives and continued to form a necessary and useful part of the legislative framework.
33. It will be a matter for Government and for Parliament as to whether the Act may be amended in future to include the provisions contained in the Land Holding Instrument.

#### **Duration of the Land Holding Instrument**

34. The duration of the Land Holding Instrument is 6 months. ASIC considers that this is appropriate to provide certainty for entities subject to the Land Holding Instrument and minimise regulatory burden associated with compliance changes. During the Land Holding Instrument's 6 months of operation, ASIC intends to engage in further targeted consultations regarding the necessity of its further extension.

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### **Legislative authority**

35. The Land Holding Instrument and the Repeal Instrument are made under paragraph 926A(2)(c) of the *Corporations Act 2001*.
36. The Land Holding Instrument and the Repeal Instrument are disallowable legislative instruments.
37. The Repeal Instrument is made under paragraphs 601QA(1)(a), 601QA(1)(b), 926A(2)(c), 1020F(1)(a) and 1020F(1)(c) of the *Corporations Act 2001*.
38. Under subsection 33(3) of the *Acts Interpretation Act 1901*, 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.

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

39. 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 (Land Holding for Primary Production Schemes) Instrument 2024/15*** and ***ASIC Corporations (Repeal) Instrument 2024/19***

### Overview

1. *ASIC Corporations (Land Holding for Primary Production Schemes) Instrument 2024/15* specifies minimum standards that a responsible entity must meet in relation to the holding of interests in land required for the operation of a registered managed investment scheme to ensure the land holding arrangements enable the scheme to be operated efficiently, honestly and fairly.
2. *ASIC Corporations (Repeal) Instrument 2024/19* repeals a number of ASIC legislative instruments which are otherwise scheduled to sunset on 1 April 2024.

### Assessment of human rights implications

3. The instruments do not engage any of the applicable rights or freedoms.

### Conclusion

4. The instruments are 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*.