

**EXPLANATORY STATEMENT for**  
**ASIC CORPORATIONS (MARKET RESEARCH AND ROADSHOWS)**  
**INSTRUMENT 2016/79**

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (ASIC) makes ASIC Corporations (Market Research and Roadshows) Instrument 2016/79 under section 741 of the *Corporations Act 2001* (the *Act*).

Section 741 of the Act provides that ASIC may exempt—either unconditionally or subject to specified conditions—all persons, specified persons or a specified class of persons from all or specified provisions of Chapter 6D of the Act, or ASIC may declare that Chapter 6D applies to all persons, specified persons or a specified class of persons, as if specified provisions were omitted, modified or varied as specified in the declaration. Such an exemption or declaration may relate to all securities, specified securities or a specified class of securities and or any other matter generally or as specified.

## **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 include:

- (a) ASIC Class Order [CO 00/175] *Pre-prospectus roadshow presentations*;
- (b) ASIC Class Order [CO 00/176] *Pre-prospectus market research*; and

- (c) ASIC Class Order [CO 00/656] *Announcements to securities exchanges about offers by subsidiaries of the listed body*.

ASIC has recently reviewed the policy underlying each of Class Orders [CO 00/175], [CO 00/176] and [CO 00/656] 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. ASIC has also reviewed, and reached the same conclusion in relation to product disclosure statement advertising relief in Class Order [CO 02/138] *Announcements to financial markets by holding companies* and Class Order [CO 02/143] *Financial product market research* (the underlying policy of which is analogous to [CO 00/656] and [CO 00/176] respectively). Accordingly, ASIC has decided to consolidate and reissue the relief in Class Orders [CO 00/175], [CO 00/176], [CO 00/656], [CO 02/138] and [CO 02/143] in ASIC Corporations (Market Research and Roadshows) Instrument 2016/79.

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 00/175], [CO 00/176], [CO 00/656], [CO 02/138] and [CO 02/143], being legislative instruments, were scheduled to eventually expire under the sunsetting provisions of the *LA*.

ASIC's review of the policy underlying Class Orders [CO 00/175], [CO 00/176], [CO 00/656], [CO 02/138] and [CO 02/143]— 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 each of Class Orders [CO 00/175], [CO 00/176], [CO 00/656], [CO 02/138] and [CO 02/143] effective from the date that ASIC Corporations (Market Research and Roadshows) Instrument 2016/79 commences.

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

Section 734 of the Act restricts certain conduct relating to the advertising and/or publicising of an offer of securities for issue or sale that requires a disclosure document. Section 1018A(2) contains similar restrictions relating to product disclosure statements.

The Act recognises—through the provision of certain statutory exceptions—that an absolute prohibition on advertising may impose unreasonable and uncommercial constraints on issuers. ASIC has provided further exceptions in order to facilitate generally the undertaking of ordinary and commercially necessary preparatory work associated with a proposed offer of financial products (which would otherwise be prohibited) and to obviate any unintended consequences of the advertising restrictions.

ASIC Corporations (Market Research and Roadshows) Instrument 2016/79 provides relief in the circumstances outlined below.

### ***Roadshows***

ASIC Corporations (Market Research and Roadshows) Instrument 2016/79 provides relief from the operation of the advertising and publicity provisions to allow an issuer to undertake a roadshow (a series of presentations drawing attention to an impending offer of securities for issue or sale) prior to lodgement of the disclosure document with ASIC. The relief operates to allow issuers to disclose certain information about an upcoming offer to Australian Financial Services Licence holders which—without our relief—would breach the advertising prohibitions and impinge on the ability of issuers to undertake ordinary and commercially preparatory work associated with a proposed offer.

### ***Market research***

ASIC Corporations (Market Research and Roadshows) Instrument 2016/79 provides relief from the operation of the advertising and publicity prohibitions where an issuer, or an independent third party engaged by the issuer, undertakes market research in relation to an upcoming offer prior to lodgement of the disclosure document with ASIC. The relief operates to allow a bona fide market research organisation engaged by the issuer to conduct market research to ascertain the anticipated public demand for an offer, the persons to whom the offer should be marketed and the type and extent of marketing that should be undertaken. Without our relief, such activity would be precluded by operation of the advertising and publicity prohibitions and impinge on the ability of issuers to undertake ordinary and commercially necessary preparatory work associated with a proposed offer. The relief is extended to market research in relation to offers of financial products under a product disclosure statement.

### ***Offers by subsidiaries***

ASIC Corporations (Market Research and Roadshows) Instrument 2016/79 provides relief from the operation of the advertising and publicity prohibitions in circumstances where a listed body is required by the relevant market operating rules to make an announcement to the market operator regarding an offer or intended offer of financial products to be made by a subsidiary or proposed subsidiary of the listed body. Our relief obviates an unintended consequence of the advertising and publicity prohibitions in that—in the circumstances described above—they may preclude an issuer from complying with the operating rules of the prescribed financial market upon which the securities or financial products are quoted because the market announcement itself may contravene the prohibitions.

### ***Electronic media***

Subsections 734(7) and (8) of the Act—amongst other things—provide an exception to the advertising and publicity prohibitions to allow the advertisement or publishing of certain statements related to an offer of securities if they are made in the ordinary course of publishing a newspaper or magazine or broadcasting by radio or television. These Chapter 6D provisions are inconsistent with the analogous exception in s1018A (contained in Chapter 7) which, because it was enacted later than Chapter 6D, explicitly includes advertisements or statements made via electronic media. ASIC Corporations (Market Research and Roadshows) Instrument 2016/79 addresses the inconsistency to include advertisements or statements made via electronic media in the exception to the Chapter 6D advertising and publicity prohibitions.

### 3. Operation of the instrument

ASIC Corporations (Market Research and Roadshows) Instrument 2016/79, in giving effect to the relief outlined above, comprises three exemptions from and one modification to the Act.

#### *Roadshows*

ASIC Corporations (Market Research and Roadshows) Instrument 2016/79 exempts bodies from Parts 6D.2 and 6D.3 of the Act for any act by the body (whether or not involving an offer of securities for issue or sale and whether or not involving advertising or the publication of a statement) which directly or indirectly refers, or calls to the attention of, a financial services licensee or their representatives, and no other person, to an intended offer of securities for issue or sale by the body to be made under a disclosure document to be lodged with ASIC.

The exemption only applies if the securities the subject of the offer are intended to be quoted on a prescribed financial market.

#### *Market research*

ASIC Corporations (Market Research and Roadshows) Instrument 2016/79 exempts:

- (a) a body that intends to offer securities and a market research organisation engaged by the body in relation to that offer; and
- (b) a person that intends to make available a financial product or proposed financial product by way of issue or sale and a market research organisation engaged by the person in relation to that intended availability,

from sections 734(2) and 1012C respectively in relation to the publication of certain market research related advertisements or statements, provided certain conditions are satisfied. The conditions include:

- (a) the securities or financial products are or are intended to be quoted on a prescribed financial market;
- (b) the advertisements or statements relate to the intended offer under the disclosure document or PDS (as applicable);
- (c) certain requirements are met, to ensure that the market research activity is bona fide, including:
  - (i) limitations on the information able to be provided to persons by the market research organisation;
  - (ii) a restriction on the disclosure by the market research organisation of the information collected to the body or person (as applicable); and

- (iii) a limit on the number of advertisements or statements that can be made (to 5,000 in number); and
- (d) the market research is undertaken solely for the purpose of ascertaining printing requirements, the persons to whom the offer should be marketed and the type and extent of marketing which should be undertaken.

### ***Offers by subsidiaries***

ASIC Corporations (Market Research and Roadshows) Instrument 2016/79 exempts a listed body and/or its officers from the operation of subsections 734(2) and 1018A(1) and (2) in relation to the publication of a statement about an offer or intended offer of securities, or financial products, where the offeror is a subsidiary or proposed subsidiary of the listed body, provided:

- (a) the statement consists of a notice or report by the listed body, or one of its officers, about its affairs to the relevant market operator; and
- (b) the statement contains material which is required by law or by the operating rules of the relevant financial market to be contained in the statement and nothing more.

### ***Electronic media***

ASIC Corporations (Market Research and Roadshows) Instrument 2016/79 extends, by modification, the scope of the statutory exceptions in subsections 734(7) and (8). These sections—amongst other things— provide an exception to the advertising and publicity prohibitions to allow the advertisement or publishing of certain statements related to an offer of securities if they are made in the ordinary course of publishing a newspaper or magazine or broadcasting by radio or television. The instrument extends the exception to include statements made or published on electronic services (including the internet), rather than only traditional media formats.

## **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 00/175], [CO 00/176], [CO 00/656], [CO 02/138] and [CO 02/143]) 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](http://www.asic.gov.au).

Notwithstanding ASIC's consultation, ASIC considers that ASIC Corporations (Market Research and Roadshows) Instrument 2016/79 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 (Market Research and Roadshows) Instrument 2016/79**

*ASIC Corporations (Market Research and Roadshows) Instrument 2016/79 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**

ASIC Corporations (Market Research and Roadshows) Instrument 2016/79 exempts persons from the restrictions in s734 and 1018A(2) of the *Corporations Act 2001* in relation to statements made in certain discrete circumstances:

- (a) market research; and
- (b) offers by subsidiaries.

ASIC Corporations (Market Research and Roadshows) Instrument 2016/79 exempts persons from the requirements in Part 6D.2 and Part 6D.3 of the *Corporations Act 2001* in relation to roadshow presentations of intended offers of securities.

ASIC Corporations (Market Research and Roadshows) Instrument 2016/79 also modifies s734 to insert a reference to “electronic media” in s734(7) and (8) to ensure consistency with analogous provisions contained in Chapter 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**