

**EXPLANATORY STATEMENT for**  
**ASIC CORPORATIONS (OFFERS OF CONVERTIBLES)**  
**INSTRUMENT 2016/83**

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (**ASIC**) makes ASIC Corporations (Offers of Convertibles) Instrument 2016/83 under section 741 of the *Corporations Act 2001* (the **Act**).

Subsection 741(1) of the Act provides that ASIC may exempt a person from a provision of Chapter 6D of the Act or declare that the Chapter 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. This relief includes Class Order [CO 00/195] *Offer of convertible securities under s713* to allow a body to use a transaction-specific prospectus under s713 of the Act when offering convertible notes and convertible preference shares on the conversion of which the holder will be issued continuously quoted securities of the body.

The exemption under [CO 00/195] was intended to apply to bodies offering convertible securities that would be able to use a transaction-specific prospectus under s713 of the Act for an offer of the underlying continuously quoted securities of the body. However, there is uncertainty as to whether [CO 00/195] operates to allow a body to use a transaction-specific prospectus for an offer of convertible securities on the conversion of which the holder will be issued continuously quoted securities of *another* body.

There is also uncertainty as to whether [CO 00/195] operates to allow a body to use a transaction-specific prospectus for an offer of *converting* securities. Converting securities are those under which conversion can or may occur automatically in accordance with the terms of the security, on particular dates or if certain events occur.

ASIC has recently reviewed the policy underlying Class Order [CO 00/195] as part of a wider review of class orders relating to the fundraising provisions in Chapter 6D and considers that the relief in this class order is still both necessary and appropriate. Accordingly, ASIC has decided to reissue and clarify the relief available in Class Order [CO 00/195] in ASIC Corporations (Offers of Convertibles) Instrument 2016/83.

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 Order [CO 00/195], being a legislative instrument, was scheduled to eventually expire under the sunsetting provisions of the LA.

ASIC's review of the policy underlying Class Order [CO 00/195]—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 00/195] effective from the date that ASIC Corporations (Offers of Convertibles) Instrument 2016/83 commences.

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

ASIC Corporations (Offers of Convertibles) Instrument 2016/83 provides equivalent relief to that previously provided in [CO 00/195], but is drafted as a modification rather than an exemption (as was the case with [CO 00/195]). The instrument modifies the Act to allow the offer of convertible notes or convertible preference shares to be made based on information required by s713(2) instead of s710(1). This modification recognises that the disclosures required by investors for these convertible notes and convertible preference shares are similar to those required for the underlying continuously quoted securities (except that the rights attaching to the convertibles will be different), and the only new information investors should require for the offer is:

- (a) the effect of the offer on the body;
- (b) the rights and liabilities attaching to:
  - (i) the convertibles offered; and

- (ii) the underlying securities into which the convertibles will convert; and
- (c) information not previously disclosed to the market, which covers information excluded from a continuous disclosure notice under the relevant listing rules.

Further, the instrument incorporates a new reference to converting notes and converting preference shares to clarify that relief is available for these securities, which was consulted on in ASIC Consultation Paper 239 *Disclosure documents: Update to ASIC instruments and guidance (CP 239)*.

The instrument also clarifies that relief is available only where the issuer of the convertible security is also the issuer of the underlying security.

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

Section 713 of the Act provides an alternative general disclosure test for disclosing entities offering continuously quoted securities, or options to acquire continuously quoted securities. This is known as transaction-specific disclosure. A prospectus prepared under section 713 (a ‘transaction-specific prospectus’) must contain information regarding:

- (a) the effect of the offer on the body (s713(2)(a));
- (b) the rights and liabilities attaching to the securities offered (or if the securities are options, the rights and liabilities attaching to the options themselves and the underlying securities) (s713(2)(c)-(d)); and
- (c) information not previously disclosed to the market, which covers information excluded from a continuous disclosure notice under the relevant listing rules (s713(5)).

This instrument modifies section 713 so that a transaction-specific prospectus can be used for the offer of convertible or converting notes or convertible or converting preference shares of a body that are convertible or may convert into continuously quoted securities of the body. In addition to the information required by paragraph 713(2)(a) and subsection 713(5), a transaction-specific prospectus of this nature must contain information about the rights and liabilities attaching to both the convertible or converting securities themselves, and the underlying securities: s713(2)(ca).

### **4. Consultation**

On 17 September 2015 ASIC released 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 Order [CO 00/195]) 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 (Offers of Convertibles) Instrument 2016/83 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 (Offers of Convertibles) Instrument 2016/83**

*ASIC Corporations (Offers of Convertibles) Instrument 2016/83 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 (Offers of Convertibles) Instrument 2016/83 relates to fundraising and notionally modifies section 713 of the *Corporations Act 2001* to allow the offer of convertible or converting notes or convertible or converting preference shares of a body that are convertible or may convert into continuously quoted securities of the body to be made based on information required by s713 instead of s710.

#### **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**