

**EXPLANATORY STATEMENT for**  
**ASIC CORPORATIONS (OPTIONS—BONUS ISSUES)**  
**INSTRUMENT 2016/77**

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (*ASIC*) makes ASIC Corporations (Options—Bonus Issues) Instrument 2016/77 under section 741 of the *Corporations Act 2001* (the *Act*).

Paragraph 741(1)(a) of the Act provides that ASIC may exempt a person from all or specified provisions of Chapter 6D of the Act.

## **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 the 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. One of these class orders was Class Order [CO 00/1092] *Application form relief for bonus issues of options*.

ASIC has recently reviewed the policy underlying Class Order [CO 00/1092] as part of wider review of class orders relating to the fundraising provisions in Chapter 6D and considers that the relief in the class order is still both necessary and appropriate. Accordingly, ASIC has decided to reissue the relief underlying Class Order [CO 00/1092] in ASIC Corporations (Options—Bonus Issues) Instrument 2016/77.

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 00/1092], being a legislative instrument, was scheduled to eventually expire under the sunset provisions of the LA.

ASIC's review of the policy underlying Class Order [CO 00/1092]—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 revoked Class Order [CO 00/1092] effective from the date that ASIC Corporations (Options—Bonus Issues) Instrument 2016/77 commences.

## 2. Purpose of the instrument

This legislative instrument addresses minor and technical issues arising in relation to the operation of a certain procedural element of Chapter 6D in circumstances where a particular form of offer is made: a pro-rata bonus issue of options to existing members of a company for nil consideration. The relief afforded by this legislative instrument reduces regulatory burden and facilitates this type of offer being made in circumstances where the procedural requirements of Chapter 6D may otherwise preclude or significantly deter issuers from undertaking it.

An offer of securities for issue or sale needs—unless a relevant statutory exception applies—disclosure under Chapter 6D. An issuer who grants bonus options to existing shareholders pro-rata for nil consideration (but with consideration payable upon exercise of the option) is considered for the purposes of Chapter 6D to offer securities for issue. This is because—for the purposes of Chapter 6D—an option over securities is considered to be a 'security' and the grant of a bonus option is considered to be an 'offer'.

Accordingly, an issuer proposing to undertake a transaction of this type is required to prepare and lodge with ASIC a disclosure document in accordance with Chapter 6D. In addition to specifying the form and content requirements for a disclosure document, Chapter 6D sets out the relevant procedure that must be adhered to when offering securities for issue or sale under a disclosure document. One particular procedural element relates to the issue or transfer of securities to an applicant for those securities under a disclosure document. Section 723 of the Act provides that securities may only be issued or transferred in response to an application form and in circumstances where the person issuing or transferring them has reasonable grounds to believe that the application form was included in, or accompanied by, the disclosure document (the **application form requirement**). The underlying policy of the application form requirement is to ensure that persons applying for securities under an offer have been provided with the disclosure document.

Under a pro-rata bonus issue of options to existing members of a company, the issuing company determines those persons to whom the options are to be issued on the basis of the composition of the company's register of members at the record date specified in the offer. Those members are issued the bonus options—for which no consideration is payable—by virtue of and in proportion to their shareholding in the company rather than on the basis of a completed application form.

Accordingly, ASIC has provided relief from the application form requirement.

The integrity of the policy underlying the application form requirement is preserved by the drafting of the relief which is narrowly cast and only extends to the application form requirement, not the requirement to prepare and lodge a disclosure document and provide a copy of that disclosure document to members. Further, an issuer of pro rata bonus options to existing members for nil consideration holds certainty as to the persons to whom a disclosure document must be provided (as the issuer has this information in its register of members) and there is no risk of a person being issued securities without the benefit of a disclosure document, because the offer is not capable of being accepted by any person outside this specific category of persons.

Section 734 of the Act contains a general prohibition on advertising and publicising an offer or intended offer of securities before a disclosure document is lodged with ASIC. One of the exceptions to this general prohibition (contained in subsection 734(5)) requires an issuer—in order to qualify for that exception—to make certain statements regarding the ‘completion of an application form that will be in or will accompany the disclosure document’. Because ASIC has given relief from the application form requirement, ASIC considers it appropriate to give additional relief such that an issuer relying on the application form relief will not be precluded from relying on the relevant exception in subsection 734(5) merely because an application form is not used for the offer.

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

ASIC Corporations (Options—Bonus Issues) Instrument 2016/77 operates to exempt bodies undertaking a pro-rata bonus issue of options for nil consideration from the requirements of subsection 723(1) of the Act to the extent that it only permits the issue of the options in response to an application form included in or accompanied by a disclosure document.

Practically, the exemption means that issuers do not need to include an application form with a disclosure document for such offers. Importantly, the instrument does not provide any exemption from the requirement to make the offer of pro-rata bonus options for nil consideration under a disclosure document.

ASIC Corporations (Options—Bonus Issues) Instrument 2016/77 also exempts bodies undertaking a pro-rata bonus issue of options for nil consideration from the advertising restriction in subsection 734(2) provided the relevant advertisement or publication includes certain statements drawing attention to the availability of a disclosure document. The precise nature of the statement required depends on whether the advertisement or publication is published before or after the disclosure document is lodged.

#### **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 Ch 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 00/1092]) 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 (Options—Bonus Issues) Instrument 2016/77 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 (Options—Bonus Issues) Instrument 2016/77**

ASIC Corporations (Options—Bonus Issues) Instrument 2016/77 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**

This legislative instrument addresses discrete minor and technical issues arising in relation to the operation of a certain procedural element of Chapter 6D of the Corporations Act in circumstances where a particular form of offer is made: a pro-rata bonus issue of options to existing members of a company for nil consideration. The instrument provides relief from the application form and advertising requirements set out in Chapter 6D in relation to offers of securities.

**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**