

# **EXPLANATORY STATEMENT for**

## **ASIC CORPORATIONS (EXPOSURE PERIOD) INSTRUMENT 2016/74**

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (**ASIC**) makes *ASIC Corporations (Exposure Period) Instrument 2016/74* under sections 741 and 1020F of the *Corporations Act 2001* (the *Act*).

Paragraphs 741(1)(a) and 1020F(1)(a) of the Act provide that ASIC may exempt a person from all or specified provisions of Chapter 6D and Part 7.9 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 that disclosure document. 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 00/168] *Relief from exposure period: quoted securities*;
- (b) ASIC Class Order [CO 00/169] *Relief from exposure period: supplementary and replacement prospectuses*; and
- (c) ASIC Class Order [CO 00/843] *Options over listed securities: exposure period relief*.

ASIC has recently reviewed the policy underlying each of Class Orders [CO 00/168], [CO 00/169] and [CO 00/843] 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, analogous product disclosure statement exposure period relief in ASIC Class

Order [CO 02/145] *Relief from exposure period: managed investment products able to be traded on a licenced market*. Accordingly, ASIC has decided to consolidate and reissue the relief in Class Orders [CO 00/168], [CO 00/169], [CO 00/843] and [CO 02/145] in ASIC Corporations (Exposure Period) Instrument 2016/74.

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 00/168], [CO 00/169], [CO 00/843] and [CO 02/145], are legislative instruments and were scheduled to eventually expire under the sunsetting provisions of the LA.

ASIC’s review of the policy underlying Class Orders [CO 00/168], [CO 00/169], [CO 00/843] and [CO 02/145]— 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 00/168], [CO 00/169], [CO 00/843] and [CO 02/145] effective from the date that ASIC Corporations (Exposure Periods) Instrument 2016/74 commences.

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

Where a disclosure document offering non-quoted securities is lodged, s727(3) imposes a waiting period of seven days from the date of lodgement during which a person must not accept applications for, transfer or issue, securities under the disclosure document (commonly referred to as the ‘exposure period’). Where a PDS offering managed investment products that are not able to be traded is lodged, s1016B imposes an exposure period of seven days from the date of lodgement during which a person must not accept applications for, transfer or issue, securities under the PDS. Both periods may be extended to up to 14 days by ASIC.

### ***Supplementary and replacement disclosure documents***

Subsections 719(4) and (5) provide that—for the purposes of applying Chapter 6D—a ‘disclosure document’ is either the original document read together with the supplementary document, or the replacement document (as applicable) for events that occur after their lodgment. The exposure period imposed by s727(3) therefore applies to supplementary and replacement disclosure documents (even where the document being supplemented or replaced has already been subject to an exposure period). ASIC Corporations (Exposure Period) Instrument 2016/74 provides minor and technical relief to ensure that the replacement and supplementary disclosure documents are not subject to a separate exposure period because the legislative policy is clearly framed around one exposure period only.

### ***Quoted securities***

Arguably, s727(3) imposes an exposure period on all disclosure documents because—even where securities are in the same class as securities that are quoted on a prescribed financial market—the actual new securities offered will be non-quoted at the time the disclosure document is lodged (for example, under the listing rules of the Australian Securities Exchange

Ltd, new securities are not automatically granted quotation even if they are in the same class as securities that are already quoted). ASIC Corporations (Exposure Period) Instrument 2016/74 provides minor and technical relief to the effect that disclosure documents for an offer of securities that are in the same class as securities which at the time of the lodgement are quoted on a prescribed financial market are not subject to the exposure period imposed by s727(3).

### ***Options to acquire quoted securities***

Chapter 6D of the Act recognises the intrinsic link between an option to acquire a quoted security and the quoted security itself. ASIC Corporations (Exposure Period) Instrument 2016/74 extends exposure period relief to disclosure documents offering options to acquire quoted securities.

### ***Managed investment products able to be traded on a market***

Arguably s1016B imposes an exposure period on all PDSs because—even where the managed investment products are in the same class as managed investment products able to be traded on a prescribed financial market, the actual new managed investment products offered will not be able to be traded at the time the PDS is lodged. ASIC Corporations (Exposure Period) Instrument 2016/74 provides exposure period relief for offers of managed investment products under a PDS, taking into account the slightly different drafting of the exposure period in s1016B (which imposes an exposure period on an offer of managed investment products not able to be traded as opposed to s727(3), which refers to non-quoted securities).

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

ASIC Corporations (Exposure Period) Instrument 2016/74 sets out four exemptions:

- (a) three of which exempt an issuer from the operation of s727(3); and
- (b) one that exempts a responsible person from the operation of s1016B(1),

in certain circumstances, as set out below.

### ***Supplementary and replacement disclosure documents***

A person who lodges a supplementary or replacement disclosure document after the expiration of the exposure period in relation to a disclosure document that is being supplemented or replaced does not have to comply with subsection 727(3) of the Act to the extent it would otherwise prohibit the person from accepting an application for, or issuing or transferring, securities offered under the updating document until the period of seven days after the lodgment of the supplementary or replacement document has ended.

ASIC Corporations (Exposure Period) Instrument 2016/74 does not exempt issuers from the operation of s727(3) as it applies to a supplementary or replacement disclosure document in circumstances where the supplementary or replacement is lodged at a point in time at which the document being supplemented or replaced is itself still subject to the exposure period. The relief for the supplementary or replacement disclosure document is activated once the

exposure period (or extended exposure period) applying to the document being supplemented or replaced expires.

### ***Quoted securities***

A person does not have to comply with the exposure period requirements in s727(3) if, at the time of lodgment of the disclosure document, the securities offered therein are in a class of securities that are quoted on a prescribed financial market.

### ***Options to acquire quoted securities***

A person does not have to comply with subsection 727(3) of the Act in relation to an offer of options to acquire securities if, at the time of lodgment of the disclosure document for the options, the underlying securities are in a class of securities that are quoted on a prescribed financial market.

### ***Managed investment products that are able to be traded on a market***

A responsible person does not have to comply with subsection 1016B(1) of the Act in relation to an application made in response to a Product Disclosure Statement for a managed investment product if, at the time of lodgment of the Product Disclosure Statement, the managed investment product is in a class of managed investment products that are able to be traded on a prescribed financial market.

ASIC Corporations (Exposure Period) Instrument 2016/74 also clarifies that, for the purposes of s1016B(1), a class of managed investment products is not to be taken as not being able to be traded on a prescribed financial market merely because, at the time of lodgment of the Product Disclosure Statement, trading in that class has been suspended.

## **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 ASIC Class Orders [CO 00/168], [CO 00/169], [CO 00/843] and [CO 02/145]) 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 (Exposure Period) Instrument 2016/74 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 (Exposure Period) Instrument 2016/74**

ASIC Corporations (Exposure Period) Instrument 2016/74 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 (Exposure Period) Instrument 2016/74 sets out four exemptions:

- (a) three of which exempt an issuer from the operation of s727(3); and
- (b) one that exempts a responsible person from the operation of s1016B(1), in certain circumstances (set out below):
  - (a) supplementary and replacement disclosure documents;
  - (b) options to acquire quoted securities;
  - (c) quoted securities; and
  - (d) managed investment products able to be traded on a market.

#### **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**