# EXPLANATORY STATEMENT for

# ASIC CORPORATIONS (HORSE SCHEMES) INSTRUMENT 2016/790

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (**ASIC**) makes ASIC Corporations (Horse Schemes) Instrument 2016/790 (the **Instrument**) under subsections 601QA(1), 926A(1), 992B(1) and 1020F(1) of the *Corporations Act 2001* (the ***Act***). Subsection 601QA(1) provides that ASIC may exempt a person from a provision of Chapter 5C of the Act (s601QA(1)(a)) or declare that Chapter 5C of the Act applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration (s601QA(1)(b)).

Subsection 926A(2) provides that ASIC may exempt a person from a provision of Part 7.6 (other than Divisions 4 and 8) of the Act (s926A(2)(a)) or declare that Part 7.6 (other than Divisions 4 and 8) applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration (s926A(2)(c)).

Subsection 992B(1) provides that ASIC may exempt a person from a provision of Part 7.8 of the Act (s992B(1)(a)) or declare that Part 7.8 of the Act applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration (s992B(1)(c)).

Subsection 1020F(1) provides that ASIC may exempt a person from a provision of Part 7.9 of the Act (s1020F(1)(a)) or declare that Part 7.9 of the Act applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration (s1020F(1)(c)).

The Instrument remakes the following ASIC Class Orders in a single legislative instrument:

- Class Order [CO 02/319]: *Horse racing syndicates* (**[CO 02/319]**), which will cease to have effect, or to sunset, on 1 October 2016 under the *Legislation Act 2003*;
- Class Order [CO 02/172] – *Horse breeding schemes: private broodmare syndication* (**[CO 02/172]**), which will sunset on 1 October 2017; and
- Class Order [CO 02/178] – *Horse breeding schemes: private stallion syndication* (**[CO 02/178]**), which will sunset on 1 October 2017.

ASIC has issued ASIC Corporations (Repeal) Instrument 2016/791, which repeals [CO 02/319], [CO 02/172] and [CO 02/178] prior to their respective sunset dates.



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The Instrument will take effect on the day after it was registered on the Federal Register of Legislation.

## 1. Background

### *Summary of the Class Order relief*

### Horse racing syndicates

[CO 02/319] was intended to reduce the compliance burden on the promoters of small scale horse racing syndicates.

The effect of [CO 02/319] was to provide the promoter and manager of a small scale horse racing syndicate with relief from the requirement to register the syndicate as a managed investment scheme under section 601ED of the Act. If a promoter or manager was able to rely on the relief under [CO 02/319] in relation to a small scale horse racing syndicate, the managed investment scheme provisions in Chapter 5C of the Act did not apply in relation to the horse racing syndicate.

To be eligible for relief under [CO 02/319], the promoter must have been registered by a lead regulator in an Australian State or Territory as the promoter of a horse racing syndicate.

[CO 02/319] did not provide relief from the requirement to hold an Australian Financial Services licence (**AFSL**) under Chapter 7 of the Act, nor did it provide relief from the requirement to give a syndicate investor a Product Disclosure Statement (**PDS**) under Part 7.9 of the Act.

A key feature of relief under [CO 02/319] was the co-regulatory aspect. The promoter of a horse racing syndicate must have been registered by a lead regulator as a promoter of horse racing syndicates in order to be eligible for relief from the scheme registration requirements under [CO 02/319]. The lead regulator was required to register each syndicate in order for the promoter to be able to rely on [CO 02/319]. Further, the lead regulator had to approve a PDS for the syndicate as a pre-requisite for relief under [CO 02/319].

Under the terms of [CO 02/319], the relief for a horse racing syndicate was subject to two important limits:

(a) a maximum of 20 participants in a syndicate; and
(b) limit of $250,000 raised from the issue of interests to scheme participants.

[CO 02/319] set out a range of conditions, including the requirement that the promoter hold a dealer's licence or AFSL.

**Horse breeding schemes**

[CO 02/172] and [CO 02/178] were intended to reduce the compliance burden on operators of small-scale private horse breeding schemes and those providing certain financial services in relation to these schemes. [CO 02/172] provided relief in relation to small-scale private broodmare schemes and [CO 02/178] provided relief in relation to small-scale private stallion schemes.

The effect of [CO 02/172] and [CO 02/178] was to provide conditional relief from the requirements to:

(a) register the scheme as a managed investment scheme under s601ED of the Act;
(b) hold an AFSL under Chapter 7 of the Act (except for promoters of private stallion schemes in certain circumstances); and
(c) provide a PDS under Part 7.9 of the Act.

Key features of this relief were:

(a) a requirement that all offers to join generally be 'personal offers' as defined in s1012E(5) of the Act (or offers for which a disclosure document was not required);
(b) a limit on the aggregate number of interests that may be issued or sold in any horse breeding scheme by the operator of a private horse breeding scheme (together with any associates) over a 12-month period; and
(c) in the case of a private stallion scheme, a requirement that:
    i. each promoter of the scheme hold either an AFS licence or at least 10% fully paid of all interests in the scheme; and
    ii. offers be made through a stallion scheme agreement that meets certain requirements.

***Policy principles***

**Horse racing syndicates**

The policy rationale for relief under [CO 02/319] is that regulation of horse racing syndicates under the co-regulatory arrangements should promote informed and confident investment in the syndicates. Co-regulation arrangements for horse racing schemes are a more appropriate form of regulation under the Act. The co-regulation arrangements ensure that the interests of investors in these schemes continue to be protected while due recognition is given to the regulatory role played by the lead regulators and to their particular expertise.

Further, participation in horse racing syndicates often occurs for the pleasure of participating in ownership, rather than primarily to produce financial benefits.

**Horse breeding schemes**

Horse breeding is a specialised activity that involves different competencies from those that apply to providers of financial services for other managed investment schemes.

Relief is provided to small-scale private broodmare and stallion schemes in recognition that small-scale private arrangements to breed horses do not warrant regulation as managed investment schemes under the Act. The relief is not intended to apply to horse breeding schemes operated by professional commercial promoters.

## 2. Purpose of the Instrument

### Horse racing syndicates

In relation to horse racing syndicates, the main purpose of the Instrument is to continue the registration relief beyond the sunset date of 1 October 2016 and to make some non-fundamental changes to the terms of the relief.

In summary, the Instrument makes the following changes to the terms of the relief:

(a) the limit on the number of members of a horse racing syndicate is raised from 20 to 50;

(b) the limit on the amount sought to be raised by a horse racing syndicate is raised from $250,000 to $500,000;

(c) the current position that a lead regulator be approved by ASIC is incorporated in the terms of the relief. A pre-requisite for this approval is that the lead regulator enters into a memorandum of understanding with ASIC that contains specific minimum content requirements;

(d) numerous new items have been added to the required items in a PDS for a horse racing syndicate; and

(e) minor and non-substantive drafting changes.

The Instrument also includes transitional provisions to assist the promoter and manager of a horse racing syndicate that were entitled to rely on [CO 02/319] to rely on the relief under the Instrument.

### Horse breeding schemes

In relation to horse breeding schemes, the main purpose of the Instrument is to continue the various forms of relief available under [CO 02/172] and [CO 02/178] beyond the sunset date of 1 October 2017, to make some non-fundamental changes to the terms of relief and to consolidate the relief into a single instrument. This means that relief under the Instrument will apply to a small-scale private broodmare scheme or stallion scheme that previously was eligible for, and met the terms of, relief under [CO 02/172] or [CO 02/178] (respectively).

## 3. Operation of the Instrument

### Horse racing syndicates

#### *General*

The Instrument continues the registration relief for small scale horse racing syndicates with non-fundamental changes. The parameters of horse racing syndicates that may be able to rely on the relief have been widened, the co-regulatory arrangements between ASIC and lead regulators are strengthened, and prescribed disclosure items are mandated for a PDS for a horse racing syndicate.

#### *Registration relief and requirements*

The exemption from the requirement to register a horse racing syndicate under section 601ED of the Act is set out in s5(1) of the Instrument. The exemption will be available to a promoter or manager where all of the requirements in s5(2) are satisfied.

The requirement that the promoter of the horse racing syndicate holds an Australian Financial Services Licence (**AFSL**) authorising the promoter to provide financial services in relation to the horse racing syndicate is continued in s5(2)(a)(i). Further, s5(2)(a)(ii) preserves the requirement that the promoter be registered by a lead regulator as the promoter of a horse racing syndicate.

The definition of "lead regulator" in the Instrument introduces a requirement that the lead regulator has entered into a memorandum of understanding with ASIC that ASIC is satisfied meets the minimum content requirements in s4(2): please refer to the definition in section 4 of the Instrument. The definition also adds a requirement that the relevant body has been notified by ASIC in writing that the body is approved as a lead regulator for the purposes of the Instrument. The ASIC approval requirement was introduced to improve ASIC's capacity to monitor lead regulators and to ensure that the co-regulatory arrangements function to an optimum standard. As the expertise of the lead regulators in horse racing matters is a key policy principle that underpins our relief, it is vital to ensure that the lead regulators are performing their roles adequately and that ASIC has suitable arrangements in place to monitor and determine that the lead regulators are doing so. ASIC has a general discretion about whether to approve a body as a lead regulator.

#### *Memorandum of understanding between ASIC and a lead regulator*

A prerequisite for ASIC approving a lead regulator is that ASIC and the lead regulator have entered into a memorandum of understanding that covers minimum content requirements. The minimum content requirements are set out in subsection 4(2). These content requirements comprise provisions that deal with the following matters:

- registration of promoters and maintaining a register of promoters: see ss4(2)(a) to 4(2)(c);
- having adequate arrangements in place to approve a disclosure document for a horse racing syndicate that satisfied the requirements of the Instrument: see s4(2)(d)(i);

- reviewing PDSs within a reasonable time after they are submitted to the lead regulator for approval: see s4(2)(d)(ii);
- ensuring that a promoter provides to a lead regulator all documents required by the Instrument: see ss4(2)(d)(iii) and 5(7);
- dealing with complains and disputes received regarding promoters, managers or the operation of horse racing syndicates: s4(2)(d)(iv);
- regularly monitoring advertising of horse racing syndicates for misleading or deceptive content: s4(2)(d)(v);
- regularly monitoring compliance by promoters and managers with, where applicable, the terms of the Instrument and the AFSL conditions of the promoter or manager: s4(2)(d)(vi);
- notifying ASIC of conduct of a promoter or manager that may involve a breach of Chapter 7 of the Act, applicable terms of the Instrument or AFSL conditions, as well as the lead regulator taking any action against the promoter or manager that lead regulator considers is appropriate: s4(2)(e);
- ensuring that all employees and associates of a promoter that is registered with the lead regulator have agreed to be bound by the rules and requirements of the lead regulator relating to horse racing syndicates: s4(2)(f); and
- lodging an annual report with ASIC of the lead regulator's performance of these functions: s4(2)(g).

***Limits on the total amount raised by a syndicate and the number of syndicate members***

The Instrument increases the scope of horse racing syndicates that may rely on the registration relief in two respects. Firstly, the limit on the total amount sought to be raised by a horse racing syndicate is increased from $250,000 under [CO 02/319] to a new maximum of $500,000: see s5(2)(c). This change was made in recognition of marked increases in costs of purchasing, maintaining and training racehorses that have occurred since the registration relief was first provided by ASIC in 1992 and since [CO 02/319] was issued in 2002. The registration relief should be available to horse racing syndicates that are small in commercial terms and the increase in the investment limit reflects the fact that horse racing syndicates must now meet higher costs than previously. The new investment limit of $500,000 is designed to achieve a suitable balance between allowing promoters to offer members of the public an opportunity to participate in horse racing syndicates free from the legal and compliance burdens that would flow from compulsory registration of syndicates under Chapter 5C of the Act, on the one hand, and not exposing syndicate members to an unreasonable risk of financial loss.

The second increase in the scope is that the maximum number of members of a horse racing syndicate is increased from 20 under [CO 02/319] to a new limit of 50: see paragraph 5(2)(b). This change is a flow-on from the increase in the investment limit to $500,000 and is intended to give operators of horse racing syndicates more flexibility to offer interests in horse racing syndicates. The increase in the maximum number of horse racing syndicate members is intended to enable membership of a horse racing syndicate to be more affordable to members of the general public. Greater affordability of syndicate membership is a benefit because members of the public will have more of an opportunity to join a group to follow the fortunes

of a racehorse and to enjoy any financial benefits that flow from that horse's racing performances.

The Instrument continues the requirement that the relevant lead regulator must approve a PDS for the horse racing syndicate: s5(2)(d)(ii). The Instrument consolidates specific disclosure items for a horse racing syndicate PDS under [CO 02/319] and adds several new items to the list of disclosure items that must be contained in a PDS for a horse racing syndicate. The disclosure requirements for a horse racing syndicate PDS are detailed in s5(3). The disclosure requirements consist of three categories:

(a) disclosure items which were expressly required by [CO 02/319]: these are now set out in ss5(3)(b), 5(3)(e), 5(3)(f) and 5(3)(g) of the Instrument;

(b) the general PDS requirements for financial products under Subdivision C of Division 2 of Part 7.9 of the Act: see s5(3)(a); and

(c) new disclosure items that are specific to horse racing syndicates that rely on the registration relief. The new items are detailed in ss5(3)(c), 5(3)(d) and ss5(3)(h) to 5(3)(m), inclusive.

The rationale for requiring a PDS for a horse racing syndicate to detail specific items of information is to improve the usefulness of information in a horse racing syndicate PDS and to improve consistency and comparability between PDSs of different syndicates.

The disclosure requirements under the Instrument clarify the position that a horse racing syndicate must be based on 100 % of the ownership interests in, or leasehold interests that relate to 100 % of the ownership interests in, the syndicate racehorse. Please refer to ss5(3)(l)(i) and 5(3)(l)(ii) of the Instrument, which refer, respectively, to unencumbered title to the whole of the horse or the members of the syndicate leasing the whole of the horse under a finance lease agreement. The rationale for this approach is that significant risks would flow from a syndicate being based on less than 100 % of the ownership interest or leasehold interest in a horse. The risks are that the limit on the number of members and/or the investment limit would be undermined because it would leave open the prospect of multiple syndicates being established for a particular racehorse where, in respect of that racehorse, the aggregate number of members exceeds 50 and/or the aggregate amount to be subscribed is more than $500,000. This situation would run contrary to the underlying policy principles that the relief should be available only for syndicates of a small commercial scale. This would significantly compromise the level of investor protection contemplated under the Instrument.

The disclosure items under s5(3) include a notice that a member of a horse racing syndicate may elect to have the horse tested for a prohibited substance under the Australian Rules of Racing, with the cost of testing to be borne by all syndicate members, regardless of whether the syndicate members elected to have the horse tested: see s5(3)(m). This disclosure item was not included in [CO 02/319] and its scope differs from the corresponding item in the draft instrument attached to ASIC Consultation Paper 242 – *Remaking ASIC class orders on horse racing syndicates and horse breeding schemes* (**CP 242**), which referred to anabolic steroids or other performance enhancing substances.

***The role of the manager***

The Instrument provides that the syndicate agreement for the horse racing syndicate must include the matters set out in s5(4) of the Instrument, subject to the terms being excluded or changed by the written agreement of all members of the horse racing syndicate: see s5(2)(h) of the Instrument.

The matters in s5(4) of the Instrument are as follows:

(a) under s5(4)(a), the manager of the syndicate must manage the syndicate in accordance with the terms of the syndicate agreement throughout its duration unless that person:

- retires after being given written consent by the majority of the syndicate members not associated with the retiring manager;
- is removed in accordance with the terms of the agreement; or
- otherwise retires or is removed after being given written consent by the lead regulator; and

(b) under s5(4)(b), if the manager of the syndicate retires or is removed in accordance with s5(4)(a), a new manager will be appointed and that manager will become subject to the terms of the syndicate agreement.

It is possible that the promoter and manager of a horse racing syndicate are the same entity. The terms regarding the role and responsibilities of the manager are set out in s5(5) of the Instrument.

***Conditions of relief***

The Instrument sets out some on-going requirements that will need to be satisfied by the manager or promoter, as the case may be. These requirements are separate from the pre-requisites, or elements, of the relief which must be satisfied for the relief to be available in relation to a horse racing syndicate.

A manager that relies on the registration relief under the Instrument must comply with the requirements set out in subsection 5(5) of the Instrument. These requirements are in relation to keeping accounting records for a syndicate, lodging financial statements for the syndicate with the lead regulator, providing financial statements to ASIC on request and keeping a separate bank account for the syndicate. The requirements substantively replicate the corresponding provisions that were in [CO 02/319].

A promoter that relies on the registration relief under the Instrument must comply with the conditions of relief, as set out in subsections 5(6) to 5(14), inclusive, of the Instrument. These requirements are substantially the same as the corresponding requirements that applied under Schedule D of [CO 02/319]. The Instrument removes the transitional aspects of item 1 of Schedule D and item 13 of Schedule D of [CO 02/319] in relation to dealer's licences.

### *Definitions*

Where applicable, the definitions in [CO 02/319] have been used in the Instrument with minor and machinery changes: see section 4 of the Instrument. The specific term "horse racing syndicate" is used rather than the general term "scheme". The definition of "lead regulator" is more general in the Instrument because, due to the ASIC approval requirements, it will no longer be necessary to list the lead regulators as [CO 02/319] did. For clarity, we have added definitions of the terms "financial year", "offeree" and "standard form".

### *Transitional arrangements*

Section 7 of the Instrument sets out the transitional provisions of the relief for horse racing syndicates. The purpose of the transitional provisions is to assist the promoter and manager of a horse racing syndicate that were entitled to rely on [CO 02/319] to rely on the relief under ASIC Corporations (Horse Schemes) Instrument 2016/790.

The starting point of the transitional provisions is that, despite the repeal of [CO 02/319] by the ASIC Corporations (Repeal) Instrument 2016/791, [CO 02/319] continues to apply until 31 December 2016. This arrangement allows promoters and managers to continue to rely on the registration relief under [CO 02/319] for a reasonable period while ASIC considers applications from bodies to be approved as lead regulators under the Instrument.

The other transitional provisions deal with a horse racing syndicate for which a promoter or manager were entitled to rely on the relief under [CO 02/319]. These provisions are designed to ensure a smooth transition from [CO 02/319] to the Instrument and to avoid imposing unnecessary burdens on promoters and managers.

A body that was a lead regulator under [CO 02/319] will not automatically be a lead regulator under the Instrument. For a body to continue its status as a lead regulator, the body must be approved by ASIC as a lead regulator for the purposes of the Instrument. In the situation where a body that was a lead regulator under [CO 02/319] is approved as a lead regulator under the Instrument, the transitional provisions of the Instrument will be relevant.

In relation to determining whether the requirements of the Instrument have been satisfied for a syndicate that was registered by a body that was a lead regulator under [CO 02/319] and is approved by ASIC as a lead regulator under ASIC Corporations (Horse Schemes) Instrument 2016/790, suitable recognition should be made for requirements that the promoter or manager, as the case may be, had satisfied to rely on [CO 02/319]. The transition to the Instrument should be as smooth as possible. For this to occur effectively where the same body is a lead regulator under [CO 02/319] and the Instrument, some requirements of the Instrument should be adapted to avoid imposing unnecessary burdens on promoters and managers. The changes to the standard requirements are set out in s7(2) of the Instrument.

In summary, s7(2) makes the following changes in relation to a syndicate with a body that was a lead regulator under [CO 02/319] and was approved by ASIC as a lead regulator for the purposes of the Instrument:

(a) the disclosure document for the horse racing syndicate does not have to be updated to include the items specified in the Instrument: see s7(2)(a), which includes transitional exceptions from ss5(2)(d)(i) and 5(3). The exceptions are based on the disclosure document for the syndicate satisfying the content requirements that applied under [CO 02/319] at the time the disclosure document was issued;

(b) where a lead regulator has already approved a disclosure document for the purposes of [CO 02/319], the promoter does not have to have the disclosure document re-approved under the Instrument in order to rely on the Instrument: see s7(2)(a). This is a transitional exception from s5(2)(d)(ii) of the Instrument. Again, the exception is predicated on the disclosure document for the syndicate satisfying the content requirements that applied under [CO 02/319] at the time the disclosure document was issued;

(c) the Instrument exempts a promoter from the standard prohibition under s5(8) of giving an offeree a PDS where a lead regulator has not approved the PDS: s7(2)(a);

(d) the requirement to return all application monies for a horse racing syndicate that is not fully subscribed within six months of the date the disclosure document was approved by the lead regulator does not apply: see s7(2)(b). This is a transitional exception from s5(2)(e), which imposes a requirement that the promoter return application monies and any interest accrued within 10 business days of the expiry of that six month period. This exclusion is based on the promoter having complied with the refund requirements of [CO 02/319] in relation to any syndicate that failed under [CO 02/319];

(e) the requirement that the syndicate is registered with the lead regulator within 45 days of being fully subscribed does not apply: see s7(2)(c). This provision provides a transitional exemption from s 5(2)(f) of the Instrument. For a syndicate to fall within these transitional exceptions, the promoter will need to have originally registered with the existing lead regulator within 45 business days of the scheme being fully subscribed;

(f) where a promoter has already provided a lead regulator with any information that is required under the terms of the relief, such as a PDS, for the purposes of [CO 02/319], the promoter does not need to provided that information to the lead regulator again under the Instrument: see 7(2)(d). This is a transitional exception from s 5(7). The exception is based on the disclosure document for the syndicate satisfying the content requirements that applied under [CO 02/319] at the time the disclosure document was issued. To rely on the Instrument, the promoter will be required to give the lead regulator any updates to the documents;

(g) where a lead regulator has already given a promoter approval to advertise interests in a syndicate or to publish any statement that is reasonably likely to induce people to acquire interests in the syndicate – the promoter does not have to obtain this approval again in relation to advertisements or statements about the syndicate in order to rely on the Instrument: see s7(2)(e). This is a transitional exception from the standard requirement under s5(9). For the exception to operate, the promoter must have obtained approval from the existing lead regulator for any advertisements or publications previously issued; and

(h) under s7(2)(f), the Instrument provides a transitional exemption from the standard requirement under s5(13). Under s5(13), a promoter must ensure that, before or on registration of the horse racing syndicate with the lead regulator, either:

- the syndicate members have unencumbered title to the whole of the syndicate horses; or
- the syndicate members lease the whole of the syndicate horses under a finance lease agreement in standard form.

The transitional arrangements under s7(2)(g) of the Instrument cover the situation where [CO 02/319] was relied on for a horse racing syndicate registered by a body that:

- was a lead regulator under [CO 02/319]; and

- when the Instrument takes effect, was not approved by ASIC as a lead regulator for the purposes of ASIC Corporations (Horse Schemes) Instrument 2016/790.

In this situation, the promoter of the syndicate must ensure that both the promoter and the syndicate are registered with a lead regulator approved under the Instrument within six months of the Instrument taking effect: s7(2)(g). A lead regulator under the Instrument may, in registering a syndicate for which the promoter and manager were entitled to rely on the relief under [CO 02/319], take into account the operation of the transitional arrangements in relation to the syndicate: s7(3). This allows the new lead regulator to rely on things done by the previous lead regulator under [CO 02/319], if appropriate.

**Horse breeding schemes**

***General***

The Instrument continues with non-fundamental changes the relief previously available under both [CO 02/172] and [CO 02/178] for small-scale private horse breeding schemes.

***Definitions***

Where applicable, the definitions in [CO 02/172] and [CO 02/178] have been used in the Instrument with minor and machinery changes: see subsection 4(1) of the Instrument.

***Private horse breeding schemes***

Relief provided in the Instrument for horse breeding schemes applies only in relation to 'private horse breeding schemes': see section 6 of the Instrument. The term 'private horse breeding scheme' is defined in subsection 4(1) of the Instrument to mean a 'private broodmare scheme' or 'private stallion scheme'. This means that relief under the Instrument will only apply in relation to a managed investment scheme that meets the definition of either 'private broodmare scheme' or 'private stallion scheme'.

The terms 'private broodmare scheme' and 'private stallion scheme' are defined in subsection 4(1) of the Instrument. These terms are defined in a way that reflects how those types of schemes were previously identified under [CO 02/172] and [CO 02/178], respectively. This

means that the key features of schemes eligible for relief under those repealed class orders are replicated in the Instrument in the definitions for each type of private horse breeding scheme.

*Private broodmare schemes*

A 'private broodmare scheme' is defined in subsection 4(1) of the Instrument to mean a managed investment scheme that has all of the following features:

(a) the principal purpose of the scheme is to breed horses out of broodmares to which the scheme relates;

(b) each interest in the scheme is issued as a result of either:

(i) acceptance of a personal offer – the term 'personal offer' in relation to a private broodmare scheme is defined in subsection 4(1) of the Instrument and reflects the definition of 'personal offer' in s1012E(5) of the Act (generally, an offer will be a 'personal offer' where it can only be accepted by the person to whom it is made, and is made to a person likely to be interested in the offer having regard to previous contact, some professional or other connection to the person making the offer, or statements or actions that indicate that they are interested in offers of that kind); or

(ii) an offer that did not require a PDS (other than because of section 6 of the Instrument) – offers not requiring a PDS under section 6 of the Instrument are excluded to avoid a circular reference caused by the relief from the PDS requirements in subsection 6(5) of the Instrument; and

(c) none of the offers of interests in the scheme results in the operator of the scheme, together with any associates of the operator, having issued or sold in a 12 month period more than 20 interests in managed investment schemes, the principal purpose of which is to breed horses (**horse breeding schemes**).

The limit on the number of interests that may be issued or sold over a 12-month period in paragraph (b) of the definition of 'private broodmare scheme' means that relief under the Instrument will apply only where the operator of the scheme, together with any associates, has not issued or sold more than 20 interests in any horse breeding scheme over the previous 12 months.

*Private stallion schemes*

A 'private stallion scheme' is defined in subsection 4(1) of the Instrument to mean a managed investment scheme that has all of the following features:

(a) the principal purpose of the scheme is to acquire a stallion and provide stud services of the stallion;

(b) each interest in the scheme is only able to be acquired under a stallion scheme agreement (the term 'stallion scheme agreement' is defined in subsection 4(1) of the Instrument) and is issued as a result of either:

(i) acceptance of a personal offer – the term 'personal offer' in relation to a private stallion scheme is defined in subsection 4(1) of the Instrument and reflects the definition of 'personal offer' in s1012E(5) of the Act, with the addition that the offer be accompanied by a copy of the proposed stallion scheme agreement; or

(ii) an offer which does not need a PDS (otherwise than because of section 6 of the Instrument);

(c) none of the offers of interests in the scheme results in the operator of the scheme, together with any associates of the operator, having issued or sold in a 12 month period more than 40 interests in horse breeding schemes; and

(d) each promoter of the scheme holds either an AFSL or at least 10% fully paid of all interests in the scheme.

The limit on the number of interests that may be issued or sold over a 12-month period in paragraph (c) of the definition of 'private stallion scheme' means that relief under the Instrument will apply only where the operator of the scheme, together with any associates, has not issued or sold more than 40 interests in any horse breeding scheme over the previous 12 months.

*Stallion scheme agreement*

A 'stallion scheme agreement' is defined in subsection 4(1) of the Instrument in relation to a private stallion scheme to mean a written agreement which includes various provisions and certain information. This definition is intended to replicate with minor changes and updates the definition of 'stallion scheme agreement' in [CO 02/178]. It is not intended that any change will be necessary to existing stallion scheme agreements that previously met the definition under [CO 02/178].

To ensure that existing small-scale private stallion schemes relying on relief under [CO 02/178] are likewise able to rely on the relief provided by the Instrument, the requirement in paragraph (k) of the definition of 'stallion scheme agreement' is deemed to be satisfied where a stallion scheme agreement includes a provision to the effect that [CO 02/178] was being relied on by the operator and the operator was entitled to rely on that class order immediately before the commencement of the Instrument: see section 8 of the Instrument.

There is no corresponding requirement in relation to private broodmare schemes that interests be acquired under a written agreement which contains certain provisions and information. Reasons for this difference include that arrangements for stallion schemes tend to be more standardised as well as the greater number of interests that may be issued in a private stallion scheme under our relief.

***The relief***

Section 6 of the Instrument provides for the following four types of relief in relation to private horse breeding schemes:

(a) registration relief – relief from the requirement to register a managed investment scheme: see subsection 6(1) of the Instrument;

(b) licensing relief – relief from the requirement to hold an AFSL: see subsections 6(2) – (3) of the Instrument;

(c) hawking relief – relief from the prohibition of offers made in the course of, or because of, certain unsolicited meetings with or telephone calls to a person: see subsection 6(4) of the Instrument; and

(d) financial product disclosure relief – relief from certain provisions of Part 7.9 of the Act (including the requirement to give a PDS) in relation to certain financial services: see subsections 6(5) – (6) of the Instrument.

Section 6 of the Instrument continues the substantive effect of the relief previously available under [CO 02/172] and [CO 02/178]. An amendment has been made to the hawking relief to clarify its intended scope (see below).

*Registration relief*

Subsection 6(1) of the Instrument provides the operator of a private horse breeding scheme with relief from the requirement in s601ED(5) of the Act to register the scheme as a managed investment scheme.

*Licensing relief*

Subsection 6(2) of the Instrument provides the operator of a private horse breeding scheme with relief from the requirement to hold an AFSL covering financial services provided in relation to interests in the scheme.

Subsection 6(3) of the Instrument provides persons (other than the operator of a scheme to whom subsection 6(2) of the Instrument applies) with relief from the requirement to hold an AFSL covering financial services provided in relation to a managed investment scheme which appears to meet the definition of 'private horse breeding scheme' in subsection 4(1) of the Instrument (except where that person is aware, or ought reasonably to be aware, that it does not meet that definition).

It is noted that, in order for a scheme to satisfy the definition of 'private stallion scheme' in subsection 4(1) of the Instrument, each promoter must at all times hold either an AFSL or at least 10% fully paid of all interests in the scheme.

*Hawking relief*

Subsection 6(4) of the Instrument provides the operator of a private horse breeding scheme with relief from section 992AA of the Act in relation to an offer of an interest in the scheme for issue or sale made to a person in the course of, or because of, an unsolicited meeting with the person or an unsolicited telephone call to the person. Section 992AA of the Act generally prohibits such unsolicited offers, except in certain circumstances.

This relief only applies where, at the commencement of the unsolicited meeting or telephone call, the person was a person to whom a personal offer (as that term is defined in subsection s1012E(5) of the Act) could have been made. This means that an unsolicited meeting or telephone call cannot, in isolation, be relied on to form the basis for a subsequent offer of interests in a private horse breeding scheme being a 'personal offer' (see definition of 'personal offer' in subsection 4(1) of the Instrument and s1012E(5) of the Act).

As a result of ASIC Class Order [CO 02/641], which clarifies that section 992A of the Act does not apply to interests in managed investment schemes (which are covered by s992AA), it was not necessary to continue the relief provided under [CO 02/172] and [CO 02/178] from s992A.

*Financial product disclosure relief*

Subsection 6(5) of the Instrument provides the operator of a private horse breeding scheme with relief from certain financial product disclosure provisions in Part 7.9 of the Act in relation to a recommendation to acquire an interest in the scheme, an offer to issue or sell an interest in the scheme and the issue or sale of interests in the scheme. Relief is not provided from the following sections of Part 7.9 of the Act:

(a) section s1017E (dealing with money received for financial product before the product is issued);

(b) s1017F (confirming transactions);

(c) s1020D (Part cannot be contracted out of); and

(d) s1021O (offences of issuer or seller of financial product failing to pay money into an account as required).

Subsection 6(6) of the Instrument provides persons (other than the operator of a scheme to whom subsection 6(5) of the Instrument applies) with relief from Part 7.9 of the Act in relation to a recommendation to acquire, or an offer to arrange the issue of, an interest in a managed investment scheme which appears to meet the definition of 'private horse breeding scheme' in subsection 4(1) of the Instrument (except where that person is aware, or ought reasonably to be aware, that it does not meet that definition).

***Existing stallion scheme agreements***

Paragraph (k) of the definition of 'stallion scheme agreement' in subsection 4(1) of the Instrument requires that a stallion scheme agreement contain a statement that the Instrument is being relied on by the operator of the scheme.

Similarly, [CO 02/178] required that a stallion scheme agreement contain a statement that [CO 02/178] was being relied on.

Section 8 of the Instrument provides that paragraph (k) of the definition of 'stallion scheme agreement' is satisfied in relation to a stallion scheme agreement entered into before the commencement of the Instrument if the stallion scheme agreement included a provision to the

effect that [CO 02/178] was being relied on by the operator and the operator was entitled to rely on [CO 02/178] immediately before the commencement of the Instrument. This ensures that existing stallion schemes eligible for relief under [CO 02/178] are likewise able to rely on the relief provided by the Instrument.

## 4. Documents incorporated by reference

The Instrument does not incorporate any documents by reference.

## 5. Consultation

We released CP 242 in November 2015. This Consultation Paper dealt with [CO 02/319], [CO 02/172] and [CO 02/178]. For all three Class Orders, we proposed in the Consultation Paper to remake the instruments with non-fundamental changes.

We received feedback from the Consultation Paper. The submissions received were generally supportive of the continuation of relief and did not raise any fundamental issues or object to the draft of the instruments that were included in the Consultation Paper. We consider that the terms of the relief should be continued with refinements to clarify the operation of the relief and other minor and technical changes.

**Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

**ASIC Corporations (Horse Schemes) Instrument 2016/790**

ASIC Corporations (Horse Schemes) Instrument 2016/790 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 (Horse Schemes) Instrument 2016/790:

- continues the relief available to small scale horse racing syndicates under ASIC Class Order [CO 02/319] – *Horse racing syndicates* from the requirement to register a horse racing syndicate as a managed investment schemes under Chapter 5C of the *Corporations Act 2001*; and
- continues the relief available to private small scale horse breeding schemes under ASIC Class Order [CO 02/172] and [CO 02/178],

with non-fundamental changes to the terms of those class orders.

## 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.