

**EXPLANATORY STATEMENT for  
ASIC Corporations (Transfers of Division 3 Securities) Instrument  
2016/893**

**and**

**ASIC Corporations (Repeal) Instrument 2016/894**

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (**ASIC**) makes the following legislative instruments under subsection 1073E(1) of the *Corporations Act 2001* (the **Act**):

- (a) *ASIC Corporations (Transfers of Division 3 Securities) Instrument 2016/893* (the **principal instrument**);
- (b) *ASIC Corporations (Repeal) Instrument 2016/894* (the **repeal instrument**).

Subsection 1073E(1) of the Act provides that ASIC may, among other things, declare that particular securities or a particular class of securities are securities to which Division 3 of Part 7.11 and regulations under the *Corporations Regulations 2001* (the **Regulations**) made for the purposes of section 1073D apply.

Under subsection 33(3) of the *Acts Interpretation Act 1901* (as in force as at 1 January 2005 and as applicable to the relevant powers because of section 5C of the Act), where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

## **1. Background**

Under the *Legislative Instruments Act 2003*, legislative instruments cease automatically, or ‘sunset’, after 10 years, unless action is taken to exempt or preserve them. To preserve its effect, a legislative instrument must be remade before the sunset date. The purpose of sunseting is to ensure that instruments are kept up to date and only remain in force while they are fit for purpose, necessary and relevant.

ASIC Class Order [CO 02/313] ensures transfers of securities of a foreign company not covered by paragraphs 1073A(1)(a)-(d) of the Corporations Act are subject to the application of Division 3 of Part 7.11 of the Act and regulations under the Regulations made for the purpose of that Division. The principal instrument also allows brokers to stamp transfer documents in relation to transfers of Division 3 securities when the transfer forms relate to the performance of obligations under a securities lending arrangement or a transfer from or to a broker’s clearing account in accordance with the operating rules of a financial market. In

addition, the class order allows the use of standard unsigned marketable security transfer forms to transfer options over unissued securities instead of signed forms for marketable rights. It also allows company options to be transferred without the transferee being required to exercise the rights. This instrument is due to sunset on 1 April 2017. ASIC has reviewed its policy underlying the class order. In light of this review and following public consultation, ASIC considers that this class order relief is necessary, fit for purpose and relevant. As such, ASIC has decided to reissue the relief underlying the instrument into a new legislative instrument, being the principal instrument.

## **2. Purpose of the legislative instruments**

The purpose of the principal instrument is to:

- (a) ensure that transfers of the financial products to which the instrument applies benefit from statutory warranties and indemnities;
- (b) increase the efficiency of transferring Division 3 securities by allowing absolute beneficial owners of Division 3 securities to give authority to designated brokers to sell or transfer those Division 3 securities and execute an instrument of transfer of those Division 3 securities on the transferor's behalf, even if no authority is given by the transferor;
- (c) allow brokers to stamp a transfer document with a broker's stamp in certain circumstances where the Act is otherwise incompatible with the operating rules of a financial market or contractual obligations under a scheme of arrangement; and
- (d) amend the operation of the Regulations such that, in relation to a transfer of unexercised company options, a transferee is not required to execute those options.

The purpose of the repeal instrument is to discontinue the existing instrument, which will be superseded by the principal instrument.

## **3. Operation of the legislative instruments**

The principal instrument provides that Division 3 of Part 7.11 of the Act and regulations under the Regulations made for the purposes of section 1073D of the Act apply to shares in, or debentures of, a foreign company that are quoted on the financial market operated by ASX Limited.

In relation to the transfers of Division 3 securities, the principal instrument provides:

- (a) if a designated broker is given authority by or on behalf of the absolute beneficial owner of Division 3 securities to sell or transfer those Division 3 securities, the broker is taken to have authority from the transferor to do so on the transferor's behalf, even if no authority is given by the transferor; and
- (b) a broker may stamp with a broker's stamp a transfer document that relates to Division 3 securities and may be used as a sufficient transfer under Part 7.11 if the transfer document relates to:
  - (i) the performance of obligations under a securities lending arrangement; or

- (ii) a transfer from or to a broker's clearing account in accordance with the operating rules of the financial market in which the broker is a participant.

The principal instrument also provides that for the purposes of regulations 7.11.11 to 7.11.14 of the Regulations, and of the forms in Schedule 2A of the Regulations, a Division 3 right that is a company option is taken to be a Division 3 asset and not to be a Division 3 right. In addition, if Division 3 assets are transferred by means of a sufficient transfer, the transferee is taken to have agreed at the execution time to accept the rights subject to the terms and conditions on which the transferor held them immediately before that time. Lastly, the principal instrument provides that regulation 7.11.16 operates with reference to the time at which the transferee subsequently makes payment to the issuer in relation to the Division 3 assets of the application monies or exercise price (the payment time), instead of the execution time.

The repeal instrument repeals ASIC Class Order [CO 02/313]. Entities relying on statutory warranties and indemnities may now rely on the principal instrument.

#### **4. Consultation**

The relief given in the principal instrument was the subject of Consultation Paper 262 *Remaking and repealing ASIC class orders on markets and securities (CP 262)*. CP 262 was published in July 2016. ASIC did not receive any feedback opposing the making of the principal instrument. The Office of Best Practice Regulation advised that a Regulatory Impact Statement is not required in order to make the principal instrument.

## Statement of Compatibility with Human Rights

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

### **ASIC Corporations (Transfers of Division 3 Securities) Instrument 2016/893 ASIC Corporations (Repeal) Instrument 2016/894**

The following legislative instruments are 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*:

- *ASIC Corporations (Transfers of Division 3 Securities) Instrument 2016/893*;
- *ASIC Corporations (Repeal) Instrument 2016/894*.

#### **Overview**

*ASIC Corporations (Transfers of Division 3 Securities) Instrument 2016/893* provides that Division 3 of Part 7.11 of the Act and regulations under the Regulations made for the purposes of section 1073D of the Act apply to shares in, or debentures of, a foreign company that are quoted on the financial market operated by ASX Limited. This ensures, among other things, that transfers of those financial products benefit from statutory warranties and indemnities. In addition, the class order allows the use of standard unsigned marketable security transfer forms to transfer options over unissued securities instead of signed forms for marketable rights. It further enables quoted rights to be transferred without the transferee being required to exercise the rights.

*ASIC Corporations (Repeal) Instrument 2016/894* discontinues ASIC Class Order [CO 02/313], being the instrument that gave effect to ASIC's previous policy, and which will be superseded by *ASIC Corporations (Transfers of Division 3 Securities) Instrument 2016/893*.

#### **Human rights implications**

The legislative instruments do not engage any of the applicable rights or freedoms.

#### **Conclusion**

The legislative instruments are compatible with human rights as they do not raise any human rights issues.

### **Australian Securities and Investments Commission**