

**EXPLANATORY STATEMENT for
ASIC Corporations (Securities—NZ FASTER System) Instrument 2016/891**

and

ASIC Corporations (Repeal) Instrument 2016/892

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 1075A(1) of the *Corporations Act 2001* (the **Act**):

- (a) *ASIC Corporations (Securities—NZ FASTER System) Instrument 2016/891* (the **principal instrument**);
- (b) *ASIC Corporations (Repeal) Instrument 2016/892* (the **repeal instrument**).

Subsection 1075A(1) of the Act provides that ASIC may, among other things, declare that Part 7.11 of the Act applies in relation to a person or a financial product, or a class of persons or financial products, as if specified provisions were omitted, modified or varied as specified in the declaration.

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 sunsetting 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 07/183] exempts issues and transfers of company securities through New Zealand Exchange Limited’s (**NZX**) Fully Automated Screen Trading and Electronic Registration Trading (**FASTER**) system in the same way subsections 1071H(2) and (4) of the Act exempt issues and transfers through Australia’s Clearing House Electronic Subregister System (**CHES**). This instrument is due to sunset on 1 October 2017.

The securities of a number of Australian companies are traded on a financial market operated by NZX. The FASTER system is a similar system to CHES which operates to effect clearing and settlement in relation to NZX transactions. Like CHES, the FASTER system

operates on the basis that the relevant securities are held and transferred in an “uncertificated form”. However, NZX does not have the benefit of being a prescribed CS facility. Since Division 2 of Part 7.11 of the Act has extraterritorial operation, without the Class Order, the issue and transfer of Australian companies’ securities under the FASTER system may result in technical contraventions of subsections 1071H(1) and 1071H(3).

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 instruments by making the principal instrument.

2. Purpose of the legislative instruments

The purpose of the principal instrument is to ensure issues and transfers of an Australian company’s securities through New Zealand’s FASTER system are treated in the same manner as issues and transfers of securities through CHESS. Without the principal instrument, issues and transfers of these securities through the FASTER system potentially involve technical contraventions of subsections 1071H(1) or 1071H(3). ASIC considers that the principal instrument makes the transfer of an Australian company’s securities in New Zealand more efficient and that no useful purpose is served by the continued application of a requirement to provide title documents for securities covered by an electronic system of registration and transfer.

ASIC may only exercise its discretionary power under subsection 1075A(1) where it is satisfied (according to subsection 1075A(2)) that:

- (a) if the exemption were granted or the declaration were made, the interests of the holders of those financial products, or of financial products in that class, would continue to have adequate protection, and
- (b) the granting of the exemption or the making of the declaration would make the transfer of those financial products, or of financial products in that class, more efficient.

ASIC is satisfied that on making the principal instrument, relevant investors would continue to have adequate protection. In this regard, ASIC notes that NZX is responsible for the FASTER System. NZX requires its trading participants to ensure the accuracy and integrity of all trading messages which are entered into the system and to have appropriate filters, screens and security measures in place to ensure that only authorised persons may access the trading system. In addition, the NZX must be satisfied of a person’s integrity, high standard of business conduct and fulfilment of training and accreditation requirements before granting that person access to the system.

ASIC is also satisfied that making the principal instrument would make the transfer of the securities in question more efficient. ASIC considers that there is no regulatory benefit associated with applying a requirement to provide title documents for securities covered by an electronic system of registration and transfer.

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 a company need not comply with subsection 1017H(1) in relation to the issue of a security or subsection 1017H(3) in relation to a transfer of a security, provided:

- (a) the security is able to be traded on specified financial markets operated by NZX;
- (b) the issue or transfer of the security is covered by the FASTER system; and
- (c) any document required to be sent or delivered to the person to whom the security is issued, or the transferee, under the FASTER system in relation to the issue or the transfer has been sent or delivered.

The repeal instrument repeals ASIC Class Order [CO 07/183]. Companies can 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 (Securities—NZ FASTER System) Instrument 2016/891 **ASIC Corporations (Repeal) Instrument 2016/892**

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 (Securities—NZ FASTER System) Instrument 2016/891*;
- *ASIC Corporations (Repeal) Instrument 2016/892*.

Overview

ASIC Corporations (Securities—NZ FASTER System) Instrument 2016/891 ensures issues and transfers of an Australian company's securities through New Zealand Exchange Limited's Fully Automated Screen Trading and Electronic Registration Trading (**FASTER**) system are treated in the same manner as issues and transfers of securities through Australia's Clearing House Electronic Subregister System. Without the principal instrument, issues and transfers of those securities through the FASTER system potentially involve technical contraventions of subsections 1071H(1) or 1071H(3).

ASIC Corporations (Repeal) Instrument 2016/892 discontinues ASIC Class Order [CO 07/183], being the instrument that gave effect to ASIC's previous policy, and which will be superseded by *ASIC Corporations (Securities—NZ FASTER System) Instrument 2016/891*.

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