

EXPLANATORY STATEMENT for Corporations (Low Volume Financial Markets) Instrument 2016/888

Prepared by the delegate of the Minister

Corporations Act 2001

The delegate of the Minister makes the *Corporations (Low Volume Financial Markets) Instrument 2016/888* (the **principal instrument**) under section s791C of the *Corporations Act 2001* (the **Act**).

Subsection 791C(1) of the Act provides that the Minister may, among other things, exempt a particular financial market or type of financial market from the operation of Part 7.2 of the Act by publishing a notice in the *Gazette*.

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 sunset is to ensure that instruments are kept up to date and only remain in force while they are fit for purpose, necessary and relevant.

The *Corporations (Low Volume Financial Markets) Exemption Notice 2003* exempts low volume financial markets from the operation of Part 7.2 of the Act and, accordingly, exempts them from the requirement to hold an Australian market licence. This instrument is due to sunset on 1 October 2016. The delegate of the Minister has reviewed the policy underlying the instrument. In light of this review and following public consultation, the delegate of the Minister considers that this relief is necessary, fit-for-purpose and relevant. As such, the delegate of the Minister has decided to reissue the relief underlying the instrument by making the principal instrument.

The delegate of the Minister has decided to increase the transaction value threshold in the principal instrument to take into account factors such as inflation as the threshold has not been changed since 2003 and entities that, according to the initial purpose of the instrument, should not be licenced as financial markets have been required to seek individual exemptions from ASIC.

In addition, the delegate of the Minister has decided to amend the definition of low volume financial market to clarify the transaction period to which the transaction threshold applies. The delegate of the Minister considers that the transaction period of ‘any 12 month period’

set out in the *Corporations (Low Volume Financial Markets) Exemption Notice 2003* is ambiguous in the context of the instrument.

2. Purpose of the legislative instrument

The purpose of the principal instrument is to exempt low volume financial markets from the requirement to hold an Australian market licence by exempting them from the operation of Part 7.2 of the Act. The delegate of the Minister considers that it would be inconsistent with the purpose of the market licence regulatory regime to require a low volume financial market to hold a market licence.

3. Operation of the legislative instrument

The principal instrument exempts a low volume financial market whose operator is named on the register of entities that is established and kept by ASIC for the purposes of section 791C of the Act in relation to low volume financial markets from the operation of Part 7.2 of the Act.

A low volume financial market is a financial market on which no more than 100 completed transactions are entered into and the value of the transactions entered into does not exceed \$1.5 million in the 12 month period commencing on the date the financial market was named in the register or any subsequent 12 month period.

For an operator of a low volume financial market to rely on the relief in the principal instrument, it must comply with the following conditions:

- (a) the operator must ensure that it and its associates do not operate more than 2 financial markets to which the principal instrument applies or a operate a licenced market;
- (b) the operator must ensure that the financial products able to be traded on the financial market are:
 - (i) issued by the same person who must be either the operator or an issuer who has appointed the operator to operate the financial market (this means that the financial products able to be traded on a low volume financial market may be issued by a maximum of one issuer);
 - (ii) able to be traded on the financial market are of a kind mentioned in paragraphs 764(1)(a), (b) or (ba) of the Act; and
 - (iii) are not able to be traded on a licensed market;
- (d) the operator must ensure the financial market does not have a mechanism for the automatic execution of orders or the automatic formation of contracts between market users that enter into a transaction through the market;
- (e) the operator of the financial market must not handle the purchase money for the settlement of a transaction entered into through the market unless the operator holds an Australian financial services licence that authorises it to deal in the financial product to which the transaction relates;
- (f) before a person uses the financial market for the first time, the operator of the market must give a written notice to the person containing statements which state that the

operator is relying on an exemption under section 791C of the Act and therefore is not licensed under Part 7.2 of the Act and is not subject to the legal obligations that apply to the operator of a licensed market;

- (g) the operator of the financial market must inform ASIC, in writing, of any significant change to the operation of the market as soon as practicable after the change occurs;
- (h) the operator of the financial market must notify ASIC in writing if the operator fails to comply with any of the conditions in the principal instrument and must notify ASIC as soon as practicable after the operator becomes aware of the failure;
- (i) the operator of the financial market must comply with a request from ASIC to assist in monitoring and supervising compliance with the conditions; and
- (j) the operator of the financial market must give a written report to ASIC within 45 days after each anniversary of the date it was named in the register which includes the total number and total value of transactions carried out on the market in each month and the number of users of the market during the 12 months immediately before the date of the anniversary.

ASIC considers that the above conditions limit the regulatory risk associated with entities relying on this instrument not being required to hold an Australian markets licence. The conditions ensure that the financial markets which receive the benefit of the instrument are limited in size and complexity such that there is little regulatory benefit associated with subjecting them to the Australian markets licencing regime.

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

Corporations (Low Volume Financial Markets) Instrument 2016/888

The following legislative instrument 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*:

- *Corporations (Low Volume Financial Markets) Instrument 2016/888.*

Overview

Corporations (Low Volume Financial Markets) Instrument 2016/888 exempts low volume financial markets from the requirement to hold an Australian market licence by exempting them from the operation of Part 7.2 of the Act. The delegate of the Minister considers that it would be inconsistent with the purpose of the market licence regulatory regime to require a low volume financial market to hold a market licence.

Human rights implications

The legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

The legislative instrument is compatible with human rights as it does not raise any human rights issues.