

EXPLANATORY STATEMENT

ASIC Corporations (Dematerialised Securities: Austraclear) Instrument 2016/841

ASIC Corporations (Repeal) Instrument 2016/842

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (ASIC) makes the following legislative instruments under subsections 283GA(1), 601QA(1), 741(1) and 1075A(1) of the *Corporations Act 2001* (the **Act**):

- (a) *ASIC Corporations (Dematerialised Securities: Austraclear) Instrument 2016/841* (the **Principal Instrument**); and
- (b) *ASIC Corporations (Repeal) Instrument 2016/842* (the **Repeal Instrument**).

The Repeal Instrument will have the effect of repealing ASIC Class Order [CO 02/281].

Chapter 2L of the Act imposes requirements in relation to trust deeds for certain kinds of offers of debentures. Section 283GA(1) provides that ASIC may exempt a specified person or a specified class of person from a provision of Chapter 2L of the Act.

Chapter 5C of the Act imposes requirements in relation to managed investment schemes that are required to be registered with ASIC. Section 601QA(1) provides that ASIC may exempt a specified person from a provision of Chapter 5C of the Act.

Chapter 6D of the Act imposes disclosure requirements in relation to certain kinds of offers of securities (including debentures). Section 741(1) provides that ASIC may exempt a specified person or specified class of persons from a provision of Chapter 6D of the Act.

Part 7.11 of the Act prescribes rules in relation to title to and transfer of certain kinds of securities. Section 1075A(1) provides that ASIC may exempt specified financial products, or a specified class of financial products, from a provision of Part 7.11 of the Act.

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 any instrument, the power includes a power exercisable in the like manner and subject to the like conditions (if any) to repeal it.

1. Background

Under the *Legislation 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.

ASIC Class Order [CO 02/281] ensured the same legislative treatment of e-notes (including electronic certificates of deposit) and e-bills (both dematerialised securities) traded on Austraclear Limited (**Austraclear**) to that of their respective paper-based equivalents, promissory notes (including certificates of deposit) and bills of exchange.

[CO 02/281] removed any doubt as to whether e-notes and e-bills were excluded from the definition of ‘debenture’ in section 9 of the Act. At the time that [CO 02/281] was made, promissory notes (including certificates of deposit) and bills of exchange were expressly excluded from the definition of ‘debenture’ in the Act. Accordingly, certain requirements in the Act which applied to debentures did not apply to promissory notes and bills of exchange. [CO 02/281] ensured that those legislative requirements also did not apply in respect of e-notes and e-bills.

The *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009* amended the definition of ‘debenture’ in the Act. Under this amendment, promissory notes with a value of more than \$50,000 were no longer excluded from the definition of ‘debenture’. Currently the relief in [CO 02/281] still applies to e-notes, and therefore they are still excluded from the definition of debenture. As a result, the debenture provisions in Parts 2L.1–2L.6 of the Act do not currently apply to e-notes. However, the debenture provisions in Parts 2L.1–2L.6 do apply to their paper-based equivalents. Therefore, the regulation of these e-notes and promissory notes is not consistent.

Promissory notes may still fall within one of the other exclusions in the s9 definition of ‘debentures’. For example, certificates of deposit being single party debt obligations are usually structured as promissory notes to satisfy the definition of ‘promissory note’ in s89 of the *Bills of Exchange Act 1909* (**Bills of Exchange Act**). To address this inconsistency, the relief provided in the Principal Instrument will only apply to the extent that a dematerialised security (including an e-note) is a debenture in circumstances where the bill of exchange, certificate of deposit or promissory note to which the dematerialised security relates is not a debenture. This will ensure that e-notes are subject to the same regime for the regulation of debentures as promissory notes.

2. Purpose of the instrument

The purpose of the Principal Instrument is to continue providing the relief underlying [CO 02/281]. Since [CO 02/281] was made, the definition of ‘debenture’ in the Act has not been amended to treat electronic instruments in a manner consistent with their paper-based equivalents. The Principal Instrument facilitates ASIC’s policy on electronic commerce, which stipulates that electronic transactions should (where appropriate) be regulated in a manner that is consistent with the regulation of equivalent paper-based transactions. The

purpose of the instrument is to continue provide the same relief from the Corporations Act that is currently afforded in respect of the electronic equivalent of:

- (a) certificates of deposit that are issued by a bank;
- (b) bills of exchange that are issued by a bank; and
- (c) certificates of deposit issued by a person other than a bank or a promissory note.

Bill of exchange, certificate of deposit and promissory notes

‘Bill of exchange’, ‘certificate of deposit’ and ‘promissory note’ are not defined in the Act. A ‘bill of exchange’ is defined in subsection 8(1) of the Bills of Exchange Act. A ‘promissory note’ is defined in section 89 of the Bills of Exchange Act. Certificates of deposit are usually structured as promissory notes to satisfy the definition of ‘promissory note’ in section 89 of the Bills of Exchange Act. The Bills of Exchange Act relies on concepts such as physical delivery and indorsement, which generally prevents the creation, holding and transfer of negotiable debt instruments such as bills of exchange and promissory notes via electronic means.

A bank-accepted bill of exchange (a two party debt obligation) is not a debenture because of the express exclusion in the section 9 definition of ‘debenture’ in subparagraph (c)(iii). While a bill of exchange is not a debenture, there is doubt about whether an electronic equivalent deposited with Austraclear as a dematerialised security with equivalent rights (ie rights of the holder to enforce undertakings to repay as debt) is covered by that exclusion.

A certificate of deposit (a single party debt obligation) of an Australian ADI will fall within the express exclusion in the section 9 definition of ‘debenture’ in paragraph (b). While bank-issued certificate of deposits are not debentures, there is doubt about whether an electronic equivalent deposited with Austraclear as a dematerialised security with equivalent rights is covered by that exclusion.

Other kinds of promissory notes are no longer excluded from the section 9 definition of ‘debenture’, and so would prima facie satisfy the definition of debenture, but they might fall with one of the other exclusions in the section 9 definition of ‘debenture’. Even if they did fall with one of the other exclusions in the s9 definition of ‘debenture’, there is doubt about whether an electronic equivalent deposited with Austraclear as a dematerialised security with equivalent rights is covered by one of those exclusions.

The Austraclear Regulations - legal effect of negotiability via electronic means

The Austraclear Regulations, particularly Parts 8A (Deposits of Dematerialised Securities), 8B (Rights and Obligations under Dematerialised Securities), and aspects of Part 12 (Transactions), seek to replicate the legal effect of negotiability via electronic means, namely:

- (a) the Austraclear Regulations are a valid binding and enforceable contract between each and every Austraclear participant, other entities using the system and Austraclear itself (see regulation 23.3);
- (b) participants of Austraclear may lodge certain kinds of debt securities in dematerialised form into the Austraclear system and to transfer and register them through that system (see regulation 8A.3);
- (c) each Austraclear participant that deposits dematerialised securities into the system warrants and represents that:
 - the participant has, or has the right to pass, good and unencumbered title to the dematerialised security;
 - the dematerialised security is duly made, issued, drawn, accepted or endorsed, as appears on the electronic record of it;
 - the participant is liable for any apparent or concealed defects concerning the dematerialised security (see regulation 8A.5);
- (d) Austraclear participants can lodge and transfer dematerialised securities with good title held by the owner if the transfer was in good faith for value and without notice of any existing defect in title (see regulation 8B.1);
- (e) Austraclear records the transfer in each participant's security record (see regulation 8A.8);
- (f) the records of Austraclear prove the terms and the execution of a dematerialised security in the same way and with same effect as the equivalent paper security; and the rights and obligations of any person who is deemed to be the issuer, drawer, maker, acceptor, indorser or holder of a dematerialised security are to be equivalent to those to which that person would be entitled or subject if it were the issuer, drawer, maker, acceptor, indorser or holder of an equivalent paper security (see regulation 8B.2);
- (g) when transferring dematerialised securities, each participant must include in the terms of the transfer an agreement to indorse the dematerialised security (see regulation 12.6).

The purpose of the Repeal Instrument is to repeal [CO 02/281].

3. Operation of the instrument

A dematerialised security for the purposes of the Principal Instrument is any of the following securities which are acceptable for deposit in the clearing and settlement facility operated by Austraclear:

- (a) electronically recorded single party debt obligations under which the rights as between the maker or issuer and any participant of the clearing and settlement facility who deals

in them will be equivalent to the rights which would arise under a certificate of deposit issued by a bank;

- (b) electronically recorded two party debt obligations under which the rights as between the drawer, acceptor, any indorser and any participant of the clearing and settlement facility who deals in them will be equivalent to the rights which would arise under a bill of exchange accepted by a bank (“**e-bill**”);
- (c) electronically recorded single party debt obligations under which the rights as between the maker or issuer and any participant of the clearing and settlement facility who deals in them will be equivalent to the rights which would arise under a certificate of deposit issued by a person other than a bank or a promissory note.

Exemption from Chapters 2L and Parts 6D.2 and 6D.3 of the Act

The exemption in paragraph 5 of the Principal Instrument applies to:

- (a) Austraclear;
- (b) a participant of the clearing and settlement facility operated by Austraclear; and
- (c) a non-participant of Austraclear but who is a drawer of an e-bill.

The exemption provides that these entities do not have to comply with Chapter 2L and Parts 6D.2 and 6D.3 of the Act in relation to any offer of dematerialised securities for issue or sale, and any issue or sale of dematerialised securities that occurs in the course of:

- (a) the trading by a participant in dematerialised securities that are deposited into the clearing and settlement facility operated by Austraclear;
- (b) the drawing by a non-participant of an e-bill deposited into the clearing and settlement facility operated by Austraclear and accepted by members of Austraclear.

Chapter 2L of the Act requires a trust deed and trustee where a body issues or makes an offer of debentures(subsection 283A(1)). Chapter 2L also outlines the requirements of a borrower (ie a debenture issuer) and a guarantor in relation to the offer of debentures (Part 2L.2 and Part 2L.3). Parts 6D.2 and 6D.3 contain the fundraising provisions in relation to the offer to issue debentures to the public.

This exemption in paragraph 5 of the Principal Instrument only applies to the extent that a dematerialised security is a debenture in circumstances where the bill of exchange, certificate of deposit or promissory note to which the dematerialised security relates is not a debenture.

Exemption for dematerialised securities from Division 2 and 3 of Part 7.11 of the Act

Paragraph 5 of the Principal Instrument also exempts dematerialised securities from Divisions 2 and 3 of Part 7.11 of the Act. This exemption also only applies to the extent that dematerialised securities are debentures.

Division 2 of Part 7.11 deals generally with the transfers of certain kinds of securities. Subdivision A of that Division 2 covers, among other things, debentures of a company. To the extent dematerialised securities are debentures of a company, the provisions in relation to e.g. proper instruments of transfer in Subdivision A are not appropriate for the Austraclear electronic framework in relation to the transfer of dematerialised securities.

Division 3 of Part 7.11 of the Act deals with the transfer of certain securities (including debentures of a company) effected otherwise than through a prescribed CS facility. Austraclear is a licensed CS facility but it is not a prescribed CS facility see regulation 7.1.03.

ASIC may only exercise its discretionary power under subsection 1075A(1) of the Act to exempt a specified class of financial products from Part 7.11 of the Act where it is satisfied that, if the exemption were granted, the interests of the holders of financial products in that class, would continue to have adequate protection, and the granting of the exemption would make the transfer of financial products in that class more efficient.

ASIC is satisfied that, if the exemption were granted, the interests of holders of the dematerialised securities would continue to have adequate protection because of the terms of the Austraclear Regulations as a valid binding and enforceable contract between each and every participant, other entities using the Austraclear system and Austraclear itself.

ASIC is also satisfied that, if the exemption were granted, the transfer of dematerialised securities would be more efficient because the Austraclear Regulations as they apply to the transfer and registration dematerialised securities operate satisfactorily without the additional regulatory overlay of provisions dealing with, among other things, the way in which a security may be transferred (including the forms to be used for this purpose); the legal effect of a proper or sufficient transfer of a security; the rights, liabilities and obligations of the transferor and transferee of a security; and when a person may be required not to register or give effect to a transfer.

Exemption from Chapter 5C of the Act for Austraclear

For the avoidance of doubt, paragraph 6 of the Principal Instrument exempts Austraclear from the requirement to comply with Chapter 5C of the Act in relation to the operation of the clearing and settlement facility for dematerialised securities in accordance with the operating rules of the facility.

Chapter 5C of the Act contain the provisions relating to the operation of a managed investment scheme including the requirement to register the scheme, and the responsibilities for operating a managed investment scheme.

The Repeal Instrument repeals [CO 02/281].

4. Consultation

On 24 August 2015, ASIC released Consultation Paper 236 *Remaking ASIC class orders: [CO 02/281] and [CO 02/312] (CP 236)* seeking feedback on our proposal to continue the effect of those instruments.

We received four submissions in response to CP 236. Only one of the submissions received included feedback in relation to the proposal to continue the effect of the relief given by [CO 02/281]. The feedback received was fully supportive of the proposal. 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 (Dematerialised Securities: Austraclear) Instrument 2016/841 and ASIC Corporations (Repeal) Instrument 2016/842

*ASIC Corporations (Dematerialised Securities: Austraclear) Instrument 2016/841 (the **Principal Instrument**) and ASIC Corporations (Repeal) Instrument 2016/842 (the **Repeal Instrument**) 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.*

Overview

The purpose of the Principal Instrument is to continue providing the relief underlying ASIC Class Order [CO 02/281]. [CO 02/281] ensures the same legislative treatment of e-notes (including electronic certificates of deposit) and e-bills (both dematerialised securities) traded on Austraclear to that of their respective paper-based equivalents, promissory notes (including certificates of deposit) and bills of exchange.

The Principal Instrument facilitates ASIC's policy on electronic commerce, which stipulates that electronic transactions should (where appropriate) be regulated in a manner that is consistent with the regulation of equivalent paper-based transactions. The purpose of the instrument is to continue provide the same relief from the Corporations Act that is currently afforded in respect of the electronic equivalent of:

- (a) certificates of deposit that are issued by a bank;
- (b) bills of exchange that are issued by a bank; and
- (c) certificates of deposit issued by a person other than a bank or a promissory note.

The purpose of the Repeal Instrument is to repeal [CO 02/281].

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.