

EXPLANATORY STATEMENT for
ASIC Corporations (School Enrolment Deposits) Instrument 2016/812
and
ASIC Corporations (Repeal) Instrument 2016/819

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (*ASIC*) makes:

- ASIC Corporations (School Enrolment Deposits) Instrument 2016/812 (the *Instrument*); and
- ASIC Corporations (Repeal) Instrument 2016/819 (the *Repeal Instrument*).

The Instrument is made under paragraph 601QA(1)(a), 741(1)(a), 926A(2)(a), 992B(1)(a) and 1020F(1)(a) of the *Corporations Act 2001* (the *Act*).

The Repeal Instrument revokes ASIC Class Order [CO 02/151] *School enrolment deposits (CO 02/151)*. The Repeal Instrument is made under paragraphs 283GA(1)(a), 601QA(1)(a), 741(1)(a), 911A(2)(l), 992B(1)(a) and 1020F(1)(a) of the Act.

Paragraphs 283GA(1)(a), 601QA(1)(a), and 741(1)(a) of the Act provide that ASIC may exempt a person from a provision of Chapters 2L, 5C, and 6D of the Act, respectively.

Paragraph 911A(2)(l) provides that ASIC may exempt a person from the requirement to hold an Australian financial services licence for a financial service they provide where the provision of the service is covered by an exemption specified by ASIC in writing and published in the *Gazette*.

Paragraph 926A(2)(a) provides that ASIC may exempt a person or class of persons from all or specified provisions to which this paragraph 926A(2)(a) applies.

Paragraphs 992B(1)(a) and 1020F(1)(a) of the Act provides that ASIC may exempt a person or class of persons from all or specified provisions in Parts 7.8 and 7.9 of the Act, respectively.

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

Schools used to rely on certain conditional exemptions from the Act under CO 02/151, which we have revoked. CO 02/151 was due to expire on 1 April 2017.

The Act imposes broad obligations on corporations and financial services providers in relation to disclosure, fundraising, and licensing provisions. These provisions have been legislated in order to create efficient, transparent and confident financial markets, and provide consumers with sufficient information and protections to make sound financial decisions. In some cases, these provisions may extend beyond the legislature's intent and impose burdensome requirements that render certain business models cost prohibitive.

One such instance concerns school enrolment deposits, which are deposits that are typically paid to private schools as a condition of enrolment. These deposits are often refundable upon completion of the child's enrolment or education. These deposits may be caught by the definition of "debenture" in the Act, and where the school is a corporation may invoke the fundraising provisions of the Act. Alternatively, the deposits may qualify as interests in a managed investment scheme. In addition, a school dealing in these financial products is likely to be considered a financial services provider, and consequently be required to hold an Australian financial services licence. Characterising these school enrolment deposits as debentures or interests in a managed investment scheme under the Act imposes potentially significant legal and regulatory costs on schools, which would render this practice cost prohibitive.

ASIC considers that these obligations do not appropriately reflect that, for the depositor, profit is not likely to be a consideration in making such a deposit. Therefore the depositor does not expect or seek the information required by the fundraising provisions, the licensing provisions, nor the protections set out in the managed investment or debenture provisions. As a consequence, ASIC considers it appropriate to provide schools with an exemption from the requirements of Parts 6D.2 and 6D.3, section 992AA, and Part 7.9 of the Act where a deposit is required to be lodged as a condition of enrolment. Further, ASIC has provided schools with an exemption from the requirements of 601ED(5) for the operation of managed investment schemes involving school enrolment deposits.

We will also use our exemption power in paragraph 926A(2)(a) of the Act to give relief to schools from the requirement to hold an AFS licence.

Schools will be eligible for these exemptions only if:

- (a) the deposit is required as a condition for the enrolment of a child in the school; and
- (b) any rights or interests attaching to the deposit are merely incidental to the enrolment.

CO 02/151 is due to sunset on 1 April 2017. ASIC has reviewed the operation of this instrument and as a result of that review, made:

- (a) the Instrument, which has the effect of continuing the relief underlying CO 02/151 ;
and
- (b) the Repeal Instrument, which repeals CO 02/151 before its statutory sunset in 1 April 2017

2. Purpose of the Instrument

The purpose of the Instrument is to give class exemption from certain fundraising, debenture and licensing requirements of the Act for school enrolment deposits. The Instrument also gives exemption from the requirements of the Act for the operation of managed investment schemes involving school enrolment deposits.

The purpose of the Repeal Instrument is to discontinue relief from the fundraising and licensing provisions provided by CO 02/151.

3. Operation of the Instrument

The Instrument operates by exempting a person who conducts a school and the officers, employees and agents of the school from the requirements of Parts 6D.2 and 6D.3, section 992AA, and Part 7.9 of the Act where a deposit is required to be lodged as a condition of enrolment. Further, ASIC has provided schools with an exemption from the requirements of 601ED(5) for the operation of managed investment schemes involving school enrolment deposits.

Clause 1(a) exempts a person from the requirements to register a managed investment scheme in relation to the operation of a school enrolment deposit scheme.

Clause 1(b) exempts a person from the fundraising requirements associated with an offer for the issue of a school enrolment debenture.

Clause 1(c) exempts a person from the prohibition on the offer of interests in a managed investment scheme in relation to an interest in a school enrolment deposit.

Clause 1(d) exempts a person from the disclosure obligations and provisions relating to the issue, sale and purchase of financial products in relation to an interest in a school enrolment deposit.

Clause 2 of the Instrument exempts a person providing financial services in relation to a school enrolment deposit scheme or a school enrolment debenture from the requirement to hold an Australian financial services licence for the provision of those services..

The Repeal Instrument repeals CO 02/151.

4. Consultation

On 20 May 2013, ASIC released Consultation Paper 207 *Charitable investment fundraisers* (CP 207) outlining two options for amending exemptions currently available to charitable investments fundraisers in ASIC Class Order [CO 02/184] *Charitable investment schemes—fundraising* and under Regulatory Guide 87 *Charities* (RG 87). This paper sought industry feedback on the appropriateness of continuing to provide relief to schools for school enrolment deposits under ASIC Class Order [CO 02/151].

The issue of school enrolment deposits was not the primary focus of CP 207, so responses were limited. However, there were no objections to this relief being extended, and certain respondents supported its continued existence.

The Office of Best Practice Regulation has agreed with ASIC's assessment that CO 02/151 is operating effectively and efficiently and will be remade or otherwise continue without significant changes and therefore no Regulation Impact Statement is required.

Statement of Compatibility with Human Rights

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

ASIC Corporations (School Enrolment Deposits) Instrument 2016/812

and

ASIC Corporations (Repeal) Instrument 2016/819

ASIC Corporations (School Enrolment Deposits) Instrument 2016/812 (the *Instrument*) and ASIC Corporations (Repeal) Instrument 2016/819 (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 Instrument provides exemptions from certain fundraising, debenture and licensing requirements of the Corporations Act 2001 in relation to school enrolment deposits. The Instrument also provides exemptions from the requirements of the Corporations Act for the operation of managed investment schemes involving school enrolment deposits.

The Instrument remakes ASIC Class Order [CO 02/151] School enrolment deposits (*CO 02/151*) into a new ASIC instrument and continues the relief provided under that instrument. The Instrument provides exemption from Chapters 2L, 5C and 6D, sections 992A and 992AA and Part 7.9 of the Act. The relief is provides exemption to a person who conducts an establishment (“school”) in which children are given formal primary or secondary education, and the officers, employees and agents of the school.

The Repeal Instrument repeals CO 02/151 (which has been remade, as discussed above, to preserve its effect beyond its sunseting date).

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.

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