

EXPLANATORY STATEMENT for
ASIC Corporations (Managed investment schemes: interests not for money) Instrument 2016/1107

and

ASIC Corporations (Repeal) Instrument 2016/1108

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (ASIC) makes the *ASIC Corporations (Managed investment schemes: interests not for money) Instrument 2016/1107* (the **Instrument**) under subsections 601QA(1), 926A(2), 992B(1) and 1020F(1) of the *Corporations Act 2001* (the **Act**).

Subsection 601QA(1) of the Act provides that ASIC may exempt a person from a provision of Chapter 5C of the Act; or declare that Chapter 5C applies to a person as if specified provisions were omitted, modified or varied.

Subsection 926A(2) of the Act provides that ASIC may exempt a person or a financial product or class of persons or financial products from all or specified provisions of Part 7.6 of the Act (other than Divisions 4 and 8); or declare that Part 7.6 of the Act (other than Divisions 4 and 8) applies in relation to a person or a financial product or class of persons or financial products as if specified provisions were omitted, modified or varied.

Subsection 992B(1) of the Act provides that ASIC may exempt a person or a financial product or class of persons or financial products from all or specified provisions of Part 7.8 of the Act; or declare that Part 7.8 of the Act applies in relation to a person or a financial product or class of persons or financial products as if specified provisions were omitted, modified or varied.

Subsection 1020F(1) of the Act provides that ASIC may exempt a person or a financial product or class of persons or financial products from all or specified provisions of Part 7.9 of the Act and may declare that Part 7.9 of the Act applies in relation to a person or a class of persons as if specified provisions were omitted, modified or varied.

ASIC makes the *ASIC Corporations (Repeal) Instrument 2016/1108* under subsections 601QA(1), 992B(1) and 1020F(1) and paragraph 911A(2)(l) of the Act.

Paragraph 911A(2)(l) provides that ASIC may exempt a person from the requirement to hold an Australian financial services (AFS) licence for a financial service they provide where ASIC makes the exemption in writing and publishes it 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

The wide scope of the definition of managed investment schemes under section 9 of the Act means that all registered management investment schemes must comply with the managed investment, AFS licensing, anti-hawking and product disclosure provisions of the Act.

In 2002, ASIC issued [CO 02/210] – *Interests in film and theatrical ventures* ([CO 02/210]), [CO 02/211] – *Managed investment schemes: interests not for money* ([CO 02/211]) and [CO 02/236] – *Film investment schemes* ([CO 02/236]) (collectively, the **Class Orders**) to provide relief for managed investment schemes that issue or offer interests for consideration other than money.

Each of the Class Orders was issued for the following purpose:

- (a) [CO 02/210] was issued to give relief from the managed investment, AFS licensing, anti-hawking and product disclosure provisions where a person is involved in the film, writing and entertainment industries.
- (b) [CO 02/211] was issued to provide relief for interests not for money schemes from the managed investment, AFS licensing, anti-hawking and product disclosure provisions.
- (c) [CO 02/236] was issued to give relief from the managed investment, AFS licensing, anti-hawking and product disclosure provisions to operators of film investment schemes.

The Class Orders address situations where the provisions of the Act impose obligations on managed investment schemes which, given the nature of the arrangements of the scheme, would generally be inappropriate.

As part of ASIC's initiative to refresh class orders that are due to sunset, the Class Orders have been updated and streamlined into one legislative instrument given that they cover interests and offers of interests not issued for money in a managed investment scheme. ASIC *Regulatory Guide 80: Managed investment schemes: interests not for money* and *Regulatory Guide 19: Film investment schemes* which provide regulatory guidance for these schemes will be streamlined into one regulatory guide for consistency with the process of consolidation of related legislative instruments.

ASIC's rationale for each of the Class Orders is as follows:

- (a) [CO 02/210] – It is our view that given the nature of the arrangements contemplated by [CO 02/210], it would be inappropriate for film and theatrical ventures to be regulated by the Act. We consider that distributors and broadcasters of films (i.e. persons whose ordinary business is or includes broadcasting or distributing films) do not require the same level of protection as is provided to other investors who are unrelated bodies.
- (b) [CO 02/211] - Interests not for money schemes generally do not have a predominant investment character. As a result, we consider that these schemes are not intended to be captured and regulated by the managed investment scheme provisions of the Act.
- (c) [CO 02/236] – A government body does not require protection to the same extent as that provided by the Act to other bodies. These bodies are experienced in the film industry, can be expected to monitor closely the development and production of a film and may have been established with objectives which are not purely commercial. Further, a promotor of a film investment scheme is exempt from compliance with provisions of the Act which regulate managed investment schemes where:
- i. an issue of, offer for subscription or purchase of, or issuing of invitations to subscribe or buy, prescribed interests out of the film investment scheme is made to a government body or bodies; or
 - ii. offers of prescribed interests are made to a film distributor or broadcaster arising out of the investment, where that distributor or broadcaster has an interest in licensing or otherwise exploiting the right to use the copyright to the film to which the investment relates.

This relief is provided on the basis that distributors and broadcasters do not require protection as investors to the extent provided to other unrelated bodies.

2. Purpose of the Instrument

This Instrument remakes three ASIC Class Orders with minor and technical changes, combining the terms of the three Class Orders into one legislative instrument. All three of the Class Orders would have ceased to have effect, or to sunset, on 1 April 2017 under the *Legislation Act 2003*.

The purpose of the Instrument is to continue the relief in the Class Orders beyond the sunset date of 1 April 2017 in substantially the same terms.

In summary, the Instrument makes the following changes:

- (a) combines [CO 02/210], [CO 02/211] and [CO 02/236] into a single instrument;
- (b) updates the name of the legislative instrument;

- (c) reflects current drafting practice and update the format of the current document;
- (d) simplifies the drafting to give greater clarity; and
- (e) updates legislative references and definitions.

ASIC Corporations (Repeal) Instrument 2016/1108 is made to repeal the relief provided by the Class Orders.

3. Operation of the Instrument

ASIC Corporations (Managed investment schemes: interests not for money) Instrument 2016/1107

Part 1 – Preliminary

Section 1 – Name of the legislative instrument

This section provides that the title of the Instrument is the ASIC Corporations (Managed investment schemes: interests not for money) Instrument 2016/1107.

Section 2- Commencement

This section provides that the Instrument commences at the same time as the commencement of *ASIC Corporations (Repeal) Instrument 2016/1108*. This is because *ASIC Corporations (Repeal) Instrument 2016/1108* requires gazettal. This section is designed to ensure that this instrument commences as soon as the Class Orders are repealed.

Section 3 – Authority

This section provides that the Instrument is made under subsections 601QA(1), 926A(2), 992B(1) and 1020F(1) of the Corporations Act 2001.

Section 4 – Definitions

This section provides definitions that inform the content of the Instrument.

Definition of “Act”

Act means the *Corporations Act 2001*

Definition of “cinematograph film”

Cinematograph film is defined to have the meaning given by section 10 of the *Copyright Act 1968*.

Definition of “film investment scheme”

Film investment scheme is defined to mean a managed investment scheme for the development and/or production of a cinematograph film (including a script or component of a cinematograph film), where each offer or issue of interests in the scheme is made to one or more of the following:

- (a) Australian Broadcasting Corporation;
- (b) Australian Children's Television Foundation;
- (c) Screen Australia;
- (d) Film Victoria;
- (e) Screen NSW;
- (f) Screen Queensland;
- (g) South Australian Film Corporation;
- (h) Special Broadcasting Service Corporation;
- (i) ScreenWest;
- (j) a person whose ordinary business is or includes broadcasting or distributing films and who has a right to license or otherwise exploit the copyright to the cinematograph film to which the offer or issue relates; or
- (k) a person to whom a Product Disclosure Statement is not required to be given in respect of the issue other than because of this Instrument. This allows for interests in the film investment scheme to be issued to wholesale investors.

The reference to 'component' is intended to include, but not be limited to, the following:

- (a) location survey;
- (b) lighting;
- (c) editing;
- (d) marketing;
- (e) acting;
- (f) animation, computer generated imaging and visual effects;
- (g) cinematography;
- (h) set and costume design and build;
- (i) choreography;

(j) hair and makeup; and

(k) composing.

Definition of “interests not for money scheme”

Interests not for money scheme is defined to mean a managed investment scheme arising out of a contract or proposed contract under which every interest in the scheme is issued:

(a) to participants as consideration for or as part of the consideration for any of the following:

(i) personal or professional services to be provided by the participant or, where the participant is not a natural person, by an officer or employee of the participant providing such services in the ordinary course of the participant’s business;

(ii) the sale or transfer of or grant of any right to use or exploit present or future intellectual property or know-how of the participant resulting from the labour or efforts of the participant or, where the participant is not a natural person, acquired in the ordinary course of its business;

(iii) the sale or transfer of goods imported, manufactured or produced by the participant in the ordinary course of its business;

(iv) the sale or transfer of, or the entry into or grant of any interest in land where:

(A) the participant; or

(B) a person (other than the issuer or one of its associates) that held an interest in the scheme and from whom the participant has acquired the interest in land;

has held the interest in land for at least six months before any offer of an interest in the scheme was made;

(v) the sale, grant or transfer of any business, or any proprietary interest with respect to a business, owned by the participant for at least six months before any offer of an interest in the scheme was made;

where:

(vi) no money is to be paid and no financial products are to be transferred by the participant in consideration for the interest or in relation to the grant of the interest, either to the issuer or to any associate of the issuer, unless:

- (A) the payment is a fee for services rendered or a reimbursement of incidental expenses; and
 - (B) the nature of the services or expenses and the applicable cost or means of calculating the applicable cost is separately disclosed to the participant before entering into the contract;
- (vii) any right of the participant under the terms of the contract to terminate the contract or otherwise take action for default is not dependent upon the approval or other action of persons who have entered into similar contracts with the issuer;
- (viii) the interest does not relate to any other managed investment scheme;
or
- (b) in circumstances, other than in reliance on this instrument, that do not require a Product Disclosure Statement to be given.

An example of the type of transaction that may fall within the relief may include where parties are engaged in share farming.

Definition of “show scheme”

Show scheme is defined to mean a managed investment scheme for the development and/or production of a cinematograph film, sound recording, work, or live performance (including a script or component of a cinematograph film, sound recording, work, or live performance), under which every interest in the scheme is issued:

- (a) to participants as consideration for or as part of the consideration for any of the following:
 - (i) personal or professional services to be provided by the participant or, where the participant is not a natural person, by an officer or employee of the participant providing such services in the ordinary course of the participant’s business; or
 - (ii) the sale or transfer of or grant of any right to use or exploit present or future intellectual property or know-how of the participant resulting from the labour or efforts of the participant or, where the participant is not a natural person, acquired in the ordinary course of its business;

where:

- (iii) no money is to be paid and no financial products are to be transferred by the participant in consideration for the interest or in relation to the grant of the interest, either to the issuer or to any associate of the issuer, unless:

- (A) the payment is a fee for services rendered or a reimbursement of incidental expenses; and
 - (B) the nature of the services or expenses and the applicable cost or means of calculating the applicable cost is separately disclosed to the participant before entering into the contract;
- (iv) any right of the participant under the terms of the contract to terminate the contract or otherwise take action for default is not dependent upon the approval or other action of persons who have entered into similar contracts with the issuer;
- (v) the interest does not relate to any other managed investment scheme; or
- (b) in circumstances, other than in reliance on this instrument, that do not require a Product Disclosure Statement to be given.

The reference to ‘component’ is intended to include the items set out under the definition of “film investment scheme”.

An example of the type of transaction that may fall within this relief may include a scriptwriter agreeing to take royalties as consideration for the providing a script.

Definition of “work”

Work is defined to have the meaning given by section 10 of the *Copyright Act 1968*.

Part 2 – Exemption

The Instrument preserves the position in the Class Orders to provide relief from the managed investment, AFS licensing, anti-hawking and product disclosure provisions of the Act for film investment schemes, interests not for money schemes and show schemes.

The Instrument does not make any substantive changes to the relief from section 992AA and Part 7.9 of the Act for Exempt Schemes. However, the Instrument removes the exemption from section 992A of the Act previously available under the Class Orders on the basis that ASIC Class Order [CO 02/641] – *Hawking securities and managed investments* already provides the necessary exemption.

Section 5 – Film investment scheme

Paragraph 5(1) exempts a person from complying with subsection 601ED(5) of the Act in relation to a film investment scheme. This means operators of film investment schemes are not required to register their managed investment schemes. Consequently, Chapter 5C of the Act will also not be applicable to film investment schemes.

Paragraph 5(2) exempts a person providing financial services in relation to an interest in a film investment scheme from complying with subsection 911A(1) of the Act.

Paragraph 5(3) exempts a person from complying with section 992AA and Part 7.9 of the Act in relation to an offer, issue or recommendation to acquire an interest in a film investment scheme.

Section 6 – Interests not for money scheme

Paragraph 6(1) exempts a person from complying with subsection 601ED(5) of the Act in relation to an interests not for money scheme. This means operators of interests not for money schemes are not required to register their managed investment schemes. Consequently, Chapter 5C of the Act will also not be applicable to interests not for money schemes.

Paragraph 6(2) exempts a person providing financial services to an interests not for money scheme from complying with subsection 911A(1) of the Act.

Paragraph 6(3) exempts a person from complying with section 992AA and Part 7.9 of the Act in relation to an offer, issue or recommendation to acquire an interest in an interests not for money scheme.

Section 7 – Show scheme

Paragraph 7(1) exempts a person from complying with subsection 601ED(5) of the Act in relation to a show scheme. This means operators of show schemes are not required to register their managed investment schemes. Consequently, Chapter 5C of the Act will also not be applicable to show schemes.

Paragraph 7(2) exempts a person providing financial services a show scheme from complying with subsection 911A(1) of the Act.

Paragraph 7(3) exempts a person from complying with section 992AA and Part 7.9 of the Act in relation to an offer, issue or recommendation to acquire an interest in a show scheme.

ASIC Corporations (Repeal) Instrument 2016/1108

ASIC Corporations (Repeal) Instrument 2016/1108 repeals [CO 02/210], [CO 02/211] and [CO 02/236] as they have been remade by the Instrument.

4. Consultation

The relief given in the Instrument was the subject of public consultation in Consultation Paper 266 - *Remaking ASIC class orders on managed investment schemes: Not for money (CP 266)*. CP 266 was published on 10 August 2016 and is available on ASIC's website. For [CO 02/210], [CO 02/211] and [CO 02/236], we proposed in CP 266 to remake the instruments as a single instrument with minor and technical changes.

We received feedback from CP 266. The submissions received did not raise any fundamental issues or object to the draft of the Instrument that was included with CP 266. The Instrument is the same in all material aspects as the draft instrument that was included with CP 266. We considered that the relief under the three Class Orders should be continued in a single instrument with refinements to clarify the operation of the relief and other minor and technical changes.

Statement of Compatibility with Human Rights

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

Purpose of ASIC Corporations (Managed investment schemes: interests not for money) Instrument 2016/1107

and

ASIC Corporations (Repeal) Instrument 2016/1108

ASIC Corporations (Managed investment schemes: interests not for money) Instrument 2016/1107 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*.

ASIC Corporations (Repeal) Instrument 2016/1108 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*.

Overview

ASIC Corporations (Managed investment schemes: interests not for money) Instrument 2016/1107 remakes ASIC Class Order [CO 02/210], ASIC Class Order [02/211] and ASIC Class Order [02/236] with minor and technical changes, combining the terms of the three Class Orders into one legislative instrument.

ASIC Corporations (Repeal) Instrument 2016/1108 repeals ASIC Class Order [CO 02/210], ASIC Class Order [02/211] and ASIC Class Order [02/236].

Human rights implications

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

Conclusion

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

Australian Securities and Investments Commission