

EXPLANATORY STATEMENT for
ASIC Corporations (Amendment) Instrument 2016/1211

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes *ASIC Corporations (Amendment) Instrument 2016/1211* (**Instrument**).

The Instrument is made under subsection 341(1) of the *Corporations Act 2001* (**Act**).

Subsection 341(1) of the Act provides that ASIC may make an order in writing in respect of a specified class of companies, registered schemes or disclosing entities, relieving any of the directors, the companies, registered schemes or disclosing entities themselves, or the auditors of the companies, registered schemes or disclosing entities from all or specified requirements of Parts 2M.2, 2M.3 and 2M.4 (other than Division 4) of the Act. These requirements relate to financial reporting and audit.

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 Instrument amends *ASIC Corporations (Wholly-owned Companies) Instrument 2016/785* (**Principal Instrument**).

The Principal Instrument relieves a wholly-owned company from financial reporting and audit requirements provided it enters into a deed of cross guarantee with its holding entity and other wholly owned entities of the group, and meets certain other conditions.

The Principal Instrument replaced ASIC Class Order [CO 98/1418], which provided similar relief. The Principal Instrument applies in relation to financial years ending on or after 1 January 2017. Under transitional provisions, Class Order [CO 98/1418] continues to apply in relation to financial years ending before 1 January 2017. Among other matters, Class Order [CO 98/1418] required a company relying on the financial reporting relief in relation to a

financial year to have become party to a deed of cross guarantee before the end of that financial year: see condition (l) of the First Order in Class Order [CO 98/1418].

The deed of cross guarantee required under the Principal Instrument must be in the form of ASIC Pro Forma 24 as at 28 September 2016 (subject to certain minor permitted variations and provisions grandfathering deeds of cross guarantee that conformed with a previous version of ASIC Pro Forma 24).

ASIC Pro Forma 24 was updated on 28 September 2016, the same day that the Principal Instrument and the instrument repealing Class Order [CO 98/1418] were made. The Principal Instrument commenced on 29 September 2016 and the repeal of Class Order [CO 98/1418] also took effect on 29 September 2016. The previous update to ASIC Pro Forma 24 occurred on 31 March 2008.

2. Purpose of the instrument

The current version of ASIC Pro Forma 24 came into force on 28 September 2016, the day before Class Order [CO 98/1418] was repealed. There is doubt as to whether, without the amendments made by the Instrument, a deed of cross guarantee based on the 31 March 2008 version of ASIC Pro Forma 24 would be acceptable for the purposes of an entity wishing to take advantage of financial reporting relief under [CO 98/1418] (as continued in force) or the Principal Instrument in relation to a financial year ending on or after 28 September 2016.

The purpose of the Instrument is to amend the Principal Instrument so that the 31 March 2008 version of the deed of cross guarantee continues to be an acceptable form of deed of cross guarantee for the purposes of the financial reporting relief given by the Principal Instrument and Class Order [CO 98/1418] where the deed of cross guarantee was entered into before 28 September 2016.

3. Operation of the instrument

The Instrument takes effect on the day after its registration.

The Instrument amends the Principal Instrument as follows:

- paragraph (a) of the definition of deed of cross guarantee in the Principal Instrument is amended so that a deed of cross guarantee for the purposes of the Principal Instrument will include a deed of cross guarantee under Class Order [CO 98/1418] (as continued in force by the Principal Instrument); and
- section 13 of the Principal Instrument continues Class Order [CO 98/1418] in force in relation to a financial year ending before 1 January 2017. Section 13 of the Principal Instrument is amended so that a deed of cross guarantee for the purposes of the Class Order [CO 98/1418] (as continued in force by the Principal Instrument) includes both a deed of cross guarantee in the form of ASIC Pro Forma 24 as at 31 March 2008 and a deed of cross guarantee in the form of ASIC Pro Forma 24 as at 28 September 2016. Deeds of cross guarantee based on previous versions of ASIC Pro Forma 24 are also accommodated by Class Order [CO 98/1418] and the Principal Instrument.

4. Documents incorporated by reference

The Instrument incorporates by reference ASIC Pro Forma 24 as at 31 March 2008 and as at 28 September 2016. ASIC Pro Forma 24 as at 31 March 2008 is available in the *ASIC Digest*, published by Thomson Reuters. ASIC Pro Forma 24 as at 28 September 2016 is available at ASIC's website, www.asic.gov.au.

5. Consultation

ASIC did not undertake consultation with respect to the Instrument because it is minor and machinery in nature and is consistent with the intention of 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 (Amendment) Instrument 2016/1211

*ASIC Corporations (Amendment) Instrument 2016/1211 (**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*.*

Overview

The Instrument amends *ASIC Corporations (Wholly-owned Companies) Instrument 2016/785 (Principal Instrument)*.

The Principal Instrument replaced ASIC Class Order [CO 98/1418] (subject to transitional provisions) and relieves a wholly-owned company from financial reporting and audit requirements provided it enters into a deed of cross guarantee with its holding entity and other wholly owned entities of the group, and meets certain other conditions. The deed of cross guarantee needs to be based on ASIC Pro Forma 24, which was updated on 28 September 2016.

The amendments ensure that a deed of cross guarantee based on the previous version of ASIC Pro Forma 24 is an acceptable form of deed of cross guarantee for the purposes of the financial reporting relief given by the Principal Instrument and Class Order [CO 98/1418] (as continued in force by the Principal Instrument) where the deed of cross guarantee was entered into before 28 September 2016.

Human rights implications

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

Conclusion

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