

# ASIC Corporations (Amendment) Instrument 2017/580

## EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (*ASIC*) makes *ASIC Corporations (Amendment) Instrument 2017/580 (amending instrument)* under subsections 655A(1), 741(1), 926A(2) and 1020F(1) of the *Corporations Act 2001* (the *Act*).

Subsection 655A(1) of the Act provides that ASIC may, among other things, declare that Chapter 6 of the Act applies to all persons as if specified provisions were omitted, modified or varied as specified in the declaration.

Subsection 741(1) of the Act provides that ASIC may, among other things, declare that Chapter 6D of the Act applies to all persons as if specified provisions were omitted, modified or varied as specified in the declaration.

Subsection 926A(2) of the Act provides that ASIC may, among other things, declare that Part 7.6 of the Act (other than Divisions 4 and 8) applies in relation to a class of persons as if specified provisions were omitted, modified or varied as specified in the declaration.

Subsection 1020F(1) of the Act provides that ASIC may, among other things, declare that Part 7.9 of the Act applies in relation to a class of persons as if specified provisions were omitted, modified or varied as specified in the declaration.

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

*Exemptions from requirement to hold an Australian financial services licence*

Subsection 911A(1) of the Act provides that a person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services.

ASIC has two independent sources of power in Part 7.6 of the Act to grant an exemption to a person or a class of persons from the requirement to hold an Australian financial services licence covering the provision of financial services. The sources of power are:

- (a) paragraphs 911A(2)(h) and (l) of the Act; and

(b) subsection 926A(2) of the Act.

Paragraph 911A(2)(a) of the Act exempts a person from the requirement to hold an Australian financial services licence for a financial service they provide if they provide the service as representative of second person who carries on a financial services business and who either holds an Australian financial services licence or is exempt under subsection 911A(2) of the Act from the requirement to hold an Australian financial services licence that covers the provision of the service. The exemption does not apply if the second person is exempt as a result of an exemption made by ASIC under subsection 926A(2) of the Act. ASIC considers this to be an anomaly.

Subsection 911B(1) of the Act provides that a person (the *provider*) must only provide a financial service in this jurisdiction on behalf of another person (the *principal*) who carries on a financial services business in certain circumstances.

Under paragraph 911B(1)(e), one such circumstance is where, if the principal (rather than the provider) provided the service, the principal would not need an Australian financial services licence because the provision of the financial service would be exempt under subsection 911A(2) of the Act. This would cover licensing exemptions granted by ASIC under paragraphs 911A(2)(h) and (l) of the Act but would not cover licensing exemptions granted by ASIC under subsection 926A(2) of the Act. ASIC considers that to be an anomaly.

In 2015, ASIC made *ASIC Corporations (Effect of Licensing Exemptions) Instrument 2015/1115 (principal instrument)*, a declaration under subsection 926A(2) of the Act. The principal instrument granted relief to ensure that subsection 911B(1) of the Act operates in the same way for any licensing exemption granted by ASIC, irrespective of the source of power used by ASIC to grant the exemption.

Part 7.9 of the Act imposes various obligations on “regulated persons” in relation to issues, sales and recommendations of financial products to a retail client. These include the requirement to provide retail clients with a Product Disclosure Statement for the financial product in certain circumstances. Section 1101B of the Act defines *regulated person*. The definition includes financial services licensees, together with persons who are not required to hold an Australian financial services licence because the person is covered by an exemption specified by ASIC for the purposes of paragraph 911A(2)(l) of the Act. The definition does not extend to a person who is not required to hold an Australian financial services licence because the person is covered by an exemption under subsection 926A(2) of the Act. ASIC considers that to be an anomaly.

#### *Consequences of lodging certain supplementary and replacement documents*

Chapter 6 of the Act regulates takeover bids, including requirements for bidder’s and target’s statements. Section 646 of the Act provides that if a supplementary bidder’s or target’s statement is lodged with ASIC, for the purposes of the application of Chapters 6 and 6B to events that occur after lodgement, the bidder’s or target’s statement is taken to be the original statement together with the supplementary statement.

Chapter 6D of the Act regulates prospectuses and other disclosure documents used in relation to offers of shares and other securities. Subsections 719(4) and (5) of the Act provide that if a supplementary or replacement document is lodged with ASIC, the disclosure document is taken to be the disclosure document as supplemented or replaced for the purposes of the application of Chapter 6D to events that occur after lodgement. Subsections 719A(7) to (9) contain similar provisions dealing with the effect of lodging supplementary and replacement documents in relation to 2-part simple corporate bonds prospectuses. On commencement of Schedule 1 to the *Corporations Amendment (Crowd-sourced Funding) Act 2017*, subsections 783W(8) and (9) of the Act will contain similar provisions dealing with the effect of publishing supplementary and replacement CSF offer documents.

Part 7.9 of the Act contains requirements in relation to issues, sales and recommendations of financial products to retail investors. In particular, a Product Disclosure Statement is generally required to be provided in such circumstances. Subdivision DA of Division 2 of Part 7.9 of the Act enables a Replacement Product Disclosure Statement to be used in relation to an offer of stapled securities. Section 1014J provides that if a Replacement Product Disclosure Statement is prepared and lodged with ASIC, a reference to a Product Disclosure Statement is taken to be a reference to the Replacement Product Statement for the purposes of the application of “this Act” to events that occur after the lodgement.

Section 9 of the Act provides that “*this Act* includes the regulations”. Given that the definition of *this Act* is not expressed to include ASIC instruments, there may be some uncertainty as to whether references to disclosure documents, bidder’s and target’s statements and Product Disclosure Statements in ASIC instruments are taken to be references to those documents as supplemented or replaced in relation to events that occur after lodgement of a supplementary or replacement document.

## 2. Purpose of the instrument

The purposes of the amending instrument are to amend the principal instrument to:

- ensure that the licensing exemption for representatives in paragraph 911A(2)(a) of the Act operates in the same way for a licensing exemption granted by ASIC under subsection 926A(2) of the Act as for a licensing exemption granted by ASIC under paragraph 911A(2)(1) of the Act; and
- ensure that the definition of *regulated person* in section 1101B of the Act operates in the same way for a licensing exemption granted by ASIC under subsection 926A(2) of the Act as for a licensing exemption granted by ASIC under paragraph 911A(2)(1) of the Act; and
- clarify that references in ASIC instruments to disclosure documents, bidder’s and target’s statements and Product Disclosure Statements operate in the same way as references in the Act in circumstances where the relevant document has been supplemented or replaced.

### 3. Operation of the instrument

#### *Renaming of principal instrument*

Item 1 of Schedule 1 to the amending instrument changes the name of the principal instrument from *ASIC Corporations (Effect of Licensing Exemptions) Instrument 2015/1115* to *ASIC Corporations (Miscellaneous Technical Relief) Instrument 2015/1115*. The new name more accurately describes the nature of the principal instrument as amended.

#### *Identification of authority to make principal instrument*

Item 2 of Schedule 1 to the amending instrument amends section 3 of the principal instrument so that it identifies each head of power under which the principal instrument (as amended) is made.

#### *Modifications in relation to exemptions under subsection 926A(2)*

Item 3 of Schedule 1 to the amending instrument omits and substitutes section 5 of the principal instrument. In addition to the existing modification made by the principal instrument to subsection 911B(1) of the Act, as amended the principal instrument:

- modifies paragraph 911A(2)(a) of the Act so that it applies in relation to an exemption granted by ASIC under subsection 926A(2)(a) of the Act in the same way that it applies in relation to an exemption granted by ASIC under paragraph 911A(2)(l) of the Act; and
- inserts a new notional subparagraph (f)(iv) into the definition of **regulated person** in section 1101B of the Act. This extends the definition to include persons who are not required to hold an Australian financial services licence because of an exemption granted by ASIC under subsection 926A(2) of the Act. This reproduces the effect of paragraph (f)(iii) of the definition in relation to licensing exemptions granted by ASIC under paragraph 911A(2)(l) of the Act.

#### *Consequences of lodging or publishing certain supplementary or replacement documents*

Item 4 of Schedule 1 to the amending instrument adds a new section 6 to the principal instrument. The new section 6 of the principal instrument modifies section 646, subsections 719(4) and (5), subsections 719A(7) to (9) and section 1014J of the Act. The effect of these modifications is to clarify that references in ASIC instruments to disclosure documents, bidder's and target's statements and Product Disclosure Statements are taken, for the purposes of the application of an instrument to events that occur after lodgement or publication of a supplementary or replacement document, to be a reference to the original document as supplemented or to the replacement document (as the case may be). This is consistent with the way in which references to such documents in the Act are currently treated.

On its commencement, Schedule 1 to the *Corporations Amendment (Crowd-sourced Funding) Act 2017* amends the Act to establish a framework to facilitate crowd-sourced funding offers by small unlisted public companies. Schedule 3 to the amending instrument modifies subsections 738W(8) and (9) to clarify that references in ASIC instruments to a CSF offer document are taken, for the purposes of the application of an instrument to events that occur after publication of a supplementary or replacement CSF offer document, to be a reference to the original document as supplemented or to the replacement document (as the case may be). The modifications to subsections 738W(8) and (9) commence on the later of registration of the amending instrument and commencement of Schedule 1 to the *Corporations Amendment (Crowd-sourced Funding) Act 2017*.

Disclosure documents, bidder's and target's statements and Product Disclosure Statements are documents that provide critical information to investors. ASIC considers that the modifications to the Act referred to above will promote investors receiving up-to-date information where such documents have been supplemented or replaced. ASIC considers that the modification to section 646 will promote the purposes of Chapter 6 set out in section 602 of the Act. The modification will clarify that requirements in ASIC instruments that relate to a bidder's or target's statement operate in relation to the bidder's or target's statements as supplemented. This will promote the acquisition of control over voting shares in listed entities taking place in an efficient, competitive and informed market and help ensure that holders of shares or interests are given enough information to enable them to assess the merits or a proposal to acquire a substantial interest in the relevant entity: see paragraphs 602(a) and (b) of the Act.

#### *Updating references to the principal instrument in other legislative instruments*

A number of legislative instruments made by ASIC contain notes referring to the operation of the principal instrument. Items 5 to 7 of Schedule 1 to the amending instrument and Schedule 2 to the amending instrument update these notes so that they refer to the new name of the principal instrument and describe the operation of the principal instrument as amended.

#### **4. Consultation**

ASIC did not engage in consultation before making the amending instrument as the effect of the instrument is of a minor or machinery nature.

## Statement of Compatibility with Human Rights

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

### ASIC Corporations (Amendment) Instrument 2017/580

The 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*.

#### Overview of the instrument

*ASIC Corporations (Amendment) Instrument 2017/580 (amending instrument)* amends *ASIC Corporations (Effect of Licensing Exemptions) Instrument 2015/1115 (principal instrument)*.

ASIC has two independent sources of power in the *Corporations Act 2001* (the *Act*) to grant an exemption to a person from the requirement to hold an Australian financial services licence covering the provision of financial services. The principal instrument contains provisions that modify the Act to ensure that a licensing exemption has the same effect, regardless of which source of power is used.

Under the Act, various obligations are imposed on a “regulated person” in relation to issues, sales and recommendations of financial products to a retail client. The definition of “regulated person” includes a financial services licensee as well as a person who is exempt from the licensing requirement because of an ASIC exemption under a particular head of power. The definition does not include a person who is exempt from the licensing requirement because of an ASIC exemption that was made under the other head of power. ASIC considers that to be an anomaly.

The amending instrument removes the anomaly to ensure the Act operates in the same way for any licensing exemption granted by ASIC, irrespective of the source of power used by ASIC.

Under the Act, references to disclosure documents, bidder’s and target’s statements and Product Disclosure Statements are taken to be references to the document as replaced or supplemented for the purposes of the application of the Act to events that occur after lodgement of a replacement or supplementary document with ASIC.

As amended, the principal instrument modifies the Act to clarify that references in ASIC instruments to disclosure documents, bidder’s and target’s statements and Product Disclosure Statements also operate in this way where the relevant document has been supplemented or replaced.

#### 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.