
EXPLANATORY STATEMENT for
ASIC Corporations (Mortgage Investment Schemes) Instrument
2017/857

ASIC Corporations (Repeal) Instrument 2017/858

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (ASIC) makes *ASIC Corporations (Mortgage Investment Schemes) Instrument 2017/857* (the **principal instrument**) under subsections 601QA(1), 926A(2), 992B(1) and 1020F(1) of the *Corporations Act 2001* (the Act).

ASIC makes *ASIC Corporations (Repeal) Instrument 2017/858* (the **repealing instrument**) under paragraphs 601QA(1)(a), 601QA(1)(b), 911A(2)(l), 992B(1)(a) and 1020F(1)(a) of the Act.

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

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

Subsection 992B(1) provides that ASIC may exempt a person from a provision of Part 7.8 of the Act or declare that Part 7.8 of the Act applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

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. This is done by granting an exemption in writing and publishing it in the *Gazette*.

Subsection 1020F(1) provides that ASIC may exempt a person from a provision of Part 7.9 of the Act or declare that Part 7.9 of the Act applies to a person 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

Corporations 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

Remake of ASIC Class Order [CO 02/238]

The principal instrument remakes with changes relief previously given by ASIC Class Order [CO 02/238] *Mortgage schemes: Chapter 5C and disclosure relief* ([CO 02/238]), which was due to expire ('sunset') on 1 October 2017.

[CO 02/238] provided the following types of relief in relation to managed investment schemes, the only investments of which were mortgages over real estate and deposits with Australian ADIs (**mortgage investment schemes**):

- (a) registration, Australian financial services (AFS) licensing, hawking and disclosure relief for small-scale schemes with no more than 20 members;
- (b) registration relief in relation to individual mortgages in a scheme;
- (c) registration relief for small 'industry-supervised' schemes;
- (d) transitional registration relief for 'run-out' schemes; and
- (e) withdrawal relief for individual mortgages in a scheme.

Schemes with no more than 20 investors

[CO 02/238] exempted operators of certain small-scale mortgage investment schemes with no more than 20 members from the requirements under the Act to register a scheme, hold an AFS licence, or give Product Disclosure Statement (PDS) disclosure. Section 2 also provided relief to persons other than the operator, and hawking relief.

The requirement under section 601ED of the Act to register a scheme would generally not apply if the operator of a scheme with no more than 20 members was not in the business of promoting managed investment schemes. However, if the view is taken that there is a separate scheme for each mortgage entered into under a scheme promoted by an operator, and there are several mortgages made from time to time, the operator's activities might be regarded as carrying on a business of promoting managed investment schemes for the purposes of paragraph 601ED(1)(b). Relief was granted to ensure that in this situation the mortgage investment scheme does not need to be registered.

The AFS licensing and PDS relief reflect the position under paragraph 765A(1)(s) of the Corporations Act that an interest in a scheme with no more than 20 members, and which is not promoted by a person in the business of promoting managed investment

schemes, is not a financial product (unless subject to a determination under subsection 601ED(3) of the Corporations Act).

The principal instrument continues the effect of the relief given by [CO 02/238], with a requirement that, except for the mortgage investment scheme, together with any other managed investment scheme operated by the operator or by an associate of the operator that have assets invested in mortgage loans, the operator is not in the business of promoting managed investment schemes: see section 5 of the principal instrument. This is consistent with the rationale underlying the relief.

As a result of ASIC Corporations (Securities and Managed Investment Scheme Hawking Relief) Instrument 2017/184, which clarifies that a person making an offer of interests in managed investment schemes does not have to comply with subsection 992A(1) of the Act, it was not necessary to continue the relief provided under [CO 02/238] from section 992A.

Registering a mortgage business as a scheme

[CO 02/238] exempted the operator of a mortgage investment scheme from the registration requirement under section 601EB of the Act to the extent that subsection 601ED(5) may require that a separate scheme be registered for each mortgage operated under that scheme.

For an operator of a mortgage investment scheme, there may be uncertainty as to whether such a scheme would be characterised as:

- (a) a single managed investment scheme; or
- (b) a single managed investment scheme and a number of individual managed investment schemes (see *ASIC v Knightsbridge Managed Funds Ltd* [2001] WASC 339 and *Re Idylic Solutions Pty Ltd & ASIC v Hobbs* [2012] NSWSC 1276).

Our relief in [CO 02/238] eliminated the legal uncertainty by making it clear that when an operator registers a mortgage investment scheme, the operator does not need to separately register a scheme for each mortgage operated under that scheme.

Note: [CO 02/238] modified the Corporations Act for mortgage investment schemes to which this relief applies: see 'Modification in relation to registering mortgage businesses' below.

The principal instrument continues the effect of the relief in [CO 02/238] with minor drafting changes to provide greater clarity and accuracy: see section 6 of the principal instrument.

Small industry-supervised schemes

[CO 02/238] exempted operators of certain small mortgage investment schemes from the requirement to register the scheme under section 601ED if it:

- (a) was operated under the supervision of an industry supervisory body (ISB);
- (b) complied with any applicable rules and directions of the ISB; and

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- (c) met certain conditions.

The key features of a mortgage investment scheme to which this relief applied were:

- (a) the principal of loans outstanding (when aggregated with related unregistered schemes) did not exceed \$7.5 million;
- (b) interests in the scheme were not issued unless the operator reasonably believes the person received a copy of the PDS that had been lodged with the relevant ISB; and
- (c) the scheme was operated in accordance with the 'ISB conditions', which were a set of conditions set out in [CO 02/238] that include conditions relating to loan valuation, restrictions on the jurisdictions in which interests may be issued, a prohibition on public advertising, providing for investor choice of mortgages, and the holding of cash in designated trust accounts.

The principal instrument continues for a period of one year the effect of the relief in [CO 02/238] without changes: see section 7 of the principal instrument. A requirement of the relief (as continued in effect) is that the relevant scheme be operated under the supervision of an ISB. This means that the relief will cease to apply where the scheme is not operated under the supervision of such a body, for example because the laws of a State or Territory prohibit the operation of a managed investment scheme by persons who would be supervised by the body.

Run-out schemes (transitional relief)

[CO 02/238] exempted the operator of a 'run-out' mortgage investment scheme from the need to register the scheme under section 601ED. Conditions of this relief included that the scheme:

- (a) was operated under the supervision of, and in compliance with any applicable rules and directions of, an ISB;
- (b) complied with the ISB conditions; and
- (c) complied with the requirement that no new loans were made under the scheme or any related scheme.

This relief was transitional in nature and was provided to enable the orderly winding down of mortgage investment schemes where the operator decided not to comply with the requirements introduced by the *Managed Investments Act 1998* or to rely on other relief (e.g. to become a small, industry-supervised scheme subject to relief under [CO 02/238]). Therefore, this relief has not been remade by the principal instrument.

Modification in relation to registering mortgage businesses

[CO 02/238] modified the withdrawal provisions in subsection 601GA(4) and Part 5C.6 of the Corporations Act for mortgage investment schemes to which section 3 of [CO 02/238] applies to allow the application of the requirements on a mortgage-by-mortgage basis, rather than for the scheme as a whole. In particular, the relief provided that:

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- (a) each reference in those provisions to a scheme which is liquid (or not liquid) was taken to be a reference to a mortgage administered under the scheme which is liquid (or not liquid); and
 - (b) each reference to members of the scheme was taken to be a reference to members who have interests relating to the mortgage.

Relief was provided in recognition that where a mortgage investment scheme relates to different mortgages in which particular members have an interest, provisions covering withdrawal from a scheme that is not liquid may not apply appropriately.

The relief allowed:

- (a) a different withdrawal period to be specified in the constitution for different mortgage arrangements; and
- (b) differences in the likely ability to realise a mortgage for its market value to be recognised.

The principal instrument continues the effect of the relief in [CO 02/238], with drafting changes to improve accuracy. The relief is intended to allow for withdrawal in relation to one mortgage where withdrawal is not able to occur from other existing mortgages in the scheme. The relief covers money received under a mortgage pending payment to an investor or for meeting expenses relating to the mortgage. The relief does not however allow for the operation of a general account where money held on an allocated basis can be used for providing liquidity across mortgage investments, unfairly providing liquidity to some and leaving others without it.

Repeal of [CO 02/238]

[CO 02/238] is repealed by the repealing instrument on the basis that it is no longer necessary where the relief is continued (with changes, as detailed above) by the principal instrument.

2. Purpose of the instruments

The purpose of the principal instrument is to continue the relief given by [CO 02/238], with changes.

The purpose of the repealing instrument is to repeal [CO 02/238].

3. Operation of the instruments

The principal instrument

Commencement

Section 2 of the principal instrument provides that the principal instrument commences at the same time as the commencement of the repealing instrument, being the later of:

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- (a) the gazettal of the repealing instrument (being the date it is published in the ASIC Gazette); and
 - (b) the day after the repealing instrument is registered on the Federal Register of Legislation.

Definition of 'mortgage investment scheme'

Section 4 defines 'mortgage investment scheme' to mean a managed investment scheme that has, or is likely to have, at least 50% of non-cash assets invested in mortgage loans, and 100% of assets invested in mortgage loans or in an account with an Australian ADI.

Mortgage investment schemes with no more than 20 investors

Section 5 of the principal instrument remakes with changes the relief previously given by Part 2 of [CO 02/238] in relation to mortgage investment schemes with no more than 20 investors.

Where relief applies

Subsection 5(7) provides that the exemptions in subsections 5(1), (2), (4) and (5) (see below) are only available where all of the following are satisfied:

- (a) the mortgage investment scheme, together with any other managed investment scheme operated by the operator or by an associate of the operator that has assets invested in mortgage loans, has no more than 20 members; and
- (b) the operator, and any associate of the operator, does not operate a mortgage investment scheme registered under section 601EB of the Act; and
- (c) except for the scheme, together with any other managed investment scheme referred to in paragraph (a), or any managed investment scheme that forms part of those schemes, the operator is not in the business of promoting managed investment schemes.

Registration relief

Subsection 5(1) exempts the operator of the mortgage investment scheme from complying with the requirement to register a scheme in subsection 601ED(5) of the Act in relation to the operation of the scheme.

Licensing relief

Subsection 5(2) exempts the operator of a mortgage investment scheme from complying with the requirement in subsection 911A(1) of the Act to hold an Australian financial services licence covering the provision of financial services in relation to interests in the scheme.

Subsection 5(3) exempts a person (other than a person to whom subsection 5(2) applies) from complying with the requirement in subsection 911A(1) of the Act to hold an Australian financial services licence covering the provision of financial services in relation to interests in a mortgage investment scheme in relation to which paragraphs 5(7)(a) to 7(c) appear to be satisfied except where the person is aware, or

ought reasonably to be aware, that those paragraphs are not satisfied in relation to the scheme.

Hawking relief

Subsection 5(4) exempts the operator of a mortgage investment scheme from complying with the hawking restrictions in section 992AA of the Act in relation to an offer of an interest in the scheme to a person in the course of, or because of:

- (a) an unsolicited meeting with the person; or
- (b) an unsolicited telephone call to the person.

Financial product disclosure relief

Subsection 5(5) exempts the operator of a mortgage investment scheme from complying with Part 7.9 of the Act in relation to any of the following:

- (a) a recommendation to acquire an interest in the scheme;
- (b) an offer to issue or sell an interest in the scheme;
- (c) the issue or sale of an interest in the scheme.

Subsection 5(6) exempts a person (other than a person to whom subsection 5(5) applies) from complying with Part 7.9 of the Act in relation to either of the following:

- (a) a recommendation to acquire an interest in a mortgage investment scheme;
- (b) an offer to arrange the issue of an interest in a mortgage investment scheme;

in relation to which paragraphs 5(7)(a) to (7)(c) appear to be satisfied except where the person is aware, or ought reasonably to be aware, that those paragraphs are not satisfied in relation to the scheme.

Registering a scheme in relation to individual mortgage loans

Section 6 of the principal instrument remakes with changes the relief previously given by Part 3 of [CO 02/238] from any requirement to register schemes in relation to each mortgage loan in relation to which a mortgage investment scheme operators.

Section 6 exempts the operator of a mortgage investment scheme registered under section 601EB of the Act from complying with the requirement to register a scheme in subsection 601ED(5) of the Act to the extent that subsection 601ED(5) would require the operator to register a scheme in relation to each mortgage loan in relation to which the scheme operates.

Small industry-supervised mortgage investment schemes

Section 7 of the principal instrument temporarily continues the relief given by Part 4 of [CO 02/238] in relation to small, industry-supervised mortgage investment schemes.

Subsection 7(1) provides that the relevant exemption in [CO 02/238], as in force immediately before its repeal by the repealing instrument, continues to apply in the circumstances and on the conditions specified in relation to the exemption.

Subsection 7(2) provides that subsection 7(1) (i.e. the extension of relief) has effect for a period of one year commencing on the day the principal instrument commences. This means that the continuation of relief under section 7 of the principal instrument will cease after one year from the commencement of the principal instrument.

Note: Section 7 continues the relevant exemption for one year in the circumstances and on the conditions specified in the relevant exemption. This includes the requirement that the mortgage investment scheme be operated under the supervision of an industry supervisory body. This means that the relief will cease to apply where the scheme is not operated under the supervision of a relevant industry supervisory body, for example because the laws of a State or Territory prohibit the operation of a managed investment scheme by persons who would be supervised by the body.

Withdrawal rights for registered mortgage investment schemes

Section 8 of the principal instrument remakes with changes the relief previously given by Part 6 of [CO 02/238] in relation to withdrawal rights from a registered scheme that relates to different mortgages in which particular members have an interest.

Section 8 modifies how Chapter 5C of the Act applies to all persons in relation to a mortgage investment scheme in respect of which the operator has relied on the exemption in section 6 of the principal instrument. Specifically, section 8 provides that Chapter 5C applies as if subsection 601GA(4) and Part 5C.6 were modified or varied as follows:

- (a) after “members” (wherever appearing, other than at the end of subsection 601GA(4), in paragraph 601KB(2)(b), in subsection 601KB(4) and in section 601KE), inserting:
 - (i) in subsection 601KB(1) (wherever appearing) and in the formula in section 601KD:

“who have an interest in the particular mortgage loan”; and
 - (ii) otherwise, 'who have an interest in a particular mortgage loan';
- (b) in paragraph 601KB(2)(b), after “members of the scheme” and “members of a particular class”, inserting “who have an interest in the particular mortgage loan”;
- (c) in subsection 601KA(3), after “member” , inserting “who has an interest in a particular mortgage loan”;

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- (d) in the formula in section 601KD, after “member”, inserting “who has an interest in the particular mortgage loan”;
 - (e) after “withdraw from the scheme” (wherever appearing) and “withdraw, wholly or partly, from the scheme” (in subsection 601KB(1)), inserting “in relation to the particular mortgage loan”;
 - (f) after “scheme is liquid” (wherever appearing), inserting
 - (i) in subsection 601KA(4), “in relation to a particular mortgage loan”; and
 - (ii) otherwise, “in relation to the particular mortgage loan”;
 - (g) after “scheme is not liquid” (wherever appearing) and “scheme that is not liquid” (wherever appearing), inserting:
 - (i) in subsection 601KB(1) and sections 601KC, 601KD and 601KE, “in relation to a particular mortgage loan”; and
 - (ii) otherwise, “in relation to the particular mortgage loan”;
 - (h) in subsection 601KA(4), after “liquid assets”, inserting “in relation to the particular mortgage loan”;
 - (i) in subsections 601KA(5) and (6), after “liquid assets” and “liquid asset”, inserting “in relation to a particular mortgage loan”;
 - (j) in subsection 601KA(4), after “scheme property.”, inserting “in relation to the particular mortgage loan”.

The repealing instrument

Commencement

Section 2 of the repealing instrument provides that the repealing instrument commences on the later of:

- (a) the day of its gazettal (being the date it is published in the ASIC Gazette); and
- (b) the day after it is registered on the Federal Register of Legislation.

Repeal

Section 4 of the repealing instrument provides that each instrument that is specified in a Schedule to the instrument is repealed as set out in the applicable items in the Schedule concerned.

Schedule 1 of the repealing instrument repeals [CO 02/238].

4. Consultation

On 22 June 2017, ASIC released Consultation Paper 287 *Remaking ASIC class order on mortgage schemes and proposed relief for multiple withdrawal periods* seeking feedback on the principal instrument. The public consultation period closed on 4 August 2017.

Statement of Compatibility with Human Rights

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

ASIC Corporations (Mortgage Investment Schemes) Instrument 2017/857 ASIC Corporations (Repeal) Instrument 2017/858.

ASIC Corporations (Mortgage Investment Schemes) Instrument 2017/857 (the principal instrument) and *ASIC Corporations (Repeal) Instrument 2017/858* (the repealing 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 principal instrument continues with changes the relief provided by ASIC Class Order [CO 02/238] ([CO 02/238]) in relation to managed investment schemes, the only investments of which were mortgages over real estate and deposits with Australian ADIs.

The repealing instrument repeals [CO 02/238].

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.