

**EXPLANATORY STATEMENT for**  
**ASIC (AMENDMENT, REPEAL AND TRANSITIONAL) INSTRUMENT**  
**2017/839**

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (**ASIC**) makes *ASIC (Amendment, Repeal and Transitional) Instrument 2017/839* (the **Instrument**) under paragraphs 601QA(1)(a), 601QA(1)(b), 926A(2)(c), 992B(1)(a) and 992B(1)(c) of the *Corporations Act 2001 (Act)*.

Section 601QA provides that ASIC has the power to make exemption and modification orders and declarations in relation to provisions of Chapter 5C of the Act.

Section 926A provides that ASIC has the power to make exemptions, modifications and declarations in relation to provisions of Part 7.6 of the Act (with the exception of Divisions 4 and 8).

Section 992B provides that ASIC has the power to make exemptions and declarations in relation to provisions of Part 7.8 of the Act.

The Instrument operates to:

- repeal ASIC Class Order [CO 03/1111] *Prime brokerage: Relief from holding scheme property separately (JCO 03/1111)*;
- repeal ASIC Class Orders [CO 03/1110] *Prime brokerage: Relief from holding client property on trust (JCO 03/1110)* and [CO 03/1112] *Relief from obligation to hold client money on trust (JCO 03/1112)*, while providing transitional relief to extend their effect for 12 months; and
- amend ASIC Class Orders [CO 13/1409] *Holding assets: Standards for responsible entities (JCO 13/1409)* and [CO 13/1410] *Holding assets: Standards for providers of custodial and depository services (JCO 13/1410)*.

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

### Prime broking relief

On 16 December 2003, ASIC made [CO 03/1110], [CO 03/1111] and [CO 03/1112]. Originally, these three ASIC class orders intended to address the problem that a responsible entity of a registered scheme was unable to appoint a prime broker (which is also an Australian, authorised deposit-taking institution (ADI)) to hold scheme property on its behalf unless such property was held separately and on trust for the benefit of the scheme's members. The Australian ADI prime broker was therefore unable to use such property in the ordinary course of its business (that is, using client monies in its banking business, or utilising rehypothecation of securities). The Australian ADI prime broker passed on the cost of the burden (of holding and administering client monies and property separately on trust) to responsible entities and their clients, with only marginal benefits to any party involved.

### Regulatory guidance for managed investment schemes

On 3 August 1998, ASIC released Regulatory Guide 133 *Managed investments: Scheme property arrangements (RG 133)* providing guidance on the minimum standards in relation to holding scheme property and other assets, whether held by the responsible entity or a custodian. RG 133 was updated in 1999.

In 2005, ASIC re-released Regulatory Guide 167 *Licensing: Discretionary powers (RG 167)* which included guidance on the minimum standards in providing a custodial or depository service by providing that with limited adaptation reflecting RG 148 the minimum standards in RG 133 for holding scheme property and assets of a registered managed investment scheme applied.

### Reforms following the collapse of Trio Capital

In May 2012, the Parliamentary Joint Committee on Corporations and Financial Services (*PJC*) released a report *Inquiry into the collapse of Trio Capital*. In this report, the PJC stated that it strongly supported ASIC's program to review custodian businesses and identify those issues requiring regulatory reform.

In July 2012, ASIC released Report 291 *Custodial and depository services in Australia*, which discussed ASIC's review of the Australian custodial industry, the regulatory regime and matters that ASIC considered to be 'good practice'.

In June 2013, ASIC released Regulatory Guide 148 *Platforms that are managed investment schemes (RG 148)* which included guidance on the minimum standards in holding property and assets of an investor directed portfolio service by providing that with limited adaptation the minimum standards in RG 133 for holding scheme property and assets of a registered managed investment scheme applied.

In late 2013, ASIC completed a review of RG 133 based on extensive industry consultation during 2012 and early 2013. In implementing the policy described in the replacement RG 133,

ASIC made a number of class orders, including [CO 13/1409] and [CO 13/1410]. These class orders comprehensively establish minimum standards for custodians and minimum content requirements for agreements between custodians and sub-custodians.

## **Review of RG 133**

ASIC is currently updating RG 133 and reviewing its policy approach to managed investment schemes. ASIC will consider whether existing exemptions, modifications and declarations remain appropriate, and whether any further exemptions, modifications or declarations may be needed. ASIC is extending [CO 03/1110] and [CO 03/1112] to allow sufficient time to consider various options, as set out below.

## **2. Purpose of the Instrument**

ASIC Class Orders [CO 03/1110], [CO 03/1111] and [CO 03/1112] were due to automatically repeal ('sunset') on 1 October 2017 in accordance with Chapter 3, Part 4 of the *Legislation Act 2003*.

The purpose of the Instrument is to repeal [CO 03/1111] and to preserve the effect of [CO 03/1110] and [CO 03/1112] for 12 months. This 12 month period will allow ASIC to consider options as to whether or not to remake the class orders, whether affected stakeholders should consider applying for individual relief, or whether affected stakeholders should consider making alternative arrangements in order to comply with their statutory obligations.

ASIC Class Order [CO 13/1409] incorporates [CO 03/1111] by reference and ASIC Class Order [CO 13/1410] incorporates [CO 03/1110] and [CO 03/1112] by reference. Therefore, the purpose of this Instrument is to also amend [CO 13/1409] to remove the reference, and effect, of [CO 03/1111]. The Instrument also amends [CO 13/1410] to take into account the 12 month, transitional period in relation to the repeal of [CO 03/1111] and [CO 03/1112].

## **3. Operation of the Instrument**

### **Name**

The name of the Instrument is the *ASIC (Amendment, Repeal and Transitional) Instrument 2017/839*.

### **Commencement**

The Instrument commences on the day after registration.

### **Authority**

ASIC has the power under paragraphs 601QA(1)(a), 601QA(1)(b), 926A(2)(c), 992B(1)(a) and 992B(1)(c) of the Act to exempt specified persons from provisions of Chapter 5C, Part

7.6 and Part 7.8 of the Act, as well as the power to make declarations as to the operation of such provisions, including specifying conditions.

## **Schedules**

Each instrument that is specified in a Schedule to the Instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Instrument has effect according to its terms.

Schedule 1 provides for the amendment of the class orders specified. Schedule 2 provides for the repeal of the class orders specified. Schedule 3 provides for the transitional operation of certain provisions as specified.

### **Schedule 1**

The Instrument amends [CO 13/1409] and [CO 03/1410].

The Instrument omits notional subparagraph 601FCAA(1)(a)(iii) of the Act as inserted by paragraph 4 of [CO 13/1409]. The notional subparagraph dealt with [CO 03/1111], which is being repealed.

The Instrument omits notional paragraph 912AAC(3)(c) of the Act as inserted by paragraph 4 of [CO 13/1410], substituting a notional paragraph that states “the property is held under an arrangement in relation to which an exemption from paragraph 981B(1)(c) or 984B(1)(a) applies because of Schedule 3 to the *ASIC (Amendment, Repeal and Transitional) Instrument 2017/839*”. A note is added that Schedule 3 of the Instrument provides that the exemptions given by [CO 03/1110] and [CO 03/1112] immediately before their repeal continue in force until 30 September 2018.

### **Schedule 2**

The Instrument repeals [CO 03/1110], [CO 03/1111] and [CO 03/1112], each in its entirety.

### **Schedule 3**

The Instrument provides that an exemption specified in [CO 03/1110] or [CO 03/1112] (each as in force immediately before its repeal) continues to apply in the circumstances and on the conditions specified in relation to the exemption until 30 September 2018.

The Instrument provides that the declaration specified in [CO 03/1112] (as in force immediately before its repeal) continues to apply in the circumstances specified in relation to the declaration.

## **4. Consultation**

In 2015 and 2016, ASIC consulted several Australian ADI prime brokers (also known as investment banks) about their use of [CO 03/1110], [CO 03/1111] and [CO 03/1112], and the potential impact of the class orders being repealed. From these discussions, it appeared that no

relevant stakeholders relied on the class orders, and therefore, there would be no impact if the class orders were repealed.

ASIC published Consultation Paper 273 *Repealing ASIC class orders on holding client assets* (CP 273) on 23 November 2016, proposing to repeal [CO 03/1110], [CO 03/1111] and [CO 03/1112], and proposing that, if appropriate, that ASIC would consider granting similar relief on an individual basis.

We received written responses from two Australian ADI prime brokerage firms and one industry association (the Alternative Investment Management Association). The respondents indicated that they did not support ASIC's proposal to repeal the class orders. The respondents also indicated that in the event ASIC repealed the class orders, the respondents expected that ASIC would grant them sufficient time to apply for substantially similar relief on an individual basis.

Ongoing consultation with the respondents explored other issues not previously identified or canvassed in early consultation (before the publication of CP 273), nor subsequently provided in direct response to CP 273. As such, ASIC was not entirely comfortable with repealing the relief without further considering options about: remaking the class orders; whether affected stakeholders should consider applying for individual relief; or whether affected stakeholders should consider making alternative arrangements in order to comply with their statutory obligations. ASIC formed the view that it would be appropriate to extend the operation of part of the relief to allow sufficient time to consider these options.

## **Statement of Compatibility with Human Rights**

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

### **ASIC (Amendment, Repeal and Transitional) Instrument 2017/839**

*ASIC (Amendment, Repeal and Transitional) Instrument 2017/839* 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 (Amendment, Repeal and Transitional) Instrument 2017/839:*

- repeals ASIC Class Orders [CO 03/1110], [CO 03/1111] and [CO 03/1112];
- provides a 12 month transitional period to extend the operation of ASIC Class Orders [CO 03/1110] and [CO 03/1112]; and
- amends ASIC Class Orders [CO 13/1409] and [CO 13/1410] to make changes that are consequential on the repeal of ASIC Class Orders [CO 03/1110], [CO 03/1111] and [CO 03/1112] and the 12 month transitional period extending the operation of ASIC Class Orders [CO 03/1110] and [CO 03/1112].

ASIC Class Orders [CO 03/1110], [CO 03/1111] and [CO 03/1112] operated to permit a responsible entity of a registered scheme to appoint a prime broker (which is also an Australian, authorised deposit-taking institution (ADI)) to hold scheme property on its behalf without such property having to be held separately and on trust for the benefit of the scheme's members. The Australian ADI prime broker was subsequently able to use such property in the ordinary course of its business (for example, using client monies in its banking business, or utilising rehypothecation of securities). Few, if any, relevant stakeholders have been found to be relying on the exemptions and declarations in these class orders.

#### **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.

**Australian Securities and Investments Commission**