



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC (Senior Staff Members—Determination) Instrument 2019/117

This is the Explanatory Statement for *ASIC (Senior Staff Members—Determination) Instrument 2019/117*.

The Explanatory Statement is approved by the Chairperson of the Australian Securities and Investments Commission (*ASIC*).

Summary

1. This legislative instrument determines which staff members of ASIC are ‘senior staff members’ for the purposes of certain delegation provisions in the *Australian Securities and Investments Commission Act 2001* (the *ASIC Act*) and other legislation.

Purpose of the instrument

2. The purpose of the instrument is to facilitate the delegation of certain powers conferred on ASIC, the Chairperson of ASIC and the relevant Minister.
3. The *ASIC Act* and other Acts contain restrictions in respect of which ASIC staff may be delegated the authority to perform and exercise particular functions and powers. Currently, these delegation provisions operate by reference to persons that form part of the Senior Executive Service (SES) or SES equivalent employees. ‘SES’ means ‘Senior Executive Service’ and is a concept defined in the *Public Service Act 1999* (the *PS Act*).
4. ASIC staff will cease to be employed under the *PS Act* from 1 July 2019, as a result of amendments made by the *Treasury Laws Amendment (Enhancing ASIC’s Capabilities) Act 2018* (the *Transition Act*). From 1 July 2019, it will no longer be apparent which members of ASIC staff will be an SES employee, and it may no longer be apparent which members of ASIC staff will be the equivalent of an SES employee.
5. The *Transition Act* introduces a new section 122A of the *ASIC Act* enabling the Chairperson of ASIC to make a determination identifying which ASIC staff members are ‘senior staff members’. The *Transition Act* amends the restrictive delegation provisions referred to in paragraph 3 to enable powers to be delegated to ‘senior staff members’ as determined by the Chairperson.

Consultation

6. Section 17 of the *Legislation Act 2003* provides that, before a legislative instrument is made, the rule-maker must be satisfied that there has been undertaken any consultation that is considered by the rule-maker to be appropriate, and reasonably practicable to undertake.
7. In determining whether any consultation that was undertaken is appropriate, the rule-maker may have regard to any relevant matter, including the extent to which the consultation drew on the knowledge of persons having expertise in fields relevant to the proposed instrument.
8. No consultation was undertaken prior to the making of this legislative instrument. The reason why no consultation was undertaken is because consultation would be inappropriate given the machinery nature of this legislative instrument. The legislative instrument deals with the identification of staff members in ASIC who are capable of being delegated the authority to perform or exercise certain statutory powers and functions.

Operation of the instrument

Senior staff members for all purposes

9. Section 5 of this legislative instrument is a determination of senior staff members for all purposes. It provides that a senior staff member is a person who holds or acts in the following positions in ASIC:
 - (a) Executive Director;
 - (b) Senior Executive Leader;
 - (c) Senior Executive Specialist; and
 - (d) other senior positions with particular titles.
10. Each of these positions is a senior office in ASIC. Specifically:
 - (a) Executive Directors have primary responsibility for ASIC's day-to-day operations and decision-making;
 - (b) Senior Executive Leaders lead the various teams in ASIC;
 - (c) Senior Executive Specialists hold responsibilities of a similar seniority to Senior Executive Leaders, and work in specialised areas; and
 - (d) For the avoidance of doubt, section 5(d) specifies senior positions which have particular titles.
11. It is therefore appropriate that staff holding or acting in these positions are included within the determination as a senior staff member for all purposes.

Senior staff members for limited purposes

12. Section 6 of the legislative instrument is, by contrast, a determination of senior staff members for limited purposes.

Markets Disciplinary Panel

13. The Markets Disciplinary Panel (the **MDP**) makes decisions about whether to issue infringement notices to market participants in relation to alleged contraventions of the ASIC market integrity rules. The market integrity rules are rules that apply to the conduct of market participants on licensed markets.
14. The MDP comprises persons who are engaged by the ASIC Chairperson as consultants under section 121 of the ASIC Act. MDP members are not internal ASIC staff members but they are ‘staff members’ because they are engaged under subsection 121 of the ASIC Act.
15. The MDP operates as a Division of ASIC under section 97 of the ASIC Act. When MDP members sit as a sitting panel (comprising 3 MDP members) in relation to a particular matter, acting as a Division of ASIC, one of those members is designated as the chair of that sitting panel, and is performing a function of chairing that Division in relation to the matter: see sections 103 and 106 of the ASIC Act. In order to do so, the chair of the sitting panel must be delegated that power by the ASIC Chairperson in that capacity.
16. The Transition Act amends section 119A of the ASIC Act so that, from 1 July 2019, the functions and powers of the ASIC Chairperson or a Deputy Chairperson of ASIC may only be delegated to another ASIC member or to a senior staff member of ASIC.
17. Accordingly, MDP members are to be senior staff members for the limited purpose of performing functions and exercising powers in relation to matters referred to the MDP. This is appropriate given that, when chairing a sitting panel of the MDP, these persons undertake duties which are functionally equivalent to those performed by the senior positions in ASIC referred to in section 5 of the legislative instrument.

Financial Services and Credit Panel

18. Similar to the MDP, the Financial Services and Credit Panel (the **FSCP**) also operates as a Division of ASIC under section 97 of the ASIC Act.
19. Sitting panels of the FSCP are constituted by three persons, two of whom are engaged as consultants under subsection 121(1) of the ASIC Act. The other member of a sitting panel of the FSCP is a senior administrative lawyer in ASIC’s Chief Legal Office. These staff members occupy the position in ASIC known as Hearing Delegate. A sitting panel of the FSCP will always be chaired by a Hearing Delegate.
20. Accordingly, and for the same reason as outlined at paragraph 15, staff members who hold or act in the position of Hearing Delegate are to be senior staff

members for the limited purposes of performing functions and exercising powers in relation to matters referred to the FSCP. This is appropriate given that, when chairing a sitting panel of the FSCP, these staff members undertake duties which are functionally equivalent to those performed by the senior positions in ASIC referred to in section 5 of the legislative instrument.

Commencement

21. This instrument commences on the later of 1 July 2019 and the day after it is registered on the Federal Register of Legislation.

Incorporation by reference

22. This legislative instrument does not incorporate any documents by reference.

Retrospective application

23. This legislative instrument does not have retrospective application.

Legislative authority

24. This legislative instrument is made under section 122A of the ASIC Act. Section 122A of the ASIC Act commences on 1 July 2019. This instrument has been made before its enabling provision has commenced, relying on subsection 4(1) of the *Acts Interpretation Act 1901*.¹

Statement of compatibility with human rights

25. This 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*. This is a statement of compatibility with human rights under subsection 9(1) of that Act.

Assessment of human rights implications

26. This instrument facilitates the delegation of certain powers conferred on ASIC, the Chairperson of ASIC and the relevant Minister. The instrument determines which staff members of ASIC are ‘senior staff members’ for the purposes of certain delegation provisions in the ASIC Act and other legislation.
27. This legislative instrument does not engage any of the applicable rights or freedoms.

¹ The *Acts Interpretation Act 1901* as in force on 1 January 2005 applies to the ASIC Act: see section 5A of the ASIC Act.