



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Amendment) Instrument 2019/933

This is the Explanatory Statement for *ASIC Corporations (Amendment) Instrument 2019/933*.

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

Summary

1. *ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547* (the **Purchase Plan Instrument**) and ASIC Class Order [CO 09/425] (now repealed) respectively give effect to ASIC's current and past policy on share and interest purchase plans. These instruments grant exemptions from regulated disclosure under the *Corporations Act 2001* (the *Act*).
2. In remaking ASIC's purchase plan relief the definition of the term 'custodian' was refined to provide a more clear and concise description. To facilitate the new definition of 'custodian' ASIC also inserted a definition of 'custodial or depository service'.
3. However, because of an oversight, the combined effect of the definitions of 'custodian' and 'custodial or depository service' is such that the relief for purchase plans did not extend to offers made through certain persons who are deemed to not provide a 'custodial or depository service' under section 766E of the Act, such as trustees of self-managed superannuation funds.
4. *ASIC Corporations (Amendment) Instrument 2019/933* (the **Amendment Instrument**) corrects that oversight by amending the definition of 'custodial or depository service' to ensure the Purchase Plan Instrument operates as intended.

Purpose of the instrument

5. The Purchase Plan Instrument remade the relief previously provided by ASIC Class Order [CO 09/425], facilitating the offer of share and interest purchase plans to existing registered holders, who are provided with the opportunity to participate in secondary capital raisings at a discount to the market price without brokerage fees.

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6. The Purchase Plan Instrument includes certain arrangements such that the relief may be extended to offers made to a person providing a custodial or depository service to beneficial holders of the issuer's securities or interests.
 7. The custodian arrangements are intended to apply to a person that provides a custodial or depository service and:
 - (a) holds an Australian financial services licence covering the provision of a custodial or depository service;
 - (b) is exempt from the requirement to hold an Australian financial services licence covering the provision of a custodial or depository service;
 - (c) holds an Australian financial services licence covering the operation of an investor directed portfolio service (*IDPS*) or is a responsible entity of an IDPS-like scheme;
 - (d) is a trustee of a self-managed superannuation fund or a superannuation master trust; or
 - (e) is a registered holder of shares or interests in the class and is noted on the register of members of the body or scheme as holding the shares or interests on account of another person.
 8. However, because of the imported definition of 'custodial or depository service' from section 766E of the Act in the Purchase Plan Instrument, trustees of self-managed superannuation funds were unintentionally precluded from meeting the requirements to be considered to be providing a custodial or depository service.
 7. This is due to the operation of paragraph 766E(3)(e) of the Act which provides that conduct of a kind prescribed by the *Corporations Regulations 2001* (the *Regulations*) is taken not to constitute providing a custodial or depository service. Paragraph 7.1.40(1)(c) of the Regulations, which is made for the purposes of paragraph 766E(3)(e) of the Act, specifies conduct where the provider and its associates have no more than 20 clients in aggregate for all custodial or depository services that they provide. This is likely to capture trustees of self-managed superannuation funds which all have four or fewer beneficiaries.
 8. The Purchase Plan Instrument should have disregarded subsection (3) of section 766E of the Act when importing the definition of 'custodial or depository service'.
 9. The purpose of the Amendment Instrument is to correct that oversight.

Consultation

10. Consultation was not undertaken in relation to the Amendment Instrument, as the single amendment does not have any impact on the policy settings of the Purchase Plan Instrument.

Operation of the instrument

11. The Amendment Instrument makes a single definitional change which does not materially affect the policy settings of the Purchase Plan Instrument.
12. Schedule 1 to the Amendment Instrument omits and replaces the definition of ‘custodial or depository service’ at section 4 of the Purchase Plan Instrument with an amended definition which disregards subsection 766E(3) of the Act.
13. The Amendment Instrument commences the day after it is registered on the Federal Register of Legislation.

Legislative authority

14. The Amendment Instrument is made under subsections 741(1) and 1020F(1) of the Act.
15. Under subsection 33(3) of the *Acts Interpretation Act 1901* where an Act confers a power to make an instrument the power is to be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to amend it.
16. The Amendment Instrument is a disallowable legislative instrument.

Statement of Compatibility with Human Rights

17. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is in the Attachment.

Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

ASIC Corporations (Amendment) Instrument 2019/933

Overview

1. *ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547* and ASIC Class Order [CO 09/425] (now repealed) respectively give effect to ASIC's current and past policy on share and interest purchase plans.
2. These policies facilitate the offer of share and interest purchase plans to existing registered holders, who are provided with the opportunity to participate in secondary capital raisings at a discount to the market price without brokerage fees. These offers are facilitated by granting disclosure exemptions.
3. In transitioning from ASIC's past policy to its current policy, revised definitions of 'custodian' and 'custodial or depository service' were included in the instrument that gives effect to the new policy.
4. However, because of an oversight, the revised definitions had the unintended effect of excluding trustees of self-managed superannuation funds from satisfying the definition of 'custodian', and as such the disclosure relief does not extend to offers made to trustees of self-managed superannuation funds.
5. This instrument corrects that oversight by making a corrective amendment to the definition of 'custodial or depository service'.

Assessment of human rights implications

6. This instrument does not engage any of the applicable rights or freedoms.

Conclusion

7. This 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*.