



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Amendment) Instrument 2019/1037

This is the Explanatory Statement for *ASIC Corporations (Amendment) Instrument 2019/1037*.

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Interest Purchase Plans) Instrument 2019/547* (the **Purchase Plan Instrument**) and ASIC Class Order [CO 09/425] (now repealed) respectively give effect to ASIC's current and past policy on share and interest purchase plans.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 instrument was updated such that:
 - (a) the conditions to relief were simplified and reordered and
 - (b) the definition of the term 'custodian' was refined to provide a more clear and concise description.
3. However, in preparing the Purchase Plan Instrument typographical errors were made with respect to:
 - (a) paragraph 8(1)(c) of the conditions to relief; and
 - (b) the definition of the term 'custodian'.
4. *ASIC Corporations (Amendment) Instrument 2019/1037* (the **Amendment Instrument**) corrects the typographical errors in the Purchase Plan Instrument by:
 - (a) substituting a reference to "subsection (5)" in place of "subsection (4)" at paragraph 8(1)(c); and
 - (b) inserting the word "of" at paragraph (c) of the definition of 'custodian'.

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.
6. The Purchase Plan Instrument maintained the conditions to relief of ASIC Class Order [CO 09/425]. However, the conditions were reordered to read more clearly and cogently. Subsection 8(1) was inserted into the Purchase Plan Instrument to delineate the conditions that need to be satisfied with regard to non-custodian versus custodian offers.
7. Subsection 8(1) of the Purchase Plan Instrument states that an issuer must not issue shares or interests under a purchase plan to a registered holder unless:
 - (a) in relation to an offer made to a registered holder that is not a custodian—subsection (2) is satisfied;
 - (b) in relation to a registered holder that is a custodian—either subsection (2) or (3) is satisfied; and
 - (c) in any case—subsection (4) is satisfied.
8. Paragraph 8(1)(c) was intended to refer to subsection 8(5) of the Purchase Plan Instrument which requires that regardless of whether the offer is made to the beneficiary as the registered holder, or the custodian of the registered holder, the total subscription value does not exceed \$30,000 per registered holder, per 12-month period.
9. 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.
10. A 'custodian' is defined as a person that provides a custodial or depository service in relation to shares of a body or interests in a registered scheme and who:
 - (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 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

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- (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.
11. Paragraph (c) of the definition of ‘custodian’ should read “...holds an Australian financial services licence covering the operation *of* (emphasis added) an investor directed portfolio service (*IDPS*) or is a responsible entity of an *IDPS-like* scheme...”.
12. The purpose of the Amendment Instrument is to correct the typographical errors in the Purchase Plan Instrument by substituting “subsection (5)” in place of “subsection (4)” in paragraph 8(1)(c), and inserting “of” into paragraph (c) of the definition of ‘custodian’.

Consultation

13. Consultation was not undertaken in relation to the Amendment Instrument, as the two amendments do not have any impact on the policy settings of the Purchase Plan Instrument.

Operation of the instrument

14. The Amendment Instrument makes two minor changes which do not materially affect the policy settings of the Purchase Plan Instrument.
15. Schedule 1 to the Amendment Instrument inserts “of” after “operation” at paragraph (c) of the definition of ‘custodian’ and omits and replaces “subsection (4)” with “subsection (5)” at paragraph 8(1)(c) of the Purchase Plan Instrument.
16. The Amendment Instrument commences the day after it is registered on the Federal Register of Legislation.

Legislative authority

17. The Amendment Instrument is made under subsections 741(1) and 1020F(1) of the Act.
18. 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.
19. The Amendment Instrument is a disallowable legislative instrument.

Statement of Compatibility with Human Rights

20. 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 2019/1037

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, each of the conditions to relief, and the definition of 'custodian' were refined and simplified in the instrument that gives effect to the new policy.
4. However, because of typographical errors, the conditions to relief and the definition of 'custodian' do not read as they were intended.
5. This instrument corrects the typographical errors by making corrective amendments to paragraph 8(1)(c) and paragraph (c) of the definition of 'custodian'.

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*.