



ASIC
Australian Securities &
Investments Commission

ASIC Corporations (Hardship Withdrawals Relief) Instrument 2020/778

I, Anthony Graham, delegate of the Australian Securities and Investments Commission, make the following legislative instrument.

Date 26 August 2020

Anthony Graham

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Part 1—Preliminary

1 Name of legislative instrument

This is the *ASIC Corporations (Hardship Withdrawals Relief) Instrument 2020/778*.

2 Commencement

This instrument commences on the day after it is registered on the Federal Register of Legislation.

Note: The register may be accessed at www.legislation.gov.au.

3 Authority

This instrument is made under subsection 601QA(1) of the *Corporations Act 2001*.

4 Definitions

In this instrument:

Act means the *Corporations Act 2001*.

excluded scheme means a registered scheme that is any of the following:

- (a) an IDPS-like scheme (within the meaning of *ASIC Class Order [CO 13/762]*);
- (b) a mortgage investment scheme (within the meaning of *ASIC Corporations (Mortgage Investment Schemes) Instrument 2017/857*);
- (c) a registered litigation funding scheme (within the meaning of *ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787*) that involves representative proceedings (within the meaning of *ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787*);
- (d) a registered time-sharing scheme (within the meaning of *ASIC Corporations (Time-sharing Schemes) Instrument 2017/272*).

frozen scheme means a registered scheme for which the responsible entity of the scheme has:

- (a) suspended withdrawals (other than any hardship withdrawals) from the scheme; and
- (b) ceased to allow the issue of new interests in the scheme.

hardship withdrawal has the same meaning as in subsection 601KEB(1) of the Act (as notionally inserted by this instrument).

Part 2—Exemption

5 Equality of treatment—hardship withdrawal payments

The responsible entity of a frozen scheme does not have to comply with paragraph 601FC(1)(d) of the Act to the extent that the requirement to treat members in the same class equally would prevent the responsible entity from allowing a member to withdraw in accordance with section 601KEB of the Act, as notionally inserted by this instrument.

Part 3—Declaration

6 Scheme constitutions and hardship withdrawals

Chapter 5C of the Act applies to the responsible entity of a registered scheme (other than an excluded scheme) as if Part 5C.3 of the Act were modified or varied as follows:

- (a) insert the following section in its relative order in Part 5C.3:

“601GAH Discretions in relation to hardship withdrawals

- (1) Despite subsection 601GA(4), the constitution does not have to set out adequate procedures for making and dealing with withdrawal requests to the extent that, in relation to a hardship withdrawal request under section 601KEB for which the requirements set out in the constitution for allowing the hardship withdrawal request are otherwise satisfied, the constitution gives the responsible entity a discretion to do one or both of the following:
- (a) decide whether to allow or refuse the hardship withdrawal request;
- (b) decide whether to allow the hardship withdrawal request in whole or in part.

Exercise of discretion must be reasonable

- (2) The responsible entity must act reasonably in exercising a discretion covered by subsection (1).

Note: The responsible entity is also subject to its general duties under section 601FC including the duty to act in the best interests of the members of the scheme.”;

- (b) after subsection 601GC(1), insert:

“(1A)The constitution of a registered scheme may also be modified, or repealed and replaced with a new constitution by the responsible entity in accordance with section 601GCC.”;

- (c) insert the following section in its relative order in Part 5C.3:

“601GCC Changing the scheme constitution to enable hardship withdrawals

- (1) Subject to subsection (2), the responsible entity of a registered scheme may modify the constitution of the scheme to the extent that the responsible entity reasonably considers that the modification is necessary for, or incidental to, the responsible entity being able to allow a member to withdraw under a hardship withdrawal in accordance with section 601KEB.
- (2) The responsible entity may modify the constitution under subsection (1) where:

- (a) the responsible entity has given members of the scheme written notice of the modification by sending each member by post or by email a copy of a notice that complies with subsection (3); and

Note: A single notice could be used for the purposes of paragraph (a) and paragraph 601KEB(2)(b).

- (b) the responsible entity has published a notice that complies with subsection (3) on its website:
- (i) no later than the date it gives written notice under paragraph (a); and
- (ii) in a way that it is likely to come to the attention of a person looking for information about the scheme on the website; and

- (c) as at a date (*relevant date*) that is:
- (i) specified in the notices provided under paragraphs (a) and (b); and
- (ii) at least 14 days after the responsible entity gives notice to members under paragraph (a);

the responsible entity has not received requests from members with at least 5% of the votes that may be cast on the resolution referred to in paragraph (3)(b) to call and arrange to hold a meeting as specified in the notice.

- (3) A notice complies with this subsection if it:

- (a) sets out a summary of the reason for, and the effect of, the proposed modification of the constitution; and
 - (b) states that the responsible entity will modify the constitution as proposed unless it receives requests to call and arrange to hold a meeting of the scheme's members to consider and vote on a special resolution to modify the constitution as proposed:
 - (i) from members with at least 5% of the votes that may be cast on the resolution; and
 - (ii) by the relevant date; and
 - (c) states that a request referred to in paragraph (b) must be made in writing and may be sent to a specified email address of the responsible entity; and
 - (d) is worded and presented in a clear, concise and effective manner.
- (4) Unless the scheme's constitution provides otherwise, a notice sent by post is taken to be given 3 days after it is posted. A notice sent by email is taken to be given on the business day after it is sent.
- (5) The responsible entity may repeal and replace the constitution instead of modifying it where:
- (a) the replacement constitution has the effect that the constitution would have had if it had instead been modified in accordance with subsection (1); and
 - (b) subsection (2) had been satisfied as if references in subsections (2) and (3) to modifying the constitution included references to repealing and replacing it.
- (6) The responsible entity may modify or repeal and replace the constitution under subsections (1) and (5) even if the constitution includes provisions to the effect that it may only be modified or repealed and replaced in accordance with one or more of paragraphs 601GC(1)(a), (b) and (c) or provisions to the effect of those paragraphs.

Note 1: Paragraph 601GC(1)(c) is notionally inserted by *ASIC Corporations (Attribution Managed Investment Trusts) Instrument 2016/489*.

Note 2: The responsible entity must act in the best interests of the members in exercising the power in subsections (1) and (4) to modify, or repeal and replace the constitution: see paragraph 601FC(1)(c)."

7 Hardship withdrawals

(1) Chapter 5C of the Act applies to a responsible entity of a registered scheme (other than an excluded scheme) as if Part 5C.6 of the Act were modified or varied as follows:

(a) after subsection 601KA(3) insert:

“(3AA) Subsection (3) and sections 601KB to 601KE do not apply to a hardship withdrawal in accordance with the scheme’s constitution and section 601KEB.”;

(b) after subsection 601KE insert:

“601KEA Hardship withdrawals—definitions

(1) In this section and in sections 601KA, 601KEB and 601KEC:

cash means scheme property that consists of money in an account or on deposit with a bank.

frozen scheme means a registered scheme for which the responsible entity of the scheme has:

- (a) suspended withdrawals (other than any hardship withdrawals) from the scheme; and
- (b) ceased to allow the issue of new interests in the scheme.

hardship category has the meaning given by subsection (2).

hardship criteria has the meaning given by subsection (2).

hardship withdrawal has the meaning given by subsection 601KEB(1).

hardship withdrawal request means a request for a hardship withdrawal.

operator means a person who is any of the following:

- (a) a member of the scheme in its capacity as responsible entity or custodian of another registered scheme;
- (b) a life company within the meaning of the *Life Insurance Act 1995*;
- (c) a trustee of a trust;
- (d) a trustee or custodian of a superannuation entity within the meaning of the *Superannuation Industry (Supervision) Act 1993*;

- (e) a trustee of a self-managed superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act 1993*;
- (f) a provider or acquirer in relation to a custodial arrangement as defined in section 1012IA.

quarter means a period of three months ending on 31 March, 30 June, 30 September or 31 December.

- (2) For the purposes of this section and sections 601KEB to 601KEC, the person in relation to whom a hardship withdrawal request is made is:
 - (a) unless paragraph (b) or (c) applies—the member making the hardship withdrawal request;
 - (b) where the member is deceased—a beneficiary of the estate of the deceased member; or
 - (c) where the member is an operator—a person (*instructor*) who has asked the operator to exercise a right to withdraw.
- (3) For the purposes of this section and sections 601KEB to 601KEC, a person in relation to whom a hardship withdrawal request has been made falls within a **hardship category** specified in column 2 of the following table if the **hardship criteria** specified in column 3 are satisfied in relation to the person.

Item	Column 2 <i>hardship category</i>	Column 3 <i>hardship criteria</i>
1	Urgent Financial Hardship	The amount requested under the hardship withdrawal request is needed to enable the person to meet reasonable and immediate living expenses for the person or any dependant.
2	Unemployment	The person has not been in gainful employment for a period of at least three months and has no other means of financial support (except government assistance, such as unemployment benefits).

Item	Column 2 <i>hardship category</i>	Column 3 <i>hardship criteria</i>
3	Compassionate Grounds	<p>The amount requested under the hardship withdrawal request is needed for one or more of the following:</p> <ul style="list-style-type: none"> (a) to help the person or a dependant pay for medical costs (including transport costs) required to treat a life-threatening illness or injury, to alleviate acute or chronic pain, or to alleviate an acute or chronic mental disturbance where a registered medical practitioner has provided a certified statement confirming the medical condition is of this nature; (b) to fund specific modifications to a principal place of residence or vehicle that are necessary to accommodate special needs of the person or a dependant arising from a severe disability; (c) if the person is a beneficiary of the estate of a deceased member—to assist with funeral and other expenses related to the death of the deceased member; (d) to assist with funeral and other expenses related to the death of a dependant of the person; (e) to enable the person to provide care for another person who is dying from a terminal illness, including home care; (f) to prevent a mortgagee or lender from selling the person’s principal place of residence; (g) to meet a binding financial obligation entered into by the person before the responsible entity suspended withdrawals (other than hardship withdrawals, if any); <p>where the person and, if applicable, their dependant (and in the case of paragraphs (c) and (d), the estate of the deceased member or dependant as the case may be) do not otherwise have the financial capacity to meet the expense.</p>

Item	Column 2 <i>hardship category</i>	Column 3 <i>hardship criteria</i>
4	Permanent Incapacity	Where the person has ceased gainful employment by reason of mental or physical ill-health and the person is unlikely ever again to engage in gainful employment of the type for which the person is reasonably qualified by education, training or experience.

601KEB Hardship withdrawals

Power to allow hardship withdrawals

- (1) Subject to this section, the responsible entity of a frozen scheme may allow a member to withdraw (***hardship withdrawal***) from the scheme in accordance with a provision of the scheme's constitution that provides that the responsible entity may allow a member to withdraw if:
 - (a) the member has made a hardship withdrawal request; and
 - (b) the responsible entity is satisfied that:
 - (i) the member falls within a hardship category; or
 - (ii) where the member is deceased—a beneficiary of the estate of the deceased member falls within a hardship category; or
 - (iii) where the member is an operator—a person (***instructor***) who has asked the operator to exercise a right to withdraw falls within a hardship category.

Responsible entity must notify ASIC and members before allowing hardship withdrawals

- (2) The responsible entity must not allow a hardship withdrawal unless:
 - (a) the responsible entity has, since the scheme most recently became a frozen scheme, given written notice to ASIC that the responsible entity proposes to allow hardship withdrawals and that includes a statement signed by a director or secretary of the responsible entity that the board of the responsible entity has resolved that that:

- (i) the scheme is a frozen scheme; and
- (ii) the board has considered expected hardship withdrawals and believes on reasonable grounds that the scheme property will include adequate cash over the following 6 months to meet hardship withdrawals from members and continue the day-to-day operations of the scheme; and

Note: If the scheme ceases to be a frozen scheme after the responsible entity gives a notice under paragraph (a) and then becomes a frozen scheme again, the responsible entity will need to give a new notice under paragraph (a) if it wishes to allow hardship withdrawals.

- (b) before allowing the first hardship withdrawal for each period during which the scheme has become a frozen scheme, the responsible entity has given each member of the scheme written notice by post or by email explaining the effect of allowing hardship withdrawals; and

Note: A single notice could be used for the purposes of paragraph 601GCC(2)(a) and paragraph 601KEB(2)(b).

- (c) the responsible entity has published a statement on its website:
 - (i) explaining the effect of allowing hardship withdrawals; and
 - (ii) in a way that it is likely to come to the attention of a person looking for information about the scheme on the website.

Responsible entity to notify ASIC if scheme ceases to be a frozen scheme

- (3) If the responsible entity has given notice to ASIC under paragraph (2)(a), the responsible entity must give written notice to ASIC that the scheme has ceased to be a frozen scheme as soon as practicable after the scheme ceases to be frozen.

Other restrictions on hardship withdrawals

- (4) The responsible entity must not allow a hardship withdrawal in relation to a member, beneficiary or instructor (as applicable) unless the responsible entity is satisfied that:
 - (a) there are reasonable grounds to consider that following the withdrawal the scheme property would include adequate cash over the following 6 months to meet likely future hardship withdrawals and for the day-to-day operation of the scheme; and

- (b) allowing the hardship withdrawal:
 - (i) would not result in more than 4 hardship withdrawals for the member, beneficiary or instructor in any calendar year; and
 - (ii) would not result in the total amount of hardship withdrawals for the member, beneficiary or instructor in any calendar year exceeding \$100,000; and
- (c) in the case of a withdrawal in relation to a beneficiary—any amount paid on withdrawal to an executor or administrator of the estate will be paid to the beneficiary after deduction of any fees and charges payable to the executor or administrator; and
- (d) in the case of a withdrawal in relation to an instructor—any amount paid on withdrawal to an operator will be paid to the instructor after deduction of any fees and charges payable to the operator.

Note: In making any payment to an instructor, an operator must comply with any obligations under the terms of the relevant trust or arrangement under which it acts and other applicable laws. For example, the responsible entity of a registered scheme must comply with Part 5C.6 and the trustee of a superannuation entity or self-managed superannuation fund must comply with requirements under the *Superannuation Industry (Supervision) Act 1993*.

601KEC Hardship withdrawals—record keeping and reporting

- (1) Subsections (2) and (3) apply to a responsible entity if the scheme’s constitution includes a provision permitting the responsible entity to allow hardship withdrawals.

Record keeping for hardship withdrawal requests

- (2) The responsible entity must ensure that the records which it keeps under section 988A document how and why a decision to allow or refuse a hardship withdrawal request was made, including in relation to any discretion:
 - (a) to allow or refuse the hardship withdrawal request; or
 - (b) to allow the hardship withdrawal request in whole or in part.

Information to be provided to ASIC

- (3) The responsible entity must for each quarter from the date it gives notice to ASIC under paragraph 601KEB(2)(a) and for

so long as the scheme is a frozen scheme for some or all of a quarter, provide ASIC with an electronic spreadsheet that includes the following information for the scheme within 14 days after the end of the quarter:

Note: ASIC Information Sheet 249 *Frozen funds – Information for responsible entities (INFO 249)* contains a link to a template spreadsheet provided for this purpose. INFO 249 is available from ASIC's website.

- (a) the total value of the scheme property as at the end of the quarter;
- (b) the number of members of the scheme as at the end of the quarter;
- (c) the number and total value of hardship withdrawal requests received for the scheme in that quarter;
- (d) for each hardship category:
 - (i) the number of hardship withdrawal requests accepted in full in that quarter and the total value of those hardship withdrawal requests; and
 - (ii) the number of hardship withdrawal requests accepted in part in that quarter and:
 - (A) the total value in respect of which those hardship withdrawal requests were accepted; and
 - (B) the total value in respect of which those hardship withdrawal requests were rejected; and
 - (iii) the number of hardship withdrawal requests rejected in full in that quarter and the total value of those hardship withdrawal requests;

Note: Where a responsible entity accepts or rejects a hardship withdrawals request under two or more hardship categories, the responsible entity should identify the primary hardship category for reporting purposes.

- (e) across all hardship categories:
 - (i) the total number of hardship withdrawal requests accepted in full for that quarter and the total value of those hardship withdrawal requests; and
 - (ii) the total number of hardship withdrawal requests accepted in part in that quarter and:

- (A) the total value in respect of which those hardship withdrawal requests were accepted; and
- (B) the total value in respect of which those hardship withdrawal requests were rejected; and
- (iii) the total number of hardship withdrawal requests rejected in full in that quarter and the total value of those hardship withdrawal requests;
- (f) the number of complaints in relation to hardship withdrawals that were received in that quarter.

Note: Complaints in relation to hardship withdrawals include complaints about changes to the scheme's constitution to facilitate hardship withdrawals and the time taken to pay accepted hardship claims."

Part 4—Cessation

8 Cessation

The exemption in section 5 and the declarations in sections 6 and 7 cease to apply 5 years after the date this instrument commences.