



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Short Term Trading Market) Class Exemption 2021/218

This is the Explanatory Statement for *ASIC Corporations (Short Term Trading Market) Class Exemption 2021/218* (the **Instrument**).

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

Summary

1. The Instrument provides an exemption to the Australian Energy Market Operator (**AEMO**) and trading participants on their Short Term Trading Market for gas (**STTM**) from the requirement to hold an Australian financial services (**AFS**) licence covering the provision of specified financial services related to the operation of the STTM.

Purpose of the instrument

2. On 3 June 2010, AEMO and trading participants on their STTM were granted an exemption from the requirement to hold an AFS licence in relation to the provision of specified financial services related to the operation of the STTM, under ASIC Class Order [CO 10/407] (the **Class Order**).
3. The purpose of the Instrument is to continue to preserve the effect of the Class Order for 5 years until 1 April 2026. This 5-year period will allow ASIC to consider options as to whether or not to remake the Class Order at the end of the 5-year period, 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.
4. ASIC considers that the 5-year period is appropriate as there would be appreciable business uncertainty about the licensing requirements for AEMO and their trading participants that may give rise to significant commercial risks and costs about the effective operation of the STTM if the sunset period was shorter.
5. The exemption from the requirement to hold an AFS licence is needed as an ‘ex ante market’ forms part of the STTM process. The ex ante market is where gas is traded a day ahead of the day the gas is actually supplied, that is, a day ahead of a ‘gas day’. The ex ante market sets the price for all gas supplied on a gas

day. AEMO must prepare a market schedule for the gas day based on the bids and offers provided by Trading Participants.

6. This schedule will specify the ex ante market price and the quantity of gas that Trading Participants are expected to deliver or withdraw. This scheduling creates what we have termed ‘ex ante rights’. That is, the rights and obligations created when AEMO schedules trading participants in the ex-ante market of the STTM. These rights may satisfy the definition of a derivative under s 761D of the Corporations Act 2001 (the **Act**) upon consideration of the following features:
 - (i) Trading Participants who are scheduled in the ex ante market are given the right but not the obligation to deliver or withdraw a specified quantity of gas on the following ‘gas day’;
 - (ii) Trading Participants undertake these obligations the day following their scheduling in the ex ante market; and
 - (iii) the amount of consideration is ultimately determined by reference to the volume of gas actually delivered (or withdrawn) on the gas day, multiplied by the ex ante market price, and subject to variations.
7. A derivative is specified as a financial product under paragraph 764A(1)(c) of the Act. As such without relief AEMO and Trading Participants may be required to hold an AFS licence to deal in ex ante rights.

Consultation

8. ASIC conducted bilateral consultation with the AEMO and the Australian Energy Regulator (**AER**) as stakeholders that would be affected by ASIC’s decision to remake or revoke the Class Order.
9. The consultation sought feedback from the affected stakeholders in relation to:
 - (a) whether the Class Order has been operating as intended (including any unforeseen or unintended consequence of the Class Order’s operation);
 - (b) whether the relief granted by the Class Order is still required after 1 April 2021 (including the appropriateness of the form in which the relief is granted); and
 - (c) the impact on the AEMO, AER and other stakeholders in meeting their regulatory obligations or conducting their business if ASIC did not remake the Class Order.
10. ASIC received feedback from the AEMO that:
 - (a) the Class Order has been operating as intended and there has not been any unforeseen or unintended consequences;
 - (b) the relief granted by the Class Order is still required after 1 April 2021 in the current form; and

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- (c) if the Class Order was not remade then the AEMO and their participants would need to consider their licencing requirements and the AEMO may not be prepared to operate the STTM without a licence.

Regulation Impact Statement

- 11. The Office of Best Practice Regulation (**OBPR**) has determined that a regulation impact statement need not be prepared in relation to the Instrument, on the basis that the Class Order has been operating effectively and efficiently and that the Class Order has been remade without significant changes.
- 12. The OBPR's determination was reached on the basis of a preliminary assessment conducted by ASIC and a self-certification letter provided by ASIC stating that the Class Order is operating effectively and efficiently and that the Class Order would be remade as the Instrument without significant changes.

Operation of the instrument

Commencement

- 13. Section 2 of the Instrument provides that the Instrument commences on the later of:
 - (a) the day after it is registered on the Federal Register of Legislation; and
 - (b) 1 April 2021.

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

Exemption from the requirement for AEMO to hold an AFS licence

- 14. Section 5 of the Instrument provides that AEMO does not have to comply with subsection 911A(1) of the Act for the provision of the following financial services to a Trading Participant that is a wholesale client:
 - (a) providing general advice in relation to ex ante rights;
 - (b) dealing in ex ante rights by issuing them; and
 - (c) making a market in ex ante rights.

Exemption from the requirement for Trading Participants of AEMO to hold an AFS licence

- 15. Section 6 of the Instrument provides a Trading Participant does not have to comply with subsection 911A(1) of the Act for dealing in ex ante rights on its own behalf by issuing the ex ante rights where the ex ante rights are also issued by AEMO to the Trading Participant as a wholesale client of AEMO.

Duration of Exemption

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16. Section 7 of the Instrument provides that the Instrument is repealed on 1 April 2026.

Incorporation by reference

17. The Instrument incorporates by reference the National Gas Rules made by the Australian Energy Market Commission (**AEMC**) under section 74 of the National Gas (South Australia) Law set out in the Schedule to the National Gas (South Australia) Act 2008 of South Australia as in force at the date of commencement of the Instrument.
18. The National Gas Rules are available at the website of the AEMC (<https://www.aemc.gov.au/>).
19. The Instrument complies with section 14 of the *Legislation Act 2003*.

Legislative instrument and primary legislation

20. The subject matter and policy implemented by this Instrument is more appropriate for a legislative instrument rather than primary legislation because:
- (a) The matters contained in the Instrument are a specific exemption designed to ensure the application of primary legislation remained flexible to adapt to market developments, in particular the operation of the ex ante market of the STTM, and applies in a way consistent with the intended policy of the Act and the enabling provisions in the primary legislation.
 - (b) The matters contained in the Instrument only affect a relatively small subset of entities. The Instrument provides administrative relief in circumstances where strict compliance with the primary legislation produces a significant regulatory burden. On this basis, it is appropriate for ASIC to provide relief through its exemption powers, as the matters contained in this particular instrument are of a highly specific nature which are more appropriate for legislative instrument rather than primary legislation.
 - (c) The matters contained in the Instrument are appropriately used to deal with specific, technical and machinery issues or where necessary to provide flexibility to keep pace with industry developments. As a consequence, if the matters in the Instrument were to be inserted into the primary legislation, they would insert, into an already complex statutory framework, a set of specific provisions that would apply only to a relatively small group of entities. This would result in additional cost and unnecessary complexity for other users of the primary legislation.

Legislative authority

21. The Australian Securities and Investments Commission (ASIC) makes the *ASIC Corporations (Short Term Trading Market) Class Exemption 2021/218* (the ***Exemption Instrument***) under paragraph 926A(2)(a) of the Act. Under

paragraph 926A(2)(a) of the Act, ASIC may exempt a person or class of persons from Part 7.6 of the Act (other than Divisions 4 and 8).

22. The Instrument is a disallowable legislative instrument.

Statement of Compatibility with Human Rights

23. 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 (Short Term Trading Market) Class Exemption 2021/218

Overview

1. The Instrument provides exemptive relief to the Australian Energy Market Operator (**AEMO**) and trading participants on their Short Term Trading Market for gas (**STTM**) from the requirement to hold an Australian financial services licence covering the provision of specified financial services related to the operation of the ex ante market of the STTM.

Assessment of human rights implications

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

Conclusion

3. 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*.