



**ASIC**  
Australian Securities &  
Investments Commission

## Explanatory Statement

### ASIC CORPORATIONS (AMENDMENT) INSTRUMENT 2021/550

This is the Explanatory Statement for *ASIC Corporations (Amendment) Instrument 2021/550*.

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

#### Summary

1. Section 5 of the *ASIC Corporations (Superannuation and Schemes: Underlying Investments) Instrument 2016/378 (Instrument 2016/378)* provides an exemption to trustees of public offer entities (**PO trustees**) from the requirement in subsection 911A(1) of the *Corporations Act 2001 (Act)* to hold an Australian financial services licence (**AFSL**) covering the provision of particular financial services (**section 5 exemption**).
2. Changes to the Act and the *Corporations Regulations 2001 (Regulations)* expand AFS licensing obligations in Chapter 7 of the Act for superannuation trustees and extend them to non-public offer trustees (**NPO trustees**) with effect from 1 July 2021.
3. The instrument amends Instrument 2016/378 to extend the AFSL relief in the section 5 exemption to trustees of registrable superannuation entities.

#### Purpose of the instrument

4. The purpose of this instrument is to ensure that from 1 July 2021 NPO trustees are regulated consistently with PO trustees under the Act.
5. On 1 January 2021 schedule 9 of the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020 (Hayne Act)*, came into effect. The Hayne Act introduces the financial service of providing a superannuation trustee service (**PSTS**) from 1 July 2021. The obligation to have a PSTS authorisation will apply to both PO trustees and NPO trustees from that date.
6. On 11 December 2020, the *Financial Sector Reform (Hayne Royal Commission Response) (Regulation of Superannuation) Regulations 2020 (Hayne Regulations)* were registered. The Hayne Regulations repeal Regulation 7.6.01(1)(a) of the Regulations (**Regulation 7.6.01(1)(a)**), with effect from 1 July 2021. Regulation 7.6.01(1)(a) currently exempts NPO trustees from the

requirement to hold an AFSL to deal in a financial product in the capacity of trustee of a superannuation fund.

7. Section 5 of Instrument 2016/378 exempts PO trustees from the requirement to have an AFSL authorising conduct related to investment activity on behalf of the beneficiaries of the trust (fund members), such as investing in shares, derivatives, and financial products. At the time it was made, PO trustees were required to be licensed under Chapter 7 of the Act to deal in superannuation interests, but NPO trustees were not.
8. Extending the relief in the section 5 exemption to NPO trustees will ensure that PO trustees and NPO trustees have the same licensing obligations under Chapter 7 of the Act. Consistent regulation of PO trustees and NPO trustees was a legislative intention of the Hayne Regulations. The explanatory statement to the Hayne Regulations states: *“this is intended to ensure the regulation of superannuation entities by ASIC on a consistent basis and reflects that members of non-public offer funds should have the same degree of protection as members of other funds.”*
9. The section 5 exemption will be made for a period of 18 months (ending 31 December 2022) to allow the continued justification for the relief to be considered having regard to the new financial service of PSTS. After 31 December 2022, the exemption may be removed or continued subject to the outcome of this consideration, which will include consultation with industry.

### **Consultation**

10. ASIC engaged with NPO trustees in relation to extending the section 5 exemption as part of and following consultations by the Department of Treasury, leading to the Hayne Act and Hayne Regulations. ASIC did not undertake wider consultation with respect to the instrument as it is machinery in nature and of a limited duration.

### **Operation of the instrument**

11. The instrument amends the section 5 exemption by replacing the reference to a “public offer entity” with “registrable superannuation entity” and to “public offer entities” with “registrable superannuation entities”, with the effect that the section 5 exemption extends to both PO trustees and NPO trustees.
12. The instrument also includes an expiry date of 31 December 2022 for the section 5 exemption with the effect that the section 5 exemption will fall away at that date unless extended further by ASIC.
13. The instrument commences on the later of the day after it is registered on the Federal Register of Legislation, and 1 July 2021.

### Legislative instrument and primary legislation

14. The subject matter and policy implemented by this instrument is more appropriate for a legislative instrument rather than primary legislation because:
  - a. This matter has had to be dealt with as a matter of urgency as part of the implementation of the Hayne Act and Hayne Regulations.
  - b. The exemption for NPO trustees has been in place since the Chapter 7 licensing obligations applied to superannuation trustees. Given the process of transitioning to the new licensing regime with a PSTS authorisation and extending the regime to NPO trustees, it would have been too complex to also deal with a review and consultation of the section 5 exemption. Consequently, it was anticipated at the time that ASIC would extend the section 5 exemption to allow the ongoing justification of the exemption to be considered over the next 18 months. To have attempted to provide this within the primary act, would insert, into an already complex statutory framework, additional complex provisions which may need further amendment within a short period of time.

### **Legislative authority**

15. Subsections 926A(2) and 951B(1) of the Act provide the legislative authority for Instrument 2016/378.
16. Under subsection 33(3) of the *Acts Interpretation Act 1901* (as in force as at 1 January 2005 and as applicable to the relevant powers because of section 5C of the Act), where an Act confers a power to make any 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 any such instrument.
17. The instrument is a disallowable legislative instrument.

### **Statement of Compatibility with Human Rights**

18. 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 2021/550.***

#### Overview

1. The legislative instrument amends the *ASIC Corporations (Superannuation and Schemes: Underlying Investments) Instrument 2016/378* to ensure consistency of licensing obligations for PO trustees and NPO trustees. While currently only PO trustees are required to be licensed under Chapter 7 of the Act, the Hayne Act and Hayne Regulations amend the Act and Regulations with the effect that from 1 July 2021 NPO trustees will also need to be licensed. This was done to ensure consistent licensing obligations between PO trustees and NPO trustees. Instrument 2016/378 was made when only PO trustees were required to be licensed. If the section 5 exemption is not extended to NPO trustees, there will not be consistency of licensing between PO trustees and NPO trustees.

#### 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*.