



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Describing Debentures—Secured Notes) Instrument 2022/61

ASIC Corporations (Repeal) Instrument 2022/62

This is the Explanatory Statement for ASIC Corporations (Describing Debentures—Secured Notes) Instrument 2022/61 and ASIC Corporations (Repeal) Instrument 2022/62

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

Summary

1. *ASIC Corporations (Describing Debentures—Secured Notes) Instrument 2022/61* (the **Instrument**) provides conditional relief to introduce a “secured notes” category for the purposes of section 283BH of the Corporations Act 2001 (*Act*).
2. Section 283BH sets out rules on how debentures may be described in a document relating to an offer (e.g. a prospectus or advertisement). There are three permitted categories for describing debentures – ‘mortgage debenture’, ‘debenture’ and ‘unsecured note’ (sometimes called a ‘unsecured deposit note’).
3. The category under which a debenture will fall depends on the nature of any security, the type of property offered as collateral under the security and whether the property that constitutes the security is sufficient to meet the obligations under the debenture.
4. Only tangible property, that is property that has an actual physical existence such as goods and lands, is considered for this purpose. This does not include a chose in action such as a receivable.
5. Without relief, the Act would require debentures that are secured by intangible property, such as loans receivable, to be referred to as ‘unsecured notes’.
6. *ASIC Corporations (Repeal) Instrument 2022/62* (the **Repeal Instrument**) repeals Class Order [CO 12/1482] (the predecessor to the Legislative Instrument) which was due to expire on 1 April 2022.

Purpose of the instruments

7. The purpose of the Instrument is to introduce an additional “secured notes” category for the purposes of section 283BH of the ACT where security has been provided over intangible property, subject to various conditions.
8. The Instrument provides issuers who offer debentures with sufficient first ranking security that do not satisfy the higher ‘debenture’ or ‘mortgage debenture’ tests with an alternative to ‘unsecured notes’ for the purposes of section 283BH provided they meet the terms of the Instrument. Where these terms are met, a debenture can be called a ‘secured note’.
9. The key objective of the Instrument is to strike an appropriate balance between assisting issuers to avoid a label that their product is unsecured where there is sufficient security in place, and ensuring that investors are aware of the risk of loss and readily understand the underlying security.
10. The purpose of the Repeal Instrument is to repeal [CO 12/1482].

Consultation

11. In July 2021, ASIC sought feedback on our proposal to remake [CO 12/1482], without significant changes in Consultation Paper 344: *Remaking ASIC class order on when debentures can be called secured notes: [CO 12/1482] (CP 344)*.
12. ASIC received one submission in response to CP 344, from the Australian Financial Markets Association. They were supportive of the proposal, agreeing that the class order “...*is operating effectively and efficiently, as a necessary and valued part of regulatory arrangements...*”.

Operation of the Instrument

13. The Instrument declares that Chapter 2L of the Act applies to all persons as if section 283BH were modified or varied to introduce an additional way of referring to a debenture into section 283BH. This is done by inserting the new category of “secured notes” into the table in subsection 283BH(1).
14. The Instrument also adds subsection 283BH(4) into the Act, which sets out the circumstances in which the “secured notes” description can be used (e.g. only where the borrowing has been secured by a first ranking security interest in favour of the trustee which is sufficient to repay the borrowing). The Instrument further adds subsections 283BH(5) and 283BH(6) which restrain how the issuer may publicly refer to their secured notes, including by requiring the issuer to:
 - a) ensure that advertisements for debentures which require an offer, make clear that the secured note is not a bank deposit and that there is a risk that investors could lose some or all of their money;

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- b) provide specific information (e.g. identifying the property constituting the security for the security interest) when referring to secured notes in disclosure documents and quarterly reports; and
 - c) include copies of their most recent quarterly report (prepared in accordance with subsection 283BF), offer document and continuous disclosure notices on their website, where the website refers to the secured notes.

Why the relief is in delegated legislation rather than primary legislation

- 15. ASIC considers that the modifications made by the Instrument are more appropriate in a legislative instrument rather than primary legislation at this time because:
 - a) the modifications made by the Instrument are highly specific amendments designed to ensure the application of primary legislation is consistent with the intended policy and the enabling provisions in the primary legislation;
 - b) the relief only affects a relatively small number of issuers, and as such, the specialised nature of the relief does not justify undertaking law reform prior to the sunset of [CO 12/1482]; and
 - c) this Instrument makes the modifications on an interim basis ahead of the Government making the changes on a more permanent basis to ensure that relevant issuers may continue to refer to their debentures as ‘secured notes’ prior to the intended legislative amendments.

The appropriate duration of the Instrument

- 16. ASIC considers that three years is the appropriate duration for the Instrument.
- 17. ASIC understands that the Government will consider making future amendments to the Act before the instrument sunsets in 2025. A three-year period for the instrument gives Treasury and ASIC time to undertake a thorough review of the instrument and, if required, progress amendments to the primary law or regulations. This type of review is likely to be complicated and may need to commence a year or more before the instrument sunsets.

Legislative authority

- 18. ASIC makes the Instrument under paragraph 283GA(1)(b) of the the Act.
- 19. The Instrument commences on the day after it is registered on the Federal Register of Legislation and continues in force for three years until 1 April 2025.
- 20. The Repeal Instrument is made under paragraph 283GA(1)(b) of the Act.
- 21. 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, grant or issue any

instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

22. Each of the Instrument and the Repeal Instrument are disallowable under section 42 of the *Legislation Act 2003*.

Statement of Compatibility with Human Rights

15. 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 (Describing Debentures—Secured Notes) Instrument 2022/61

ASIC Corporations (Repeal) Instrument 2022/62

Overview

1. *ASIC Corporations (Describing Debentures—Secured Notes) Instrument 2022/61* (the **Instrument**) provides relief to allow debenture issuers to describe debentures that are secured over intangible property as “secured notes”, subject to various conditions.
2. The Instrument declares that Chapter 2L of the *Corporations Act 2001* (**Act**) applies to all persons as if section 283BH were modified or varied to include an additional way of referring to a debenture in section 283BH, namely as a “secured note”. This is done by inserting an additional category of “secured notes” into the table in subsection 283BH(1).
3. Absent relief provided by the Instrument, issuers of debentures secured by intangible property (e.g. loans receivable) would be required to refer to their debentures as ‘unsecured notes’.
4. The Instrument remakes ASIC Class Order [CO 12/1482] as a new legislative instrument without any material change. *ASIC Corporations (Repeal) Instrument 2022/62* (the **Repeal Instrument**) repeals the superseded [CO 12/1482].

Assessment of human rights implications

3. The Instrument and the Repeal Instrument do not engage any of the applicable rights or freedoms.

Conclusion

4. The Instrument and the Repeal Instrument are 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*.