



**ASIC**  
Australian Securities &  
Investments Commission

# Explanatory Statement

## *Corporations (CS Facility Exemption) Instrument 2023/18*

This is the Explanatory Statement for *Corporations (CS Facility Exemption) Instrument 2023/18* (the **Instrument**).

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

### Summary

1. The Instrument provides conditional class exemptive relief from the *Corporations Act 2001* (the **Act**) with respect to the requirement to hold an Australian CS facility licence under Part 7.3 of the Act, for pilot participants (**Pilot Participants**) operating a use case platform in the central bank digital currency pilot project (**CBDC Pilot**) administered by the Reserve Bank of Australia (**RBA**) and the Digital Finance Cooperative Research Centre (**DFCRC**).

### Purpose of the instrument

2. The Act provides that a person must only operate a clearing and settlement facility in this jurisdiction if the person has an Australian CS facility licence that authorises the person to operate the facility in this jurisdiction or the facility is exempt from the operation of Part 7.3 of the Act.
3. The purpose of the Instrument is to exempt use case platforms in the CBDC Pilot involving the operation of a clearing and settlement facility from the requirement to hold an Australian CS facility licence by exempting them from the operation of Part 7.3 of the Act, subject to the conditions set out in the Instrument.
4. To rely on the relief, a Pilot Participant is required to provide ASIC with a written notice (**Opt-In Notice**) that meets the requirements set out in the Instrument. The Opt-In Notice is intended to provide certainty to ASIC and the Pilot Participant as to when a Pilot Participant is relying on the exemption in section 5 of the Instrument, and when the Pilot Participant is required to comply with the conditions in section 7 of the Instrument.

### Consultation

5. In making the Instrument, ASIC has consulted bilaterally with applicants to the

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CBDC Pilot whose use cases involved the operation of a clearing and settlement facility. ASIC has also received an application for relief from an applicant to the CBDC Pilot.

6. Further, ASIC has consulted bilaterally with the Payments Efficiency team at the RBA in its capacity as one of the entities jointly conducting the CBDC Pilot and with the Financial Market Infrastructure team at the RBA in its capacity as the co-regulator of clearing and settlement facilities.
7. The Instrument responds to concerns raised by the applicant in its application for relief. These concerns include that:
  - (a) There is a significant burden on pilot participants in terms of the costs associated with applying for an Australian CS facility licence as well as the costs of ongoing compliance with the obligations of CS facility licensees under Part 7.3 of the Act;
  - (b) There is limited regulatory benefit in requiring pilot participants to hold an Australian CS facility licence due to the limited time the CBDC Pilot will operate for and the controlled segregated environment of the CBDC Pilot; and
  - (c) The costs of requiring pilot participants to acquire an Australian CS facility licence significantly outweighs the benefits of the regulatory outcomes achieved as the potential delay in acquiring the Australian CS facility licence would impact on timelines for the CBDC Pilot.
8. ASIC has consulted with the Office of Impact Analysis (**OIA**) in relation to whether an Impact Analysis (**IA**) is required. OIA advised that the preparation of an IA was not required because it assessed the proposal as unlikely to have a more than minor regulatory impact.

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## **Operation of the instrument**

### **Part 1 – Preliminary**

#### ***Commencement***

9. Section 2 of the Instrument provides that the Instrument commences on the day after it is registered on the Federal Register of Legislation.

#### ***Authority***

10. Section 3 of the Instrument provides that the Instrument is made under subsection 820C(1) of the Act.

### **Part 2 – Exemption**

#### ***Australian CS facility licence exemption – use case platforms***

11. Section 5 of the Instrument provides that the use case platform of a Pilot Participant is exempt from the provisions of Part 7.3 of the Act in relation to the operation of the use case platform by the Pilot Participant in the CBDC Pilot.

#### ***Opt-In Notice***

12. Section 6 of the Instrument provides that the exemption in section 5 only applies to a use case platform of a Pilot Participant if, at least 5 business days before operating the use case platform in the CBDC Pilot, the Pilot Participant has given ASIC a written notice which includes the following information:
  - (a) the name and contact details of the Pilot Participant;
  - (b) a description of the use case platform proposed to be operated by the Pilot Participant in the CBDC Pilot, including a description of the following:
    - (i) the structure of the use case platform;
    - (ii) the nature of the services to be provided by or through the use case platform;
    - (iii) the proposed size of the use case platform;
    - (iv) the type of financial products to which the use case platform will relate;
    - (v) the type of persons who will be participants in relation to the use case platform and whether those participants:
      - (A) in using the use case platform will be providing financial services to other persons; or
      - (B) will use the use case platform in respect of financial products they acquire or dispose of and, if so, whether the acquisition or

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- disposals will be as retail clients or as wholesale clients; or
- (C) will be participants in relation to a financial market or any other clearing and settlement facility in relation to the financial products to which the use case platform relates;
- (vi) the technology to be used in the operation of the use case platform;
- (c) a copy of the signed CBDC Pilot Participation Agreement in relation to the Pilot Participant;
- (d) the date from which the Pilot Participant proposes to operate the use case platform in reliance on the exemption in section 5 of the Instrument.
13. Paragraph 6(b)(iii) of the Instrument provides that a Pilot Participant giving an Opt-In Notice to ASIC has to include information about the proposed size of the use case platform in the Opt-In Notice. ASIC considers that the information about the proposed size of the use case platform would include the volume and value of transactions that the Pilot Participant considers would be processed through their use case platform in the CBDC Pilot, categorised according to asset type and provided both on an aggregate basis and on a per counterparty and per product type basis if available.
14. Paragraph 6(b)(vi) of the Instrument provides that a Pilot Participant giving an Opt-In Notice to ASIC has to include information about the technology to be used in the operation of the use case platform in the Opt-In Notice. ASIC considers that information about the technology to be used in the operation of the use case platform would include information about the settlement model utilised by the Pilot Participant in their use case platform.

### ***Conditions***

15. Section 7 of the Instrument provides the conditions that a Pilot Participant relying on the exemption in section 5 of the Instrument must comply with.

### ***Information to be given to new users***

16. Subsection 7(1) of the Instrument provides that before allowing a participant to access the use case platform for the first time, the Pilot Participant must notify the participant in writing of the following:
- (a) the use case platform is covered by an exemption under section 820C of the Act;
- (b) the Pilot Participant operating the use case platform is not licensed under Part 7.3 of the Act;
- (c) the Pilot Participant operating the use case platform is not subject to the legal obligations that apply to the operator of a licensed clearing and settlement facility, including the requirement, to the extent that it is

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reasonably practicable to do so, to do all things to ensure that the facility's services are provided in a fair and effective way.

*ASIC to be informed of changes to use case platform*

17. Subsection 7(2) of the Instrument provides that the Pilot Participant must inform ASIC, by notice in writing, of any material change to the operation of the use case platform that is set out in the Opt-In Notice or in a notice under this section at least 5 business days before the change occurs.

*Notifying ASIC about non-compliance with conditions*

18. Subsection 7(3) of the Instrument provides that the Pilot Participant must notify ASIC in writing if the Pilot Participant fails to comply with any of the conditions in the Instrument. The Pilot Participant must notify ASIC as soon as practicable after the Pilot Participant becomes aware of the failure.

*Assistance to ASIC and the RBA*

19. Subsection 7(4) of the Instrument provides that the Pilot Participant must comply with sections 821C and 821D of the Act in relation to the use case platform as if the Pilot Participant held an Australian CS facility licence that authorised the Pilot Participant to operate the use case platform in this jurisdiction.

*Report to ASIC*

20. Subsection 7(5) of the Instrument provides that the Pilot Participant must provide a written report to ASIC, within 30 days after the conclusion of the CBDC Pilot, which sets out the operation of the use case platform in the CBDC Pilot, including information in relation to:
  - (a) the activities undertaken on the use case platform, including the total number and total value of transactions entered into on the use case platform; and
  - (b) any divergences during the CBDC Pilot between the planned and actual activities undertaken on the use case platform; and
  - (c) the clearing and settlement performance, including any failures or delays in settlement on the use case platform in the CBDC Pilot.
21. Paragraph 7(5)(c) of the Instrument provides that the written report provided by the Pilot Participant to ASIC under subsection 7(5) would include information in relation to the clearing and settlement performance, including any failures or delays in settlement on the use case platform in the CBDC Pilot. We consider that failures would include settlement failures or settlement delays caused by participants on the use case platform.
22. ASIC intends to provide this written report to the RBA under paragraph 127(2A)(d) of the *Australian Securities and Investments Commission Act 2001*.

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### **Part 3 – Repeal**

23. Section 8 of the Instrument provides that the Instrument is repealed at the start of 1 June 2023.

### **Legislative instrument and primary legislation**

24. 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 only affect a relatively small subset of entities, namely those participating in the CBDC Pilot. 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 the delegate of the Minister to provide exemptive relief, as the matters contained in this particular instrument are of a highly specific and temporary nature which are more appropriate for a legislative instrument rather than primary legislation.
  - (b) There is a need to move more quickly than Parliamentary processes allow due to the timeline of the CBDC Pilot.

### **Duration of the instrument**

25. The Instrument is repealed at the start of 1 June 2023, by section 8 of the Instrument.
26. ASIC considers that the short duration of the Instrument is appropriate as the Instrument is intended to provide relief for the duration of the CBDC Pilot.
27. ASIC will consider whether to extend the operation of the Instrument if ASIC is advised of changes to the duration of the CBDC Pilot.

### **Legislative authority**

28. The delegate of the Minister makes the Instrument under subsection 820C(1) of the Act. Under subsection 820C(1) of the Act, the Minister may exempt a particular clearing and settlement facility, or class of clearing and settlement facilities, from all or specified provisions of Part 7.3 of the Act.
29. An exemption may apply unconditionally or subject to specified conditions, and a person to whom a condition specified in an exemption applies must comply with the condition (see subsection 992B(3) of the Act).
30. This legislative instrument is disallowable under section 42 of the *Legislation Act 2003*.

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

31. 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*.

### ***Corporations (CS Facility Exemption) Instrument 2023/18***

#### Overview

1. The *Corporations (CS Facility Exemption) Instrument 2023/18* (the ***Instrument***) provides conditional class exemptive relief from the *Corporations Act 2001* (the ***Act***) with respect to the requirement to hold an Australian CS facility licence under Part 7.3 of the Act, for pilot participants operating a use case platform in the central bank digital currency pilot project (***CBDC Pilot***) administered by the Reserve Bank of Australia (***RBA***) and the Digital Finance Cooperative Research Centre (***DFCRC***).
2. The Act requires that a person must only operate a clearing and settlement facility in this jurisdiction if the person has an Australian CS facility licence that authorises the person to operate the facility in this jurisdiction or the facility is exempt from the operation of Part 7.3 of the Act.
3. The purpose of the Instrument is to exempt use case platforms involving the operation of a clearing and settlement facility from the requirement to hold an Australian CS facility licence by exempting them from the operation of Part 7.3 of the Act.
4. To rely on the relief, a pilot participant in the CBDC Pilot (***Pilot Participant***) is required to provide ASIC with a written notice (***Opt-In Notice***) that meets the requirements set out in the Instrument. The Opt-In Notice is intended to provide certainty to ASIC and the Pilot Participant as to when a Pilot Participant is relying on the exemption in section 5 of the Instrument, and when the Pilot Participant is required to comply with the conditions in section 7 of the Instrument.

#### Assessment of human rights implications

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

#### Conclusion

6. 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*.