



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Relevant Interests, ASIC and ASIC Chairperson) Instrument 2023/194

ASIC Corporations (Repeal) Instrument 2023/195

This is the Explanatory Statement for *ASIC Corporations (Relevant Interests, ASIC and ASIC Chairperson) Instrument 2023/194* and *ASIC Corporations (Repeal) Instrument 2023/195*.

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

Summary

1. *ASIC Corporations (Relevant Interests, ASIC and ASIC Chairperson) Instrument 2023/194 (Instrument)* limits the circumstances in which ASIC will have a relevant interest in securities to circumstances where the securities are vested in, or held by, ASIC or the Commonwealth. For the avoidance of doubt, the Instrument also specifies that the Chairperson of ASIC will not have a relevant interest in securities simply because ASIC has a relevant interest in securities.
2. *ASIC Corporations (Repeal) Instrument 2023/195 (the Repeal Instrument)* repeals Class Order [CO 12/1209] (the predecessor to the Legislative Instrument) which was due to expire on 1 April 2023.

Purpose of the instruments

3. Section 608 of the *Corporations Act 2001 (Act)* sets out when a person has a relevant interest in securities of a listed entity. Section 671B sets out when a person must give certain information about their relevant interests in a listed entity when their relevant interest is 5% or more (substantial holding) to the relevant market operator and the listed entity.
4. In certain circumstances ASIC may have a relevant interest in securities because it holds the securities or has power in relation to voting or disposal of securities. For example, ASIC will generally have a relevant interest in securities if securities are vested in ASIC or if securities are vested in the Commonwealth and ASIC has the power to vote or dispose of the securities on behalf of the Commonwealth.

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5. The purpose of the Instrument is to preserve the effect of the relief previously provided under ASIC Class Order [CO 12/1209] beyond the sunset date of 1 April 2023 and to limit the circumstances in which ASIC will have a relevant interest in securities to circumstances where the securities are vested in, or held by, ASIC or the Commonwealth. Although it is arguable that other circumstances may technically give ASIC a relevant interest in securities, having regard to the role of ASIC as regulator and the fact that such circumstances (e.g. entry into an enforceable undertaking) are generally disclosed to the market, making such arrangements subject to the substantial holding disclosure regime is likely to confuse the market, rather than providing meaningful additional disclosure.
 6. The Instrument also specifies that the Chairperson of ASIC does not have a relevant interest in securities merely because ASIC does. The effect of this is that the Chairperson of ASIC will not be required to include securities in which ASIC has a relevant interest when determining his or her personal substantial holding disclosure obligations. The Chairperson of ASIC will continue to be required to disclose any substantial holdings that they have in their personal capacity.
 7. The purpose of the Repeal Instrument is to repeal [CO 12/1209].

Consultation

8. On 30 November 2022, ASIC released Consultation Paper 365: *Remaking ASIC class orders on takeovers, compulsory acquisitions and relevant interests (CP 365)* seeking feedback on proposals to remake nine class orders relating to takeovers, compulsory acquisitions and relevant interests (including [CO 12/1209], [CO 13/519], [CO 13/520], [CO 13/521], [CO 13/522], [CO 13/524], [CO 13/525], [CO 13/526], and [CO 13/528]). The consultation period closed on 23 January 2023.
9. CP 365 invited feedback as to whether [CO 12/1209] *Relevant Interests, ASIC and ASIC Chairperson* was operating effectively and efficiently, or whether there were issues or improvements that should be considered to improve its operation.
10. ASIC received 4 submissions in response to CP 365. Respondents expressed no objections or comments on our proposal to continue the relief under [CO 12/1209]. Details of the submissions received will be provided in a report available on ASIC's website at www.asic.gov.au.
11. As this Instrument merely clarifies the law and does not change its practical operation, ASIC considers the making of the Instrument to be of a minor and technical nature.

Operation of the instrument

12. The Instrument notionally modifies section 609 of the Act by notionally inserting new subsections (14) and (15) declaring that ASIC does not hold a relevant interest in securities unless:

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- (a) the securities are vested in, or held by, ASIC for and on behalf of the Commonwealth; or
 - (b) the securities are vested in, or held by, the Commonwealth on trust.
13. The Instrument also notionally modifies the association provisions in subsection 12(2) of the Act so that they do not apply to ASIC.
 14. The Instrument notionally inserts a new subsection 609(16) of the Act that specifies that to avoid doubt that the Chairperson of ASIC does not have a relevant interest in securities merely because ASIC has a relevant interest in securities and the Chairperson holds that office.

Legislative instrument and primary legislation

15. ASIC understands that the Government intends to consult on incorporating the relief in this instrument into the primary legislation, and will consider the merits of making future amendments to the primary legislation and regulations as part of the review process for the Instrument prior to its expiry date. If these are amended to include the relief, ASIC will repeal the Instrument.
16. It will be a matter for the Government and for Parliament as to whether the Act or Regulations may be amended in future to include the relief in the Instrument.

Duration of the instrument

17. The 5-year sunseting date of the Instrument has been applied to allow sufficient time for the Government to consider the merits of incorporating the relief into primary legislation.

Legislative authority

18. This Instrument is made under sections 655A(1)(b), 669(1)(b) and 673(1)(b) of the Corporations Act 2001. Section 655A provides that ASIC may declare that Chapter 6 of the Act applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration. Section 669(1)(b) provides that ASIC may declare that Chapter 6A of the Act applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration. Section 673(1)(b) provides that ASIC may declare that Chapter 6C of the Act applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.
19. The Instrument commences on the day after it is registered on the Federal Register of Legislation and continues in force for 5 years until 1 April 2028.
20. The Repeal Instrument is made under paragraphs 655A(1)(b), 669(1)(b) and 673(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 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.

22. As a legislative instrument, each of the Instrument and the Repeal Instrument are disallowable under section 42 of the Legislation Act 2003.

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 (Relevant Interests, ASIC and ASIC Chairperson) Instrument 2023/194

ASIC Corporations (Repeal) Instrument 2023/195

Overview

1. The Instrument limits the circumstances in which ASIC will have a relevant interest in securities to circumstances where the securities are vested in, or held by, ASIC or the Commonwealth. The Instrument also specifies that the Chairperson of ASIC does not have a relevant interest in securities merely because ASIC does.
2. The Repeal Instrument repeals the superseded Class Order [12/1209].

Assessment of human rights implications

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

Conclusion

3. 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*.