



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Amendment) Instrument 2023/706

This is the Explanatory Statement for *ASIC Corporations (Amendment) Instrument 2023/706*.

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

Summary

1. *ASIC Corporations (Amendment) Instrument 2023/706* (**Amendment Instrument**) amends *ASIC Corporations (Design and Distribution Obligations Interim Measures) Instrument 2021/784* (the **Principal Instrument**) so that it repeals on 5 October 2028 and no longer applies an exemption to cashless welfare arrangements.

Purpose of the instrument

2. The *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* introduced the design and distribution obligations (**DDO**) to Part 7.8A of the *Corporations Act 2001* (**the Act**). The DDO regime commenced on 5 October 2021.
3. Prior to the commencement of the DDO regime, the Government announced that a number of amendments were required to achieve the intended operation of the reforms, including to clarify the law, to ensure a consistent application of the law, and that the regime remains fit-for-purpose.
4. To assist with providing certainty on the application of the DDO regime in the period prior to the Government making the necessary legislative amendments, the Principal Instrument was made to enact interim measures consistent with the Government's policy intentions, using ASIC's modification and exemption powers under s994L of the Act. The Principal Instrument was made for a period of 2 years and is due to repeal on 5 October 2023.
5. This instrument amends the Principal Instrument by extending its operation for a further five years until 5 October 2028, to allow sufficient time for the Government to make the necessary changes to the primary law.
6. This instrument also removes the exemption for cashless welfare arrangements from the Principal Instrument, as it is no longer required following amendments

to the *Social Security (Administration) Act 1999*, and the making of the *Corporations Amendment (Design and Distribution Obligations – Income Management Regimes) Regulations 2023*.

Consultation

7. ASIC undertook a streamlined consultation for this instrument. Submissions were supportive of ASIC making the amendments. The submissions agreed with ASIC's assessment that the Principal Instrument was operating effectively and efficiently and continued to form a necessary and useful part of the legislative framework.
8. Prior to the commencement of Principal Instrument, ASIC also undertook targeted consultation with affected entities as detailed in the Explanatory Statement to the Principal Instrument.

Operation of the instrument

9. Section 4 of the Amendment Instrument states that each instrument specified in the Schedule is amended as set out in the applicable items in the Schedule.

Repeal date

10. Item 1 of the Schedule to the Amendment Instrument amends section 3 of the Principal Instrument by replacing the repeal date of 5 October 2023 with a new repeal date – the start of 5 October 2028.

Cashless welfare arrangements

11. Item 2 of the Schedule to the Amendment Instrument repeals subsection 7(4) of the Principal Instrument. Subsection 7(4) implemented the Government's intention to exempt the Cashless Debit Card and the BasicsCard from the DDO regime, as the key design and distribution obligations for those products are set out in the *Social Security (Administration) Act 1999*. This exemption was consistent with other financial products, such as MySuper products, which are subject to specific legislation and are also exempted from the requirement to make a target market determination.
12. In March 2023, changes were made to the cashless debit card regime in the *Social Security (Administration) Act 1999*, which resulted in subsection 7(4) of the Principal Instrument becoming partially redundant. In addition, the *Corporations Amendment (Design and Distribution Obligations – Income Management Regimes) Regulations 2023* were made to exempt issuers of welfare payment income management accounts under the *Social Security (Administration) Act 1999* from the DDO regime and reflect the changes in that legislation. As such, the relief in subsection 7(4) of the Principal Instrument is no longer required and will be repealed by this instrument.
13. The Amendment Instrument will commence on the day after it is registered on the Federal Register of Legislation.

Incorporation by reference

14. This instrument does not incorporate any matters by reference.

Retrospective application

15. This instrument does not have retrospective application.

Legislative instrument and primary legislation

16. The subject matter and policy implemented by this instrument is more appropriate for a legislative instrument rather than primary legislation because:
 - (a) This instrument extends the time for interim changes made under the Principal Instrument. The interim changes are based on a number of amendments to the primary law and regulations which the Government identified would be required to achieve its intended operation of the DDO regime.
 - (b) This instrument will allow further time for the Government to make the changes to the DDO regime on a more permanent basis and will avoid the need for firms to implement product governance arrangements for products that are not intended to be subject to the DDO obligations.
17. It will be a matter for the Government and for Parliament as to when the primary law or regulations may be amended in future to include the relief in the Principal Instrument.

Duration of the instrument

18. This instrument amends the duration of the Principal Instrument by an additional 5 years.
19. This instrument will be repealed in accordance with Division 1 of Part 3 of Chapter 3 of the *Legislation Act 2003*.

Legislative authority

20. This instrument is made under subsection 994L(2) of the Corporations Act 2001.
21. This instrument amends the Principal Instrument. Under subsection 33(3) of the *Acts Interpretation Act 1901* (as in force 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. This instrument is a disallowable legislative instrument under 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 (Amendment) Instrument 2023/706

Overview

24. *ASIC Corporations (Amendment) Instrument 2023/706* (**Amendment Instrument**) extends the period of operation of the *ASIC Corporations (Design and Distribution Obligations Interim Measures) Instrument 2021/784* (the **Principal Instrument**) which put in place interim measures to provide certainty on the application of the design and distribution obligations (**DDO**) regime under Part 7.8A of the *Corporations Act 2001* (the **Act**) consistent with the Government's publicly stated policy intention, using ASIC's modification and exemption powers. The Amendment Instrument also removes an exemption for cashless welfare arrangements.

Assessment of human rights implications

25. 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*.
26. The DDO framework was introduced by *Treasury Laws Amendment (Design Act, and Distribution Obligations and Product Intervention Powers) Act 2019* (**DDO Bill**) and amended by the *Corporations Amendment (Design and Distribution Obligations) Regulations 2019* (**DDO Regulations**). As explained and discussed in the explanatory materials to the DDO Bill and the DDO Regulations, the DDO Framework potentially engages the following human rights:
- (a) the right to the presumption of innocence; and
 - (b) the right to privacy.
27. The effect of the Amendment Instrument is to amend the Principal Instrument by extending the duration of relief from certain requirements under the DDO legislative framework and by removing an exemption for cashless welfare arrangements. To the extent that there may be any engagement with the above human rights, the instrument will be protective of those rights, and as a result, are compatible with the human rights and freedoms.

Conclusion

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28. 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*.