



ASIC
Australian Securities &
Investments Commission

ASIC Corporations (Asset Holding Standards for Responsible Entities) Instrument 2024/16

I, Kate Metz, delegate of the Australian Securities and Investments Commission,
make the following legislative instrument.

Date 21 March 2024

Kate Metz

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Part 1—Preliminary

1 Name of legislative instrument

This is the *ASIC Corporations (Asset Holding Standards for Responsible Entities) Instrument 2024/16*.

2 Commencement

This instrument commences on the day after it is registered on the Federal Register of Legislation.

Note: The register may be accessed at www.legislation.gov.au.

3 Authority

This instrument is made under paragraphs 601QA(1)(a) and (b) of the *Corporations Act 2001*.

Part 2—Declaration

4 Minimum standards for holding scheme property or assets

Chapter 5C of the Act applies to a responsible entity as if Part 5C.2 were modified or varied by before section 601FD inserting:

“601FCAA Minimum standards for asset holders

- (1) The responsible entity must:
- (a) do all things necessary to ensure that a custodian holds the scheme property or assets on trust for the responsible entity (whether directly or by holding a beneficial interest in scheme property or assets held by a sub-custodian) except where any of the following apply:
 - (i) where both of the following apply:
 - (A) the property or assets are located in a place outside of this jurisdiction where trusts are not known to the law;
 - (B) it is reasonable for the property or assets to be held in accordance with the law in that place;
 - (ii) where both of the following apply:
 - (A) the property or assets are located in a place outside of this jurisdiction and it is not reasonable for the property or assets to be held on trust in accordance with the law in that place;
 - (B) the responsible entity has documented in writing that:
 - (I) it is satisfied that the property or assets are held in a manner that, having regard to the relevant laws, provides reasonably effective protection in case of insolvency of the person holding the property or assets; and
 - (II) the basis on which the responsible entity is satisfied;
 - (iii) the property or assets are held by a member of the scheme or the responsible entity; and

- (b) have reasonable procedures for giving instructions to the custodian or where there is no custodian, custodial staff in relation to the scheme property or assets that include how the instructions are given and reasonable controls to ensure that the instructions are properly authorised and carried out; and
 - (c) do all things necessary to ensure that a custodian that holds scheme property:
 - (i) as far as practicable identifies the property or assets as held on behalf of the responsible entity in relation to the scheme; and
 - (ii) holds the property or assets separately from property in which the responsible entity or the custodian has an interest and from the property of any other person or scheme except where the responsible entity is exempted from holding the property separately under section 601QA and complies with the conditions of the exemption.
- (2) The responsible entity must do all things necessary to ensure that the custodian or, if there is no custodian in relation to particular scheme property or assets that are not held by a member, the responsible entity:
- (a) has an organisational structure that supports compliance with paragraph (1)(c)(ii) or subparagraph 601FC(1)(i)(ii) (as applicable); and
 - (b) segregates custodial staff from persons performing other functions, in a way that minimises the potential for conflict, if a conflict of interest exists or might arise between:
 - (i) their duties as custodial staff; and
 - (ii) the interests served or advanced by persons who perform duties to make investment decisions, trading decisions or other discretionary decisions resulting in the transfer or disposal of scheme property or assets other than discretionary decisions in relation to holding a deposit account with a corporation that is regulated for the taking of deposits where the balance of the deposit account is payable on demand and discretionary decisions relating to buying or selling foreign currency; and
 - (c) has a documented policy that is:

- (i) approved by its directors or governing body, or a senior manager authorised to give approval on behalf of the directors or governing body or, in the case of a custodian that is a foreign company that is carrying on business in this jurisdiction or registered under Division 2 of Part 5B.2, its most senior officer or employee in this jurisdiction with responsibility for managing the functions performed by custodial staff; and
 - (ii) designed to ensure that custodial staff are not influenced because of a conflict mentioned in paragraph (b) to act other than in accordance with their duties; and
- (d) undertakes reasonable checks to find out and document if there has been any attempt to inappropriately influence custodial staff and take reasonable action in the event this happens; and
- (e) structures its business so that:
- (i) custodial staff can report to the directors of the responsible entity or the compliance committee for the scheme directly or through other custodial staff; and
 - (ii) the duties of:
 - (A) direct managers of custodial staff; and
 - (B) indirect managers of custodial staff that are not the most senior officer of the responsible entity or the most senior officer or employee of the custodian in this jurisdiction or, for a custodian, the jurisdiction in which the custodian is based; and
 - (C) custodial staff;do not extend to other functions that may create conflicts of interest including that custodial staff and those managers are not responsible for investment decisions, trading decisions or other discretionary decisions resulting in the transfer or disposal of scheme property or assets other than discretionary decisions in relation to holding a deposit account with a corporation that is regulated for the taking of deposits where the balance of the deposit account is payable on

demand and discretionary decisions relating to buying or selling foreign currency; and

- (iii) custodial staff and persons involved in investment decisions, trading decisions or other discretionary decisions resulting in the transfer or disposal of scheme property or assets are located sufficiently separately during the performance of their duties to reduce, so far as reasonably practicable, the risk of inappropriate influence on decisions relating to holding of scheme property and assets.
- (3) The responsible entity must, for its custodial staff ensure that, and for custodial staff of any custodian do all things necessary to ensure that the custodian ensures that:
- (a) custodial staff have the knowledge and skills necessary to perform their duties properly; and
 - (b) ongoing training and educational programs are provided to custodial staff that provide reasonable assurance they have knowledge that remains at a level necessary for performing their duties including knowledge of the responsible entity's obligations under this Chapter to the extent relevant to enable the custodial staff to perform their duties; and
 - (c) custodial staff have the necessary time and authority to perform their duties; and
 - (d) resources are made available to custodial staff to the extent necessary for them to adequately perform their duties.
- (4) The responsible entity must also comply with paragraph (1)(c) and subsections (2) and (3) as if any sub-custodian were the custodian except to the extent that, in relation to assets outside of this jurisdiction, it is not reasonably practicable for the responsible entity to do all things necessary to ensure that the sub-custodian does a particular thing.

Note: For example, if the custodian engaged a sub-custodian, the responsible entity would need to do all things necessary to ensure that the requirements of paragraph (1)(c) and subsections (2) and (3) were satisfied in relation to the custodian, the sub-custodian and their custodial staff, subject to the exception in relation to assets outside this jurisdiction.

- (5) The responsible entity must keep for 7 years records demonstrating how it complies with subsections (1) to (4).
- (6) If:

- (a) a custodian is appointed to hold scheme property or assets that had previously been held by the responsible entity; or
- (b) a custodian or the responsible entity commences to hold scheme property or assets that had been held by a custodian;

the responsible entity must obtain a report from a person with relevant knowledge who is not a related party of the custodian or the responsible entity confirming that all property and assets to be transferred have been identified and transferred as required unless it reasonably believes that it is not in the best interests of members to do so, and if the report is not obtained, keep for 7 years a record in writing as to its grounds for that belief.

- (7) The responsible entity must set out in writing and implement a reasonable process to monitor and assess any custodian's performance of its obligations as a custodian and do all things necessary to ensure that a custodian it engages sets out in writing and implements a reasonable process to monitor and assess the performance of its obligations by any sub-custodian.
- (8) The responsible entity must not permit a custodian or a sub-custodian to be involved in discretionary decisions concerning a deposit account, unless the responsible entity is satisfied that the custodian or sub-custodian has set out in writing and implements reasonable processes for:
 - (a) determining which account to use; and
 - (b) monitoring performance by the issuer of the account of the issuer's obligations in relation to that account; and
 - (c) taking action in case of failure of the issuer of the account of the issuer's obligations in relation to that account.
- (9) The responsible entity must ensure that it keeps records of scheme property and assets in a way that enables the holding of the property and assets to be conveniently and properly audited by the auditor of the scheme and do all things necessary to ensure that any custodian or sub-custodian keeps such records in relation to any property or asset that the custodian holds or that is held by the sub-custodian.
- (10) The responsible entity must set out in writing and implement a reasonable process for determining if it should hold scheme property or assets or engage a custodian and if it is to engage a

custodian which person will be the custodian and on what terms. The process must involve the application of a reasonable written policy approved by the directors which addresses potential conflicts of interest and any other considerations relevant to the best interests of members.

- (11) The responsible entity must:
- (a) review the appropriateness of the written policies and processes it is required to have or do all things necessary to ensure exist under subsection (7), (8) and (10) at least once in every 13 months; and
 - (b) as directed by ASIC in writing, arrange for a report on the effectiveness of or the reasonableness of any of the processes or policies to be prepared and given to ASIC.

The written direction may specify who is to prepare the report and the time by which it must be given to ASIC.

- (12) A responsible entity that complies with this section is taken to comply with conditions (if any) of its Australian financial services licence to the extent that the conditions:
- (a) refer to ASIC Policy Statement 133 or ASIC Regulatory Guide 133 as applying on a certain date; and
 - (b) are not conditions that apply to the responsible entity because it is a trustee company.
- (13) In this section and section 601FCAB:

custodian means a person engaged by the responsible entity to hold scheme property or assets on behalf of the responsible entity.

custodial staff means natural persons who, whether under an arrangement with the responsible entity or a custodian, have duties relating to holding scheme property or assets, record keeping relating to scheme property or assets, checking authorisations for instructions to transact or functions incidental to these functions other than making investment decisions, trading decisions or other discretionary decisions resulting in the transfer or disposal of scheme property or assets other than discretionary decisions in relation to holding a deposit account with a corporation that is regulated for the taking of deposits where the balance of the deposit account is payable on demand and discretionary decisions relating to buying or selling foreign currency.

sub-custodian means a person directly or indirectly engaged by a custodian to hold scheme property or assets.

- (14) For the purposes of this section and section 601FCAB:
- (a) a person (**first person**) engages another person if the first person engages or authorises the other person; and
 - (b) a person (**first person**) indirectly engages another person (**second person**) if:
 - (i) the first person engages a person and that person engages the second person; or
 - (ii) a person who is indirectly engaged by the first person under subparagraph (i) or this subparagraph (ii) engages the second person.

601FCAB Arranging for another person to hold scheme property or assets

- (1) A responsible entity that engages a custodian to hold scheme property or assets on behalf of the responsible entity must:
- (a) ensure that it has a written agreement with the custodian that meets the requirements of subsections (2) to (5); and
 - (b) do all things necessary to ensure that the custodian has a written agreement with each person that the custodian engages to hold the scheme property or assets and the written agreement meets the requirements of subsections (2) to (5) (but not including paragraph (2)(p)) as if the person were the custodian and the custodian were the responsible entity except:
 - (i) to the extent that, in relation to scheme property or assets held outside of this jurisdiction, the responsible entity holds documents that demonstrate that it is not reasonably practicable to engage another person to hold the scheme property or assets who is willing to include such matters in the agreement; or
 - (ii) where the person is controlled by the custodian the custodian is liable to the responsible entity for the acts and omissions of the person as if they were the acts or omissions of the custodian.
- (2) The agreement with the custodian must have provisions:

- (a) specifying reasonable rights that the responsible entity has for the ongoing review and monitoring of the custodian and any sub-custodian and the standards against which their performance will be assessed; and
- (b) to the effect that the custodian must certify to the responsible entity in writing at least every 13 months that the custodian believes on reasonable grounds that the custodian and each sub-custodian have met since the date of the previous statement in writing or the commencement of the agreement, and the custodian has no reason to believe that the custodian and each sub-custodian will not continue to meet:
 - (i) in the case of the custodian, the terms of the agreement; and
 - (ii) in any case, the requirements that the responsible entity must do all things necessary to ensure under paragraph 601FCAA(1)(c) and subsections 601FCAA(2) to (4), (7) and (9) are met by the custodian or the sub-custodian in relation to scheme property or assets held by the custodian or a sub-custodian (except to the extent that the responsible entity is not complying with a requirement to comply with the conditions of an exemption under section 601QA and the custodian is not aware of any non-compliance);other than in relation to matters:
 - (iii) that:
 - (A) are disclosed in writing to the responsible entity; or
 - (B) the custodian reasonably believes are trivial; and
 - (iv) for which the custodian acknowledges that it or the sub-custodian must continue to meet the relevant obligations; and
- (c) to the effect that the custodian must acknowledge to the responsible entity on request that the scheme property or assets to which the agreement relates are held for the responsible entity and notify any other person where the custodian is aware to do so might protect the beneficial interest of the responsible entity that the property or assets are so held unless the responsible entity directs in writing otherwise; and

- (d) specifying how instructions will be given by the responsible entity to the custodian; and
- (e) to the effect that the custodian must not take or grant a security interest, mortgage, lien or other encumbrance over, or in relation to, the scheme property or assets held under the agreement unless it is accordance with the agreement and does not cover unpaid fees of the custodian; and
- (f) specifying how the custodian will maintain records of the scheme property or assets to which the agreement relates and the transactions in relation to that property and assets, including by whom, when and how transactions were authorised; and
- (g) specifying procedures for reconciliation each business day or, if it is ordinary and reasonable commercial practice to reconcile certain property less frequently, in accordance with that practice, by checking information the custodian is given as to the existence and quantity of the scheme property or assets against the records of the custodian and for reporting by the custodian concerning the outcomes of the reconciliation in case of any unreconciled matter; and
- (h) to the effect that the custodian must provide all reasonable access and assistance to any auditor engaged to audit the responsible entity's financial statements or the scheme's financial statements; and
- (i) to the effect that the custodian will provide the responsible entity with written notice of, and contact information for, any other person holding scheme property or other assets appointed or to be appointed by the custodian:
 - (i) as soon as reasonably practicable; and
 - (ii) in any event before the property or assets are held, except in exceptional circumstances identified in the agreement; and
- (j) to the effect that the responsible entity may terminate the agreement without:
 - (i) payment other than in relation to entitlements previously accrued or the reasonable expenses involved in transfer of the scheme property and assets to the responsible entity or another custodian; and

- (ii) limiting any right to damages the responsible entity may have under the agreement, including recovering expenses referred to in subparagraph (i) if the custodian is in breach;

if the responsible entity has reasonable grounds for believing that:

- (iii) there is or has been an act or omission of the custodian or a sub-custodian that results in the custodian being in breach of the agreement; and
 - (iv) as a result of the act or omission, to a material extent the custodian or a sub-custodian is not complying with or is unlikely to comply with the requirements that the responsible entity must do all things necessary to ensure under paragraph 601FCAA(1)(c) and subsections 601FCAA(2) to (4), (7) and (9) are met by the custodian or the sub-custodian in relation to scheme property or assets held by the custodian or that the custodian arranged to be held, having regard to any remedy provided or that may be expected to be provided by the custodian or the sub-custodian; and
- (k) to the effect that on termination of the engagement, the scheme property or assets must be transferred to the responsible entity, or as the responsible entity directs, within a reasonable period subject to reasonable provisions for the obligations of the parties at termination, including the payment of outstanding fees and charges to the custodian and any costs of the transfer; and
 - (l) to the effect that the custodian must notify material or systemic breaches of the agreement by it or by the responsible entity in writing to the board of directors of the responsible entity or the compliance committee of the relevant scheme within a reasonable time of becoming aware of the breach; and
 - (m) specifying the terms on which the custodian is authorised to engage another person to hold the scheme property or assets to which the agreement relates and providing that any such engagement must be either:
 - (i) under a written agreement meeting the requirements of subsections (2) to (5) (including this subparagraph and subparagraph (ii), but not including paragraph (2)(p)) as if the person engaged were the custodian and the custodian

- were the responsible entity except to the extent that, in relation to assets held outside of this jurisdiction, the custodian has provided written reasons to the responsible entity as to why it reasonably considers that it is not practicable to engage a person that is willing to include such matters in the agreement; or
- (ii) an arrangement with a related body corporate of the custodian, where the custodian has a written agreement with the responsible entity that it is liable to the responsible entity for the acts and omissions of the related body corporate relating to the scheme as if those acts and omissions were the acts or omissions of the custodian; and
 - (n) to the effect that the custodian must establish and maintain business continuity arrangements that are reasonable for a business of the nature, scale and complexity of the custodian's business; and
 - (o) to the effect that the custodian must not disclose any confidential information relating to the scheme, apart from any disclosure to ASIC or as required or permitted by law or by the responsible entity in writing; and
 - (p) to the effect that the custodian must establish and maintain adequate arrangements to ensure that it will report to ASIC in writing within 10 business days if it suspects that the responsible entity has breached its obligations to report a reportable situation in relation to the responsible entity as required by [section 912DAA].
- (3) The responsible entity must ensure that the agreement with the custodian has reasonable liability provisions and does not include provisions that exclude the liability of the custodian for direct loss that it would have if the exclusion were not included except in particular circumstances that the responsible entity considers to be reasonable and contains, if appropriate, reasonable indemnity provisions in relation to losses caused to the responsible entity as responsible entity of the scheme by the custodian's acts and omissions that relate to that agreement.
- (4) A responsible entity who arranges for a custodian to hold scheme property or assets must not permit, under the agreement with the custodian or otherwise, the granting of a security interest, mortgage, lien or other encumbrance in favour of the custodian or its associates unless the responsible entity reasonably believes for reasons it has recorded in writing that any conflict that may arise as a result of the

security interest, mortgage, lien or encumbrance will not materially increase the risks that the custodian will fail to meet its obligations and the responsible entity must keep the written record of reasons for 7 years after the security interest, mortgage, lien or encumbrance has ceased.

- (5) The responsible entity must ensure that no agreement it has with a custodian contains any provision that would require the custodian to disclose to the responsible entity or another person that it has communicated with ASIC concerning a suspicion of contravention of a financial services law or that it is considering doing so.
- (6) A responsible entity that complies with this section in relation to an arrangement with a custodian is taken to comply with any condition on its Australian financial services licence concerning the arrangement.”.

Part 3—Exemption

5 Omnibus accounts

- (1) A responsible entity does not have to comply with subparagraph 601FC(1)(i)(ii) of the Act for scheme property that comprises:
 - (a) Australian or foreign currency; or
 - (b) a deposit taking facility of a body carrying on a business of accepting money on deposit including rights under that facility; or
 - (c) securities; or
 - (d) derivatives.

Conditions

- (2) A responsible entity that relies on the exemption in subsection 5(1) must do all of the following:
 - (a) put in place and keep for 7 years after it was last relied on, a written policy in relation to not holding scheme property separately in reliance on the exemption which sets out its reasons why that policy is appropriate having regard to any extent to which it might expose its members of the scheme to the risks arising from the property not being held separately or there is reason to believe that applying the policy might not be in the best interests of the members;
 - (b) ensure that the policy is reviewed at least every 13 months, prepare a written record of the outcome of the review and keep that record for 7 years;
 - (c) do all things necessary to ensure that adequate records are kept at all times showing the scheme's entitlement to property that includes the scheme property not held separately;
 - (d) do all things necessary to ensure reconciliation procedures are performed on each business day in relation to the scheme property not held separately or if because of the nature of the property, it is ordinary and reasonable commercial practice to reconcile property of that kind less frequently, as frequently as would be performed in accordance with that practice;
 - (e) do all things necessary to ensure that not holding the scheme property separately does not restrict the capacity of the responsible entity to exercise rights in relation to the property including in relation to voting rights;

- (f) do all things necessary to ensure that if the property that includes the scheme property is not sufficient to meet the entitlements of all persons in relation to that property, the insufficiency ceases by the second business day after the insufficiency arises whether through the provision of additional property by the person holding the property or otherwise;
- (g) do all things necessary to ensure that the scheme property is held separately from property in which the person holding the property or the responsible entity has an interest other than as a trustee for a person that is not the responsible entity except where property is not held separately to comply with paragraph (f).

Part 4—Repeal

6 Repeal

This instrument is repealed at the start of 1 April 2029.