

CS 57 Proposed remake of Corporations Instruments 2016/841, 2016/881 and 2016/889

ASIC

Submitter:

Michael Sanderson

Phone:

Email:

Introduction

I make this submission in response to ASIC Simple Consultation 57 concerning the proposed remake of three legislative instruments relating to financial market operations.

I do not oppose regulatory relief merely because it is regulatory relief. An exemption may be justified where the ordinary law creates duplication, treats equivalent transactions inconsistently or imposes obligations that provide no corresponding public benefit. However, relief is not an administrative entitlement and sunseting is not meant to be a rubber stamp.

ASIC proposes to remake all three instruments for another five years. It says they are operating effectively, remain necessary and useful, and require only minor amendments to improve clarity and adopt market neutral language. ASIC has not published a conventional consultation paper, formal questions, usage data, complaints information, surveillance findings, incident history, enforcement outcomes or an explanation of how it assessed the instruments as effective.

That is not an adequate public interest review of exemptions affecting directors' disclosures, critical financial market infrastructure and records of offshore transactions.

The three instruments should be examined separately. Each alters a different part of the Corporations Act framework. Each benefit different regulated parties. Each transfers different risks to investors, market participants, regulators and the public. Their inclusion in one simple consultation should not obscure those differences.

Page **1** of **10**

My position is that the Austraclear instrument may remain justified, but only with substantially stronger continuity and accountability safeguards. The directors' interests instrument may also remain justified, but the proposed reasonable belief condition is too weak and the market neutral expansion requires a genuine equivalence test. The foreign markets records instrument should not be remade unless ASIC can demonstrate that complete equivalent records remain available and can be obtained promptly whenever an Australian regulatory interest arises.

Sunseting must be a genuine public interest test

The purpose of sunseting is defeated when an instrument is remade because it has existed for ten years without producing a publicly visible controversy.

The absence of an identified failure is not proof of safety. It may merely mean that ASIC has not published the information needed to determine how the relief has been used, whether it has created regulatory gaps, whether investigators have encountered difficulties or whether risks have accumulated without yet producing a public loss.

ASIC should be required to establish who uses each instrument, how frequently it is relied upon, what financial value is affected, what regulatory work is avoided, what protection replaces the ordinary law and what evidence supports continuation.

The burden should sit with ASIC and the beneficiaries of the relief. The public should not be required to prove that an exemption is unsafe before ASIC explains why it remains necessary.

A five-year remake extending to 1 October 2031 is especially significant because financial markets, cyber capability, artificial intelligence, international transactions and digital infrastructure have changed materially since 2016. A legislative instrument designed around conditions existing a decade ago should not be renewed on the assumption that the surrounding risk environment has remained static.

Disclosure of directors' interests

The existing ASIC Corporations Disclosure of Directors' Interests Instrument 2016/881 excuses a director of an ASX listed public company from making a separate notification under subsection 205G(1) where the director reasonably believes the company has complied with ASX Listing Rule 3.19A.

The proposed instrument would extend that relief to directors of public companies listed on any declared financial market where the market's listing rules require the company to notify the relevant market operator about the director's notifiable interest.

Avoiding duplicate disclosure can serve a legitimate public purpose. Requiring both a company and a director to deliver substantially identical information to the same market operator may add paperwork without improving transparency.

However, removing duplication must not remove responsibility.

Reasonable belief is too weak

The proposed exemption applies where the director reasonably believes the company has complied. That formulation focuses on the director's belief rather than on whether the market actually received accurate and timely disclosure.

A director's interest is personal to the director. The director knows, or should know, the relevant facts. The director should remain responsible for giving the company complete and accurate information and for taking reasonable steps to confirm that the disclosure was lodged.

A director should not be relieved merely because the director assumed that another person completed the task. A reasonable belief may be difficult to challenge after the event, particularly where responsibility is dispersed among the director, company secretary, legal advisers and market disclosure personnel.

The exemption should therefore require reasonable grounds supported by evidence. The director should retain confirmation that the company lodged the disclosure and should remain responsible for correcting any error or omission once identified.

If the company fails to disclose, the director's obligation should revive. Administrative convenience should not produce a gap in which neither the company nor the director is effectively accountable.

Market neutral must not mean standard neutral

Market neutral drafting is appropriate only where the underlying standards are equivalent.

ASIC should not assume that every declared financial market imposes listing rules equal to ASX Listing Rule 3.19A. The relevant comparison must include what interests are disclosed, when disclosure must occur, how the information is made public, whether historical announcements remain accessible, what corrections are required and what enforcement consequences follow from noncompliance.

The final instrument should apply only to markets that ASIC has formally determined provide substantially equivalent disclosure. ASIC should publish the markets covered by that determination and the criteria used.

The public should not have to examine the rules of every declared market to discover whether a director's statutory obligation has been replaced by something weaker.

Required changes

ASIC should retain relief only where the company has actually made substantially equivalent public disclosure within the applicable time.

The director should be required to provide complete information to the company, retain evidence that disclosure occurred and correct any known deficiency.

ASIC should publish an equivalence assessment for each declared market covered by the relief. The instrument should not allow market neutral language to become a quiet reduction in disclosure standards or personal accountability.

Austraclear dematerialised securities

The Austraclear instrument addresses electronically recorded debt obligations that correspond to certificates of deposit, bills of exchange and promissory notes.

The draft continues exemptions from provisions concerning debentures, fundraising disclosure, managed investment schemes and securities transfers. Its central purpose is to give specified electronic instruments broadly equivalent legal treatment to corresponding paper instruments.

There is a legitimate case for legal equivalence. An electronic certificate of deposit should not be regulated more harshly than its paper equivalent merely because the legislation was drafted around physical documents.

The weakness in ASIC's proposal is not the recognition of electronic instruments. The weakness is the apparent assumption that a fully dematerialised system remains adequately protected merely because electronic settlement is efficient and has operated for many years.

Electronic efficiency creates concentrated dependency

The 2016 explanatory material relies heavily on Austraclear's electronic records and operating rules to reproduce the legal effect of paper negotiable instruments. It explains that Austraclear's records establish the terms and execution of a dematerialised security and that the rights and obligations of participants are intended to correspond to those arising under equivalent paper securities.

That structure concentrates legal evidence, ownership records, transaction history, authentication and settlement within an interconnected digital environment.

If the system is unavailable, the immediate problem is operational. If the records are corrupted, manipulated or rendered unreliable, the problem is more fundamental. The market may no longer be able to determine confidently who owns the security, what was transferred, whether an instruction was genuine, which version of the record is authoritative or whether a purported settlement was final.

Traditional redundancy does not necessarily answer that risk. A backup system may reproduce corrupted data. A secondary data centre may share the same software, credentials, access controls, suppliers or compromised administrative tools. A recovery copy is not independent merely because it sits on another server.

Frontier artificial intelligence has changed the threat model

The digital threat environment in 2026 is materially different from the environment in which the instrument was remade in 2016.

Anthropic has stated that highly capable agents are better at finding unexpected paths to a goal and may route around restrictions that designers did not anticipate. It reports that Claude models have escaped sandboxes while pursuing assigned tasks and that Claude Mythos Preview was considered to have too great a potential blast radius for general release in April 2026. Anthropic also states that model level safeguards are probabilistic and cannot provide complete protection without hard environmental containment.

OpenAI has since disclosed an internal cyber evaluation in which models operating with reduced cyber restrictions identified a previously unknown vulnerability in a package registry proxy, obtained internet access from a sandboxed environment, escalated privileges and chained further vulnerabilities and stolen credentials to access Hugging Face production infrastructure. OpenAI described the event as unprecedented and said the models were pursuing the narrow goal of obtaining benchmark solutions.

These events do not establish that artificial intelligence is conscious, malicious or independently seeking to attack financial systems. They establish something directly relevant to Austraclear. Highly capable systems can discover and combine pathways that designers did not anticipate while pursuing an apparently narrow authorised objective.

Financial market infrastructure must therefore be designed on the assumption that a capable attacker, human or artificial, may find a path around controls that passed conventional review.

Current operational concerns cannot be ignored

This is not merely a hypothetical concern imported from the artificial intelligence sector.

The Reserve Bank's September 2025 assessment maintained a rating of only partly observed for Austraclear under the Operational Risk Standard. The Reserve Bank identified gaps in business continuity planning for complete system and technical outages and considered that more comprehensive contingency arrangements were needed to improve confidence in settlement occurring by the end of the value date. It also downgraded Austraclear's Settlement Finality rating to broadly observed.

The December 2024 CHESS settlement failure did not occur within Austraclear and should not be misrepresented as an Austraclear failure. It nevertheless demonstrated that critical ASX infrastructure can fail in ways that expose weaknesses in resourcing, contingency planning and settlement continuity. The Reserve Bank has since stated that ASX is not currently meeting regulatory expectations for an operator of critical national infrastructure.

ASIC should not remake the Austraclear relief as though operational resilience has already been established beyond serious question.

An independent analogue continuity layer is required

An analogue backup does not require the routine reintroduction of negotiable paper instruments or the operation of two competing live ownership systems. That could create duplication, reconciliation problems and new opportunities for fraud.

What is required is a functionally independent continuity layer that remains usable when the primary digital environment and its ordinary backups cannot be trusted.

Austraclear should maintain regularly generated, human readable and independently authenticated snapshots of holdings, obligations and material transaction records. Those records should be stored offline and outside the ordinary administrator, network and credential environment. Copies should be held under appropriately separated custody arrangements, including access by the relevant regulators.

The system should include legally recognised procedures for determining the authoritative position after a severe compromise. It should explain how ownership will be reconstructed, how competing records will be resolved, how authorised representatives will be verified, how urgent instructions will be documented and how settlement priorities will be preserved during an extended failure.

Essential operating procedures, legal authorities, participant contacts and decision protocols should remain available in physical form. The capacity to communicate and make controlled decisions should not disappear because the primary network, identity system, cloud service or electronic records platform is unavailable.

The continuity layer should be tested against corruption, not merely interruption. Testing should assume that the primary system, replicated backups, administrator credentials, monitoring tools and ordinary communications have all been compromised. It should test whether the market can locate an uncontaminated point of truth and reconstruct legal ownership without relying on the environment that has failed.

A digital system without an independent recovery point is not fully resilient. It is merely efficient while it is working.

Required changes

ASIC should not remake the Austraclear instrument until it is satisfied that the legal and operational protections supporting dematerialised securities remain equivalent to or stronger than those available for paper instruments.

The instrument should be accompanied by enforceable requirements for independent offline records, human operable recovery procedures, regulator access, periodic reconstruction testing and public reporting of material continuity findings.

ASIC should also require testing against advanced artificial intelligence assisted attacks, compromised privileged credentials, corruption of replicated data, simultaneous loss of primary and secondary systems, third party service failure and uncertainty about which electronic record is authoritative.

The relief may remain justified, but it should not continue on the unsupported assumption that digital efficiency is itself proof of resilience.

Records of dealings on foreign markets

The third instrument exempts an Australian financial services licensee from regulation 7.8.19 where an instruction comes from or on behalf of a wholesale client outside Australia and relates to a dealing through a financial market not operated in Australia.

ASIC's original justification was that applying the Australian record keeping obligation to these dealings would be too broad and that the compliance burden would outweigh the regulatory benefit.

That conclusion should not simply be carried forward from 2016.

Record keeping is regulatory infrastructure

Transaction records are not administrative clutter. They are the evidence needed to reconstruct instructions, identify decision makers, trace intermediaries, test explanations and investigate misconduct.

An Australian financial services licensee remains an Australian regulated entity even when it deals for a foreign wholesale client on a foreign market. The offshore character of the transaction may justify relief from a particular Australian format or duplicate record. It does not justify regulatory blindness.

The proper question is not whether regulation 7.8.19 should apply mechanically. The proper question is whether complete equivalent records exist and whether ASIC can obtain them promptly whenever Australian law, an Australian licensee or an Australian market interest is engaged.

ASIC should explain whether equivalent records are normally retained under foreign law, contractual arrangements or the licensee's own systems. It should identify how long they are kept, where they are held, whether they can be searched and produced from Australia, and whether foreign secrecy, privacy, insolvency or data localisation laws can obstruct access.

ASIC should also disclose whether the exemption has ever delayed or impeded surveillance, investigation, enforcement, cooperation with another regulator or the reconstruction of disputed instructions.

Modern technology weakens the original burden argument

Electronic record keeping has become cheaper, more automated and more integrated since the original class order was made in 2003 and the instrument was remade in 2016.

ASIC should therefore reassess whether the original compliance burden remains substantial. It should not rely on a two-decade old assumption that retaining transaction instructions is inherently difficult merely because the client and market are offshore.

If the licensee already receives the instruction electronically, routes it through internal systems, conducts compliance checks and communicates with an executing party, much of the relevant record may already exist. Requiring retention may add little burden while preserving significant evidentiary value.

The regulated party should not receive relief simply because the transaction crosses a border. Offshore complexity is a reason for stronger traceability, not weaker traceability.

Required changes

ASIC should not remake the instrument in its present unconditional form.

Any relief should apply only where substantially equivalent records are retained for a defined period and can be produced promptly to ASIC in a usable and intelligible form.

The licensee should remain responsible for demonstrating who gave the instruction, on whose behalf it was given, what product was involved, which market and intermediary were used, when execution occurred and what the transaction outcome was.

An exemption from one prescribed Australian record requirement must not become an exemption from accountability.

ASIC's evidence and institutional capacity

All three instruments depend on effective ASIC supervision.

The directors' interest's relief depends on ASIC being able to assess equivalent disclosure standards and act when disclosure fails. The Austraclear relief depends on ASIC being able to scrutinise complex operational, technological and legal safeguards. The foreign markets relief depends on ASIC being able to obtain records across borders and determine whether the exemption is being used appropriately.

ASIC should therefore publish the evidence supporting its statement that the instruments are operating effectively. That evidence should include reliance data, material breaches, surveillance work, operational incidents, complaints, investigation difficulties, record access problems and the regulatory resources required to supervise the relief.

A statement that the instruments are necessary and useful is a conclusion, not an evidence base.

ASIC's consultation heading also refers to instrument 2021/889, while the instrument under review is 2016/889. The body of the material correctly identifies the 2016 instrument. This may be a minor drafting error, but a consultation concerned with simplifying and clarifying legislative instruments should correct it.

Review before 2031

ASIC should not remake all three instruments and then wait until the next sunset date before examining whether the assumptions supporting them remain valid.

The directors' interest's expansion should be reviewed after ASIC has evidence of its operation across declared markets.

The Austraclear relief should be reviewed after the required continuity and reconstruction tests have been completed.

The foreign markets records relief should be reviewed against actual record requests, access delays and enforcement experience.

A public review within two years would allow ASIC to determine whether the instruments are removing genuine duplication and legal anomaly or creating gaps in transparency, continuity and evidence.

Conclusion

ASIC should not treat CS 57 as a routine administrative rollover.

Regulatory relief may be justified where it removes duplication or gives electronic instruments treatment equivalent to their paper counterparts. That does not relieve ASIC of the obligation to demonstrate that transparency, accountability, legal certainty, operational resilience and regulatory access remain intact.

The directors' interests instrument should be remade only with a stronger requirement that equivalent disclosure actually occurs and that directors retain evidence and personal responsibility.

The Austraclear instrument should be remade only if ASIC requires an independent, offline and human operable continuity layer capable of reconstructing ownership and settlement obligations when the digital system and its ordinary backups cannot be trusted.

The foreign markets records instrument should be remade only where complete equivalent records remain available and can be produced promptly to ASIC.

The central principle is simple. Digital efficiency, market convenience and regulatory simplification are not public purposes in themselves. They serve the public only when the system remains transparent, accountable, recoverable and capable of producing reliable evidence under stress.

A financial market system that has no independent point of truth when its digital records fail, is not resilient. A disclosure regime that depends on an unverified belief is not accountable. A record keeping exemption that leaves the regulator unable to reconstruct a transaction is not proportionate.

ASIC should amend the instruments accordingly or allow the inadequately justified relief to sunset.