

[CO 05/1236]
Variation of Class Order [CO 05/26]

Issued 21/12/2005

Effective on registration on Federal Register of Legislative Instruments

Related documents: [IR 05/66].

Class Order [CO 05/1236] varies Class Order [CO 05/26].

Australian Securities and Investments Commission
Corporations Act 2001 — Subsections 601QA(1) and 1020F(1) —
Variation

Enabling legislation

1. The Australian Securities and Investments Commission makes this instrument under subsections 601QA(1) and 1020F(1) of the *Corporations Act 2001*.

Title

2. This instrument is ASIC Class Order [CO 05/1236].

Commencement

3. This instrument commences on the date it is registered under the *Legislative Instruments Act 2003*.

Note: An instrument is registered when it is recorded on the Federal Register of Legislative Instruments (*FRLI*) in electronic form: *see Legislative Instruments Act 2003*, s 4 (definition of *register*). The FRLI may be accessed at <http://www.frli.gov.au/>.

Variation

4. ASIC Class Order [CO 05/26] is varied as follows:
 - (a) in the heading omit “Subsection 601QA(1)”, substitute “Subsections 601QA(1) and 1020F(1)”;
 - (b) in paragraph 1 omit “subsection 601QA(1)”, substitute “subsections 601QA(1) and 1020F(1)”;
 - (c) in paragraph 4(a) omit “section 601GAA,”;”, substitute “sections 601GAA and 601GAB,”;”;
 - (d) after paragraph 4(a) insert:

- “(aa) in subsection 601GA(4), after “scheme,” insert “except as provided by section 601GAC”;;”;
- (e) at the end of paragraph 4(b) omit “separately.”;”, substitute “separately.

601GAB Responsible entity discretions in constitutional provisions that set the consideration for the acquisition of interests

- (1) The constitution of a registered scheme does not have to make adequate provision for the consideration (the *issue price*) that is to be paid to acquire an interest in the scheme to the extent that it provides a formula or method covered by subsection (2) that is to be used to set the issue price but gives the responsible entity, or a person (the *nominee*) nominated by the responsible entity, a discretion to do either or both of the following:
- (a) decide a matter that affects the value of a factor included in the formula;
 - (b) decide a matter that is an aspect of the method.

The discretion does not have to be referred to in the formula or method. It may arise under another provision of the constitution that is relevant, whether directly or indirectly, to applying the formula or method.

- (2) The formula or method must:
- (a) if it applies when the interests in the scheme are not quoted on a financial market—be based on the value of scheme property less any liabilities that under the constitution may be met from that property divided by the number of interests on issue and may make allowance for the expenses that are associated with acquiring scheme property; or
 - (b) if it applies when the interests in the scheme are quoted on a financial market—be based on the market price of the interests on the market and may allow for a discount from that price by or up to an amount specified in the constitution.
- (3) If a constitution includes a provision covered by subsection (1), the responsible entity must comply with subsections (4) to (10).

Exercise of discretion must be reasonable

- (4) The responsible entity or its nominee must act reasonably in exercising a discretion covered by subsection (1).

Note: The responsible entity is also subject to its general duties under section 601FC including the duty to act in the best interests of the members of the scheme.

- (5) Without limiting subsection (4), the manner in which a discretion is exercised must as far as practicable be:
- (a) if the discretion relates to working out the value of scheme property—consistent with ordinary commercial practice for valuing property of the relevant kind; and
 - (b) if the discretion relates to working out the market price of interests in the scheme which are quoted on a financial market—consistent with ordinary commercial practice for working out the market price of interests of the same kind in relation to an issue of the interests.

Documentation of exercise of discretion

- (6) The responsible entity must prepare one or more documents that:
- (a) set out:
 - (i) a description of the formula or method that the responsible entity or its nominee may apply in working out the issue price including each discretion covered by subsection (1) relevant to the formula or method; and
 - (ii) the circumstances in which the responsible entity or its nominee may exercise each discretion; and
 - (iii) what policy (the *documented policy*) (if any) the responsible entity or its nominee has set dealing with how they propose to exercise each discretion and the date on which the policy was set; and
 - (iv) what records the responsible entity will keep about the exercise of each discretion; and

Note: If a particular policy applies in relation to more than one discretion set out in the constitution, it is sufficient for the policy to be documented once provided that each of the discretions to which it relates

is specified. For instance, a policy relating to the rounding of the result of a calculation may be expressed to apply in relation to separate provisions in the constitution specifying a formula for performing calculations.

- (b) if the discretion is to be exercised by a nominee—state that the discretion will be so exercised and identify the nominee; and
 - (c) in relation to each discretion for which a documented policy has been set—explain why it is reasonable to exercise the discretion in accordance with the policy; and
 - (d) without limiting paragraph (c), if the exercise of the discretion in accordance with the documented policy would not be consistent with scheme property being valued, or the market price of interests being worked out, in accordance with ordinary commercial practice (see subsection (5))—explain why it is impracticable to do so.
- (7) When the responsible entity or its nominee exercises a discretion:
- (a) in relation to which there is no documented policy that is current at the time of exercise; or
 - (b) in a way that involves a departure from the documented policy relating to the discretion that is current at the time of exercise,
- they must prepare a document which sets out all of the following:
- (c) the date on which the discretion is exercised;
 - (d) if the discretion is exercised by a nominee—a statement to that effect which identifies the nominee;
 - (e) how the discretion is exercised;
 - (f) an explanation why it was reasonable to exercise the discretion the way it was exercised;
 - (g) without limiting paragraph (f), if they do not exercise the discretion in a way which is consistent with scheme property being valued, or the market price of interests being worked out, in accordance with ordinary commercial practice (see subsection (5))—an explanation why it is impracticable to do so.

- (8) The responsible entity must ensure that the records which it keeps under section 988A are kept in such a way as will enable:
- (a) any documented policy that was applied in the exercise of the discretion; and
 - (b) any exercise of a discretion of the kind covered by subsection (7),
- that relates to an issue of an interest to be identified.
- (9) The documented policy relating to a discretion of the kind referred to in subsection (1) must:
- (a) not involve the creation of another discretion of that kind; and
 - (b) be the only policy applicable to the exercise of the discretion at any one time.

Access to and retention of documents

- (10) The responsible entity must:
- (a) retain the documents covered by subsections (6) and (7) for 7 years after they cease to be current; and
 - (b) inform all members, on or before the first date when the responsible entity sends communication to all members after 1 May 2006, that they may obtain copies of the documents referred to in paragraph (a) from the responsible entity at no charge; and
 - (c) give a copy of the documents referred to in paragraph (a) to the following persons on request at no charge:
 - (i) a member of the scheme;
 - (ii) a person who has been or should have been given, or who has obtained, the Product Disclosure Statement for an interest in the scheme.

Note: A Product Disclosure Statement for such interests must indicate that these documents are available on request: subsection 1013D(2B).

Interaction with section 601GAA

- (11) When the responsible entity is setting the issue price in accordance with provisions of the constitution that are covered by section 601GAA and the formula or method is relevant to setting the issue price in

relation to any of the following circumstances, it must only apply the formula or method:

- (a) where the interests are quoted on a financial market (see subsections 601GAA(2) and (4));
- (b) where the interests are being offered to substantially all the members of the scheme (see subsection 601GAA(3));
- (c) where the whole or part of any money payable to a member under the constitution, by way of distribution of capital or income, is applied in payment for the issue of the interests (see subsection 601GAA(5));
- (d) where the responsible entity and a person as a wholesale client agree on an issue price that is equal to the price at which the interests would be issued under the constitution, less a reduction in the fees that are payable to the responsible entity for the issue of the interests (see subsection 601GAA(6)).

Note: Subsections 601GAA(3), (5) and (6) provide for the issue of interests at a price which varies from the price that otherwise applies under the constitution. The formula or method may be relevant to working out the price that would otherwise apply. Subsections 601GAA(2) and (4) provide for the issue of interests at a price which varies from the market price. The formula or method may be relevant to working out the market price.

Interpretation

- (12) For the purposes of subsection (1), the matters that may affect the value of a factor included in a formula or are aspects of a method include, but are not limited to:
 - (a) the time at which any matter is determined;
 - (b) the approach that is used to determine any matter;
 - (c) how the result of a calculation should be rounded.
- (13) Subsections (2) and (5) apply in relation to an interest that forms part of a stapled security (as defined in subsection 601GAA(13)) as if references to an interest in those subsections included a reference to the stapled security.

Transitional

- (14) A responsible entity and its nominees do not have to comply with subsections (4) to (10) until 1 May 2006.

601GAC Responsible entity discretions about withdrawal procedures

- (1) The constitution does not have to specify the right to withdraw from a scheme or set out adequate procedures for making and dealing with withdrawal requests to the extent that it provides a formula or method covered by subsection (2) that is to be used to work out the amount (the *withdrawal amount*) that will be paid to a member making a withdrawal but gives the responsible entity, or a person (the *nominee*) nominated by the responsible entity, a discretion to do either or both of the following:
- (a) decide a matter that affects the value of a factor included in the formula;
 - (b) decide a matter that is an aspect of the method.

The discretion does not have to be referred to in the formula or method. It may arise under another provision of the constitution that is relevant, whether directly or indirectly, to applying the formula or method.

- (2) The formula or method must be based on the value of scheme property less any liabilities that under the constitution may be met from that property divided by the number of interests on issue and may make allowance for the expenses that are associated with disposing of scheme property.
- (3) If a constitution includes a provision covered by subsection (1) the responsible entity must comply with subsections (4) to (10).

Exercise of discretion must be reasonable

- (4) The responsible entity or its nominee must act reasonably in exercising a discretion covered by subsection (1).

Note: The responsible entity is also subject to its general duties under section 601FC including the duty to act in the best interests of the members of the scheme.

- (5) Without limiting subsection (4), if the discretion relates to working out the value of scheme property,

the manner in which a discretion is exercised must as far as practicable be consistent with ordinary commercial practice for valuing property of the relevant kind.

Documentation of exercise of discretion

- (6) The responsible entity must prepare one or more documents that:
- (a) set out:
 - (i) a description of the formula or method that the responsible entity or its nominee may apply in working out the withdrawal amount including each discretion covered by subsection (1) relevant to the formula or method; and
 - (ii) the circumstances in which the responsible entity or its nominee may exercise each discretion; and
 - (iii) what policy (the *documented policy*) (if any) the responsible entity or its nominee has set dealing with how they propose to exercise each discretion and the date on which the policy was set; and
 - (iv) what records the responsible entity will keep about the exercise of each discretion; and

Note: If a particular policy applies in relation to more than one discretion set out in the constitution, it is sufficient for the policy to be documented once provided that each of the discretions to which it relates is specified. For instance, a policy relating to the rounding of the result of a calculation may be expressed to apply in relation to separate provisions in the constitution specifying a formula for performing calculations.
 - (b) if the discretion is to be exercised by a nominee—state that the discretion will be so exercised and identify the nominee; and
 - (c) in relation to each discretion for which a documented policy has been set—explain why it is reasonable to exercise the discretion in accordance with the policy; and
 - (d) without limiting paragraph (c), if the exercise of the discretion in accordance with the documented policy would not be consistent with scheme property being valued in accordance with ordinary commercial practice

(see subsection (5))—explain why it is impracticable to do so.

- (7) When the responsible entity or its nominee exercises a discretion:
- (a) in relation to which there is no documented policy that is current at the time of exercise; or
 - (b) in a way that involves a departure from the documented policy relating to the discretion that is current at the time of exercise,
- they must prepare a document which sets out all of the following:
- (c) the date on which the discretion is exercised;
 - (d) if the discretion is exercised by a nominee – a statement to that effect which identifies the nominee;
 - (e) how the discretion is exercised;
 - (f) an explanation why it was reasonable to exercise the discretion the way it was exercised;
 - (g) without limiting paragraph (f), if they do not exercise the discretion in a way which is consistent with scheme property being valued in accordance with ordinary commercial practice (see subsection (5))—an explanation why it is impracticable to do so.
- (8) The responsible entity must ensure that the records which it keeps under section 988A are kept in such a way as will enable:
- (a) any documented policy that was applied in the exercise of the discretion; and
 - (b) any exercise of a discretion of a kind covered by subsection (7),
- that relates to the withdrawal of a member to be identified.
- (9) The documented policy relating to a discretion of the kind referred to in subsection (1) must:
- (a) not involve the creation of another discretion of that kind; and
 - (b) be the only policy applicable to the exercise of the discretion at any one time.

Access to and retention of documents

- (10) The responsible entity must:
- (a) retain the documents covered by subsections (6) and (7) for 7 years after they cease to be current; and
 - (b) inform all members, on or before the first date when the responsible entity sends communication to all members after 1 May 2006, that they may obtain copies of the documents referred to in paragraph (a) from the responsible entity at no charge; and
 - (c) give a copy of the documents referred to in paragraph (a) to the following persons on request at no charge:
 - (i) a member of the scheme;
 - (ii) a person who has been or should have been given, or who has obtained, the Product Disclosure Statement for an interest in the scheme.

Note: A Product Disclosure Statement for such interests must indicate that these documents are available on request: subsection 1013D(2B).

Interpretation

- (11) For the purposes of subsection (1), the matters that may affect the value of a factor included in a formula or are aspects of a method include, but are not limited to:
- (a) the time at which any matter is determined;
 - (b) the approach that is used to determine any matter;
 - (c) how the result of a calculation should be rounded.

Transitional

- (12) A responsible entity and its nominees do not have to comply with subsections (4) to (10) until 1 May 2006.”.”; and
- (f) after paragraph 5 insert:

“Declaration—Content of Product Disclosure Statement

5A. Under paragraph 1020F(1)(c) of the Act, ASIC declares that Part 7.9 of the Act applies in relation to

a responsible entity (except a responsible entity of a time-sharing scheme) as if section 1013D of the Act were modified or varied by inserting after subsection (2A):

“(2B) Without limiting paragraph (1)(j), if the financial product is a managed investment product and the responsible entity of the registered scheme to which the product relates is required to prepare documents under subsections 601GAB(6) or (7) or 601GAC(6) or (7)—the Product Disclosure Statement must include statements to the effect that copies of the documents are available from the responsible entity at no charge. This subsection does not apply to a Product Disclosure Statement that is prepared before 1 May 2006.”.

Dated this 21st day of December 2005

Signed by Brendan Byrne

as a delegate of the Australian Securities and Investments Commission