

## **ASIC Class Order [CO 05/26]**

### **Constitutional provisions about the consideration to acquire interests**

*Issued 4/5/2005*

*Registered on Federal Register of Legislative Instruments 10/5/2005*

*Effective 10/5/2005*

*Class Order [CO 05/26] revokes [CO 98/52] and grants relief from s601GA(1)(a) in certain circumstances where, for commercial reasons, the consideration to acquire an interest in a registered managed investment scheme cannot be determined independently and investor protection will not be reduced. See Policy Statement 134 at [PS 134.19]–[PS 134.21].*

This instrument has effect under s601QA(1) and 1020F(1) of the *Corporations Act 2001*.

This compilation was prepared on 23 June 2006 taking into account amendments up to [CO 09/465]. See the table at the end of this class order.

Prepared by the Australian Securities and Investments Commission.

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### **Australian Securities and Investments Commission Corporations Act 2001 — Subsections 601QA(1) and 1020F(1) — Declaration, Exemption and Revocation**

*[Historical note: Heading amended 23/12/2005 [CO 05/1236] by replacing 'Subsection 601QA(1)' with 'Subsections 601QA(1) and 1020F(1).'*

#### **Enabling legislation**

1. The Australian Securities and Investments Commission makes the declaration, grants the exemption and effects the revocation set out in this instrument under subsections 601QA(1) and 1020F(1) of the *Corporations Act 2001* (the *Act*).

*[Historical note: Paragraph 1 amended 23/12/2005 [CO 05/1236] by replacing 'subsection 601QA(1)' with 'subsections 601QA(1) and 1020F(1).'*

#### **Title**

2. This instrument is ASIC Class Order [CO 05/26].

#### **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/>.

### **Declaration — Consideration to acquire interest**

4. Chapter 5C of the Act applies to a responsible entity (except a responsible entity of a time-sharing scheme) as if provisions of that Chapter were modified or varied as follows:
  - (a) in paragraph 601GA(1)(a) before “the” (first occurring), insert “except as provided by sections 601GAA and 601GAB,”; and
  - (aa) in subsection 601GA(4), after “scheme,” insert “except as provided by section 601GAC”;
  - (b) after section 601GA insert:

#### **“601GAA Constitutional provisions about consideration for the acquisition of interests**

- (1) The constitution of a registered scheme does not have to make adequate provision for the consideration that is to be paid to acquire an interest in the scheme to the extent that it contains provisions that have the effect of enabling the responsible entity to set the acquisition price of interests in any of the circumstances set out in subsections (2) to (8).

#### *Placements*

- (2) The responsible entity may set the issue price of interests where all of the following apply:
  - (a) the interests are in a class of interests that are quoted on:
    - (i) the financial market of ASX; or
    - (ii) an approved foreign market
 and the quotation of interests in that class is not suspended;
  - (b) interests are not issued to:
    - (i) the responsible entity; or
    - (ii) an associate of the responsible entity unless the issue is covered by subsection (12A) or (12B);

*[Historical note:* Paragraph 601GAA(2)(b) replaced 23/1/2007 [CO 07/18]. Paragraph 601GAA(2)(b) formerly read:

‘(b) interests are not issued to the responsible entity or an associate of the responsible entity;’.]

- (c) either of the following applies:
- (i) the issue, together with any related issue in the previous year does not, immediately before the issue, comprise more than 15% of the interests in that class; or (ii) all of the following apply:
    - (A) members who hold interests in the same class approve the issue by a placement resolution;
    - (B) unless the responsible entity reasonably considers that the issue will not adversely affect the interests of members in another class (if any)—members in that other class approve the issue by a placement resolution;
    - (C) any notice convening a meeting to vote on the issue contains particulars of the use to be made of the money raised by the issue.

*[Historical note: Paragraph 601GAA(2)(c)(i) replaced 18/6/2009 [CO 09/462]. Paragraph 601GAA(2)(c)(i) formerly read:*

- (i) both of the following apply:*
- (A) the issue, together with any related issue in the previous year does not, immediately before the issue, comprise more than 15% of the interests in that class;*
  - (B) the amount by which the issue price for the interests is less than the current market price for the interests in the same class does not exceed 10% of the current market price; or<sup>7</sup>.*

### *Rights issues*

- (3) The responsible entity may set the issue price of interests where all of the following apply:
- (a) the responsible entity offers the interests to persons who are members of the scheme on a date not more than 20 business days before the date of the offer, in proportion to the value of each member's interests in the scheme at that date (subject to paragraph (h), interests offered to, but not acquired by, members may be issued to other persons);
  - (b) the responsible entity offers the interests to all members of the scheme, except those foreign members (if any) it has excluded under subsection (11);
  - (c) all the interests offered are in the same class;
  - (d) the price of all the interests offered is the same;

- (e) where the interests are options for the issue of interests—both of the following apply:
  - (i) the exercise price of all the options offered is the same;
  - (ii) the means of working out the exercise price is set out in the terms of issue of the option;
- (f) the amount by which the price of an interest (other than an option for the issue of interests) and the exercise price of an option is less than the amount that would otherwise apply under the constitution does not exceed a relevant maximum percentage specified in the constitution;
- (g) the responsible entity offers the interests to the members at substantially the same time;
- (h) the responsible entity only issues interests to its associates as members of the scheme or, in the case where the interests are in a class of interests that are quoted on the financial market of ASX or an approved foreign market, in accordance with subsection (12A).

[*Historical note:* Paragraph 601GAA(3)(h) replaced 23/1/2007 [CO 07/18]. Paragraph 601GAA(3)(h) formerly read:

‘(h) the responsible entity only issues interests to its associates as members of the scheme.’.]

#### *Interest purchase plans*

- (4) The responsible entity may set the issue price of interests issued in accordance with ASIC Class Order [CO 09/425].

[*Historical note:* Subsection 601GAA(4) (including the heading to that subsection) replaced 18/6/2009 [CO 09/465]. Subsection 601GAA(4) formerly read:

#### *Interest purchase plans*

- (4) The responsible entity may set the issue price of interests where all of the following apply:
  - (a) the interests are in a class of interests which are quoted on the financial market of ASX and trading in the class is not suspended;
  - (b) the responsible entity offers the interests to each registered holder except those foreign members (if any) it has excluded under subsection (12);
  - (c) the responsible entity makes each offer on the same terms and conditions and on a non-renounceable basis;
  - (d) the issue price is less than the market price for the interests during a specified period in the 30 days before either the date of the offer or the date of the issue;
  - (e) no registered holder is issued with interests with an application price totaling more than \$5,000 in any 12 month period.’.]

#### *Distribution reinvestment plans*

- (5) The responsible entity may set the issue price of interests

(other than options for the issue of interests) 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 interests in the scheme and all of the following apply:

- (a) each member of the scheme (except those foreign members (if any) that the responsible entity has excluded under subsection (12)), may from time to time elect to participate in the arrangement as to the whole, or some proportion, of the distributions which are, or would otherwise be, payable to that member;
- (b) all the interests issued under the arrangement are in the same class;
- (c) the price of each interest issued under the arrangement in relation to any particular distribution is the same;
- (d) all interests issued under the arrangement in relation to any particular distribution are issued at substantially the same time;
- (e) the amount by which the price of an interest is less than the amount that would otherwise apply under the constitution does not exceed a relevant maximum percentage specified in the constitution.

*Negotiated fees*

- (6) The responsible entity may set the issue price of interests where all of the following apply:
  - (a) the responsible entity and a person (the **wholesale client**) as a wholesale client within the meaning of section 761G agree on an issue price that is equal to the price at which interests would be issued under the constitution, in the absence of this section, less a reduction (a **fee reduction**) in the fees that are payable to the responsible entity for the issue of the interests;
  - (b) the responsible entity has given all members a statement that fees may be individually negotiated with wholesale clients on or before the first date when the responsible entity sends communication to all members after a fee reduction is first offered;
  - (c) each Product Disclosure Statement for interests in the scheme contains a statement that fees may be individually negotiated with wholesale clients;
  - (d) the fee reduction does not adversely affect the fees that are paid or to be paid by any other member of

the scheme who does not have the benefit of a fee reduction.

*Schemes where there is limited or no pooling*

- (7) The responsible entity may set the issue price of interests where the only contributions that may be used in common with or pooled with any other asset in the scheme are:
- (a) money placed in a bank account held by the responsible entity on trust; or
  - (b) not proprietary rights and no income in which a member has any interest is to be paid or worked out by dividing up a pool; or
  - (c) used in common or pooled between joint tenants or tenants in common where:
    - (i) none of the tenants is the responsible entity or an associate of the responsible entity; and
    - (ii) each tenant is a person known to each other tenant before being offered an interest for issue.

*Forfeited interests*

- (8) The responsible entity may set the price for the sale of interests that have, in accordance with the constitution, been forfeited to the responsible entity on trust for members of the scheme where part (the ***outstanding amount***) of the issue price of the interest has not been paid when called and both of the following apply:
- (a) on the payment of the outstanding amount, the interest would be in a class of interests that are quoted on the financial market of ASX;
  - (b) the sale of the forfeited interest is in accordance with section 254Q, other than subsections (1), (9), (10) and (13), as if the interests were shares, the scheme was the company and the responsible entity was each director of the company.

*Stapled securities*

- (9) Subsections (2), (3), (5) and (8) apply in relation to an interest that forms part of a stapled security as if:
- (a) references to an interest in paragraphs (3)(f), (5)(e) and (8)(a) and (8)(b) included a reference to the stapled security; and
  - (aa) the references in paragraphs (2)(a) and (3)(h) to interests in a class of interests that are quoted on the

financial market of ASX or an approved foreign market included a reference to interests in a class of interests which form part of stapled securities where the stapled securities are quoted on such a market.

[*Historical note:* Subsection 601GAA(9) amended 18/6/2009 [CO 09/465] by

- replacing references to ‘Subsections (2) to (5) and (8)’ with references to ‘Subsections (2), (3), (5) and (8)’;
- in paragraph 601GAA(9)(a) deleting references to ‘(4)(a), (4)(d),’;
- in paragraph 601GAA(9)(aa) replacing the term ‘market; and’ with the term ‘market.’;
- and
- deleting paragraph 601GAA(9)(b). Paragraph GAA(9)(b) previously read:

‘(b) the reference to an interest in paragraph (4)(e) were a reference to the stapled security.’

[*Historical note:* Subsection 601GAA(9)(a) previously amended 18/6/2009 [CO 09/462] by replacing references to ‘in subparagraph (2)(c)(i)(B) and paragraphs (3)(f),’ with reference to ‘in paragraphs (3)(f),.’]

Subsection 601GAA(9) previously amended 23/1/2007 [CO 07/18] by inserting paragraph (aa).

*Historical note:* Paragraph 601GAA(9)(a) previously amended 23/1/2007 [CO 07/18] by deleting the reference to ‘paragraph (2)(a)’.

### *Interpretation*

#### (10) (deleted)

[*Historical note:* Subsection 601GAA(10) (not including the heading to that subsection) deleted 18/6/2009 [CO 09/465]. Subsection 601GAA(10) formerly read:

“(10) For the purposes of subsection (4):

- (a) registered holder means, subject to paragraphs (b) and (c), a person recorded in the register of members of a registered scheme as a member of that scheme; and
- (b) if 2 or more persons are recorded in the register of members as jointly holding interests in the scheme they are taken to be a single registered holder; and
- (c) if a trustee or nominee is expressly noted on the register of members as holding interests on account of another person (the beneficiary):
  - (i) the beneficiary is taken to be the registered holder of those interests; and
  - (ii) any issue of interests to the trustee or nominee is taken to be an issue to the beneficiary.’.]

(11) The responsible entity may elect not to make an offer to a foreign member under subsection (3) if the responsible entity:

- (a) where the scheme is included in the official list of the financial market operated by ASX —complies with the requirements of Rule 7.7 of the listing rules of the ASX as at 1 January 2005 concerning the treatment of members with a registered address outside Australia and New Zealand that are applicable to the relevant offer and issue of interests; or
- (b) where the scheme is not included in the official list of the financial market of ASX and the offer is renounceable — appoints a nominee to sell the

rights to acquire the interests that would otherwise have been offered to the foreign members and distribute to each foreign member their proportion of the proceeds of sale net of expenses; or

- (c) in any other case — determines that it would be unreasonable to make the offer to the member having regard to each of the following:
  - (i) the number of members in the place (the *relevant place*) where the registered address of the member is situated;
  - (ii) the number and the value of the interests that may be issued to members in the relevant place;
  - (iii) the cost of complying with legal requirements and the requirements of any relevant regulatory authority applicable to making the offer in the relevant place.

(12) The responsible entity may elect not to make an offer of the kind referred to in subsection (5) to each foreign member with a registered address in a place if it determines that it is unreasonable to make the offer to those members having regard to each of the following:

- (a) the number of members in the place;
- (b) the number and the value of the interests that may be issued under the arrangement to members in the place;
- (c) the cost of complying with legal requirements and the requirements of any relevant regulatory authority applicable to offering the arrangement in the place.

*[Historical note: Subsection 601GAA(12) amended 18/6/2009 by replacing reference to 'subsection (4) or (5)' with reference to 'subsection (5)'.]*

*Underwriting of placements and rights issues by associates of the responsible entity*

(12A) For the purposes of subsections (2) and (3), the responsible entity may issue interests to an associate as an underwriter or sub-underwriter where both of the following apply:

- (a) the issue is made under:
  - (i) an underwriting agreement between the responsible entity and the associate that is entered on terms that are no more favourable to the associate than terms that would be reasonable in the circumstances if the responsible entity

- and the associate were dealing at arm's length; or
- (ii) a sub-underwriting agreement between an underwriter and the associate that is entered on terms that are no more favourable to the associate than terms that would be reasonable in the circumstances if the underwriter and the associate were dealing at arm's length;
- (b) the associate holds an Australian financial services licence that authorises it to deal as an underwriter or sub-underwriter in interests in managed investment schemes and contains conditions to the effect that, where the licensee is an associate of the responsible entity of a registered scheme:
- (i) the licensee must not exercise voting rights in respect of any interests in the scheme that it acquires as an underwriter or sub-underwriter; and
  - (ii) the licensee may only dispose of interests in the scheme that it acquires as an underwriter or sub-underwriter:
    - (A) in the ordinary course of trading on the financial market of ASX or an approved foreign market; or
    - (B) to a person who is not an associate of the responsible entity; or
    - (C) to a person who is an associate of the responsible entity that acquires the interests in an eligible fiduciary capacity.

*Placements to associates of the responsible entity*

- (12B) For the purposes of subsection (2), the responsible entity may issue interests to a person who is its associate where all of the following apply:
- (a) before the interests are issued, the associate holds interests in the scheme in an eligible fiduciary capacity;
  - (b) the associate acquires the interests in the eligible fiduciary capacity;
  - (c) the proportion of the interests that are issued to the associate does not exceed the proportion of interests in the scheme that

the associate held immediately before the issue occurred.

(12C) For the purposes of subsections (12A) and (12B), a person holds or acquires interests in an ***eligible fiduciary capacity*** if the interests are held or acquired by the person as:

- (a) a trustee or custodian for a professional investor who is not the responsible entity or an associate of the responsible entity; or
- (b) a responsible entity of another registered scheme; or
- (c) a life insurance company, or an agent of a life insurance company, in the investment, administration and management of the assets of a statutory fund under the *Life Insurance Act 1995*; or
- (d) an approved trustee of a regulated superannuation fund under the *Superannuation Industry (Supervision) Act 1993*.

[*Historical note:* Section 601GAA amended 23/1/2007 [CO 07/18] by inserting subsection 601GAA(12A), (12B) and (12C) after subsection 601GAA(12).]

(13) For the purposes of this section:

***approved foreign market*** means each of the following:

- (a) American Stock Exchange;
- (b) Borsa Italiana;
- (c) Bursa Malaysia Main Board and Bursa Malaysia Second Board;
- (d) Euronext Amsterdam;
- (e) Euronext Paris;
- (f) Frankfurt Stock Exchange;
- (g) Hong Kong Stock Exchange;
- (h) JSE;
- (i) London Stock Exchange;
- (j) NASDAQ Stock Market;
- (k) New York Stock Exchange;
- (l) New Zealand Exchange;
- (m) Singapore Exchange;
- (n) SWX Swiss Exchange;
- (o) Tokyo Stock Exchange;

(p) Toronto Stock Exchange.

**ASX** means ASX Limited.

**foreign member** means a member of a registered scheme who has a registered address outside of this jurisdiction.

**offer** includes, in relation to an issue of interests, inviting an application for the issue of interests.

**placement resolution** means, in relation to the approval of an issue of interests, a special resolution where both of the following apply:

- (a) votes are only cast in respect of interests (the **eligible interests**):
  - (i) that are held by a member who will not acquire any of the interests that are to be issued; or
  - (ii) that are held by a member for the benefit of another person who will not obtain beneficial ownership of any of the interests that are to be issued;
- (b) the value of the eligible interests held by the members who vote represents at least 25% of the total value of eligible interests.

**related issue** means, in relation to an issue of interests, an issue of interests in the same class at a price set by the responsible entity, which has not been approved or ratified by members in accordance with a provision in the constitution to the effect of subparagraph (2)(c)(ii) or issued in accordance with a provision of the constitution other than one to the effect of subsection (2).

**stapled security** means two or more financial products including at least one interest in a registered scheme where:

- (a) under the terms on which each of the products are to be traded, they must be transferred together; and
- (b) there are no financial products in the same class as those financial products which may be transferred separately.

*[Historical note: Paragraph 4 (notional paragraph 601GAA(13) (definition of **approved foreign market**) amended 2/7/2007 [CO 07/300] by replacing paragraphs (a) to (n) with paragraphs (a) to (p). Paragraphs (a) to (p) formerly read:*

- (a) American Stock Exchange;
- (b) Borsa Italiana;
- (c) Euronext Paris;
- (d) Euronext Amsterdam;
- (e) Frankfurt Stock Exchange;
- (f) Hong Kong Stock Exchange;

- (g) London Stock Exchange;
- (h) NASDAQ Stock Market;
- (i) New York Stock Exchange;
- (j) New Zealand Exchange;
- (k) Singapore Exchange;
- (l) SWX Swiss Exchange;
- (m) Tokyo Stock Exchange;
- (n) Toronto Stock Exchange.’.

Paragraph 4 (notional paragraph 601GAA(13) (definition of *approved foreign market*)) previously amended 23/1/2007 [CO 07/18] by:

- Replacing the definition of ‘approved foreign market’. The definition formerly read:
  - ‘*approved foreign market* means each of the following:
    - (a) American Stock Exchange;
    - (b) Borsa Italiana;
    - (c) Bourse de Paris;
    - (d) Eurex Amsterdam;
    - (e) Frankfurt Stock Exchange;
    - (f) Hong Kong Stock Exchange;
    - (g) London Stock Exchange;
    - (h) NASDAQ National Market;
    - (i) New York Stock Exchange;
    - (j) New Zealand Stock Exchange;
    - (k) Stock Exchange of Singapore;
    - (l) SWX Swiss Exchange;
    - (m) Tokyo Stock Exchange;
    - (n) Toronto Stock Exchange;
    - (n) Zurich Stock Exchange.’;
- replacing the definition of ‘ASX’. The definition formerly read:
  - ‘ASX means Australian Stock Exchange Limited.’; and
- replacing the definition of ‘related issue’. The definition formerly read:
  - ‘*related issue* means, in relation to an issue of interests, an issue of interests in the same class at a price set by the responsible entity, which has not been approved or ratified by members in accordance with a provision in the constitution to the effect of subparagraph (2)(c)(ii) or issued in accordance with other provisions of the constitution.’.]

### **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:

- (i) are not quoted on a financial market; or
- (ii) are AQUA products that are able to be traded on the financial market operated by ASX,

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

*[Historical note: Subsection 601GAB(2)(a) amended 6/3/2009 (CO 09/27). Subsection 601GAB(2)(a) formerly read:*

“(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:

- (i) are quoted on a financial market; and
- (ii) are not interests to which subparagraph (a)(ii) applies,

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.

*[Historical note: Subsection 601GAB(2)(b) amended 6/3/2009 (CO 09/27). Subsection 601GAB(2)(b) formerly read:*

“(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 of interests in accordance with a provision (the ***section 601GAA provision***) of the constitution that is covered by section 601GAA, a formula or method that is referred to in this section may only be applied to the extent that it is consistent with the section 601GAA provision.

Note: This subsection ensures that a formula or method covered by this section cannot be used as a means of avoiding complying with the specific requirements of the provisions of the constitution covered by section 601GAA. However, it allows the formula or method to be applied to the extent that it complements those requirements. For example:

- (a) 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.
- (b) 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.

[Historical note: Subsection 601GAB(11) and the following note replaced 23/1/2007 [CO 07/18]. Subsection 601GAB(11) formerly read:

‘(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.

(13A) For the purposes of subsection (2) and this subsection:

***AQUA products*** has the meaning given by the operating rules of ASX.

***ASX*** means ASX Limited.

[*Historical note:* Subsection 601GAB(13) inserted 6/3/2009 (CO 09/27).]

### *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.”.

[*Historical note:* Paragraph 4 amended 23/12/2005 [CO 05/1236] by:

- in paragraph (a) replacing ‘section 601GAA’ with ‘section 601GAA and 601GAB’;
- inserting new paragraph (aa);
- in paragraph (b) inserting the notional sections 601GAB and 601GAC.]

**Exemption — Equality of treatment**

5. A responsible entity of a registered scheme (except a responsible entity of a time-sharing scheme) does not have to comply with paragraph 601FC(1)(d) of the Act to the extent that it would prevent the responsible entity from:
- (a) dealing with some members of the scheme in the way described in subsections 601GAA(11) and (12) as notionally inserted into the Act by this instrument; or
  - (b) where an offer is made in accordance with a provision of the constitution of the scheme to the effect of subsection 601GAA(3) as notionally inserted into the Act by this instrument—requiring some or all of the members who are offered interests as wholesale clients to notify the responsible entity of their acceptance of the offer by a date that occurs before another date, specified in the Product Disclosure Statement for the offer (or, if a Product Disclosure Statement does not have to be given because the offer is made in accordance with section 1012DAA of the Act, the terms of the offer), by which other members are to notify their acceptance, provided that interests are not issued to those first mentioned members before the earliest date on which they may be issued to the other members of the scheme.

Note 1: The exemption in paragraph (b) allows the responsible entity to treat institutional and retail investors differently to the extent of the period that they are given to notify their acceptance of the offer. It does not permit the responsible entity to issue interests to institutional investors before any of the retail investors.

Note 2: Relief from compliance with paragraph 601FC(1)(d) of the Act for differential fee arrangements of the kind covered by notional subsection

601GAA(6) of the Act set out above is provided by ASIC Class Order [CO 03/217]: see especially paragraph 2 of Schedule B.

[*Historical note:* Subparagraph 5(b) amended 16/5/2008 [CO 08/171] by inserting the words “(or, if a Product Disclosure Statement does not have to be given because the offer is made in accordance with section 1012DAA of the Act, the terms of the offer)” after the words “Product Disclosure Statement for the offer”.]

Subparagraph 5(b) previously replaced 23/1/2007 [CO 07/18]. Subparagraph 5(b) formerly read:

‘(b) treating some or all members who are professional investors differently to other members in either or both of the following ways:

- (i) giving them a shorter period than other members to consider an offer made in accordance with subsection 601GAA(3) as notionally inserted into the Act by this instrument; or
- (ii) issuing interests to them before they are issued to some other members.

*Note:* Relief from compliance with paragraph 601FC(1)(d) of the Act for differential fee arrangements of kind covered by notional subsection 601GAA(6) of the Act set out above is provided by ASIC Class Order [CO 03/217]: see especially paragraph 2 of Schedule B.’.]

## Declaration

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.”.

[*Historical note:* Declaration in paragraph 5A inserted after paragraph 5 23/12/2005 [CO 05/1236].]

## Interpretation

5B. In this instrument:

*wholesale client* has the meaning given by section 761G of the Act.

[*Historical note:* Interpretation inserted after paragraph 5A 23/1/2007 [CO 07/18]].

## Revocation

6. ASIC Class Order [CO 98/52] is revoked.

Dated this 4th day of May 2005

Signed by Brendan Byrne  
as a delegate of the Australian Securities and Investments  
Commission

## Notes to ASIC Class Order [CO 05/26]

### Note 1

ASIC Class Order [CO 05/26] (in force under s601QA(1) and 1020F(1) of the *Corporations Act 2001*) as shown in this compilation comprises that Class Order amended as indicated in the Tables below.

### Table of Instruments

Instrument number	Date of making or FRLI registration	Date of commencement	Application, saving or transitional provisions
[CO 05/26]	10/5/2005	10/5/2005	-
[CO 05/1236]	23/12/2005	23/12/2005	-
[CO 07/18]	23/1/2007	23/1/2007	-
[CO 07/300]	2/7/2007	2/7/2007	-
[CO 08/171]	12/5/2008	16/5/2008	-
[CO 09/27]	5/3/2009	6/3/2009	-
[CO 09/462]	18/6/2009	18/6/2009	-
[CO 09/465]	18/6/2009	18/6/2009	-

### Table of Amendments

ad. = added or inserted    am. = amended    rep. = repealed    rs. = repealed and substituted

Provision affected	How affected
Heading	am. [CO 05/1236]
Para 4	am. [CO 05/1236]; am. [CO 07/300]; am. [CO 07/18]
Para 4(b)	am. [CO 09/27]; am. [CO 09/462]; am. [CO 09/465]
Para 5 (b)	am. [CO 07/18]; am. [CO 08/171]
Para 5A	ad. [CO 07/18]