

Issued on: Thursday 18 January 2001



ASIC

Australian Securities &
Investments Commission

ASIC CLARIFIES VARIOUS PRACTICAL ISSUES RELATING TO MANAGED INVESTMENT SCHEMES

The Australian Securities and Investments Commission (ASIC) today issued further guidance to industry in relation to a number of practical issues relating to the operation of managed investment schemes.

GUIDANCE FOR ROLL OVER OF PROSPECTUSES AFTER CLERP ACT 1999

Some continuous issuers of interests in managed investment schemes have been unclear about the process to follow to ensure that they can continue to issue interests to investors when they “roll over” prospectuses.

Under s727(3) of the Corporations Law (the Law), issuers of non-quoted securities must not accept applications for, or issue securities offered under a disclosure document during the seven to 14 day exposure period after lodgement of the disclosure document.

A continuous issuer is one who seeks to have a prospectus, profile statement, or an offer information statement (disclosure documents) on issue at all times.

Issuers have expressed concern about whether they can continue to offer interests during the exposure period and whether they will therefore be out of the market for that period.

ASIC believes that a continuous issuer can have overlapping disclosure documents on issue at the same time for the same scheme or schemes provided they both comply with all the requirements of the Law.

To overcome timing difficulties, the issuer should lodge the new disclosure document early enough to ensure that the current disclosure document will not expire before the end of the exposure period for the new document.

Issuers should take into account ASIC’s policy on when we may extend the exposure period from seven to up to 14 days (see Policy Statement 152 - Lodgement of disclosure documents).

LODGED DOCUMENTS ARE REQUIRED TO BE SIGNED

While the provision of Chapter 6D of the Law do not require a prospectus to be signed, the consequences of the lodgment requirements under section 351 of the Law are that the lodged document has to be signed. Section 351 states that a document lodged with ASIC in writing by, or on behalf of a registered scheme must be signed by a director or secretary of the responsible entity of the registered scheme.

INFORMATION

ASIC CONFIRMS POLICY OF EXCLUDING ASSOCIATE LOANS FROM NTA

The responsible entity of a managed investment scheme must meet certain capital adequacy requirements under its licence (the net tangible assets or NTA requirements). One of the standard requirements in calculating NTA under ASIC Policy Statement 131 is that amounts owing from, or invested in, any “associate” are in effect not to be counted towards NTA.

ASIC has always considered that this requirement would exclude from NTA any loans made by the responsible entity to members of the scheme it operates, where the loan is made to facilitate investments by the members in the scheme. This is consistent with the policy behind the requirement. However, ASIC’s review of the practices of some licensed industry participants has revealed that some responsible entities have not been adjusting their NTA calculations to exclude these types of loans.

ASIC will amend the wording of the NTA schedule used for responsible entity licences to provide certainty in any new or varied licenses issued. However, ASIC recognises that promoters and operators of some schemes may have acted on the genuine belief that the requirement did not exclude certain loans. Any responsible entities in this position should notify ASIC by 31 March 2001 of any loans to members which have been relied upon to meet NTA requirements.

This notification should be by letter, to the ASIC regional office where the relevant managed investment schemes were registered. Where the position is disclosed to ASIC, ASIC will not take enforcement action in relation to any prior breaches and will discuss with applicants what requirements should apply going forward.

PRIMARY PRODUCTION LICENCE CONDITIONS

Policy Statement 130 *Managed Investments – Licensing*, at paragraph 23A sets out ASIC's interim policy on protection of underlying land in primary production schemes, and the licence condition that will be applied to achieve that policy. After consultation with industry ASIC has now finalised its policy in this respect. The final policy and licence condition is substantially similar to the approach taken in the interim policy. ASIC believes that this licence condition is an important protection for investors in primary production schemes.

Policy Statement 130.23A will be amended to provide that where an offer of interests in a primary production managed investment scheme is made with an offer of rights regarding the land on which the scheme will occur, a special licence condition will be imposed in the dealers licence issued to the responsible entity. The licence condition will ensure that:

- (a) an interest protecting the rights of members in relation to the land on which the primary production occurs is registered under applicable land titles law, in the name of either members collectively, each member, the custodian, the licensee (in certain circumstances), a nominee of members (in certain circumstances) or a company (in which all the issued shares are held by the members in the scheme); and
- (b) the interest is registered such that it cannot be adversely affected by either prior or later interests of others in the land.

The details will be published in the ASIC Digest.

ASIC EXTENDS POLICY ON SHARE PURCHASE PLANS TO MANAGED INVESTMENT SCHEMES

For some time, ASIC has granted relief to allow corporations listed on the Australian Stock Exchange (ASX) to offer existing shareholders the opportunity to acquire small numbers of additional shares without having to issue a prospectus (share purchase plans).

ASIC has recently given similar relief to responsible entities of some ASX listed managed investment schemes, so that they can introduce similar plans for issuing units in their schemes (unit purchase plans). ASIC will consider similar applications for this relief, and is considering modifying its existing Policy Statement 125 on share purchase plans to extend its application to unit purchase plans.

REDUNDANCY FUNDS

On 14 June 2000 ASIC issued an information release explaining the interim relief we have given to redundancy funds. We also indicated that we would undertake a public consultation process before finalising our regulatory approach on the issue. After considering preliminary comments we are of the view that the regulation of redundancy funds may be an issue of law reform rather than one that can be dealt with through the use of ASIC powers. Pending the Government's consideration of the issue, the interim relief given by ASIC will continue until 30 June 2001.

REGISTRATION OF STAPLED MANAGED INVESTMENT SCHEMES AS A SINGLE SCHEME

Interests in a number of individual trusts, each of which in isolation satisfies the definition in the Law of managed investment scheme, may sometimes be stapled together. The effect of this is that interests in each of the trusts can only be issued and traded together with one another, not separately. If each member holds interests in each of the stapled trusts, the overall stapled group of trusts may be a single managed investment scheme. In these circumstances, ASIC will not require each of the individual trusts to be registered provided the stapled group is registered.

GUIDANCE ON INCORPORATING BY REFERENCE A COMPLIANCE PLAN FOR SCHEME REGISTRATION

Questions have been raised by some practitioners on how to properly incorporate by reference an original compliance plan (the incorporated plan) into another compliance plan (the incorporating plan) in circumstances where it is appropriate to do so.

Some responsible entities have attempted to incorporate entire compliance plans of another scheme by simply naming the incorporated plan. Others have failed to take into account the requirements of Class Order 98/50, which allows future changes to the incorporating plan to apply to the incorporated plan or plans.

Section 601HB

Section 601HB of the Law sets out how the Responsible Entity may incorporate by reference provisions from another scheme's compliance plan.

The section provides that:

- (1) the responsible entity of a registered scheme may lodge with ASIC a compliance plan for the scheme that is expressed to incorporate specified provisions, as in force at a specified time, of a compliance plan of another registered scheme of which it is also the responsible entity; and
- (2) the specified provisions, as in force at the specified time, are taken to be included in the plan.

In Class Order [CO 98/50] ASIC has modified this section with the effect that a compliance plan for a managed investment scheme can incorporate parts of a previously lodged compliance plan for a different managed investment scheme as that first plan is amended from time to time. (See Policy Statement 132 at [PS 132.5]).

This is subject to the requirement that the compliance plan for the registered scheme (excluding any part incorporated by reference under section 601HB) contain a statement to the effect that the responsible entity will review the appropriateness of the compliance plan when any amendment is made to a part of a compliance plan that is incorporated by reference in it.

The incorporating plan should specify which parts of the other plan are incorporated by reference rather than purport to incorporate the whole of the other plan. As long as the incorporating plan contains a statement as required by the Class Order then all plans can be amended by an amendment to the first plan.

Suggested Approach

The following is an example of wording which ASIC considers appropriate when incorporating a compliance plan by reference:

COMPLIANCE PLAN FOR [NAME OF FUND]

1. *This is the compliance plan for [name of fund] (the Scheme).*
2. *Pursuant to section 601HB of the Corporation Law, paragraphs numbered [X] to [Y] of the compliance plan dated [insert date] for the [insert name of other scheme] ARSN [insert ARSN number] as they are amended from time to time, are incorporated into this compliance plan.*
3. *[name of officer or position] will review the appropriateness of this compliance plan as soon as practicable and in any event within one month of any amendment to the compliance plan of [insert name of other scheme] to ensure that the amendment made is relevant to this compliance plan.*
4. *This compliance plan also includes the measures set out in Schedule A below (identify the necessary measures).*

It should be emphasised that this is only a suggested wording, and other wording that specifies the relevant sections to be incorporated by reference may be acceptable.

THE USE OF TRADE DOLLARS IN MANAGED INVESTMENT SCHEMES

ASIC has recently noticed proposals for schemes where investors may contribute part of the consideration to acquire an interest in the scheme by way of trade dollars from a barter exchange.

ASIC has several concerns at the use of trade dollars as a way of providing consideration to acquire interest in managed investment schemes. Firstly, there is a risk that accepting trade dollars from an incoming investor can

dilute the value of the interests of members; especially those who paid cash or other assets such as trade dollars in a different and more valuable barter exchange.

Secondly, trade dollars would be of no value to the scheme unless the scheme is able to use the trade dollars in exchange for some goods or services for which the scheme has an imminent need. Further, for a number of reasons such as the comparative illiquidity of trade dollars, the inability to invest surplus trade dollars, the fees associated with the use of trade dollars, and the risk of collapse of a barter exchange, ASIC does not believe that trade dollars could properly be accepted on a one for one basis with cash when calculating the consideration that the member is providing.

ASIC considers the constitution of a scheme must specify consideration that leads to one independently verifiable price at any one time for interests of a class. Giving a choice of paying for an issue in money or moneys worth can be acceptable if the constitution specifies the price in money and the responsible entity is reasonably satisfied that any non monetary consideration (such as trade dollars) equals the price when taken together with any portion paid in cash.

Accordingly whilst it might in some limited circumstances be appropriate for a responsible entity to accept trade dollars as part consideration for the acquisition of interest in the scheme, this could only be done where:

- the responsible entity is satisfied that it is in best interest of all members to accept trade dollars,
- the constitution of the scheme provides that consideration other than cash (such as trade dollars) may be accepted as consideration to acquire an interest in the scheme,
- the responsible entity only accepts consideration other than cash where it is satisfied that that consideration can be applied for the benefit of the scheme,
- the responsible entity is satisfied that the value of the trade dollars to the scheme equals the cash amount otherwise payable,
- the compliance plan for the scheme sets out adequate arrangements to ensure that when accepting trade dollars the responsible entity assesses the value of the consideration provided by way of trade dollar in a way that reflects their true value for the scheme (in ASIC's view this could never be on a trade dollar for cash dollar basis) and which reflects that the true value for the scheme and which will vary over time,
- the compliance plan contains rigorous measures to ensure that the valuation methodology is robust and adequately monitored,
- the compliance plan sets out measures to ensure that the responsible entity only accepts trade dollars in appropriate circumstances (noting the potential conflict between the responsible entity's interests and its duty that may arise),
- the disclosure documents for the scheme set out any additional risks (for example relating to the comparative illiquidity of trade dollars) arising from the acceptance of trade dollars.

ASIC may give particular attention in any surveillance to ensure that these requirements are satisfied when trade dollars are accepted.

REPORTING OBLIGATIONS OF RESPONSIBLE ENTITIES

During recent surveillances ASIC has noted that a number of responsible entities did not demonstrate a knowledge of the financial reporting and other reporting requirements under the Corporations Law and Regulations.

Chapters 2M, 2N and 5C of the Law impose a number of obligations upon responsible entities to lodge a variety of periodic documents on behalf of themselves and their registered schemes. In addition, the

Corporations Law and Regulations and dealers licence conditions require responsible entities, auditors and compliance committees to report events such as breaches of licence or the constitution of a registered scheme.

ASIC is concerned many responsible entities have not taken active steps to familiarise themselves with their reporting obligations. To assist responsible entities and advisers, ASIC has prepared a table, which highlights some of the more common financial reporting and other reporting requirements.

This table is not intended to be an exhaustive list of reporting obligations and responsible entities should obtain their own advice to ascertain the full range of reporting obligations which apply in their instance. The table should however assist responsible entities to develop comprehensive compliance arrangements that deal with reporting obligations. The table is attached as an Appendix to this information release.

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Summary of typical reporting obligations

Section		ASIC Form	Due date	Fees
	CHAPTER 2M REPORTING REQUIREMENTS – COMPANIES			
319(1)	Annual Report of a Public Company that is NOT a disclosing entity.	388	4 months after end of financial year	\$0
319(1)	Annual report of a Public Company that is a disclosing entity.	388	3 months after end of financial year	\$0
320	Half yearly report by a Disclosing Entity – company	7051	75 days after half year end	\$0
	CHAPTER 2N REQUIREMENTS - COMPANIES			
345, 348	Annual return of a Public or Proprietary Company	316	31 January	\$900
	CONTINUOUS DISCLOSURE REQUIREMENTS – DISCLOSING ENTITY – COMPANY			
1001B	Disclosure Notice	7053	ASAP	\$0
	PART 7.5 REQUIREMENTS - LICENSEE			
791	Form 706 Annual Statement of Licensee	706	3 months after end of financial year	\$300
860(2)	Statement relation to accounts of a dealer and Auditor's Report of licensee. Financial report and NTA/SLF calculation (Proformas 5 or 6) also required.	711 & 712	3 months after end of financial year	\$30 + \$30
	CHAPTER 2M REPORTING REQUIREMENTS – REGISTERED SCHEMES			
319(1)	Annual report of a Registered Scheme that is NOT a disclosing entity.	388	3 months after end of financial year	\$0
319(1)	Annual report of a Registered Scheme that is a disclosing entity.	388	3 months after end of financial year	\$0
320	Half yearly report by a Disclosing Entity – registered scheme	7051	75 days after half year end	\$0
	CHAPTER 2N REQUIREMENTS – REGISTERED SCHEMES			
345, 349	Annual Return for each Registered Scheme. Note that the form requires figures such as the <u>top twenty members of each Scheme plus units on issue</u> .	7160	3 months after end of financial year	\$900
	CONTINUOUS DISCLOSURE REQUIREMENTS – DISCLOSING ENTITY – REGISTERED SCHEME			
1001B	Disclosure Notice	7053	ASAP	\$0

	PART 5C.4 - ANNUAL AUDIT OF COMPLIANCE PLAN			
601HG(7)	Lodgement of compliance plan audit	None printed	3 months after end of financial year	\$30
	REPORTS OF EVENTS/BREACHES BY LICENSEE			
Licence	Check licence conditions for reporting of events (eg Key Person, loss of responsible officers)	None printed		\$0
Reg 7.3.01	Report of event that adversely effect financial position	None printed	1 day	\$0
787	Report of breach of licence condition	None printed	1 day	\$0
601FC(1)(l)	Report any breach of Law that relates to the Scheme and has had, or is likely to have, a materially adverse effect on the interests of members.	None printed	ASAP	\$0
	REPORTS OF EVENTS/BREACHES BY COMPLIANCE COMMITTEE			
601JC(1)(c)	Report of breach of the Law involving the Scheme or breach of the Constitution where the committee is of the view that the responsible entity has not taken action to deal with breach.	None printed	ASAP	\$0
	REPORTS OF EVENTS/BREACHES BY COMPLIANCE PLAN AUDITOR			
601HG(4)	Report that a contravention of the Law has occurred and that contravention will not be adequately dealt with in the auditors report.	None printed	ASAP	\$0
	REPORTS OF EVENTS/BREACHES BY COMPANY/LICENSEE'S AUDITOR			
311	Report that a contravention of the Law has occurred and that contravention will not be adequately dealt with in the auditors report.	None printed	ASAP	\$0
861	Report of breach of specific provisions of the Law, or the licence, or event that adversely affects the ability of the licensee to meet obligations of licence.	None printed		
	REPORTS OF EVENTS/BREACHES BY SCHEME'S AUDITOR			
311	Report that a contravention of the Law has occurred and that contravention will not be adequately dealt with in the auditors report.	None printed	ASAP	\$0

Note - The first financial year of a company or registered scheme commences on the day on which it is registered or incorporated and can be for a period of up to 18 months. Any subsequent financial years must be for a period of 12 months (plus or minus 7 days) (see Section 323D)