



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 32

Trustee companies common funds

Chapter 7 — Securities (Part 7.12)

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From 5 July 2007, this document may be referred to as Regulatory Guide 32 (RG 32) or Policy Statement 32 (PS 32). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 32.1) or their policy statement number (e.g. PS 32.1).

Editor's note: See RG 136.30–RG 136.66 for information about how this guide applies to managed investment schemes.

Headnotes

Exercise of ASIC's powers under s1069(3) and 1084(6) in respect of common funds; nature of a common fund; relief from statutory covenants; single trustee; buy-back; meetings; winding up provisions.

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Introduction

RG 32.1 This guide sets out the extent to which the ASC will provide relief from Pt 7.12 Div 5 of the Corporations Law (Law) to statutory trustee companies which offer or issue interests in common funds. It replaces NCSC Release 140.

Background

RG 32.2 Trustee companies are regulated by State legislation [*Trustee Companies Act 1984* (Vic), *Trustee Companies Act 1964* (NSW), *Trustee Companies Act 1988* (SA), *Trustee Companies Act 1968* (Qld), *Trustee Companies Act 1987* (WA), *Trustee Companies Act 1953* (Tas), *Companies (Trustee and Personal Representatives) Act 1981* (NT), *Trustee Companies Ordinance 1947* (ACT)] (State Trustee Companies Acts). They are empowered under State Trustee Companies Acts to pool money in common funds notwithstanding that they are held on individual trusts.

RG 32.3 An interest of a beneficiary in a common fund is a prescribed interest as defined in s9 of the Law.

RG 32.4 Part 7.12 Div 5 of the Law contains the prescribed interest provisions. Section 1065 of the Law prohibits the issue, offer for subscription or purchase, and the issue of invitations to subscribe for or buy any prescribed interest unless there is an approved deed in force in relation to that prescribed interest. Section 1069 of the Law stipulates covenants that are required to be contained in an approved deed. Other provisions of the Division contain various requirements for prescribed interest schemes which operate under approved deeds.

RG 32.5 In a number of jurisdictions trustee companies common funds are exempted from the prescribed interest provisions of the Law of their respective jurisdictions through State legislation.

RG 32.6 In South Australia and Tasmania common funds are exempted by regulation in their respective Companies (Application of Laws) Act through the Corporations Acts of their respective States. In Western Australia they are exempted by s21 of the *Trustee Companies Act 1987*. These exemptions apply only to the offering of prescribed interests in the particular state. Interstate offerings are subject to the Law.

Nature of a common fund

RG 32.7 Certain requirements of Pt 7.12 Div 5 of the Law are not compatible with the nature of a common fund and State Trustee Companies Acts. The trust relationship between an investor and trustee in a common fund is determined on an individual basis and is established prior to money being pooled in a common fund. Given these individual relationships it is not possible for a trustee to be bound by a resolution of interest holders. A trustee could not repurchase an interest in a common fund as this would be contrary to the general trust law prohibition on dealing in trust property. This is distinct from redeeming an interest by paying out a beneficiary. A trustee cannot delegate responsibilities to another trustee under the common fund provisions of State Trustee Companies Acts. This would prevent the segregation of a trustee's duties between a trustee and management company.

RG 32.8 Common funds are used by trustee companies to pool money held on behalf of estates and under powers of attorney. Common funds are also offered to voluntary investors through prospectuses.

Extent of relief

RG 32.9 The ASC will not grant relief from the requirement that an interest in a common fund be offered under an approved deed. However, it will grant exemptions and modifications to Pt 7.12 Div 5 of the Law to enable a common fund, other than a property common fund, to be offered under an approved deed with a single trustee and no-management company.

RG 32.10 Trustee companies offering interests in common funds must hold a securities dealer's licence. They do not have the benefit of the licensing exemption in reg 7.3.11 as they are not exempt from the requirement for an approved deed.

RG 32.11 Offerings of common funds must comply with the prospectus provisions of the Law.

Rules relating to existing common funds

RG 32.12 The ASC recognises that some existing common funds are subject to rules which relate to the establishment or administration of

the common fund. Such rules are not required to be incorporated into the approved deed if:

- (a) all rules which relate to the common fund are submitted to the ASC with the proposed deed. A deed will only be approved if there is no inconsistency between the deed and the rules; and
- (b) the deed contains a provision that the trustee comply with the rules except where they are inconsistent with the terms of the deed. Where this occurs the provisions of the deed are to take precedence.

RG 32.13 All rules relating to new common funds must be included in the approved deed unless separate rules are required by State legislation which deals with the establishment of common funds.

Relief to be granted

RG 32.14 Details of relief are set out in the pro forma instrument of exemption and modification (see Pro Forma 3). A summary of the Pro Forma instrument follows in para 15 to 23.

Single trustee

RG 32.15 The ASC will grant exemptions from covenants required by s1069(1) of the Law and the regulations which are not applicable to a structure where there is a single trustee and no-management company. These are the covenants which enable the trustee to supervise the conduct of the management company, require the management company to pay money to the trustee and duplicate covenants given by the trustee.

Functions performed by the management company

RG 32.16 The ASC will grant exemptions from each covenant required to be given by the management company under s1069(1) of the Law and the regulations on condition that a corresponding covenant is given by the trustee.

Buy-back

RG 32.17 An exemption will be granted from the buy-back covenant and other related provisions contained in Pt 7.12 Div 5 of the Law. The exemption from the buy-back covenant will be conditional on a covenant being inserted into the deed requiring the trustee to redeem an interest at a price calculated in accordance with the deed. The

covenant required by s1069(1)(d) of the Law will be replaced with the requirement that the trustee is to maintain adequate redemption arrangements.

Meetings

RG 32.18 The ASC will grant exemptions from covenants and provisions of Pt 7.12 Div 5 of the Law which enable a meeting of interest holders to provide directions to the trustee, ratify a decision of the trustee, or amend the deed. Exemptions from s1069(1)(m) of the Law will only be granted on condition that a covenant is inserted into the deed enabling meetings of interest holders to be convened for information purposes. *Exemptions from s1069(1)(k) will only be granted on condition that neither the trustee nor any of its associates has an interest in the election of the director other than as a trustee. ~~under another prescribed interest scheme.~~*

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Supervisory control by ASC

RG 32.19 The ASC will grant exemptions from s1069(1)(h)(i) and s1069(1)(h)(ii) of the Law which require the provision of information by the manager to the auditor or trustee.

The exemption will be granted on condition that the trustee makes books or any other information relating to the prescribed interest scheme available to the ASC or a registered company auditor appointed by the ASC.

Conflict of interest provisions

RG 32.20 Trustees must not receive payment or benefits on retirement without interest holders approval (reg 7.12.15(1)(d)). The ASC will grant relief from this regulation if the deed includes a covenant containing an absolute prohibition on such benefits being paid.

Winding up provisions

RG 32.21 The ASC will grant relief from s1074 of the Law which provides a mechanism for a prescribed interest scheme to be wound up by a resolution of interest holders.

RG 32.22 The trustee of a common fund must withdraw from the operation of the common fund in certain circumstances. The ASC will grant an exemption from reg 7.12.15(2)(e) on condition that the deed contains a covenant requiring the trustee to withdraw from the

operation of the common fund where it ceases to carry on business; is placed in liquidation or under external management; or the ASC revokes its approval or licence.

Voluntary investors

RG 32.23 A voluntary investor is a person who invests in a common fund pursuant to a prospectus or directs the trustee to make such an investment. Certain covenants imposed as conditions of exemptions only apply for the benefit of voluntary investors. This contrasts with other investors such as estates whose money may have been invested in the common fund at the discretion of the trustee.

Applications for relief

RG 32.24 Applications for relief under this guide should be lodged at any ASC Regional Office. Applications should be accompanied by an appropriate fee. If you are seeking a variation to the pro forma instrument you should provide full reasons for the variation sought. Any additional applications for relief under s1069(3) of the Law granted under other ASC regulatory guides should be made at the same time.

RG 32.25 See Superseded Policy Statement 23 [SPN 23] for details of the ASC's procedures for the approval of deeds. See the report of the Public Hearing on the Offer of Common Funds by Statutory Trustee Companies.