



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 134

# Managed investments: Constitutions

February 2014

### **About this guide**

This guide is for operators of managed investment schemes (schemes) seeking to register the scheme(s) and their advisers.

It sets out our guidance on:

- the requirements for scheme constitutions in s601GA and 601GB of the *Corporations Act 2001* (Corporations Act); and
- how we apply these requirements in deciding whether to register a scheme.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Document history

This guide was issued in February 2014 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Regulatory Guide 134, issued August 1998, updated November 1998, June 1999 and September 2000, reissued June 2013.

### Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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## A Overview

### Key points

The constitution of a managed investment scheme that is registered with ASIC must meet certain requirements under the Corporations Act.

This guide explains how we apply these requirements from 1 October 2013 when assessing constitutions lodged as part of an application to register a scheme.

For schemes registered before 1 October 2013, we will not deregister the scheme or take any action against a responsible entity or its officers on the basis that a constitution does not comply with s601GA and 601GB of the Corporations Act if the constitution meets the requirements in the appendix to this guide.

### Requirements for a constitution

- RG 134.1 A constitution of a managed investment scheme (scheme) that is registered with ASIC must be a legally enforceable document between the responsible entity and members that sets out some or all of the rights, duties and liabilities of the responsible entity in its operation of the scheme.
- RG 134.2 Under s601GA of the *Corporations Act 2001* (Corporations Act), the constitution of a registered scheme must make adequate provision for, or specify, certain prescribed matters. These include:
- (a) the consideration to acquire and dispose of an interest in the scheme (see Section B);
  - (b) the powers and rights of the responsible entity (see Section C), including:
    - (i) for making investments, borrowing or dealing with scheme property; and
    - (ii) to be paid fees or be indemnified out of scheme property;
  - (c) the method for dealing with complaints about the scheme (see Section D);
  - (d) any rights of members to withdraw from the scheme (see Section E); and
  - (e) winding up the scheme (see Section F).
- Note: In this paper, references to sections (s), Parts (Pts) or Chapters (Chs) are references to the Corporations Act.
- RG 134.3 Under s601GB, the constitution of a registered scheme must be a document that is legally enforceable between the members and the responsible entity of the scheme: see Section G.
- RG 134.4 In our view, making provisions of the constitution under s601GA subject to other documents that may affect these provisions means that the constitution does not 'make adequate provision for' or 'specify' the matters required by s601GA: see Section H.

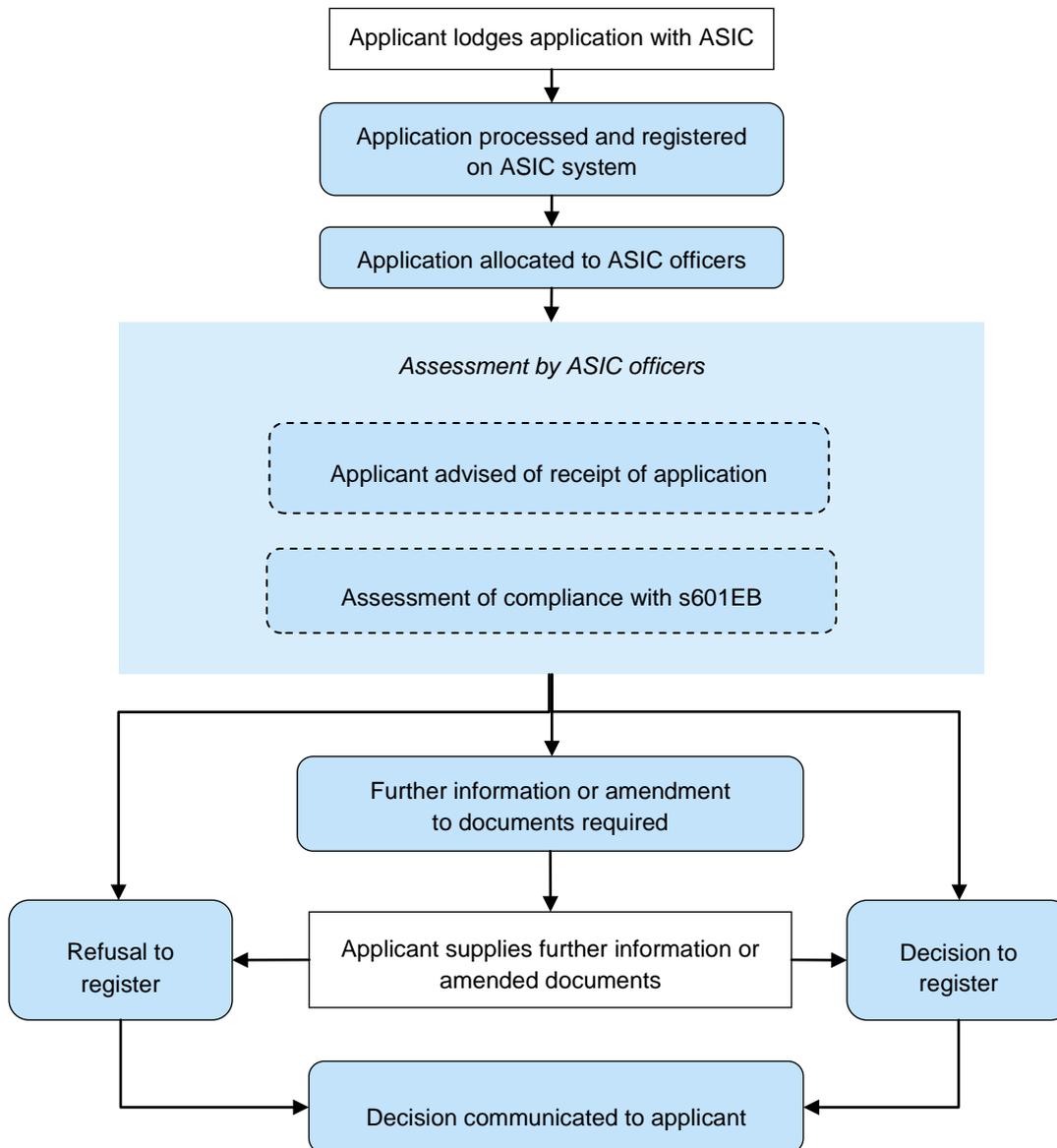
## Registering a scheme

- RG 134.5 To register a scheme with ASIC, there must be a responsible entity who is a public company that holds an Australian financial services (AFS) licence that authorises it to operate the scheme. The applicant can lodge the application electronically or in hardcopy.
- RG 134.6 The application must meet the requirements in s601EA by including:
- (a) an application form, which states the name and address of the proposed responsible entity and the person who has consented to be the auditor of the compliance plan (see Form 5100 *Application for registration of managed investment scheme*);
  - (b) a constitution that meets the requirements in s601GA and 601GB, as assessed under this guide;
  - (c) a compliance plan that meets the requirements in s601HA, as assessed under Regulatory Guide 132 *Managed investments: Compliance plans* (RG 132); and
  - (d) a statement by the directors that requires them to certify that the application complies with s601EA (see Form 5103 *Directors' statement relating to application for registration of a managed investment scheme*).
- RG 134.7 There is no prescribed form for the constitution or the compliance plan. However, the application must state which provisions of the constitution address the matters in s601GA and 601GB. We will usually only consider these provisions when registering a scheme, and other provisions that appear related.
- RG 134.8 When an application to register a scheme is lodged with us, we assess whether it complies with s601EA. We must register the scheme within 14 days of lodgement (14-day registration period) unless it appears to us that the application does not meet one or more of the requirements: s601EB.
- RG 134.9 In assessing an application to register a scheme, we may seek clarification about specific provisions in the constitution during the 14-day registration period. We may also ask for amendments to specific provisions if they do not appear to comply with this guide. If a responsible entity or its advisers is unwilling or unable to amend these provisions as required within this 14-day period, and it appears to us that the constitution does not comply, we will refuse to register the scheme.
- RG 134.10 Figure 1 sets out our process for assessing an application to register a scheme. Table 1 summarises our key guidance, what relief is available and action we may take in assessing a constitution (e.g. asking for more information, an amendment, or refusing to register the scheme).

- RG 134.11 If a responsible entity or its advisers choose to include provisions about the consideration to acquire an interest in the scheme in the constitution that do not meet our guidance, we encourage them to include a written submission with the application for registration identifying the relevant provisions and how they meet the requirements in s601GA or 601GB: see RG 134.30–RG 134.39.

## How our guidance applies

- RG 134.12 We will apply this guide when assessing constitutions lodged as part of an application to register a scheme from 1 October 2013.
- RG 134.13 For schemes registered before 1 October 2013, we will not deregister the scheme or take any action against a responsible entity or its officers on the basis that a constitution does not comply with s601GA and 601GB of the Corporations Act if the constitution meets the requirements in the appendix to this guide.
- Note: Our no-action position will not affect the rights of other persons, including members, if the responsible entity has contravened its duty in s601FC(1)(f) to ensure the constitution meets the requirements in s601GA and 601GB.
- RG 134.14 We understand that there may be legal, operational and cost implications for responsible entities of schemes registered before 1 October 2013 in amending their constitutions to comply with this guide. Responsible entities of these schemes should assess whether the constitution complies with the Corporations Act and if not, what action they should take to remedy any non-compliance.
- RG 134.15 There are consequences if a scheme's constitution does not continue to meet the requirements in s601GA and 601GB. In particular:
- (a) a responsible entity may breach its duties under s601FC(1)(f) to ensure that the constitution complies with s601GA and 601GB;
  - (b) officers of the responsible entity may breach their duties under s601FD(1)(f)(i) to do what a reasonable person in the officer's position would do to ensure that the entity complies with s601GA and 601GB; and
  - (c) we may deregister a scheme under s601PB(1)(b) if its constitution does not meet the requirements in s601GA or 601GB.
- RG 134.16 In making a decision about whether to amend the constitution, a responsible entity must consider all implications and its duties under s601FC.
- RG 134.17 For schemes registered on or after 1 October 2013, we may deregister the scheme or take action against the responsible entity and/or its officers if we consider that the constitution does not meet the requirements in s601GA or 601GB.

**Figure 1: How we assess an application to register a scheme**

Note: Applicants may choose to withdraw their application at any stage of the process. However, this does not mean that they will be entitled to a refund of the application fee.

## Table 1: Summary of our guidance and relief

### Section B: Consideration to acquire an interest

Situation/requirement	Relief available/action we may take
<b>General</b>	
<p>The constitution of a scheme must make adequate provision for the consideration that is to be paid to acquire an interest in the scheme: s601GA(1)(a): see RG 134.18–RG 134.22.</p>	<p>We will refuse to register a scheme under s601EB if it appears to us that the constitution does not provide adequate provision for the consideration to acquire an interest in the scheme.</p>
<p>In relation to the amount of the consideration to acquire interests, responsible entities can choose to:</p> <ul style="list-style-type: none"> <li>• rely on our relief under Class Order [CO 13/655] <i>Provisions about the amount of consideration to acquire interests and withdrawal amounts not covered by [CO 05/26]</i> by including provisions in the constitution that meet the requirements in that class order;</li> <li>• if the scheme was registered before 1 October 2013, include provisions that meet the requirements in Class Order [CO 05/26] <i>Constitutional provisions about the consideration to acquire interests</i>; or</li> <li>• make adequate provision in the constitution for the amount of the consideration to acquire an interest in the scheme in another way that does not meet all of the requirements in [CO 13/655] but does comply with s601GA(1)(a).</li> </ul> <p>See RG 134.23–RG 134.29.</p>	<p>Relief is available under [CO 13/655] and [CO 05/26].</p> <p>We will pay greater attention to constitutions that do not meet all of the requirements in [CO 13/655], including when assessing an application for registration of a scheme.</p>
<p>We encourage responsible entities not relying on our relief in [CO 13/655], or proposing to include provisions giving a discretion about timing that affects payment of the consideration to acquire an interest, to give us a draft of the relevant provisions before lodging an application for registration of a scheme: see RG 134.30–RG 134.39.</p>	<p>We may refuse registration if the responsible entity or its advisers have not requested a review of provisions, there appears to be non-compliance with s601GA(1)(a) and we do not have sufficient time to consider whether they comply with s601GA(1)(a).</p>
<b>Calculating the consideration</b>	
<p><i>Unlisted unlisted schemes not traded on AQUA market:</i> A responsible entity may exercise discretions or make adjustments affecting the amount of the consideration using a formula or method based on the value of scheme property less liabilities divided by the number of interests on issue, or assets less liabilities and number of interests referable to a class: see RG 134.40–RG 134.43 and RG 134.44–RG 134.51.</p>	<p>Relief is available under [CO 13/655].</p>
<p><i>Schemes traded on the AQUA market:</i> A responsible entity may exercise discretions or make adjustments affecting the amount of the consideration based on the value of scheme property less any liabilities met from scheme property divided by the number of interests on issue, or assets less liabilities and number of interests referable to a class: see RG 134.40–RG 134.43 and RG 134.52–RG 134.56.</p>	<p>Relief is available under [CO 13/655].</p>

Situation/requirement	Relief available/action we may take
<p><i>Listed schemes:</i> A responsible entity may exercise discretions or make adjustments affecting the amount of the consideration based on the reasonably current market price of the listed interests in the relevant class: see RG 134.40–RG 134.43 and RG 134.57–RG 134.62.</p>	Relief is available under [CO 13/655].
<p><i>Common enterprises and other nil or fixed price schemes, platforms and MDAs, and options:</i> Adequate provision must be made for the consideration that is to be paid to acquire an interest in these schemes under s601GA(1)(a): see RG 134.63–RG 134.68.</p>	<p>There is no relief for these schemes in [CO 13/655].</p> <p>Note: For common enterprises and other nil or fixed price schemes, our relief under [CO 13/655] would apply to any subsequent issue of interests based on 'scheme assets less liabilities' or 'assets of a class less liabilities of a class'.</p>
<p><i>Placements:</i> A responsible entity may set the consideration where the interest is issued under a placement, subject to certain conditions: see RG 134.69–RG 134.73.</p>	Relief is available under [CO 13/655].
<p><i>Rights issues</i> A responsible entity may set the consideration where the interest is issued under a rights issue: see RG 134.74–RG 134.82.</p>	Relief is available under [CO 13/655] and Class Order [CO 13/656] <i>Equality of treatment impacting on the acquisition of interests.</i>
<p><i>Distribution reinvestment plans:</i> A responsible entity may set the consideration where the interest is issued as a result of a distribution of capital or income that is payable to a member: see RG 134.83–RG 134.85.</p>	Relief is available under [CO 13/655] and [CO 13/656].
<p><i>Interest purchase plans:</i> A responsible entity may set the consideration where it meets the requirements in Class Order [CO 09/425] <i>Share and interest purchase plans:</i> see RG 134.86–RG 134.88.</p>	Relief is available under [CO 13/655] and [CO 09/425].
<p><i>Negotiated fees:</i> A responsible entity may set the consideration where it meets the requirements in Class Order [CO 03/217] <i>Differential fees:</i> see RG 134.89–RG 134.92.</p>	Relief is available under [CO 13/655] and [CO 03/217].
<p><i>Stapled securities:</i> A responsible entity may allocate the consideration to acquire an interest if that interest is a component part of a stapled security, subject to certain conditions: see RG 134.93–RG 134.97.</p>	Relief is available under [CO 13/655].
<p><i>Schemes with limited or no pooling:</i> A responsible entity may set the consideration for a scheme where the only contributions that may be used in common or pooled are specified assets of the scheme that are:</p> <ul style="list-style-type: none"> <li>• money placed in an ADI account held by the responsible entity as scheme property pending disbursement of the money to pay fees or expenses, acquire investments or carry on business;</li> <li>• 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</li> <li>• used in common or pooled between joint tenants or tenants in common as long as none of the tenants is the responsible entity or an associate and each tenant knows each other before the offer is made.</li> </ul> <p>See RG 134.98.</p>	Relief is available under [CO 13/655].

Situation/requirement	Relief available/action we may take
<p><i>Forfeited interests:</i> A responsible entity may set the consideration to acquire an interest where acquisition occurs as a result of forfeiture: see RG 134.99–RG 134.102.</p>	<p>Relief is available under [CO 13/655] and [CO 13/656].</p>
<p><i>Withdrawal price:</i> A responsible entity may exercise discretions or make adjustments affecting the amount payable on withdrawal using a formula or method based on the value of scheme property less liabilities, or a class of assets less liabilities: see RG 134.103–RG 134.106, RG 134.160–RG 134.161 and RG 134.176. See also Section E, RG 134.178–RG 134.179 on withdrawal rights.</p>	<p>Relief is available under [CO 13/655].</p>
<p><b>Procedures for exercising a discretion</b></p>	
<p><i>Valuation (all schemes):</i> If a responsible entity exercises a discretion or makes an adjustment affecting the amount of the consideration, it must:</p> <ul style="list-style-type: none"> <li>• for an unlisted scheme, calculate the value based on the ordinary commercial practice for valuing that type of scheme property and produce a value that is reasonably current at the time of issue or withdrawal; or</li> <li>• for a listed scheme, calculate the market price based on the ordinary practice for determining that price for the same kind of interest and produce a market price that is reasonably current at the time of issue or withdrawal.</li> </ul> <p>See RG 134.107–RG 134.110.</p>	<p>Relief is available under Class Order [CO 13/657] <i>Discretions affecting the amount of consideration to acquire interests and withdrawal amounts.</i></p>
<p><i>Record keeping (all schemes):</i> If a responsible entity exercises a discretion or makes an adjustment affecting the amount of the consideration, it must comply with certain documentation and record-keeping requirements: see RG 134.111–RG 134.114.</p>	<p>Relief is available under [CO 13/657].</p>

## Section C: Powers and rights of the responsible entity

Situation/requirement	Relief available/action we may take
<p><i>Powers to deal with scheme property and raise money:</i> The constitution includes provisions that appear to relate to certain kinds of investments that are inconsistent with the types of schemes the responsible entity is authorised to operate under its AFS licence: see RG 134.115–RG 134.119.</p>	<p>We may seek further information and/or ask for an amendment.</p>
<p><i>Fees and indemnities:</i> To 'specify the right', the constitution should either:</p> <ul style="list-style-type: none"> <li>• expressly state that any rights to fees or indemnification out of scheme property is subject to the proper performance by the responsible entity of its duties under the provisions for fees and indemnities; or</li> <li>• include a provision that has the effect of incorporating this restriction (e.g. a provision which states that, to the extent a provision of the constitution is inconsistent with the Corporations Act, it will be of no effect).</li> </ul> <p>See RG 134.120–RG 134.122.</p>	<p>We may:</p> <ul style="list-style-type: none"> <li>• ask for an amendment so that the constitution contains one of these provisions, or if it appears to us that the constitution contains a provision that can only operate if it overrides the provisions on proper performance; and/or</li> <li>• refuse registration.</li> </ul>

Situation/requirement	Relief available/action we may take
<p>The constitution does not clearly identify all times at which the fee accrues, the performance to which it relates and each variable (including timing variables) affecting the amount of the fee that is payable: see RG 134.123.</p>	<p>We may:</p> <ul style="list-style-type: none"> <li>• seek further information and/or ask for an amendment if we cannot clearly identify each of the variables in the fee calculation; and/or</li> <li>• refuse registration.</li> </ul>
<p>The constitution includes a provision allowing a maximum entitlement to a fee to give the responsible entity commercial flexibility to set fees without having to amend the constitution: see RG 134.124.</p>	<p>We will not generally raise concerns if a provision clearly identifies a maximum fee to which the responsible entity is entitled.</p>
<p>The constitution includes a provision calculating a variable fee with reference to an index benchmark and:</p> <ul style="list-style-type: none"> <li>• the responsible entity can replace the index with an index that is not similar; and/or</li> <li>• the provision does not clearly identify when the index can be replaced.</li> </ul> <p>See RG 134.125–RG 134.127.</p>	<p>We may:</p> <ul style="list-style-type: none"> <li>• ask for an amendment to replace the index with an index that is similar, or to identify when the index can be replaced; and/or</li> <li>• refuse registration.</li> </ul>
<p>A responsible entity may purport to indemnify itself from scheme property at an 'hourly rate to be determined by it from time to time' or 'on standard commercial terms for work undertaken' for performing functions in operation of the scheme: see RG 134.128–RG 134.129.</p>	<p>We may:</p> <ul style="list-style-type: none"> <li>• ask for a such provision to be removed on the basis that it does not comply with s601GA(2) because all of the variables affecting it are not specified in the provision; and/or</li> <li>• refuse registration.</li> </ul>
<p>The constitution allows for a right to payment of a fee in advance of proper performance of the responsible entity's duties to which the fee relates: see RG 134.130.</p>	<p>We may:</p> <ul style="list-style-type: none"> <li>• ask for such a provision to be removed as payment in advance is incompatible with the right to a fee only being available for proper performance of the duty to which it relates; and/or</li> <li>• refuse registration.</li> </ul>

## Section D: Complaints handling

Situation/requirement	Relief available/action we may take
<p><i>Complaints by retail clients:</i> To minimise the need for duplicate procedures, the constitution should include a provision to the effect that the responsible entity will comply, as an AFS licensee, with the dispute resolution requirements in s912A(2) for retail clients in dealing with member complaints in relation to the scheme: see RG 134.135–RG 134.141.</p>	<p>If such a provision is not included, we will carefully review the provisions on handling complaints from retail clients to ensure that they fully address all the relevant requirements consistent with our guidance in Regulatory Guide 165 <i>Licensing: Internal and external dispute resolution</i> (RG 165), unless the constitution provides that the scheme is not open to retail clients.</p>

Situation/requirement	Relief available/action we may take
<p><i>Complaints by wholesale clients:</i> The constitution does not appear to contain any provisions on how complaints by wholesale clients will be dealt with, or a provision that the scheme is closed to such clients.</p> <p>We have granted relief from s601FC(1)(d) to make it clear that responsible entities may treat retail and wholesale clients who may be in the same class differently in relation to complaints handling: see RG 134.142–RG 134.145.</p>	<p>We may:</p> <ul style="list-style-type: none"> <li>• ask for an amendment so that the constitution includes provisions that: <ul style="list-style-type: none"> <li>– close the scheme to wholesale clients;</li> <li>– apply the provision on s912A(1)(g) to both retail and wholesale clients; or</li> <li>– explain how complaints by wholesale clients will be dealt with; and/or</li> </ul> </li> <li>• refuse registration.</li> </ul> <p>Relief is available under [CO 13/656].</p>

## Section E: Withdrawal rights

Situation/requirement	Relief available/action we may take
<p><i>Members' right to withdraw:</i> The constitution allows the responsible entity to 'determine any pre-conditions to the exercise of a right to withdraw from time to time', or does not have sufficient provision on how members may exercise the right to withdraw and the pre-conditions that will apply: see RG 134.146–RG 134.152.</p>	<p>We may:</p> <ul style="list-style-type: none"> <li>• ask for an amendment; and/or</li> <li>• refuse registration.</li> </ul>
<p><i>Making and dealing with withdrawal requests:</i> The constitution gives a right to withdraw and states that the key elements of the withdrawal process are set out in a separate document, such as a Product Disclosure Statement (PDS) or the terms of issue: see RG 134.153–RG 134.157.</p>	<p>We will:</p> <ul style="list-style-type: none"> <li>• ask for an amendment so that the constitution includes provisions setting out key information about the withdrawal process; and/or</li> <li>• refuse registration.</li> </ul>
<p><i>Triggering a withdrawal right:</i> The constitution does not include clear steps that a member has to take to trigger a right to withdraw and how any pre-conditions can be satisfied: see RG 134.158–RG 134.159.</p>	<p>We may:</p> <ul style="list-style-type: none"> <li>• ask for an amendment so that the constitution sets out clear steps and how pre-conditions can be satisfied; and/or</li> <li>• refuse registration.</li> </ul>
<p><i>Amounts paid to members:</i> The constitution does not include provisions about the amounts that will be given to members to satisfy withdrawal requests and does not include either the withdrawal price that will apply or the formula or method for determining it, the period for payment after redemption, and the nature of the amount that members will receive: see RG 134.160–RG 134.161.</p>	<p>We may:</p> <ul style="list-style-type: none"> <li>• ask for an amendment so that the constitution includes this information; and/or</li> <li>• refuse registration.</li> </ul>
<p><i>Restrictions in dealing with withdrawal requests:</i> The constitution appears to allow restrictions on withdrawal but does not clearly describe these restrictions: see RG 134.162–RG 134.165.</p>	<p>We may:</p> <ul style="list-style-type: none"> <li>• ask for an amendment so that the constitution clearly describes any restrictions on withdrawal; and/or</li> <li>• refuse registration.</li> </ul>

Situation/requirement	Relief available/action we may take
<p>The constitution sets out specific situations in which withdrawals may be restricted (with or without a general residual discretion), or simply provides for a general discretion to restrict withdrawals.</p>	<p>We will not generally raise concerns about such a provision.</p> <p>Relief is available under [CO 13/655].</p>
<p><i>Ceasing to be a member:</i> The constitution includes provisions that treat withdrawing members as having ceased to be a member before the time scheme property is valued for the purposes of calculating the withdrawal price: see RG 134.166–RG 134.168.</p>	<p>We:</p> <ul style="list-style-type: none"> <li>• will carefully review provisions that appear to have this effect and may ask for these provisions to be amended; and/or</li> <li>• may refuse registration.</li> </ul>
<p>The constitution includes provisions that have the effect of denying withdrawing members the rights of other members until the withdrawal has occurred.</p>	<p>We may:</p> <ul style="list-style-type: none"> <li>• ask for these provisions to be amended; and/or</li> <li>• refuse registration.</li> </ul>
<p>For liquid schemes, the constitution includes a provision where withdrawal requests are satisfied in a period longer than 21 days: see RG 134.169–RG 134.171.</p>	<p>In assessing provisions on the timeframe for payment of the withdrawal amount, we may ask for an explanation about how a timeframe is fair if it appears it may be longer than 21 days. If we are not satisfied the timeframe is fair, we may refuse registration.</p> <p>Note: We are unlikely to raise questions about the timeframe for payment if it is 21 days or less, except in exceptional circumstances.</p>
<p><i>Non-liquid schemes:</i> A constitution contains provisions that allow a member to exercise a right to withdraw while the scheme is non-liquid other than in response to a current withdrawal offer: see RG 134.172–RG 134.173.</p>	<p>We may:</p> <ul style="list-style-type: none"> <li>• ask for an amendment so that such a right is removed; and/or</li> <li>• refuse registration.</li> </ul>
<p><i>Fairness to members:</i> The constitution has provisions about the right of withdrawal that unreasonably disadvantage some members: see RG 134.174–RG 134.175 and RG 134.177.</p>	<p>We may:</p> <ul style="list-style-type: none"> <li>• ask for these provisions to be amended; and/or</li> <li>• refuse registration.</li> </ul>
<p>The constitution does not provide for the withdrawal amount to be determined on the basis of valuations of scheme property that are consistent with the range of ordinary commercial practice for valuing that type of scheme property and are reasonably current: see RG 134.176.</p>	<p>We may:</p> <ul style="list-style-type: none"> <li>• ask for an amendment so that valuations are consistent with ordinary commercial practice and are reasonably current; and/or</li> <li>• refuse registration.</li> </ul> <p>Relief is available under [CO 13/657].</p>
<p>The constitution does not provide for any assets other than Australian currency that is paid as the withdrawal amount to be valued consistently with the range of ordinary commercial practice for valuing that type of scheme property and for the valuation to be reasonably current: see RG 134.178–RG 134.179.</p>	<p>We may:</p> <ul style="list-style-type: none"> <li>• ask for an amendment so that valuations of such assets are consistent with ordinary commercial practice and are reasonably current; and/or</li> <li>• refuse registration.</li> </ul>
<p><i>Suspension of withdrawals:</i> The constitution contains a provision that has the effect of allowing the responsible entity to set out the circumstances in which it may suspend the right to withdraw in another document: see RG 134.180–RG 134.181.</p>	<p>We will:</p> <ul style="list-style-type: none"> <li>• ask for an amendment so that the constitution sets out when the responsible entity may suspend the right to withdraw; and/or</li> <li>• refuse registration.</li> </ul>

## Section F: Winding up

Situation/requirement	Relief available/action we may take
<p><i>Procedures for winding up:</i> The constitution does not address the process for winding up the whole 'program or plan of action' that constitutes the scheme: see RG 134.182–RG 134.187.</p>	<p>We may:</p> <ul style="list-style-type: none"> <li>ask for an amendment so that the constitution addresses this process, or to provisions that seek to incorporate other documents, including the terms of issue of a scheme or material in a PDS; and/or</li> <li>refuse registration.</li> </ul>
<p>Unless it is clear from the nature of the scheme, the constitution does not include provisions that allow the assets and liabilities of the scheme to be clearly identified and dealt with in a winding up: see RG 134.188–RG 134.189.</p>	<p>Taking into account the nature of the scheme, we may:</p> <ul style="list-style-type: none"> <li>ask for an amendment so that the constitution contains such provisions; and/or</li> <li>refuse registration.</li> </ul>
<p>The constitution does not identify who will apportion the net proceeds of realisation between members, what criteria will be used and the priority of persons: see RG 134.190–RG 134.191.</p>	<p>We may:</p> <ul style="list-style-type: none"> <li>ask for an amendment so that the constitution clearly identifies these matters; and/or</li> <li>refuse registration.</li> </ul>
<p>The constitution does not identify the party that will bear the costs of winding up the scheme and in what priority this will be paid: see RG 134.192.</p>	<p>We may:</p> <ul style="list-style-type: none"> <li>ask for an amendment so that the constitution clearly identifies these matters; and/or</li> <li>refuse registration.</li> </ul>
<p>The constitution envisages that members can continue making payments during the winding up process or are required to make such payments to maximise the net proceeds of realisation, but does not include provisions specifying all relevant powers and obligations: see RG 134.193–RG 134.195.</p>	<p>We may:</p> <ul style="list-style-type: none"> <li>ask for an amendment so that all relevant powers and obligations are specified in this case; and/or</li> <li>refuse registration.</li> </ul>
<p>The constitution of a scheme does not contain provisions in relation to winding up the scheme where both the scheme and the responsible entity are insolvent: see RG 134.196–RG 134.199.</p>	<p>We will not refuse to register such a scheme on this basis.</p>
<p><i>Independent audit:</i> The constitution does not include a provision specifying the responsible entity must obtain an independent audit of the final accounts to be conducted by a registered company auditor or audit firm after a scheme is wound up: see RG 134.200–RG 134.203.</p>	<p>We:</p> <ul style="list-style-type: none"> <li>will ask for an amendment so that the constitution includes a provision for an independent audit, or if the provision gives the responsible entity a discretion to arrange either an independent audit or a review of the final accounts; and/or</li> <li>may refuse registration.</li> </ul>
<p><i>Postponement of winding up:</i> The constitution includes provisions that allow a responsible entity to postpone the realisation of a scheme on winding up for as long as it thinks fit: see RG 134.204.</p>	<p>We will not raise concerns about such provisions.</p>

**Section G: Legal enforceability**

Situation/requirement	Relief available/action we may take
<p>The constitution must be binding between the responsible entity and members: s601GB.</p> <p>The particular form of the constitution will determine how it needs to be drafted and executed for it to be legally enforceable: see s127(1) and (2) of the Corporations Act. See RG 134.205–RG 134.212.</p>	<p>If it appears to us that the constitution is:</p> <ul style="list-style-type: none"> <li>• a contractual agreement and is not expressed as binding between the responsible entity and members, we may ask for an amendment and/or refuse registration; and/or</li> <li>• not executed in accordance with s127(1) or (2), we may ask for information confirming that the constitution has been validly executed and/or refuse registration.</li> </ul>
<p>The constitution should contain an overriding provision to the effect that, to the extent a provision of the constitution is inconsistent with the Corporations Act, it will be of no effect: see RG 134.213–RG 134.215.</p>	<p>If the constitution does not appear to contain such a clause, we are likely to spend more time assessing it to ensure that it is not inconsistent with the Corporations Act. This could result in any concerns we have about various provisions being raised later in the 14-day registration period.</p>
<p>We also consider that a provision of the constitution will not make ‘adequate provision’ for, or ‘specify’ the matters prescribed by s601GA if it is not capable of being legally enforceable, as envisaged by s601GB: see RG 134.215.</p>	<p>If it appears to us that the constitution contains a provision that is not capable of being legally enforced, we may ask for the provision to be amended and/or refuse registration.</p>

**Section H: Incorporation by reference**

Situation/requirement	Relief available/action we may take
<p>We consider that making provisions of the constitution under s601GA subject to other documents that may affect these provisions (e.g. the terms upon which interests are issued) means that the constitution does not ‘make adequate provision for’ or ‘specify’ the matters required by s601GA: see RG 134.216–RG 134.218.</p>	<p>We may:</p> <ul style="list-style-type: none"> <li>• ask for an amendment to provisions that seek to incorporate other documents, including the terms of issue of a scheme or material in a PDS; and/or</li> <li>• refuse registration.</li> </ul>
<p>A responsible entity may include a provision that incorporates by reference and gives overriding effect to Appendix 15A of the ASX Listing Rules: see RG 134.219–RG 134.220.</p>	<p>Relief is available under Class Order [CO 98/1808] <i>Allowing constitutions to use Appendix 15A of the ASX Listing Rules</i>.</p>

## B Consideration to acquire an interest

### Key points

The constitution of a scheme must make adequate provision for the consideration that is to be paid to acquire an interest in the scheme. What constitutes ‘adequate provision’ will depend on the circumstances of the scheme.

To minimise uncertainty, we have given relief under Class Order [CO 13/655] *Provisions about the amount of consideration to acquire interests and withdrawal amounts not covered by [CO 05/26]* to allow the responsible entity to set the amount of the consideration to acquire an interest in the scheme.

We encourage a responsible entity that does not rely on our relief in [CO 13/655], or proposes to include provisions giving a discretion about timing that affects payment of the consideration, to provide us with a draft of the relevant provisions before lodging an application to register the scheme.

### What is ‘adequate provision’?

- RG 134.18 The constitution of a scheme must make adequate provision for the consideration that is to be paid to acquire an interest in the scheme: s601GA(1)(a).
- RG 134.19 This requirement aims to ensure that members have rights in the constitution about the consideration to acquire an interest in the scheme because this consideration may affect the value of other members’ interests, including by unfairly diluting them. In our view, the responsible entity may be subject to a conflict between its interest in further issues, which may increase its remuneration and may be promoted by offering interests at a discount, and the interests of members, which may be to avoid dilution of the value of their interests.
- RG 134.20 Because s601GA is principles-based, there are differing views on the exact content that is required for a constitution to make adequate provision for the consideration that is required to be paid to acquire an interest in a scheme.
- RG 134.21 We believe that what constitutes ‘adequate provision’ will depend on the circumstances of the scheme.
- RG 134.22 We acknowledge that responsible entities and their advisers might face uncertainty about whether a constitution makes adequate provision for the consideration to acquire an interest in a scheme. This might create an unnecessary layer of complexity for a responsible entity—in particular, when seeking to register a scheme with us—and might also prevent it from being able to take its product to market quickly.

## What relief is available?

- RG 134.23 To minimise uncertainty, we have granted relief under Class Order [CO 13/655] *Provisions about the amount of consideration to acquire interests and withdrawal amounts not covered by [CO 05/26]*. Responsible entities can choose to:
- (a) rely on the relief in [CO 13/655] by including provisions in the constitution that meet the requirements in that class order;
  - (b) if the scheme was registered before 1 October 2013, include provisions that meet the requirements in Class Order [CO 05/26] *Constitutional provisions about the consideration to acquire interests*; or
  - (c) make adequate provision in the constitution for the amount of the consideration to acquire an interest in the scheme in another way that does not meet all of the requirements in [CO 13/655] but does comply with s601GA(1)(a).
- RG 134.24 We will pay greater attention to constitutions that do not meet all of the requirements in [CO 13/655] when assessing an application for registration of a scheme.
- RG 134.25 We will refuse to register a scheme under s601EB if it appears to us that the constitution does not provide adequate provision for the consideration to acquire an interest in the scheme.
- RG 134.26 We have also given additional specific exemptions and modifications under:
- (a) Class Order [CO 13/656] *Equality of treatment impacting on the acquisition of interests*; and
  - (b) Class Order [CO 13/657] *Discretions affecting the amount of consideration to acquire interests and withdrawal amounts*.
- RG 134.27 For a summary of our guidance and how our relief applies, see Table 1 in Section A of this guide.

### Relying on our relief

- RG 134.28 If a responsible entity chooses to rely on all or any part of our relief in [CO 13/655], it can:
- (a) draft provisions that reflect the content of [CO 13/655]; or
  - (b) incorporate the content of [CO 13/655] by referring to the class order in a provision.

Note: If the responsible entity of a scheme registered before 1 October 2013 wishes to rely on [CO 13/655], it must publish a notice of reliance on its website.

- RG 134.29 Commonly, responsible entities incorporate an ASIC class order by specifically referring to the provisions of that class order as being taken to be incorporated in the constitution, or referring generically to the provisions of any ASIC exemption or declaration as being taken to be incorporated in the constitution.

## Requesting a review of provisions

- RG 134.30 Given the 14-day registration period, we encourage any responsible entity that does not rely on our relief in [CO 13/655], or proposes to include provisions giving a discretion about timing that affects payment of the consideration to acquire an interest, to give us a draft of the relevant provisions before lodging an application to register the scheme. This will help us in reviewing the proposed provisions and liaising with the responsible entity about them.
- RG 134.31 A written request for a review and a copy of the relevant draft provisions should be sent to [applications@asic.gov.au](mailto:applications@asic.gov.au).
- Note 1: If the draft provisions do not comply with s601GA(1)(a) taking into account this guide, the responsible entity should lodge an application for individual relief rather than asking for a review. For more information on how to apply for relief, see Regulatory Guide 51 *Applications for relief* (RG 51).
- Note 2: Ordinarily, we will not act on requests to review draft provisions other than in relation to the consideration to acquire an interest or calculation of the withdrawal amount.
- RG 134.32 The responsible entity should include an explanation of:
- (a) how the draft provisions comply with s601GA(1)(a), taking into account this guide;
  - (b) the impact of the provisions on the certainty of determining the consideration; and
  - (c) why the provisions do not create an inappropriate risk of a dilutive impact and are otherwise consistent with the purpose of s601GA(1)(a).
- RG 134.33 We will take all of this information into account in reviewing the draft provisions, and any provisions of a constitution lodged with an application for registration. We may also take into account other factors that appear relevant.
- RG 134.34 There is no fee for this service.
- RG 134.35 A responsible entity or its advisers should allow enough time for us to review the draft provisions and provide any comments on them. We will generally require at least 10 business days to review the provisions and provide our comments. However, if a provision is unusually complex or novel, we may require additional time for consideration.
- RG 134.36 When lodging a subsequent application to register the scheme, the responsible entity or its advisers should state that certain provisions have been reviewed before lodgement. We may refuse registration if the responsible entity or its advisers have not requested a review of provisions and we do not have sufficient time to consider whether they comply with s601GA(1)(a).

- RG 134.37 An application to register a scheme that has been preceded by a review by our staff will not receive any priority or an expedited processing time on that account alone.
- RG 134.38 A review of the provisions in a constitution before lodgement does not preclude us from raising additional matters when assessing whether the constitution meets the requirements under s601EB.
- RG 134.39 We may publish reports on our view of particular kinds of provisions we have reviewed. Where we have published our view about a particular kind of provision, responsible entities and their advisers will not need to apply for a review if the provision is the same. When lodging an application to register the scheme in these circumstances, the responsible entity or its advisers should state that a certain provision is the same as a provision in a published report. If there are some differences, we encourage responsible entities and their advisers to lodge a written request for a review.

## Calculating the consideration

- RG 134.40 Under [CO 13/655], a responsible entity can exercise certain discretions if the price is based on reasonably current market price for interests in a quoted class (excluding AQUA market) or net asset value for other interests (including AQUA market).
- RG 134.41 The responsible entity can decide on a matter that affects what is determined as the market price or net asset value per interest or make an adjustment to the amount determined. This relief relates only to discretions affecting the amount of the consideration.
- Note: For example, when calculating the consideration, the responsible entity can:
- (a) add or deduct from the market price or net asset value per interest; and
  - (b) cover costs associated with acquiring or disposing of scheme assets.
- RG 134.42 However, our relief under [CO 13/655] does not allow:
- (a) adjustments that are made to determine a particular amount as the consideration to acquire an interest (even if it is expressed in a form that refers to net asset value per interest or market price) as distinct from an adjustment based on something that affects the amount that is determined. This is because these types of adjustments can distort the consideration;
  - (b) discretions affecting the timing for the issue of interests; and
  - (c) discretions about the form of consideration. However, consideration in the form of a non-monetary asset may be treated as being provided in relation to the monetary price at which the responsible entity could properly buy the asset.
- RG 134.43 Our relief under [CO 13/655] takes into account the purpose of s601GA.

## Unlisted unitised schemes

- RG 134.44 After the initial issue of interests in an unlisted unitised scheme, a responsible entity will commonly choose to set the consideration to acquire an interest in an unlisted scheme using the value of scheme assets.
- RG 134.45 Under [CO 13/655], a responsible entity of an unlisted scheme may include a provision for calculating the consideration using a formula or method that is based on the value of:
- (a) scheme property less any liabilities that may be met from scheme property divided by the number of interests on issue; or
  - (b) the assets of a class of the scheme less any liabilities attributable to that class under the constitution that may be met from scheme property divided by the number of interest on issue in that class.

Note 1: A responsible entity of an unlisted scheme can choose to rely on our relief from s601GAE under [CO 13/655] even though it is issuing an interest in a situation covered by s601GAD under this class order.

Note 2: An example of a 'class pricing' provision is the price at which an interest in a particular class is issued, being the amount calculated as at the close of business on the date of application as follows:

$$\text{Application price} = \frac{\text{Net asset value} + \text{transaction costs}}{\text{Number of interests on issue}}$$

where 'net asset value', 'transaction costs' and 'number of interests on issue' are proportionate to those variables the responsible entity determines is properly referable to that class.

- RG 134.46 We consider that the best available information to determine the value of interests, or a class of interests, for an unlisted scheme is based on the value of scheme assets or assets of a class and transaction costs because the value of the interests will depend on the use or realisation of the assets.
- RG 134.47 While the consideration to acquire an unquoted interest in a scheme must be based on the value of scheme assets or assets of a class less liabilities for our relief to apply, discretions may be exercised in calculating this. In addition, adjustments may be made to the amount determined in the responsible entity's discretion.

Note: For example, a provision that gives the responsible entity discretion to determine which of the two formulas specified in the constitution (each of which is based on the value of scheme assets less liabilities of the interests) is to be used to set the consideration will be 'based on' the value of scheme assets less liabilities.

- RG 134.48 Some responsible entities will have partly paid interests on issue, and may wish to include these in the formula or method to determine the consideration to acquire an interest in the scheme. In our view, this type of provision meets the requirements in [CO 13/655] as long as the formula or method results in the partly paid interests being counted as interests in the scheme.

Note: For example, we consider the responsible entity may adjust the net asset value per interest to recognise the value of the right to make a call against the holders of the partly paid interests. However, the responsible entity should not treat partly paid interests as interests in the scheme by counting them in the same way as a fully paid interest.

- RG 134.49 We understand that there can be material costs involved in the acquisition and/or disposal of scheme assets or assets of a class which may not necessarily be reflected in the valuation of these assets. These are often described as ‘transaction costs’. These costs are in addition to any fees that are reflected in an adjustment to the net asset value per interest in calculating the amount of the consideration. The types of costs that may be incurred in acquiring or disposing of scheme assets or assets of a class will depend on the types of assets held by the scheme.
- RG 134.50 We consider that the inclusion of actual or an estimate of transaction costs ensures that members who are not acquiring or disposing of interests at a particular time are not disadvantaged by the scheme bearing costs associated with the need to acquire and dispose of assets to satisfy such applications in the consideration.
- RG 134.51 We understand the responsible entity may not always be able to include the actual costs associated with the acquisition and/or disposal of scheme assets or assets of a class. In these circumstances, we consider it acceptable for the constitution to permit the responsible entity to use an estimate of the acquisition or disposal costs to determine the transaction cost amount. If a responsible entity uses an estimate, we consider that the estimate should seek to provide equity and fairness among members.

Note 1: If the responsible entity uses estimates, it should take into account its duties under s601FC.

Note 2: A responsible entity has duties to act honestly and to act in the best interests of members. In our view, a responsible entity may not be complying with these duties if it attributes costs to the acquisition or disposal of scheme assets when there is no relationship between those costs and the cost of acquisition or disposal of scheme assets.

### **Schemes traded on the AQUA market**

- RG 134.52 The AQUA market is a specialised market operated by ASX for interests in schemes in exchange-traded funds, managed funds and structured products. Under Rule 10A3.3 of the ASX Market Rules, admission to trading status on the AQUA market will only be granted where the underlying assets of these products are assets in a market that is transparent and has a robust price discovery mechanism.
- RG 134.53 A responsible entity of a scheme traded on the AQUA market will commonly choose to set the consideration to acquire an interest in the scheme using the value of scheme assets less liabilities following the initial issue of interests.
- RG 134.54 We have given conditional relief under [CO 13/655] for responsible entities to include a provision to allow the amount of the consideration to acquire interests in a class of interests that are, or will be, quoted on the AQUA market

to be based on the value of scheme property less any liabilities that may be met from scheme property divided by the number of interests on issue.

Note: A responsible entity of a scheme traded on the AQUA market can choose to rely on our relief from s601GAE under [CO 13/655] even though it is issuing an interest in a situation covered by s601GAD under this class order.

RG 134.55 These types of schemes are required to have substantially continuous and uncapped facilities for issue and withdrawal, which are intended to ensure that arbitrage opportunities limit divergence between market price and a price based on the value of the scheme assets less liabilities. If the market price is lower, market participants could purchase interests at the lower market price and withdraw through the continuous redemption facility at the higher price to make a profit.

RG 134.56 The profit-making opportunities will attract market participants to continue with this process until the two prices equalise and any further profit making opportunities are eliminated. In our view, the quality of the management of a scheme traded on the AQUA market does not substantially affect the value of its interests. In these circumstances, we consider that the consideration to acquire an interest in this type of scheme is more accurately priced based on the value of scheme assets less liabilities rather than market price.

### Listed schemes

RG 134.57 After the initial issue of interests in a unitised scheme that is to be listed, a responsible entity will commonly choose to set the consideration to acquire an interest in the scheme, taking into account the market price of the interests in the quoted class.

RG 134.58 We have given conditional relief under [CO 13/655] for responsible entities of listed schemes to include a provision that the amount of the consideration to acquire an interest in the scheme is based on the reasonably current market price of the interests in the relevant quoted class. However, this can be subject to the discretion of the responsible entity. These discretions may relate to determining the reasonably current market price or making adjustment from it. The adjustment must be for an amount to be added to or deducted from the market price, rather than one based on it resulting in a particular outcome as to the amount of the consideration.

Note: A responsible entity of a listed scheme can choose to rely on our relief in s601GAE under [CO 13/655] even though it is issuing an interest in a situation covered by s601GAD under this class order.

RG 134.59 We consider that the market price generally better reflects the underlying value of the interests in the scheme. Market pricing is an independent pricing mechanism that regulates the depth of any discount that could result in unfair economic dilution and establishes an appropriate reference point for measuring it.

RG 134.60 Our relief enables a responsible entity to determine the exact point of time at which market price is determined, including whether it is based on completed trades or bids or offers on a date or average prices over a period (e.g. using a volume weight average). However, the market value that is used must be reasonably current.

Note: See also RG 134.110.

RG 134.61 In our view, consideration to acquire an interest in a listed scheme that is based on net asset value has the potential to unfairly dilute existing members' interests, particularly if that price is lower than the market price. However, if that price is equal to or higher than the market value, using it will not dilute members' interests.

Note: For example, a net asset value price might be appropriate when the market on which the scheme is traded is not sufficiently liquid or deep enough to allow an accurate reflection of the true value of the interest, and interests in the scheme are issued and withdrawn on a frequent basis.

RG 134.62 A listed scheme may have a class of interests on issue that is not quoted. In these circumstances, we believe the consideration to acquire an interest in that class should be priced using a formula or method based on the value of scheme property less any liabilities that may be met from scheme property referable to that class divided by the number of interests in that class on issue.

### **Common enterprises and other nil or fixed price schemes**

RG 134.63 [CO 13/655] does not give any relief for schemes where the amount of consideration to acquire an interest in the scheme is a nil or a fixed price. This is because we do not consider there is likely to be much uncertainty for responsible entities and their advisers about whether a constitution makes adequate provision for the consideration to acquire an interest at a nil or fixed price.

RG 134.64 We note that in some cases, a scheme may initially issue interests at a fixed price but subsequently issue any other interests based on 'scheme assets less liabilities per interest' or market value. Our relief in [CO 13/655] still applies to the subsequent issue of interests based on 'scheme assets less liabilities' or 'assets of a class less liabilities of a class'. However, after an initial issue, if the interest of a member depends on the value of a pool of assets the value of which varies over time, we consider the amount of the consideration to acquire should reflect the changes in net asset value per interest or market price.

### **IDPS-like schemes and MDAs**

RG 134.65 Registered schemes that operate like investor directed portfolio services (IDPS like-schemes)—also known as a type of 'platform'—are arrangements for holding and dealing with investments selected by clients. Managed discretionary account services (MDAs) are arrangements that involve a person managing a portfolio of assets for a retail client on an individual basis. Some platforms and MDAs are registered schemes.

- RG 134.66 [CO 13/655] does not give any relief for IDPS-like schemes or MDAs that are registered schemes. This is because we do not consider there is likely to be much uncertainty for responsible entities and their advisers about whether a constitution makes adequate provision for consideration to acquire an interest in these circumstances. Investors acquiring an interest in an IDPS-like scheme or MDA that is a registered scheme are making a contribution of money to the arrangement which results in an amount equal to what is used on their behalf in the scheme.
- RG 134.67 This contribution varies depending on the minimum amount for investment and the desire of the investor. Generally, a responsible entity can address the requirement for the constitution to make adequate provision for the consideration to acquire an interest by including a provision that the amount contributed, including where a specified fee is deducted, is applied to the member's account. We will not generally raise any issues with this type of provision.

### Options

- RG 134.68 A responsible entity may wish to issue options to acquire an interest in a scheme. Where a responsible entity wishes to issue options, it should consider whether the constitution will need to include a provision about how the exercise price of the option is to be calculated. We do not consider that the constitution needs to include a provision about the premium payable on the option.

### Placements

- RG 134.69 Responsible entities commonly issue interests in listed schemes by way of placement. The consideration for interests is generally at a discount to the market price at which interests in the scheme are acquired. A placement allows a responsible entity to raise capital reasonably quickly and cost effectively from targeted investors. However, as a placement excludes other existing members, it may be dilutive of the economic and voting rights of non-participating members and has the potential to be unfair.
- RG 134.70 We have given conditional relief under [CO 13/655] for responsible entities to determine the consideration to acquire an interest in a scheme where the interest is issued under a placement. The relief applies if:
- (a) the interests are quoted on ASX or an approved foreign market;
  - (b) quotation of the interests in that class has not been suspended; and
  - (c) where the interests are quoted on an approved foreign market, either:
    - (i) the interests, together with any related issue in the previous year, do not immediately before the issue comprise more than 15% of the interests in that class; or

- (ii) the following are met:
  - (A) members who hold interests in the same class approve the issue of the interests by a placement resolution;
  - (B) unless the responsible entity considers that the issue of interests by the placement will not adversely affect the interests of members in another class, members of that class also approve the issue of the interests by placement resolution; and
  - (C) the notice convening a meeting to vote on the issue of interests by placement contains particulars of how the money raised by the issue will be used by the responsible entity.

RG 134.71 A placement resolution means, in relation to an approval of an issue of interests, a special resolution where votes are only cast for interests (eligible interests) that are held by a member:

- (a) who will not acquire any of the interests that are to be issued or an interest in those interests; or
- (b) for the benefit of another person who will not acquire any of the interests that are issued or an interest in those interests.

RG 134.72 By requiring that the interests in the scheme are listed on ASX or an approved foreign market, our relief in [CO 13/655] provides an independent pricing mechanism for issue under the placement that assists in protecting members from unfair dilution. These markets regulate the depth of any discount and establish an appropriate reference point for measuring it. To ensure that the interests are adequately priced and the market is fully informed, interests in the relevant class must not be suspended from quotation.

RG 134.73 Approval of members to a placement is required if together with any related issue under a placement in the previous year, it would exceed 15% of the interests in the relevant class. For ASX-listed schemes, this requirement applies under Listing Rule 7.1. For foreign listed schemes, this requirement applies as a condition of relief under the modified provisions in [CO 13/655]. This requirement ensures that the risk of unfair economic dilution is sufficiently addressed either because it will have limited materiality or be approved by members.

Note: Our relief in [CO 13/655] focuses on provisions in relation to the calculation of the amount of consideration under a placement. However, there are also additional requirements in the Corporations Act that have the potential to impact on the acquisition of interests in a scheme by way of placement. In particular this includes:

- (a) the prohibition on the acquisition of more than 20% of a relevant interest in interests of a scheme under s606;
- (b) the requirement to manage conflicts of interest under s912A(1)(aa);
- (c) the requirement for approval of certain related party transactions under Pt 5C.7;
- (d) duties with which a responsible entity is required to comply under s601FC; and
- (e) the prohibition on self-acquisition of interests by a responsible entity in s601FG.

## Rights issues

RG 134.74 Responsible entities commonly issue interests in schemes by way of rights issue. As with an issue under a placement, the consideration for interests is generally at a discount to the standard price at which interests in the scheme are acquired.

RG 134.75 We have given relief under [CO 13/655] for responsible entities to determine the consideration to acquire an interest in a registered scheme where the interest is issued under a rights issue. The responsible entity can choose to make the offer to all members of the scheme or members of a specific class. This relief also applies to issues on the exercise of an option, if the option was offered to all members or all members of a particular class at the time of the offer of the options. Our relief is subject to any statutory exclusion of a member permitted by s601FC(1)(d) whether by ASIC exemption or otherwise.

Note: If an offer is restricted to members of a class, the responsible entity must comply with the obligation under s601FC(1)(d) to treat members of different classes fairly.

RG 134.76 Our relief in [CO 13/655] covers rights issues that meet the requirements in s9A of the Corporations Act. In our experience, this definition captures the features of the most common structure of a rights issue in the Australian market.

RG 134.77 The relief focuses on provisions for calculating the amount of consideration under a rights issue. We consider that it gives responsible entities appropriate flexibility to structure a rights issue within the parameters of the Corporations Act so to best meet the needs of the scheme.

Note: We may carefully scrutinise the structure of any rights issue (including underwriting by an associate) that appears to be a disguised placement outside of the process of assessing an application to register a scheme. We may also consider whether it is appropriate to apply for a declaration of unacceptable circumstances to the Takeovers Panel. For more information, see Regulatory Guide 6 *Takeovers: Exceptions to the general prohibition* (RG 6).

## Additional relief affecting rights issues

RG 134.78 We have given additional relief from s601FC(1)(d) under [CO 13/656] to allow a responsible entity to:

- (a) exclude foreign members (e.g. members with a registered address outside Australia or New Zealand) from participating in a rights issue; and
- (b) offer some or all members who are wholesale clients the opportunity to acquire interests under the rights issue before the opportunity is offered to other members and require members who are wholesale clients that receive the offer to notify their acceptance of the offer at a time before other members must accept the offer.

Note: A responsible entity has a duty to treat all members of the same class equally and members of different classes fairly under s601FC(1)(d).

- RG 134.79 Our relief to exclude foreign members applies in the following situations:
- (a) If the scheme is listed and the offer is one to which ASX Listing Rule 7.7 applies, the responsible entity must comply with that rule for our relief to apply.
  - (b) If the scheme is not listed on the ASX and the offer is renounceable, the responsible entity must appoint a nominee to sell the rights to acquire the interests not taken up and distribute the net proceeds for our relief to apply.
  - (c) If neither of the situations in paragraphs (a) and (b) applies, our relief will apply where the responsible entity determines that it would be unreasonable to make the offer to a foreign member, taking into account:
    - (i) the number of members in the relevant jurisdiction;
    - (ii) the number and value of interests held by members that may be issued in a particular jurisdiction;
    - (iii) the cost of complying with legal requirements and any requirements of a regulatory authority in making the offer in the relevant jurisdiction.
- RG 134.80 We grant relief from s601FC(1)(d) to exclude foreign members (e.g. members with an address outside Australia and New Zealand) because there are often only small numbers of foreign members in a particular jurisdiction and/or legal or regulatory problems with offers to foreign members meeting that jurisdiction's requirements. A responsible entity is also permitted to do this under s9A. If the scheme is listed, our relief requires that foreign holders be given a fair opportunity to share in the benefit of any discount on a rights issue where possible. This applies directly or indirectly through the requirement to comply with the ASX Listing Rules.
- RG 134.81 Our relief to allow an offer to be made to members who are wholesale clients before other members applies where the terms of the offer are such that interests will not be issued to any members before the date that any other member can elect to accept the offer to have the interest issued to them.
- RG 134.82 We grant this relief to allow offers of interests to occur at different times under a rights issue. This type of rights issue is commonly referred to as an 'accelerated' or 'jumbo' rights issue. A responsible entity structuring a rights issue as an accelerated rights issue may be treating members of the same class differently because the different offer periods for institutional and retail members mean the offers may not be made on the same terms to each class.

### **Distribution reinvestment plans**

- RG 134.83 A responsible entity will often offer members an opportunity to acquire additional interests in a scheme by using some or all of any capital or income distributions to pay for those additional interests. To increase the attractiveness of this for members, the consideration to acquire these additional interests can be at some discount, and members pay no brokerage on their acquisition.

- RG 134.84 Under [CO 13/655], a responsible entity may determine the amount of the consideration to acquire an interest in a registered scheme where some or all of a distribution of capital or income of the scheme payable to a member is applied to pay for the issue of the interests to that member.
- RG 134.85 For the reasons above, we have given additional relief from s601FC(1)(d) under [CO 13/656] to allow a responsible entity to exclude foreign members from participating in a distribution reinvestment plan.

### Interest purchase plans

- RG 134.86 An interest purchase plan generally provides members with a convenient means of obtaining additional interests in the scheme. These additional interests are often acquired at a discount to the market price and without brokerage fees or stamp duty.
- RG 134.87 Under [CO 13/655], a responsible entity can set the consideration to acquire an interest for an interest purchase plan if it meets the requirements of Class Order [CO 09/425] *Share and interest purchase plans*. [CO 09/425] applies to interest purchase plans where:
- (a) trading in the relevant class of interests has not been suspended (beyond a minimum period) on ASX;
  - (b) ASIC has not made certain determinations to prevent an issuer from relying on its relief; and
  - (c) there are no existing exemptions from particular provisions of the Corporations Act.
- RG 134.88 There are also certain conditions of the relief in [CO 09/425] that a responsible entity must meet.

Note: For more information on these conditions, see [CO 09/425] and Regulatory Guide 125 *Share purchase plans* (RG 125).

### Negotiated fees

- RG 134.89 A responsible entity may regularly negotiate lower fees with certain wholesale clients. These fees may be included in the calculation of the consideration at which interests in the scheme are issued. We recognise there are commercial benefits for responsible entities in attracting wholesale clients by negotiating commercial rates of fees with them.
- RG 134.90 Under [CO 13/655], a responsible entity may set the consideration to acquire an interest in a scheme that involves a negotiated fee arrangement, as long as it meets the requirements in Class Order [CO 03/217] *Differential fees*.
- RG 134.91 [CO 03/217] provides a conditional exemption for responsible entities of registered schemes where the responsible entity differentiates between members in relation to fees based on:

- (a) the aggregation of a member's interests across the range of financial products issued by the responsible entity (or its related body corporate), that are regulated under the Corporations Act;
- (b) the use of electronic services, or effecting electronic transactions for investments in a scheme or other financial product issued by the responsible entity, that are regulated under the Corporations Act;
- (c) the aggregation of holdings of a member and certain family members across a range of financial products offered or issued by the responsible entity (or related body corporate) according to the value or period of time during which the aggregated interests have been held; or
- (d) members who are employees of the responsible entity (or related body corporate), provided that the value of the employees' interests relative to the other members does not exceed 5%.

Note: For more information on [CO 03/217], see Regulatory Guide 136 *Managed investments: Discretionary powers and closely related schemes* (RG 136).

RG 134.92 To rely on [CO 03/217], a responsible entity must ensure that:

- (a) a statement is disclosed to members and included in any Product Disclosure Statement (PDS):
  - (i) of the basis on which the differential fee will be calculated and which sets out the fees members will have to bear; or
  - (ii) where fees are negotiated with wholesale clients, that the fee arrangement is to be offered to certain wholesale clients;
- (b) the differential fee arrangement does not adversely affect the fees paid or to be paid by any member who is not entitled to participate; and
- (c) other than where fees are negotiated with wholesale clients, the differential fee arrangement is applied without discrimination to all members who satisfy the criteria necessary to receive the benefit of the arrangement.

Note: For more information on differential fees, see [CO 03/217].

### Stapled securities

RG 134.93 Some responsible entities include one or more schemes as components of stapled securities.

RG 134.94 Generally, the responsible entity will want to retain a discretion about the allocation of the issue price of the stapled security between its component parts for tax reasons.

RG 134.95 Under [CO 13/655], a responsible entity may allocate the consideration to acquire an interest in a scheme if that interest is a component part of a stapled security if:

- (a) the constitution contains adequate provision for the consideration to acquire the stapled securities; or

- (b) the constitution contains provisions about the consideration to acquire the stapled securities that are permitted by our relief for the consideration to acquire interests.

RG 134.96 The terms of a stapled security require that each of its component parts must be transferred together. ASX permits stapled securities to be listed and traded like individual financial products. Stapled securities that are listed are generally acquired at market price. The component parts of the listed stapled security are not individually listed and, as such, each component does not have an individual market price. The consideration to acquire stapled securities that are not listed is generally based on the 'value of scheme assets less liabilities'. The issue price of a listed or unlisted stapled security will reflect the value of each of its components.

RG 134.97 Our relief in [CO 13/655] applies to stapled securities where:

- (a) there are no financial products in the same class as those financial products that are stapled which may be transferred separately;
- (b) one or more of the financial products is a share of a body corporate, the body corporate has not issued any share that may be transferred separately; and
- (c) one or more of the financial products is an interest in a scheme, no interests in that scheme may be transferred separately.

### **Schemes with limited or no pooling**

RG 134.98 Under [CO 13/655], a responsible entity may set the amount of the consideration to acquire an interest in a scheme if the only contributions that may be used in common with or pooled with any other assets of the scheme are:

- (a) money placed in an authorised deposit-taking institution (ADI) account as scheme property pending disbursement of the money to pay fees or expenses, acquire investments or carry on business;
- (b) not proprietary rights and no income in which a member has any interest is to be paid or working 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 known to each other tenant before the offer to issue an interest is made.

### **Forfeited interests**

RG 134.99 We consider that not all arrangements for sale on forfeiture may be said to involve an acquisition under s601GA(1)(a).

RG 134.100 However, as there may be situations where an acquisition occurs as a result of sale on a forfeiture that are caught by s601GA(1)(a), we have granted relief under [CO 13/655] to allow responsible entities to set the consideration to acquire a forfeited interest in a listed scheme (other than a time-sharing scheme).

Note: For more information on time-sharing schemes, see Class Order [CO 03/104] *Relief facilitating the acquisition and sale of forfeited interests in registered time-sharing schemes* and Regulatory Guide 160 *Time-sharing schemes* (RG 160).

RG 134.101 Our relief in [CO 13/655] applies where the interests have been forfeited by a member for failing to pay an outstanding amount due to, and called for by, the responsible entity and:

- (a) on payment of the outstanding amount the interest would be in a class of interests quoted on ASX; and
- (b) the sale occurs in accordance with s254Q (other than s254Q(1), (9) and (13)) as if the interest was a share and the responsible entity was each a director of the company.

#### **Additional relief for forfeited interests**

RG 134.102 We have given additional relief from s601FG under [CO 13/656] for responsible entities to acquire forfeited interests on trust for members on forfeiture of those interests if the sale of those interests is required.

#### **Withdrawal price**

RG 134.103 Under [CO 13/655], a responsible entity or its nominee may exercise a discretion to:

- (a) decide on a matter that affects a value included in the formula for calculating the withdrawal amount;
- (b) decide on a matter that is an aspect of the method; or
- (c) make an adjustment to the formula for calculating the withdrawal amount for costs in acquiring or disposing of scheme property.

RG 134.104 The formula that is used for calculating the withdrawal amount must be based on the value of scheme assets less liabilities, and can take into account the material costs involved in the disposal of scheme assets.

Note: A responsible entity of a listed scheme does not give a right to members to withdraw on-market. We note that ASX Listing Rule 1.1, Condition 5, prevents off-market withdrawals. However, other financial markets, such as NSX, do not restrict these withdrawals.

RG 134.105 [CO 13/655] limits the exercise of a discretion by the responsible entity to those affecting the withdrawal amount.

RG 134.106 In some circumstances, it may not be appropriate for the responsible entity to use a withdrawal amount based on the value of scheme assets less liabilities, as this may not be the best information as to value (e.g. for relinquishment of an interest in a time-sharing scheme). In those circumstances, the withdrawal amount should be able to be determined from the constitution.

## Procedures for exercising a discretion

### Valuation

- RG 134.107 Under [CO 13/657], responsible entities must meet certain requirements if they exercise a discretion that affects the determination or calculation of the:
- (a) consideration to acquire an interest; and
  - (b) withdrawal amount or removal in whole or part of liability of a member.

Note: An example of a situation where removal of liability of a member occurs is where an interest is partly paid and withdrawal has the effect of terminating liability of the member for any future calls.

- RG 134.108 If a responsible entity exercises a discretion in relation to determining the value of scheme property, its method for calculating the value must be consistent with the range of ordinary commercial practice for valuing that type of scheme property and produce a value that is reasonably current at the time of issue or withdrawal.

- RG 134.109 If it exercises a discretion in relation to determining the market price of interests that are quoted on a financial market, its method for calculating the price must be consistent with the ordinary commercial practice for determining the market price of interests of the same kind and produce a market price that is reasonably current at the time of issue or withdrawal.

- RG 134.110 What is a 'reasonably current' valuation or market price will depend on the nature of the asset. However, we consider 'reasonably current' would generally be:
- (a) for a quoted class of a listed scheme, the price or an average price close to the time it is issued or the time an impending issue is announced. In our view, a market price from several months before issue or announcement of the issue would not usually be 'reasonably current'; and
  - (b) for an unlisted scheme:
    - (i) on a daily basis where the financial products held are traded on a market with regular daily transactions; and
    - (ii) as determined within the last year or a longer period while the responsible entity determines that a current valuation would not be materially different where the assets held are non-liquid or thinly traded.

Note: The responsible entity must at a minimum conduct valuations at reasonable intervals appropriate to the relevant property under s601FC(1)(j) unless an exemption applies.

## Record keeping

- RG 134.111 Under [CO 13/657], a responsible entity must prepare and keep records relating to the exercise of such discretions. In particular, it must prepare a document that includes:
- (a) a description of the formula or method that is applied to work out the consideration to acquire an interest in the scheme;
  - (b) the circumstances in which the responsible entity may exercise the discretion;
  - (c) the policy the responsible entity apply in exercising the discretion, and the date on which the policy was formulated;
  - (d) what records the responsible entity will keep in relation to the exercise of the discretion; and
  - (e) if the exercise of the discretion is inconsistent with the ordinary practice of scheme property being valued or the market price of interests being determined, an explanation of why the responsible entity has been unable to follow ordinary practice.
- RG 134.112 Under [CO 13/657], the responsible entity must keep any policy that documents the exercise of a discretion for seven years after it ceases to be current. It must ensure that the records it keeps under s988A are kept in a way that enables the exercise of the discretion to be identified.
- RG 134.113 A member or a person who is entitled to receive a PDS is also entitled to be given a copy free of charge of any policy that documents the exercise of a discretion by the responsible entity or nominee. The responsible entity must advise members of this right and include a statement to that effect in the PDS. For shorter PDSs, we consider that this information can be included using incorporation by reference.
- RG 134.114 We believe that requiring a responsible entity to document its policies and procedures on how it calculates the consideration to acquire an interest or withdrawal payment promotes efficiency, consistency and transparency. We also consider it is consistent with the responsible entity's duty to exercise the degree of care and diligence that a reasonable person would exercise if they were in the position of the responsible entity.

Note: For more information about good practice for unit pricing, see Regulatory Guide 94 *Unit pricing: Guide to good practice* (RG 94).

## C Powers and rights of the responsible entity

### Key points

The responsible entity may determine the level of detail to include in the constitution about its powers of investment or dealing with scheme property and any powers to borrow or raise money for the purposes of the scheme.

The constitution does not need to expressly identify the actual amount of a fee that will be paid by members. It can identify a maximum fee to which the responsible entity is entitled, as long as all of the variables that affect the amount of any fee are specified.

### Powers to deal with scheme property and raise money

- RG 134.115 The constitution of a scheme must make adequate provision for the powers of the responsible entity in making investments of, or otherwise dealing with, scheme property: s601GA(1)(b).
- RG 134.116 If the responsible entity will have powers to borrow or raise money for the purposes of the scheme:
- (a) those powers must be specified in the constitution; and
  - (b) any other agreement or arrangement has no effect to the extent that it purposes to confer such a power: s601GA(3).
- RG 134.117 We consider that the powers that may be appropriate depend on the particular scheme the responsible entity operates. On this basis, we consider it is appropriate for a responsible entity to have the flexibility to determine the level of detail to include about its powers, taking into account the particular scheme. This is consistent with current commercial practice.
- RG 134.118 Because s601GA(1)(b) relates to its powers of investment rather than how a responsible entity intends to exercise these powers, we consider that it is not necessary for the investment strategy to be set out in the constitution.
- RG 134.119 However, a responsible entity should make known its policy on how it will exercise its powers in the PDS by reporting to members or under the continuous disclosure regime. This is information that we expect would be likely to influence persons considering investment or seeking to understand their investment. In implementing an investment strategy, a responsible entity should also ensure it is acting within what is permitted under its AFS licence.

## Fees and indemnities

- RG 134.120 If a responsible entity will have any rights to be paid fees out of scheme property, or to be indemnified out of scheme property for liabilities or expenses incurred in relation to performing its duties, these rights must be:
- (a) specified in the constitution; and
  - (b) available only in relation to the proper performance of its duties: s601GA(2).
- RG 134.121 In our view, this provision gives members an important protection by ensuring that the rights to be paid fees or to be indemnified are only amended in accordance with the processes for amending a constitution in s601GC. We consider that this provision is also intended to preclude the recovery of fees or the exercise of indemnity rights if a responsible entity fails to properly perform its duties, reflecting the general law on trustee's rights.
- RG 134.122 To 'specify the right', we consider that the constitution should either:
- (a) expressly state that any rights to fees or indemnification out of scheme property is subject to the proper performance by the responsible entity of its duties under the provisions for fees and indemnities; or
  - (b) include a provision to the effect that incorporates this restriction (e.g. a provision which states that to the extent a provision of the constitution is inconsistent with the Corporations Act it will be of no effect).
- RG 134.123 We do not consider that the words 'specify the right' in s601GA(2) require that the actual amount of the fee that will be paid by members be expressly identified. However, we believe that the time at which the fee accrues, the performance to which it relates and each variable (including timing variables) affecting the amount of the fee that is payable or when it is payable must be clearly identified in the constitution and not left to the determination of the responsible entity.
- Note: For example, if the provision allows the responsible entity to determine the period over which performance is to be assessed against a performance benchmark, we do not consider that the right to the fee is 'specified'.
- RG 134.124 In our experience, responsible entities often want to include provisions in a constitution that allow a maximum entitlement to a fee. This gives them commercial flexibility to set fees without having to constantly amend the constitution. We consider this type of provision still meets the requirements of s601GA(2) because the right is 'specified', even if in practice that right might be from time to time waived.
- Note: For example, the constitution may include a provision that allows a responsible entity to charge an application fee of up to 5% of funds under management. However, the responsible entity may decide to limit the amount it charges to 1.5% of funds under management and disclose this to investors in the PDS.

RG 134.125 We have also seen that responsible entities regularly want to include provisions in a constitution that calculates a variable fee with reference to an index benchmark. We also think this type of provision can meet the requirements of s601GA(2) because all the variables affecting the calculation of the fee can be clearly identified.

RG 134.126 Responsible entities using an index benchmark should use one that is appropriate to the type of scheme to be operated. This helps prevent the responsible entity preferring its own interests to the best interests of members by calculating a fee using an inappropriate index.

RG 134.127 We recognise that responsible entities that include provisions calculating fees using an index need flexibility to replace that index with another index if the original index becomes redundant or inappropriate. We will not generally raise concerns with a provision that allows the responsible entity to replace an index with another index that is similar to the original index if the provision clearly identifies when the index can be replaced.

Note: For example, a provision that allows the responsible entity of an Australian Real Estate Investment Trust (A-REIT) to substitute the S&P/ASX 200 A-REIT Index with the S&P/ASX 200 Industrials Index may not be a similar index benchmark.

RG 134.128 A responsible entity may purport to indemnify itself from scheme property at an 'hourly rate to be determined by it from time to time' or 'on standard commercial terms for work undertaken' for performing functions in operation of the scheme. In our view, this type of purported indemnity is better characterised as a fee. Each variable (including timing variables) affecting the amount of the fee that is payable or when it is payable must be clearly identified in the constitution.

RG 134.129 We also note that there is authority that a person in their capacity as trustee cannot contract with themselves in their personal capacity, and so this type of arrangement may be of no legal effect.

Note: See *MacarthurCook Fund Management Limited v Zhaofeng Funds Limited* [2012] NSWSC 911.

RG 134.130 We do not consider that s601GA(2) allows for a right to payment of a fee in advance of the proper performance of the responsible entity's duties to which the fee relates. We consider that payment in advance is incompatible with the right to a fee only being available for proper performance of the duty to which it relates. A responsible entity can only form a view about whether the duty has been properly performed after having performed it.

Note: However, we would not generally raise concerns with a provision that allows a fee to be payable for particular services (e.g. the issue of interests) even though obligations will arise from the issue that will only be performed after the fee is paid.

RG 134.131 Money received for the issue of interests that are not immediately issued must generally be paid into an ‘application money’ account under s1017E, and can only be withdrawn to return it to the person who paid for the interests or on the issue of the interests. We consider that money cannot be withdrawn to pay fees except when an issue of interests occurs. In our view, when an interest is issued, money paid for the interest will be a contribution of money to the scheme and, therefore, scheme property as defined in s9. This means any fees paid out of the application money account need to be permitted under s601GA(2).

Note: ‘Scheme property’ is defined broadly in s9, and includes the contribution of money or money’s worth to the scheme, and any property or income derived directly or indirectly from the use of the contributions.

RG 134.132 In the process of withdrawal, our experience is that money may be placed in a separate fund to facilitate payments of withdrawal proceeds. We consider that the rights in such an account remain scheme property if held for members. If any deductions from such an account are made for fees or to make payments by way of indemnity to the responsible entity, any right to such payments must comply with s601GA(2).

## D Complaints handling

### Key points

The provisions about complaints handling should ensure that complaints can be made by all members about all parts of the program or plan or action that constitute the scheme.

If a scheme is open to retail clients, it can comply with s601GA(1)(c) by containing a provision that the responsible entity, as an AFS licensee, will comply with the dispute resolution requirements in s912A(2) for retail clients.

If a scheme is open to wholesale clients, the responsible entity can devise its own complaints handling procedures for these clients.

If the scheme is only open to retail clients and the responsible entity relies on this as the basis on which the constitution makes adequate provision for dealing with complaints, the constitution must include a provision that the responsible entity will only issue interests in the scheme to retail clients. Similarly, if the scheme is only open to wholesale clients, there should be a provision in the constitution that the responsible will only issue interests in the scheme to wholesale clients.

RG 134.133 The constitution of a scheme must make adequate provision for the method by which complaints made by members in relation to the scheme are to be dealt with: s601GA(1)(c).

RG 134.134 In our view, the words ‘in relation to the scheme’ should be interpreted broadly so that complaints can be made by members about all parts of the ‘program or plan of action’ that constitute the scheme.

Note: For example, we do not consider that a provision that seeks to restrict complaints being made solely about the conduct of the responsible entity would constitute adequate provision for complaints being made ‘in relation to the scheme’.

### Retail clients

RG 134.135 A responsible entity is also an AFS licensee. As an AFS licensee, a responsible entity that provides financial services to retail clients must have a dispute resolution system that meets the requirements s912A(2): s912A(1)(g).

RG 134.136 Under s912A(2), an AFS licensee must have in place:

- (a) an internal dispute resolution procedure that complies with the standards and requirements made or approved by ASIC, and covers complaints made by retail clients against the licensee in connection with the financial services provided under its licence; and
- (b) membership of an external dispute resolution scheme that is approved by ASIC, and covers complaints made by retail clients against the licensee in connection with the financial services provided under its licence.

- RG 134.137 Our guidance on what an AFS licensee must do to have a dispute resolution system in place to meet the requirements in s912A(2) is set out in Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165). Class Order [CO 09/339] *Internal dispute resolution procedures* sets out our principles and requirements on internal dispute resolution procedures.
- RG 134.138 RG 165 explains the specific requirements for internal dispute resolution procedures. In RG 165.74, we state that the key requirements for internal dispute resolution procedures are that an AFS licensee:
- (a) adopts the definition of ‘complaint’ in Australian Standard AS ISO 10002–2006 *Customer satisfaction—Guidelines for complaints handling in organizations* (ISO 10002:2004 MOD) published by SAI Global Limited on 5 April 2006 (AS ISO 10002–2006) (see RG 165.90);
  - (b) satisfies the Guiding Principles in Section 4 of AS ISO 10002–2006, and follows Section 5.1—Commitment, Section 6.4—Resources, Section 8.1—Collection of information, and Section 8.2—Analysis and evaluation of complaints in this standard (see RG 165.94–RG 165.97); and
  - (c) has a system for informing complainants or disputants about the availability and accessibility of the relevant external dispute resolution scheme of which the AFS licensee is a member (see RG 165.140).

Note: For more information, see RG 165 and [CO 09/339].

- RG 134.139 We recognise that the requirements in s601GA(1)(c) and s912A(2) do not directly align with each other. The requirement in s601GA(1)(c) applies to complaints made by members of the scheme. We note that ‘members’ is defined in s9 as a ‘person who holds an interest in the scheme’. This definition does not distinguish between a retail client and a wholesale client. However, the requirement in s912A(1)(g) only applies to retail clients.
- RG 134.140 We consider that the responsible entity will be able to meet the requirements of s601GA(1)(c) in part by having a dispute resolution system for retail clients that meets the requirements of s912A(2). This will allow responsible entities to avoid the need to have different sets of complaints handling procedures for retail clients to meet their obligations under s601GA(1)(c) and 912A(2).
- RG 134.141 To minimise the need for the responsible entity to have duplicate procedures for retail clients, we believe that the constitution should include a provision to the effect that the responsible entity will comply, as an AFS licensee, with the dispute resolution requirements in s912A(2) in dealing with member complaints in relation to the scheme. However, it is open to a responsible entity not to include such a provision.

## Wholesale clients

- RG 134.142 Because s601GA(1)(c) is broader than s912A(1)(g), the responsible entity will also need to include provisions about complaints handling for wholesale clients (unless the constitution excludes the issue of interests to wholesale clients).
- RG 134.143 We acknowledge that responsible entities and wholesale clients may have in place informal arrangements to resolve disputes and/or agreements that provide assistance in resolving disputes. However, we believe that to meet its obligations under s601GA(1)(c), a responsible entity must include provisions about these arrangements to ensure that the constitution makes adequate provision for dealing with complaints in relation to a scheme.
- RG 134.144 We consider it may be appropriate for different requirements to apply for wholesale clients who may have the knowledge, resources and bargaining power to have complaints effectively resolved, and may escalate issues through arbitration and the courts. In light of this, we consider the responsible entity should be able to devise and include its own complaints handling procedures for wholesale clients.

## Additional relief for complaints handling

- RG 134.145 We have granted relief from s601FC(1)(d) under [CO 13/656] to make it clear that responsible entities may treat retail and wholesale clients who may be in the same class differently in relation to complaints handling.

## E Withdrawal rights

### Key points

A right to withdraw is any right of a member to cease to hold an interest in the scheme at the request of the member and exercisable against the responsible entity or a person acting on its behalf.

A constitution should address the following key aspects of the withdrawal process:

- how the right is triggered;
- any amount that is to be paid or given to members;
- restrictions on dealing with withdrawal requests; and
- ceasing to be a member.

The right to withdraw and any provisions for making and dealing with withdrawal requests must be fair to members.

If a responsible entity will have discretion to suspend the right to withdraw, the constitution should set out the circumstances in which it can exercise that discretion.

### Members' right to withdraw

RG 134.146 Under s601GA(4), if members have a right to withdraw from the scheme, the constitution must:

- (a) specify the right;
- (b) if the right is to be exercised while the scheme is liquid, set out adequate procedures for making and dealing with these withdrawal requests; and
- (c) if the right may be exercised while the scheme is not liquid, provide for the right to be exercised in accordance with Pt 5C.6 and set out any other adequate procedures that apply to making and dealing with these requests.

Note 1: In some circumstances, we have given relief from the requirements in RG 134.146(b) –RG 134.146(c): see, for example, Class Order [CO 07/422] *On-market buy-backs by ASX-listed schemes*.

Note 2: We have given relief from s601GA(4) for IDPS-like schemes. See Class Order [CO 13/762] *Investor directed portfolio services provided through a registered managed investment scheme*. Under [CO 13/762], a constitution for an IDPS-like scheme must specify the right to withdraw and set out procedures on how withdrawal requests will be dealt with in certain circumstances. These procedures must be fair to all members.

RG 134.147 Section 601GA(4) also requires that the right to withdraw and any provisions setting out procedures for making and dealing with withdrawal requests be fair to members.

RG 134.148 We note that s601GA does not require that members must be permitted to withdraw from a scheme. However, a responsible entity may wish to give members this right and include provisions in the constitution to allow them to withdraw from the scheme. If the right to withdraw may be exercised when the scheme is not liquid, the provisions of the constitution must be in accordance with the provisions of Pt 5C.6 that apply to schemes that are not liquid.

RG 134.149 In our view, a member can acquire the right to withdraw at any time before the withdrawal occurs. We do not believe the right to withdraw needs to exist when a request is made to trigger the application of s601GA(4).

Note: For more detail, see paragraph 9.4 of the Explanatory Memorandum to the Managed Investments Bill 1997.

RG 134.150 We consider that provisions which allow a member (at their request) to cease to be a member in relation to the interests that are the subject of the withdrawal request can confer a ‘right to withdraw’, even if the responsible entity has a discretion about whether to act on the request when it is received. When the request is made, there may be no right to withdraw. However, a right to withdraw will generally arise on the exercise of the discretion to allow withdrawal or at a later point before the withdrawal is effected.

RG 134.151 We believe this right to withdraw may arise regardless of how the withdrawal process is initiated or whether it is subject to conditions imposed by the responsible entity. We do not consider that a right to withdraw requires a member to have an automatic or unconditional right to withdraw from a scheme, because this would unduly limit the operation of s601GA(4) in a manner that is inconsistent with its legislative purpose.

RG 134.152 A right to withdraw can also exist in circumstances where the responsible entity (including by a nominee) acquires a member’s interests by transfer.

Note: We note that the member’s holding in the register must then be adjusted to cancel the withdrawn interests. This is a requirement under the modified provisions of [CO 07/422].

## Making and dealing with withdrawal requests

RG 134.153 We consider what constitutes ‘adequate procedures’ for making and dealing with withdrawal requests will depend on the circumstances of the scheme.

Note: We consider that the decision in *Re Real Estate Capital Partners Managed Investments Ltd as Responsible Entity of the Real Estate Capital Partners USA Property Trust* [2013] NSWSC 190 turns on the particular circumstances of the relevant scheme, and does not give rise to a generally applicable rule about what constitutes ‘adequate procedures’.

RG 134.154 While we do not believe it is necessary to state every aspect of the procedures, we consider that key rights about the process should be set out in the constitution so members can determine their right to withdraw from the scheme and be protected against adverse changes other than by special resolution.

- RG 134.155 In light of this view, we consider that the responsible entity and its advisers should be able to devise provisions that deal with the procedures for making and dealing with withdrawal requests, as long as the provisions deal with all of the key steps in the process from commencement to completion. We believe that this will enable responsible entities to design provisions about withdrawing from schemes that best reflect their operational practices and product design.
- RG 134.156 In our view, it is not sufficient to merely state in the constitution that the key elements of the withdrawal procedures are set out in a separate document, such as a PDS.
- RG 134.157 We consider that the key information about the withdrawal process will generally cover how the withdrawal right is exercised, any amount that will be paid or given to members, restrictions on dealing with withdrawal requests and ceasing to be a member. However, there may be other steps in the withdrawal process that a responsible entity will want to address, or must address for the procedures to be adequate.

Note: The responsible entity must also ensure that provisions about making and dealing with withdrawal requests are consistent with the constitution being enforceable under s601GB: see Section G.

### Triggering a withdrawal right

- RG 134.158 We consider how a withdrawal right is triggered is important. For this reason, we believe the constitution should provide sufficient information so that it is possible to determine how a member may trigger the right to withdraw (e.g. making a withdrawal request) and what (if any) pre-conditions apply. We believe this should include the steps that a member will have to take and whether there are any prerequisites that need to be satisfied before a right arises and is satisfied.

Note 1: An example is where the exercise of a withdrawal right may be preceded by an offer (or an invitation to offer) that is made by the responsible entity.

Note 2: Another example is that, if members may only exercise the right to withdraw subject to a requirement that the interests have been held for a minimum time period, that period should be specified in the constitution.

- RG 134.159 We believe a provision that has the effect of allowing the responsible entity to ‘determine any pre-conditions from time to time or at its own discretion’ does not give members information on how they may exercise the right to withdraw and the pre-conditions that will apply to the exercise of that right to comply with s601GA(4). In our view, the exercise of such discretions could undermine the right of members to withdraw, and avoid such rights being adversely changed only by special resolution.

## Amounts paid to members

RG 134.160 We consider a key aspect of withdrawing from a scheme is any amount that will be paid or given to members. For this reason, we believe there should be provisions about the amounts that will be given to members to satisfy withdrawal requests. This includes:

- (a) a price that will apply to the interests that are the subject of the withdrawal request (see RG 134.103–RG 134.106);
- (b) when the amount is paid to members and the maximum period for payment after withdrawal; and
- (c) the nature of the amount that members will receive and how non-monetary assets will be valued.

Note: For more information on relief in relation to withdrawal amounts and the discretions that affect it, see RG 134.103–RG 134.110.

RG 134.161 If the consideration may be paid *in-specie* or in more than one form (e.g. a combination of cash and other assets), we consider that the responsible entity's duties under s601FC(1)(c) and (d), and the fiduciary relationship with members, means it should consider the rights and interests of all members (including the withdrawing member) when deciding:

- (a) the nature of the consideration members will receive;
- (b) who bears liability for transaction costs associated with the transfer of assets; and
- (c) whether the consent of the withdrawing member is required: see also RG 134.178.

## Restrictions on dealing with withdrawal requests

RG 134.162 If a member's right to withdraw is restricted in certain circumstances or can be restricted at the discretion of the responsible entity, we consider the constitution should describe these restrictions because these are important aspects of the withdrawal right.

RG 134.163 In our view, the type of restrictions that should be stated in the constitution include:

- (a) any circumstances in which a responsible entity may suspend and resume withdrawals;
- (b) the right to impose minimum and maximum limits on the number or value of interests that may be withdrawn by a member;
- (c) the ability to satisfy requests on a partial or staggered basis; and
- (d) any other circumstance that fetters a member's right to withdraw.

- RG 134.164 We expect that any discretion would be exercised in a manner consistent with the responsible entity's statutory duties under s601FC and that, generally, any suspension that is material in duration would be disclosed to members under s675 if the scheme is a disclosing entity.
- RG 134.165 We believe the constitution should not contain a provision that has the effect of allowing the responsible entity to set out the circumstances in which it may suspend the right to withdraw in another document.

### **Ceasing to be a member of the scheme**

- RG 134.166 A 'member' of a scheme is a person who holds an interest in the scheme: s9. A person ceases to be a member in relation to the withdrawn interest of the scheme when they cease to hold an interest in it.
- RG 134.167 We believe that the constitution should not include provisions that treat withdrawing members as having ceased to be a member before the time for which the scheme property is valued for determining the withdrawal price. This is because until that time the member can share in any increase in the value of scheme property, and so retains an interest in the scheme.

Note: For example, we consider that provisions which have the effect of denying withdrawing members the right to complain under the complaints handling procedures in the constitution or which have the effect of applying withdrawal provisions for a scheme that is liquid when the scheme is not liquid at the time scheme property is valued are provisions which deny withdrawing members their rights as members, or are not in accordance with Pt 5C.6.

- RG 134.168 If a member has ceased to hold an interest in the scheme but has not been paid the withdrawal amount, they do not have rights as a member, but are taken to be a creditor of the scheme.

Note: See *MSP Nominees Pty Ltd v Commissioner of Stamps* (South Australia) (1999) 198 CLR 494 at 509) and *Basis Capital Funds Management Ltd v BT Portfolio Services Ltd* [2008] NSWSC 766.

- RG 134.169 A responsible entity will often include a provision about the timeframe from acceptance of the withdrawal request to payment of the withdrawal amount to the former member. This timeframe will vary depending on the characteristics of the scheme and the operational practices of the responsible entity, and may be subject to any permitted extension under suspension provisions.
- RG 134.170 We consider that responsible entities should be able to determine the timeframe for payment of a withdrawal amount to former members, and that the constitution needs to include a provision specifying the maximum period.
- RG 134.171 We consider that former members may have an expectation to receive payment within a reasonable time of withdrawing. Responsible entities are also under a duty to act honestly in s601FC(1)(a). For a non-liquid scheme, withdrawal requests must be satisfied within 21 days: s601KD. We expect that to ensure fairness the constitution will generally provide that former members be paid within 21 days of withdrawal.

## Non-liquid schemes

RG 134.172 In our view, the constitution should only permit members' interests to be redeemed in accordance with the procedures that apply to liquid schemes if the scheme is liquid at the time scheme property is valued for the purposes of calculating the withdrawal price. If a scheme becomes non-liquid after a member has made a request to withdraw but before the time the scheme property is valued for determining the withdrawal price (even though the time when the value is actually determined may occur later), we consider that the constitution may only allow that member to withdraw in accordance with the requirements in Pt 5C.6 for non-liquid schemes.

Note: For example, we consider that a provision where interests are purported to be redeemed upon acceptance by the responsible entity is inconsistent with the requirements in Pt 5C.6 for non-liquid schemes if this occurs before the time for which the scheme property is valued for determining the withdrawal price.

RG 134.173 Apart from any relief we give, a constitution must not contain provisions that allow a member to exercise a right to withdraw in circumstances other than in response to a current withdrawal offer while the scheme is non-liquid. This is because, in our view, Pt 5C.6 requires that the exercise of a right to withdraw should be made in reliance on a specific current offer. We consider that a provision that allows a member to make a withdrawal request 'from time to time', rather than in response to an offer by the responsible entity, is not a withdrawal request envisaged under Pt 5C.6 for a non-liquid scheme.

Note: An example is a provision to the effect that members can make a request to withdraw while the scheme is non-liquid that is not in response to a current withdrawal offer made by the responsible entity.

## Fairness to members

RG 134.174 In our view, provisions involving withdrawal procedures should not unreasonably disadvantage certain members or be otherwise inconsistent with the Corporations Act. We believe 'fairness' in the context of s601GA(4) means that the provisions in the constitution that affect the price that members will receive on withdrawal, and the procedures for satisfying withdrawal requests, must be fair to all members.

RG 134.175 Withdrawals from a scheme will not only affect the entitlements of withdrawing members, but also the remaining assets to be attributed to the interests of non-exiting members. The price at which members can withdraw, and the procedures that apply to the withdrawal, must be fair because these affect the right to withdraw, and how it operates.

Note 1: For non-liquid schemes, the concept of fairness applies to any procedures in addition to those set out in Pt 5C.6.

Note 2: See also RG 134.110.

RG 134.176 The constitution must provide for the withdrawal price to be determined in accordance with a method or manner that is fair to all members under s601GA(4). We consider that ‘fairness’ requires withdrawal provisions to specify that the withdrawal amount be determined on the basis of valuations of scheme property that are consistent with the range of ordinary commercial practice for valuing that type of scheme property and reasonably current. We believe this is essential for determining a price that results in a fair and equitable outcome for all members. We also believe it is consistent with a responsible entity’s duty under s601FC(1)(j) to ensure that scheme property is valued at regular intervals appropriate to the nature of the property.

Note: For example, a provision for payment of a fixed amount that is contributed to the scheme by a member is unlikely to be fair if the entitlement of members is to a share of a pool and the value of the pool varies due to a change in value of assets.

RG 134.177 In our view, withdrawal offers should be made in a way to ensure that all members to whom the offer is made have access to a copy of the offer. If an offer is only made via the internet or other form of public communication (e.g. in a newspaper), a responsible entity should consider whether the procedure will be ‘fair’ and consistent with its duties under s601FC(1)(d).

RG 134.178 If a responsible entity chooses to make *in-specie* payments to satisfy a withdrawal request, to be fair to all members, we believe the constitution should include provisions that the relevant assets should be based on valuations consistent with the range of ordinary commercial practice for valuing assets of that type and be reasonably current. This is because appropriate valuations affect both the amount that a member is entitled to on withdrawal and the value of the remaining interests.

RG 134.179 To the extent that a responsible entity can select particular assets to satisfy payment, that selection must be made on a fair basis and take into account to the responsible entity’s duties under s601FC(1). This also applies to the deduction of transaction costs.

Note: Responsible entities should also consider their obligation to discharge their duties under s601FC(1)(d) to treat members who hold interests of the same class equally and members who hold interests of different classes fairly when following withdrawal procedures. Although these procedures in the constitution may appear adequate to us when registering a scheme, responsible entities should not assume that they will satisfy their duties simply by following those procedures in all circumstances.

## Suspension of withdrawals

RG 134.180 Responsible entities may wish to include a provision giving them discretion to suspend a right to withdraw by suspending the processing of withdrawal requests. In this case, we consider the constitution should set out the circumstances in which it can exercise that discretion.

RG 134.181 This could be a limited range of circumstances or the responsible entity could be given the discretion whenever it thinks fit. We recognise that a responsible entity may need to suspend or defer withdrawals for an extended period of time. We consider that responsible entities should ensure that powers of suspension are exercised consistently with their duties under s601FC(1).

Note: For example, a responsible entity may need to suspend withdrawal if there is an unexpected demand for withdrawal requests, or if circumstances make it difficult to determine the withdrawal price.

## F Winding up

### Key points

A constitution should address the following key aspects of the winding up process:

- how assets, liabilities and scheme property are dealt with;
- distribution of the proceeds of winding up;
- the costs of winding up; and
- any payments to maximise proceeds of winding up.

The constitution should include a provision for an independent audit of the final accounts to be conducted by a registered company auditor or audit firm after a scheme is wound up.

The constitution can include provisions allowing the responsible entity to postpone the realisation of a scheme on winding up.

### Procedures for winding up

RG 134.182 The constitution of a scheme must make adequate provision for winding up the scheme: s601GA(1)(d).

RG 134.183 However, Ch 5C does not prescribe what constitutes winding up a scheme, or what the process entails. The responsible entity of a registered scheme must ensure that the scheme is wound up in accordance with its constitution and any orders of the court under s601NF(2): s601NE(2).

RG 134.184 We consider that winding up a scheme is a process rather than an event. As such, we expect that provisions deal with the process of winding up, rather than only the event of termination.

Note: This is consistent with Judd J's views in *Environinvest Ltd* [2009] VSC 33 at [99].

RG 134.185 We also consider that the provisions need to deal with the process for winding up the whole 'program or plan of action' that constitutes the scheme.

RG 134.186 We believe that what constitutes 'adequate provision' will depend on the circumstances surrounding the scheme. In light of this, we consider the responsible entity and its advisers should be able to devise provisions that deal with winding up the scheme taking into account the characteristics of that scheme as long as the provisions deal with the process of winding up rather than the event of termination. We believe that this will enable responsible entities to preserve flexibility in provisions about winding up schemes to deal with unforeseen situations.

RG 134.187 In our view, there are certain key steps in the process of winding up a scheme. These are dealing with assets, liabilities and scheme property, the distribution of proceeds, costs of winding up, and additional payments by members.

### **Dealing with assets, liabilities and scheme property**

RG 134.188 We consider that a key aspect of winding up a scheme is being able to identify and deal with assets and liabilities of the scheme and scheme property in order to realise them.

Note: The responsible entity must ensure that scheme property is clearly identified: s601FC(1)(i)(i).

RG 134.189 In our view, this may require more specific treatment in some contract-based schemes where it may be difficult to easily distinguish scheme property belonging to the scheme being wound up and other assets of the scheme that are to be covered in winding up from assets that are outside any winding up, such as certain non-scheme property.

Note: Examples of this non-scheme property include personal assets of the responsible entity or scheme property belonging to another scheme operated by the same responsible entity.

### **Distribution of proceeds**

RG 134.190 We also consider that a key aspect of winding up a scheme is determining how proceeds will be apportioned. For this reason, we believe the constitution should include provisions about the distribution of the net proceeds of realisation of the scheme.

RG 134.191 We consider the constitution should explain who will apportion the net proceeds of realisation between members, what criteria will be used to apportion the net proceeds of realisation between members, and the priority of persons.

### **Costs of winding up**

RG 134.192 We believe that the identification of the party that will bear the costs of winding up the scheme is an important aspect of winding up the scheme. This will generally be the responsible entity. As such, we consider that the constitution should identify the party that will bear these costs and in what priority this party will be paid.

Note: For example, the expenses may be borne out of the assets of the responsible entity if there are no assets of the scheme that can be properly realised to meet the costs of winding up.

## Payments to maximise proceeds

RG 134.193 In our experience, a party winding up a scheme may require members to continue to make payments during the winding up to maximise the proceeds of realisation.

Note: For example, members may be required to make annual payments for pesticide spraying for an agribusiness scheme irrespective of whether the scheme is being wound up.

RG 134.194 If there is any ability for members to continue making payments during the process of winding up the scheme to maximise the net proceeds of realisation or, alternatively, if members are or may be required to continue making payments, we believe that this should be included in the provisions on winding up the scheme.

RG 134.195 We consider that these key steps in the process of winding up a scheme should be addressed in all constitutions. However, a responsible entity may also want to include additional provisions to assist in the winding up of the scheme.

## Dealing with a 'worst case scenario'

RG 134.196 The winding up of a scheme can occur where the responsible entity is 'insolvent' and/or if the assets of the scheme are no longer sufficient to indemnify the responsible entity for its liabilities.

Note: In *Capelli v Shepard* [2010] VSCA 2 at [93], the court observed that a scheme may 'colloquially be characterised as insolvent in the sense that ... the liabilities referable to it cannot be satisfied as they fall due from its income or readily realisable assets'.

RG 134.197 If a scheme is 'insolvent', provisions that authorise payment out of the realisation of the assets of the scheme will be of no effect because sufficient assets will not be available to meet the costs and expenses of winding up the scheme.

RG 134.198 When drafting provisions about winding up, a responsible entity should consider whether to include provisions that might assist it to wind up the scheme if the scheme or the responsible entity is insolvent. For unitised schemes, established principles of trust law provide some assistance in determining the obligations of the responsible entity (or its successor) and the rights of members and third parties. This means there may be less of a need for a responsible entity of this type of scheme to include provisions that address winding up in insolvency.

RG 134.199 Contract-based schemes cannot rely on the established principles of trust law to provide a greater degree of clarity about winding up. Responsible entities of this type of scheme should consider adding provisions to deal with the situation of winding up the scheme where it or its responsible entity is insolvent.

## Independent audit

- RG 134.200 We consider that the constitution needs to include a provision that provides for an independent audit of the final accounts to be conducted by a registered company auditor or audit firm after a scheme is wound up.
- RG 134.201 We consider that, on winding up a scheme, it is an appropriate safeguard for the accounts to be independently audited to ensure there has been compliance with the Corporations Act.
- RG 134.202 We believe that an audit of the final accounts provides greater oversight than a review as it involves performing procedures to obtain audit evidence about the amounts and disclosures in the accounts.
- RG 134.203 We will also generally ask for an amendment to the constitution if the provision states that a person other than a registered company auditor may conduct the audit.

## Postponement of winding up

- RG 134.204 We recognise that responsible entities may sometimes need to legitimately postpone the realisation of the scheme's assets on winding up to maximise the net proceeds of realisation attributable to members. At the same time, we recognise that the discretion to postpone the realisation of a scheme on winding up may be exercised to the detriment of members and may be used to avoid the timely winding up of a scheme.

Note: If a responsible entity decides to postpone the realisation of scheme assets, it should take into account its duties under s601FC(1).

## G Legal enforceability

### Key points

The constitution of a scheme must be contained in a document that is legally enforceable between the members of the scheme and the responsible entity

The particular form of the constitution will determine the principles by which it needs to be drafted and executed for it to be legally enforceable.

### Enforceability between members and the responsible entity

- RG 134.205 The constitution of a scheme must be contained in a document that is legally enforceable between the members of the scheme and the responsible entity: s601GB.
- RG 134.206 The form of the constitution is not prescribed. Regardless of the form, the constitution must be legally binding between the responsible entity and the members of the scheme. Most constitutions take the form of a deed poll which contains a provision that binds a person on becoming a member under the terms of the deed. Some constitutions may take the form of a deed poll combined with a pro forma of the contract arrangement between the responsible entity and a member, which the member and responsible entity must execute for the interests in the scheme to be issued.
- RG 134.207 In either of these circumstances, we expect that the constitution will be expressed as binding between the responsible entity and the members.
- RG 134.208 We consider that the particular form of the constitution will determine how it needs to be drafted and executed for it to be legally enforceable.

Note 1: For example, a deed poll will need to be expressed to be executed as a deed poll and be executed by the parties authorised to sign on behalf of the responsible entity.

Note 2: The Corporations Act does not mandate how a company must execute documents. However, s127 sets out acceptable methods of execution that other persons may assume to be valid. In summary, under s127(1) a company may execute a document without using a common seal if the document is signed by two directors or a director and company secretary. Under s127(2), a company with a common seal may execute a document if the seal is fixed to the document and the fixing of the seal is witnessed by two directors or by a director and company secretary. However, there is no restriction on the ways in which a company can execute a document: s127(4).

- RG 134.209 In our view, to be enforceable, the constitution must be contained in a document that is validly executed by the proposed responsible entity. We believe this requires that the constitution be executed by the parties authorised to sign for the proposed responsible entity before the application for registration of the scheme is lodged with ASIC.

- RG 134.210 We will not register a scheme if it appears to us that at the end of the 14-day period the constitution will not be legally enforceable and as such will not meet the requirements in s601GB.
- RG 134.211 In our experience, a constitution will generally contain a clause that binds the responsible entity and each present and future member as if each of them had been a party to the constitution. We consider that all constitutions should expressly bind the responsible entity and the members of the scheme from time to time. This is consistent with the legislative intention of s601GB that the constitution is contained in a document that is or documents that are lawful and binding between the responsible entity and the members.
- RG 134.212 We consider that s601GB requires that the constitution continues to be contained in a document that is legally enforceable. This means that a method of effecting a modification chosen by the responsible entity when acting under s601GC(1)(b) will need to be one that ensures that, after the modification, the constitution continues to be wholly contained in a document that meets the requirements in s601GB.

Note: See *ING Funds Management Ltd v ANZ Nominees Ltd*; *ING Funds Management Ltd v Professional Associations Superannuation Ltd* [2009] NSWSC 243.

## Severance clauses

- RG 134.213 We encourage responsible entities to ensure that the constitution contains an overriding provision to the effect that, to the extent a provision of the constitution is inconsistent with the Corporations Act, it will be of no effect.
- RG 134.214 If the constitution does not appear to contain such a clause, we are likely to spend more time assessing it to ensure that it is not inconsistent with the Corporations Act. This could result in any concerns we have about various provisions being raised later in the 14-day registration period.

## Impact on s601GA content

- RG 134.215 We also consider that a provision of the constitution will not make 'adequate provision' for, or 'specify' the matters prescribed by s601GA if it is not capable of being legally enforceable, as envisaged by s601GB.

## H Incorporation by reference

- RG 134.216 Before registering a scheme, we must consider whether the constitution ‘makes adequate provision for’ certain matters or ‘specifies’ other matters. If the terms of the constitution allow for provisions that are regulated under s601GA to be excluded or modified by other documents, it would render our consideration of the constitution ineffectual.
- RG 134.217 Any amendment to a constitution must follow one of two processes in s601GC. We believe that s601GC gives context to how the requirements in s601GA and 601GB should be read. In our view, it would be contrary to the legislative intent for a responsible entity to seek to rely on other documents that can be amended through some other process to change the rights of members under the constitution without following the processes in s601GC.
- RG 134.218 On this basis, we think that making provisions of the constitution under s601GA subject to other documents that may affect these provisions means that the constitution does not ‘make adequate provision for’ or ‘specify’ the matters required by s601GA. We have seen provisions that seek to incorporate the terms of issue of interests of a scheme, or material included in a Product Disclosure Statement (PDS) without excluding any affect they may have on the provisions required under s601GA.
- RG 134.219 Under Class Order [CO 98/1808] *Allowing constitutions to use Appendix 15A of the ASX Listing Rules*, a responsible entity may include a provision that incorporates by reference and gives overriding effect to Appendix 15A of the ASX Listing Rules. This relief means that changes to the terms of the constitution under Appendix 15A need not be made in accordance with s601GC(1)(a) or 601GC(1)(b).
- RG 134.220 We believe that this relief is appropriate because:
- (a) the ASX Listing Rules are available to the public;
  - (b) amendments to the ASX Listing Rules are subject to regulatory oversight; and
  - (c) amendments to the terms of the constitution are highly likely to be appropriate if the ASX Listing Rules require those amendments in order to maintain listing.

## Key terms

Term	Meaning in this document
ADI	Authorised deposit-taking institution
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries out a financial services business to provide financial services  Note: This is a definition contained in s761A of the Corporations Act.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act  Note: This is a definition contained in s761A of the Corporations Act.
ASIC	Australian Securities and Investments Commission
ASX	ASX Limited or the exchange market operated by ASX Limited
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
IDPS	Investor directed portfolio service
Product Disclosure Statement (PDS)	A document that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act  Note: See s761A for the exact definition.
REP 347 (for example)	An ASIC report (in this example numbered 347)
RG 132 (for example)	An ASIC regulatory guide (in this example numbered 132)
s601GA (for example)	A section of the Corporations Act (in this example numbered 601GA)
scheme	A managed investment scheme as defined in s9 of the Corporations Act

## Related information

### Headnotes

Complaints handling procedures, content requirements, enforceability requirement, members, registered managed investment schemes, responsible entities, scheme constitutions

### Class orders

[CO 98/1808] *Allowing constitutions to use Appendix 15A of the ASX Listing Rules*

[CO 03/104] *Relief facilitating the acquisition and sale of forfeited interests in registered time-sharing schemes*

[CO 03/217] *Differential fees*

[CO 05/26] *Constitutional provisions about the consideration to acquire interests*

[CO 07/422] *On-market buy-backs by ASX-listed schemes*

[CO 09/339] *Internal dispute resolution procedures*

[CO 09/425] *Share and interest purchase plans*

[CO 13/655] *Provisions about the amount of consideration to acquire interests and withdrawal amounts not covered by [CO 05/26]*

[CO 13/656] *Equality of treatment impacting on the acquisition of interests*

[CO 13/657] *Discretions affecting the amount of consideration to acquire interests and withdrawal amounts*

[CO 13/762] *Investor directed portfolio services provided through a registered managed investment scheme*

### Regulatory guides

RG 51 *Applications for relief*

RG 61 *Underwriting—Application of exemptions*

RG 94 *Unit pricing: Guide to good practice*

RG 125 *Share purchase plans*

RG 132 *Managed investments: Compliance plans*

RG 136 *Managed investments: Discretionary powers and closely related schemes*

RG 159 *Takeovers, compulsory acquisitions and substantial holding notices*

RG 160 *Time-sharing schemes*

RG 165 *Licensing: Internal and external dispute resolution*

## Legislation

Corporations Act, s601EA, 601EB, 601FC(1)(a)–(1)(k), 601FD(1)(f)(i), 601FG, 601GA, 601GA(1)(a), 601GA(1)(b), 601GA(1)(c), s601GA(1)(d), 601GA(2), 601GA(3), 601GA(4), 601GB, 601GC(1)(b), 601HA, 601PB(1)(b), 606, 615, 761A, 912A(1)(1)(g), 912A(2)

Managed Investments Bill 1997

## Cases

*Basis Capital Funds Management Ltd v BT Portfolio Services Ltd* [2008] NSWSC 766 at [142]

*Capelli v Shepard* [2010] VSCA 2 at [93]

*Environinvest Ltd* [2009] VSC 33 at [99]

*ING Funds Management Ltd v ANZ Nominees Ltd; ING Funds Management Ltd v Professional Associations Superannuation Ltd* [2009] NSWSC 243

*MacarthurCook Fund Management Limited v Zhaofeng Funds Limited* [2012] NSWSC 911

*MSP Nominees Pty Ltd v Commissioner of Stamps (South Australia)* (1999) 198 CLR 494 at 509

*Re Real Estate Capital Partners Managed Investments Ltd as Responsible Entity of the Real Estate Capital Partners USA Property Trust* [2013] NSWSC 190

## Consultation papers and reports

CP 188 *Managed investments: Constitutions—Updates to RG 134*

REP 347 *Response to submissions on CP 188 Managed investments: Constitutions—Updates to RG 134*

## ASIC forms

5100 *Application for registration of managed investment scheme*

5103 *Directors' statement relating to application for registration of a managed investment scheme*

## Other documents

AS ISO 10002–2006 *Customer satisfaction—Guidelines for complaints handling in organizations* (ISO 10002:2004 MOD)

## Appendix: Requirements for schemes registered before 1 October 2013

- RG 134.221 This appendix sets out the requirements that applied to constitutions under the version of RG 134 as at September 2000.
- RG 134.222 For schemes registered before 1 October 2013, we will not deregister the scheme or take any action against a responsible entity or its officers on the basis that a constitution does not comply with s601GA and 601GB of the Corporations Act if the constitution meets the requirements in this appendix: see RG 134.12–RG 134.17.
- RG 134.223 This appendix is not intended to state any new policy. It merely reflects the requirements that applied under that version of RG 134.

Note 1: A copy of the version of RG 134 as at September 2000 can be obtained from ASIC Digest: see our website at [www.asic.gov.au](http://www.asic.gov.au)—select ‘Other resources’ from the ‘Publications’ tab.

Note 2: In replicating the requirements in that version of RG 134, we have updated relevant legislative references (e.g. changing references to ‘the Law’ to ‘the Corporations Act’). We have also removed historical references to the *Managed Investments Act 1998* and superseded ASIC policy statements and class orders.

Note 3: Our no-action position for schemes registered before 1 October 2013 will not affect the rights of other persons, including members, if the responsible entity has contravened its duty in s601FC(1)(f) to ensure the constitution meets the requirements in s601GA and 601GB.

## Assessing a constitution

### Our policy

#### Ordinary case

- RG 134.224 We assess a constitution when it is lodged with a registration application for a managed investment scheme. To assist us assess your constitution, your application must state where your constitution covers the matters required by s601GA and 601GB. Ordinarily, we will only check the parts of your constitution that you identify.
- RG 134.225 We will not ordinarily review amendments to a constitution or replacement constitutions lodged after registration.

#### Further review

- RG 134.226 We may, however, completely review a constitution or replacement or amended constitution at any time to see if it complies with the Corporations Act.

## Underlying principles

RG 134.227 The responsible entity and its directors have a responsibility to ensure that the constitution meets the outcomes under s601GA and 601GB.

## Explanations

### What is a 'constitution'?

RG 134.228 Each scheme must have a constitution that is lodged when applying for registration of the scheme.

RG 134.229 We cannot register a scheme if its constitution does not appear to meet s601GA and 601GB. The Corporations Act does not prescribe in detail what a constitution must contain. Instead, under s601GA and 601GB a constitution must:

- (a) adequately cover some specified matters which are important to the relationship between the members and the responsible entity; and
- (b) be a document which is legally enforceable between the members and the responsible entity.

RG 134.230 The responsible entity has a duty to comply with a constitution when the constitution is consistent with the Corporations Act: s601FC(1)(m).

RG 134.231 We are aware that constitutions will be different in length and form. Apart from the matters prescribed in s601GA, constitutions will also include different matters. For example, some constitutions may refer to other rules or regulations (which may or may not be legally enforceable between the members and the responsible entity).

RG 134.232 We are also aware that most constitutions will declare a trust in favour of the members over scheme property. This view is based on the obligation of a responsible entity under s601FC(2) to hold scheme property on trust for the members.

RG 134.233 We consider that a constitution needs to contain those matters that Pt 5C.3 of the Corporations Act requires.

### Assessing the constitution

RG 134.234 Under s601EB(1)(e), we have to assess a scheme's constitution. A constitution must deal adequately with key matters set out at s601GA and 601GB governing your rights and obligations as well as those of the members. These are:

- (a) the consideration to acquire interests in the scheme;
- (b) investment and borrowing powers of the responsible entity;
- (c) member complaints handling;
- (d) winding up the scheme;
- (e) your rights to be paid or indemnified from the scheme property; and

- (f) the withdrawal rights of the members and the exit price for interests in the scheme.

*Further review*

- RG 134.235 Although we will not usually review all of a constitution, we may do so at any time.
- RG 134.236 We may discover, for example, that a constitution has a provision that negates the effect of other provisions that we relied on in assessing the adequacy of the constitution. In this case, we may do a thorough review of the constitution.

*No compliance clause*

- RG 134.237 We do not consider that a constitution needs a provision to say that it is subject to the Corporations Act. This is because the Corporations Act imposes direct obligations to comply with the Act and the constitution.
- RG 134.238 However, we do consider that the provisions of the constitution must not be inconsistent with the Corporations Act, in order that the constitution will be legally enforceable as required by s601GB. For example, we may refuse registration of a scheme where its constitution contains a clause purporting to limit or exclude the liability of the responsible entity for conduct which may contravene the Corporations Act.
- RG 134.239 If such a clause is included in the constitution it may need to be qualified in the following manner:
- (a) the limitation of liability only operates to the extent permitted by the Corporations Act; and
  - (b) in no way does the limitation purport to exclude, or reduce liability under the Corporations Act.
- RG 134.240 This also highlights the need for parties relying on the constitution to first examine the Corporations Act to understand the effect of such an exclusion clause.

## Content needed under s601GA

### Our policy

- RG 134.241 We are required by the Corporations Act to assess whether or not a constitution makes adequate provision about the matters specified in s601GA. We consider that to make adequate provision about those matters, the content must be certain and complete in a contractual sense. That is, a person reading a constitution must be able to understand how matters will be resolved without having to rely on extrinsic material or on further agreement between the members and you. This policy gives guidance about what the Corporations Act requires to help you comply.

RG 134.242 We have given relief to allow a constitution to include a provision to the effect of Appendix 15A of the Listing Rules of the ASX: see Class Order [CO 98/1808] *Allowing constitutions to use Appendix 15A of the ASX Listing Rules*. The relief will mean that changes to the terms of the constitution as a result of the operation of Appendix 15A are not required to be made in accordance with s601GC(1) or 601GC(2).

### Consideration to acquire

RG 134.243 Section 601GA(1)(a) provides that a constitution must make adequate provision for the consideration that is to be paid to acquire an interest in the scheme. We consider that adequate provision has been made when a constitution provides for an independently verifiable price. However, we have given relief from the effect of s601GA(1)(a) under Class Order [CO 05/26] *Constitutional provisions about the consideration to acquire interests* in a number of situations when:

- (a) for commercial reasons, the consideration to acquire cannot be determined independently; and
- (b) investor protection will not be reduced.

RG 134.244 Relief is available under [CO 05/26] for:

- (a) placements of quoted interests;
- (b) when there is no pooling except of money pending its further investment;
- (c) rights issues to members and distribution reinvestment plans;
- (d) forfeited interests;
- (e) rights issues of options for the issue of interests;
- (f) interest purchase plans;
- (g) fees for wholesale clients;
- (h) interests that are components of stapled securities;
- (i) the issue of interests based on the value of scheme property less any liabilities that may be met from that property (which can make allowance for expenses that are associated with acquiring scheme property) for schemes that are not quoted on a financial market and schemes that are able to be traded on the AQUA market; and
- (j) the issue of interests based on the market price for schemes that are quoted on a financial market other than the AQUA market.

Note: If the consideration is based on the value of scheme property, the constitution has to set out how the property will be valued: see s601GAB(5) (as inserted into the Corporations Act by [CO 05/26]).

RG 134.245 This means that you do not have to include a price or the consideration in a constitution if it fits one of the situations set out in [CO 05/26]. We will consider giving relief in other situations if the criteria in RG 134.243(a)–

RG 134.243(b) are met. See Regulatory Guide 136 *Managed investments: Discretionary powers and closely related schemes* (RG 136) at RG 136.2 for our general policy on exemptions and modifications.

*How to apply for relief*

RG 134.246 To apply for relief:

- (a) lodge an application with the prescribed fee at any ASIC office; and
- (b) ensure the application complies with Regulatory Guide 51 *Applications for relief* (RG 51).

You can also contact the ASIC on 1300 300 630 for information and assistance.

**Powers to deal with scheme property**

RG 134.247 Section 601GA(1)(b) provides that a constitution must have adequate provisions about what powers you have when dealing with scheme property, such as what investments can be made. We consider that adequate provision for your powers in dealing with scheme property has been made when the powers are set out in the constitution with certainty and completeness. For example, adequate provision has been made if the constitution gives the responsible entity all the powers of a natural person to invest and to borrow on security of the scheme property.

**Complaints procedures**

RG 134.248 Section 601GA(1)(c) provides that a constitution must have adequate provisions about the method by which complaints made by members in relation to the scheme will be dealt with. We consider that a constitution makes adequate provision about member complaints when it provides for a complaints handling procedure which will give an effective way for members to efficiently get redress if they suffer loss due to breaches.

RG 134.249 When assessing the method for dealing with members' complaints, we will refer to the Australian Standard on Complaints Handling (AS ISO 10002–2006) as a guide, but it is not necessary for the constitution to set out provisions relating to every aspect of the standard. We expect a constitution to at least include provisions about:

- (a) acknowledging complaints;
- (b) properly considering complaints within reasonable timeframes;
- (c) communicating with the member;
- (d) outlining remedies available to the member; and
- (e) advising the member of any further avenue for complaint.

### Winding up

- RG 134.250 Section 601GA(1)(d) provides that a constitution must have adequate provisions about winding up the scheme. We consider that adequate provision for winding up a scheme has been made if its constitution:
- (a) deals with all the circumstances under which a scheme may be wound up; and
  - (b) provides for an independent audit by a registered company auditor of the final accounts after winding up.

The provisions about winding up need to be consistent with Pt 5C.9.

### Withdrawal rights of members

- RG 134.251 Section 601GA(4) provides that if members have a right to withdraw, the constitution must specify the right and set out adequate procedures in a way that is fair to all members. We consider that if there are provisions for a right of withdrawal, the constitution complies if it sets out fair provisions about:
- (a) how members can withdraw; and
  - (b) what exit price will apply.

- RG 134.252 If there is provision for withdrawal, the constitution must include a method for calculating the exit price in a way which is fair to all members and independently verifiable. Fairness will normally require that the price depend on appropriate, and reasonably current, valuations of scheme property.

Note: [CO 05/26] also provides relief so that the calculation of the exit price can be based on the value of scheme property less any liabilities that may be met from that property (and can make allowance for the expenses that are associated with disposing of scheme property).

- RG 134.253 Generally if the withdrawal provisions meet these requirements, we will treat them as complying with the Corporations Act unless they:
- (a) unreasonably disadvantage one group of members; or
  - (b) are otherwise inconsistent with the Corporations Act.

### Underlying principles

- RG 134.254 We consider that a constitution must address the matters in s601GA in a way that enables members to know their rights. We believe these matters must be addressed in a way that is consistent with the Corporations Act.

### Incorporation by reference

- RG 134.255 A provision that allows provisions in another document to override the terms of the constitution prevents the provisions of the constitution that deal with the matters in s601GA and 601GB from being adequate because they are not certain and complete. That type of provision may require a reader to consider

material which is extrinsic to the constitution itself and avoid the requirements for amendments of the constitution. The Corporations Act would not permit us to register a scheme if its constitution has this type of provision.

*Appendix 15A ASX Listing Rules*

- RG 134.256 We believe that relief to permit inclusion of a provision to the effect of Appendix 15A of the ASX Listing Rules that incorporates by reference and gives overriding effect to the ASX Listing Rules is appropriate. This is because:
- (a) the listing rules are available to the public;
  - (b) amendments to the listing rules are subject to regulatory oversight; and
  - (c) amendments to the terms of the constitution are highly likely to be appropriate where the listing rules require those amendments in order to maintain listing.

## Explanations

### Consideration to acquire

*Independently verifiable price*

- RG 134.257 We do not consider that ‘adequate provision’ for ‘consideration to acquire’, in s601GA(1)(a), means there must be a ‘fair price’. We do not require this because the Corporations Act does not require any duty of fairness to applicants for interests. Applicants are protected, in relation to the consideration paid for interests, by the disclosure requirements of Div 2 of Pt 7.9.
- RG 134.258 To meet s601GA(1)(a), the consideration for acquiring interests needs to be set out in the constitution so that it is independently verifiable. The Corporations Act requires provisions enabling calculation of the consideration to be set out in the constitution so members have rights about the consideration for an issue of interests. This is because the consideration for an issue of an interest to another may affect the value of a member’s interest.
- RG 134.259 If the amount of consideration can be influenced by any party who has an interest in the scheme, it will not comply. This means that the consideration is not to be influenced by:
- (a) you;
  - (b) any related party of yours;
  - (c) any person acting in concert with you in setting the consideration; and
  - (d) any other person having an interest in the amount of consideration.
- RG 134.260 For there to be an independently verifiable price, the scheme’s auditor must be able to verify the amount of consideration by referring to the constitution and without referring to you. If the consideration is based on the value of scheme property, the constitution has to set out how the property will be valued.

- RG 134.261 We will not generally give relief so interests in a trust can be issued at your discretion at a discount or at an increased price as this would not be consistent with the policy of the Corporations Act. We do not accept that, because companies can issue shares at a discount or a premium, similar treatment should be applied to issuing interests in a scheme in the form of a trust.
- RG 134.262 Unitholders in a trust have different rights from shareholders. Unitholders in a trust place their funds under your control to invest their funds. The scheme property is held for the benefit of the members. By contrast, shareholders supply capital for running a company. Shareholders are not beneficially or legally entitled to the assets of the company.
- RG 134.263 We will, however, give relief to facilitate flexibility for the responsible entity about the price of interests in a number of situations: see [CO 05/26].

*Placements of quoted interests*

- RG 134.264 We have given conditional relief in [CO 05/26] allowing interests in a scheme to be issued at a price determined by the responsible entity. This relief facilitates off-market placements of quoted interests. The relief applies only if the interests are quoted on the financial market of ASX or an approved foreign market as defined in [CO 05/26].
- RG 134.265 Relief means that interests can be issued at a discount to the market price. The price paid will normally be the result of commercial negotiations between you and the person taking up the issue.
- RG 134.266 The market price may reflect only dealings by holders of small parcels of interests. In this situation, you may not be able to find anyone willing to take a substantial placement at the market price.
- RG 134.267 If interests in the scheme are quoted, the market is an independent pricing mechanism. The market regulates the depth of any discount, and establishes an appropriate reference point for measuring it. These mechanisms are not available when a scheme is not listed.
- RG 134.268 We recognise that issuing interests at a discount to the market could dilute the value of members' interests. This is justifiable because of the substantial commercial benefit in enabling capital to be raised by a placement. There are conditions on our relief that limit the extent of any dilution of existing interests. Stricter conditions apply to issues that could involve large dilutions.
- RG 134.269 A condition of relief for placements is that unless the issue is covered by s601GAA(12A) or 601GAA(12B) (as inserted into the Corporations Act by [CO 05/26], you and your associates are not issued any of the interests.
- RG 134.270 Additional conditions apply if the issue under the proposed placement, together with any related issue in the previous year, immediately before the issue, comprise more than 15% of interests in that class.

RG 134.271 The additional conditions require 75% by value of members who hold interests in the same class to approve the issue and 25% by value to vote. If interests of members in another class are affected, then unless the responsible entity reasonably considers that the issue will not adversely affect the interests of members in that other class, those members must separately approve the issue. Those who are to be issued interests must be excluded in determining if approval is given.

*Limited pooling*

RG 134.272 Sometimes the only pooling or common use is of members' contributions before they are invested or otherwise disposed of. In this situation, the price at which interests are issued to one member does not affect the interests of the others. In these schemes, we have given relief so you can decide the issue price.

*Rights issues and distribution reinvestment plans*

RG 134.273 We have given relief so issues can be made at a discount for some rights issues and distribution reinvestment plans because there will be no unfair dilution. Relief is available when:

- (a) any price discount is less than or equal to the percentage stated in the constitution; and
- (b) the interests (whether renounceable or not) are offered to all the existing members proportionately to the value of their interests and not to anyone else. Foreign members may be excluded in a number of circumstances: see s601GAA(11) (as inserted into the Corporations Act by [CO 05/26]).

RG 134.274 We have given incidental relief from s601FC(1)(d) so foreign members can be excluded.

RG 134.275 We also have given relief so that you can decide the price under a distribution reinvestment plan. In a distribution reinvestment plan, you use money payable to a member as a distribution of capital or income to pay for additional interests. If all members may from time to time elect to participate in the distribution reinvestment plan, our relief applies. Foreign members may be excluded in a number of circumstances: see s601GAA(12) (as inserted into the Corporations Act by [CO 05/26]).

RG 134.276 Relief for distribution reinvestment plans is given on condition that:

- (a) all the issues under the distribution reinvestment plan are in the same class;
- (b) the same price applies to all interests issued under the distribution reinvestment plan in relation to a particular distribution;
- (c) all interests issued under the distribution reinvestment plan in relation to any particular distribution are issued at substantially the same time; and
- (d) any price discount offered is not more than the percentage stated in the constitution.

RG 134.277 You have to consider the rights and interests of all members when deciding the price in these circumstances, particularly, the rights and interests of members who do not take up the offer. This is because you have duties under s601FC(1)(c) and 601FC(1)(d) and a fiduciary relationship with members.

*Forfeited interests*

RG 134.278 We have given relief so you can decide the price at which partly paid interests are resold. This relief applies if the interests:

- (a) are in a listed scheme; and
- (b) are forfeited to you as responsible entity because of a failure to pay a call.

This does not imply that in these circumstances we will also give relief from the PDS or other provisions of the Corporations Act.

RG 134.279 The forfeited interests are to be sold at a public auction conducted, as far as practicable, under the Corporations Act about forfeited shares: s254Q.

*Options over interests*

RG 134.280 We have given relief so that options can be issued at a price decided by you and specified in the terms of issue of the options. This relief applies if the options are offered to all the existing members in proportion to the value of their interests and at the same price. The relief also applies if the exercise price of all the options offered is the same and the means of working out the exercise price is set out in the terms of issue of the option.

RG 134.281 The amount by which the exercise price of an option is less than the amount that would otherwise apply under the constitution must not be more than the relevant maximum percentage stated in the constitution. Foreign members may be excluded in a number of circumstances: see s601GAA(11) (as inserted into the Corporations Act by [CO 05/26]).

RG 134.282 We have given incidental relief from s601FC(1)(d) so foreign members can be excluded.

*Fees*

RG 134.283 We consider that some fees such as an entry fee are a part of the consideration payable to acquire an interest in a scheme. Without the relief available under [CO 05/26], these fees would have to be specified in an independently verifiable manner in the constitution.

RG 134.284 We recognise that fee arrangements involving negotiated rates for wholesale clients are a means by which responsible entities can attract those investors to a scheme. Such arrangements may assist in more efficient structuring of schemes by facilitating economies of scale.

- RG 134.285 Under the conditions of [CO 05/26]:
- (a) fee arrangements must be disclosed to:
    - (i) existing members of the scheme; and
    - (ii) persons being offered interests in the scheme under a PDS; and
  - (b) the fee arrangement agreed with any member must not adversely affect the fees that any other member will incur.
- RG 134.286 In some circumstances, discounted fee arrangements for related parties may be used to provide incentives for effective performance by officers and employees. We have given relief in relation to a scheme so that a differential fee arrangement could apply to employees of a related body corporate of the responsible entity of the scheme and their relatives where:
- (a) the number of employees as a proportion of all members in the scheme was insignificant (and therefore unlikely to materially affect other members in voting or takeover); and
  - (b) the differential fee arrangement involving the waiver of entry and exit fees did not impact on the scheme to the disadvantage of other members of the scheme.
- RG 134.287 We will consider applications for relief to allow differential fees for employees or officers on a case by case basis having regard to these matters. Applications should include proposals for disclosing such fee arrangements.
- RG 134.288 This relief is consistent with the relief we have given from s601FC(1)(d) to allow individually negotiated fees: see RG 136.11D.

### **Powers to deal with scheme property**

- RG 134.289 We do not consider that a scheme's investment policy must be set out in its constitution. This is because s601GA(1)(b) relates to powers of investment rather than how you intend to exercise your powers. We expect PDSs will specify the investment policy for a scheme.

### **Complaints procedures**

- RG 134.290 A constitution must adequately deal with how members' complaints will be handled: s601GA(1)(c). This implies there must be a complaints handling system. The complaints handling system may also be seen as a measure to ensure compliance that will need to be addressed in the compliance plan. Further, because the complaints handling method will be in the constitution, the scheme's compliance plan is required by the Corporations Act to include adequate measures to ensure that the scheme's complaints handling method is complied with.
- RG 134.291 The intention of the Corporations Act is that there must be an appropriate complaints handling system set out in the constitution so that it is a right of members.

**Winding up**

- RG 134.292 The Corporations Act sets out the framework for winding up of schemes. A constitution should set out members' rights in a winding-up process consistently with Pt 5C.9 of the Corporations Act.
- RG 134.293 The appointment of the auditor is terminated when a winding up commences: s331AD. The accounts of winding up should be independently audited in order to ensure compliance with the Corporations Act. We consider that provision in a constitution for the independent sign off of the accounts of a winding up is a part of adequately dealing with winding up.

**Withdrawal rights of members**

- RG 134.294 We do not prescribe how fairness is to be achieved. Because the constitution must provide for the withdrawal price, we consider that the basis for the price set out must be independently verifiable based on the terms of the constitution.

Note: [CO 05/26] provides relief so that the calculation of the withdrawal price can be based on the value of scheme property less any liabilities that may be met from that property (and can make allowance for the expenses that are associated with disposing of scheme property).

- RG 134.295 The withdrawal provisions in a constitution must be consistent with Pt 5C.6 of the Corporations Act, which restricts withdrawal from non-liquid schemes.