

Attachment 2 to CP 296: Draft regulatory guide



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 134

Funds management: Constitutions

October 2017

About this guide

This guide is for operators of registered managed investment schemes (registered schemes) and retail corporate collective investment vehicles (retail CClVs) (together, investment funds), wholesale CClVs and Australian passport funds, and their advisers.

It sets out our guidance on the requirements in the Corporations Act for the constitutions of investment funds, wholesale CClVs and Australian passport funds.

Note: This draft guide is based on the exposure drafts of the Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2017 and Corporations Amendment (Asia Region Funds Passport) Bill 2017, released 25 August 2017.

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 draft guide was issued in October 2017 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- Superseded Regulatory Guide 134, issued August 1998, updated November 1998, June 1999 and September 2000, reissued June 2013, February 2014, and October 2015

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.

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A Overview

Key points

The constitution of a managed investment scheme that is registered with ASIC (registered scheme) and the constitution of a retail corporate collective investment vehicle (retail CCIV) (together, investment funds) must meet certain requirements under the *Corporations Act 2001* (Corporations Act). In addition, the constitution of an investment fund that is registered as an Australian passport fund must meet the content requirements in the Australian Passport Rules.

This guide explains these requirements.

For managed investment 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 draft Regulatory Guide 000 *Constitution requirements for schemes registered before 1 October 2013*.

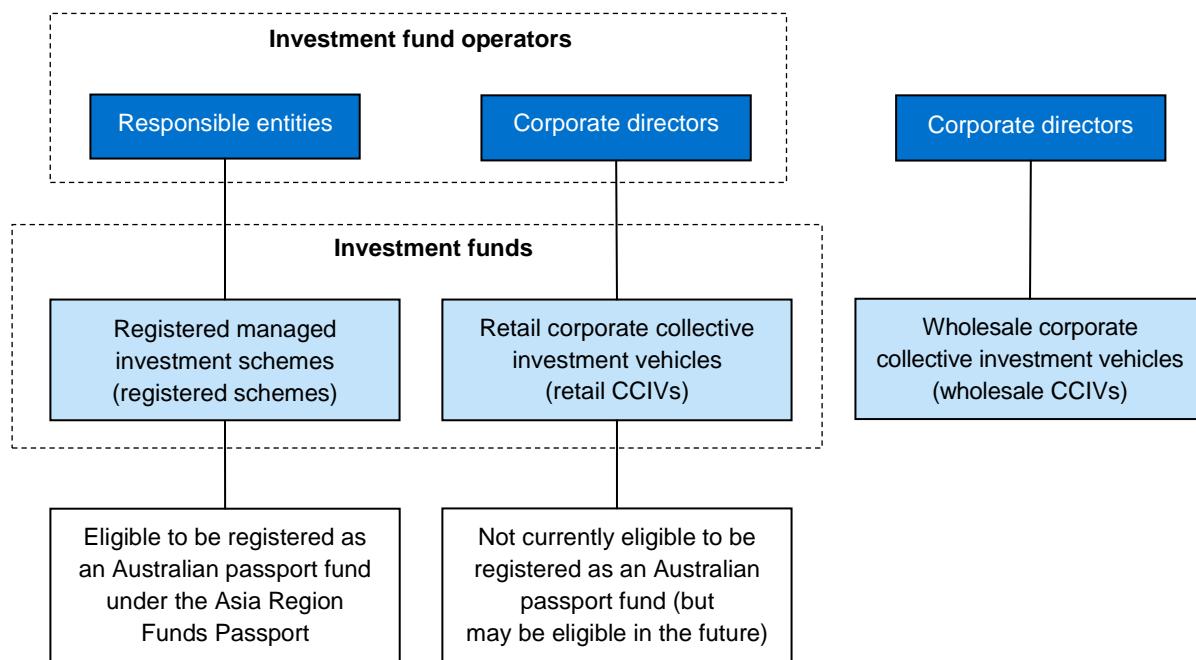
How our guidance applies

- RG 134.1 This guide is for:
 - (a) investment fund operators;
 - (b) corporate directors of wholesale CCIVs (in particular, Section G);
 - (c) Australian passport fund operators; and
 - (d) their advisers.

- RG 134.2 We will apply this guide when assessing constitutions that are part of applications lodged with ASIC to register:
 - (a) an investment fund; and
 - (b) an investment fund as an Australian passport fund.

- RG 134.3 In this guide, as illustrated in Figure 1:
 - (a) ‘investment fund’ refers to registered schemes and retail CCIVs;
 - (b) ‘investment fund operator’ refers to responsible entities of registered schemes and corporate directors of retail CCIVs; and
 - (c) ‘Australian passport fund’ refers to an investment fund that is also registered as a passport fund under the Asia Region Funds Passport.

Note: Under the draft legislation, only registered schemes are eligible to be Australian passport funds. If the legislation is changed to also allow retail CCIVs to be Australian passport funds, we will amend our guidance accordingly.

Figure 1: Overview of investment funds and Australian passport funds

Note: Investment funds, investment fund operators and Australian passport funds are described in RG 134.3 (accessible version).

Requirements for a constitution

Registered managed investment schemes

- RG 134.4 The constitution of a registered scheme 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 134.5 Under s601GA of the 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 E;
 - (d) any rights of members to withdraw from the scheme: see Section G; and
 - (e) winding up the scheme: see Section H.

Note: In this guide, references to sections (s), Parts (Pts) or Chapters (Chs) are references to the Corporations Act.

- RG 134.6 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 I.
- RG 134.7 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 J.
- RG 134.8 Under s601GC, the constitution of a registered scheme may be changed only in certain circumstances: see Section F.

Corporate collective investment vehicles

- RG 134.9 A CCIV must have a constitution: see draft s1137A. However, the replaceable rules in the Corporations Act do not apply to a CCIV: see s135(1)(a)(i).
- RG 134.10 The constitution of a retail CCIV must make adequate provision for, or specify, certain prescribed matters: see draft s1155. These include:
- (a) the consideration to acquire a share in the CCIV: see Section B;
 - (b) the establishment of sub-funds, and classes of shares referable to sub-funds: see Section C; and
 - (c) the powers and rights of the corporate director (see Section D), including:
 - (i) for making investments, borrowing or dealing with assets of the CCIV; and
 - (ii) to be paid fees or be indemnified out of assets of a sub-fund of the CCIV.
- Note: The constitution of a wholesale CCIV does not need to contain the content referred to in draft s1155, but if the corporate director is to have any powers these should be set out in the constitution.
- RG 134.11 In our view, making provisions of the constitution under draft s1155 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 draft s1155: see Section J.
- RG 134.12 Under draft s1159, if shares in a retail CCIV are redeemable, the constitution must make provision for redeemable shares to be redeemed. The provision must be consistent with a number of requirements, including the restriction in draft s1160 on when shares may be redeemed: see Section G.
- Note: Draft s1144A contains general requirements for redemption of a redeemable share in a CCIV.
- RG 134.13 Under draft s1155A, the constitution of a retail CCIV may only be changed in certain circumstances: see Section F.

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Australian passport funds

- RG 134.14 Under the Australian Passport Rules, a passport fund operator must ensure an Australian passport fund has a constitution that at all times provides for:
- (a) a member to seek remedy, including through compensation, against the Australian passport fund and its operator; and
 - (b) the agreed forum where:
 - (i) a member may commence proceedings against the fund or operator; and
 - (ii) the Australian passport fund or passport fund operator may commence proceedings against a member.

Note: The Australian Passport Rules will be made by the relevant Minister as a legislative instrument under draft s1211(1) and 1211A of the Corporations Act. Under draft s1211(2), the Australian Passport Rules must be substantially the same as the Passport Rules set out in Annex 3 to the [Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport](#).

- RG 134.15 See RG 134.161–RG 134.167 in Section E for further detail.

Complying with our guidance

- RG 134.16 There are consequences if an investment fund's constitution does not meet the requirements in the Corporations Act. In particular, non-compliance will be a potential breach of:
- (a) the duty of the investment fund operator to ensure that the constitution meets the requirements for registered schemes (see s601FC(1)(f)) or for CCIVs (see draft s1156(f)); or
 - (b) the duty of officers of the investment fund operator to do what a reasonable person in the officer's position would do to ensure that the operator complies with the requirements for registered schemes (see s601FD(1)(f)(i)) or for CCIVs (see draft s1157(f)(i)).
- RG 134.17 We may also deregister a registered scheme if its constitution does not meet the requirements in s601GA or 601GB.
- RG 134.18 In making a decision about whether to amend the constitution, an investment fund operator must consider all implications and its duties under the Corporations Act.
- Note: Our guidance on the process for registering an investment fund, including our assessment of the relevant constituent documents as part of that registration, is set out in draft Regulatory Guide 000 *Funds management: Establishing and registering a fund*, which is available on our website at www.asic.gov.au/cp under CP 296.
- RG 134.19 For schemes registered on or after 1 October 2013, we may deregister the registered scheme or take action against the responsible entity and/or their

officers if we consider that the constitution does not meet the requirements in s601GA or 601GB.

Schemes registered before October 2013

RG 134.20 For managed investment schemes registered before 1 October 2013, we will not deregister the registered scheme or take any action against a responsible entity or their 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 draft Regulatory Guide 000 *Constitution requirements for schemes registered before 1 October 2013*.

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

RG 134.21 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.

Our guidance by entity type

RG 134.22 Table 1 sets out the types of funds that each section of this guide relates to.

Table 1: Summary of our guidance by relevant fund type(s)

Topic	Relevant fund type(s)
Section B: Consideration to acquire interests and shares	• Investment funds
Section C: Sub-funds of retail CClVs and class rights in registered schemes	• Investment funds
Section D: Powers and rights of an investment fund operator	• Investment funds
Section E: Complaints, disputes and remedies in registered schemes and Australian passport funds	• Registered schemes • Australian passport funds
Section F: Changing the constitution of an investment fund	• Investment funds
Section G: Withdrawal from registered schemes and CClVs	• Investment funds • Wholesale CClVs
Section H: Winding up a registered scheme	• Registered schemes
Section I: Legal enforceability of a registered scheme's constitution	• Registered schemes
Section J: Incorporation by reference in investment fund constitutions	• Investment funds

B Consideration to acquire interests and shares

Key points

The guidance in this section is relevant to investment funds.

The constitution of a registered scheme must make adequate provision for the consideration that is to be paid to acquire an interest in the scheme.

The constitution of a retail CCIV must make adequate provision for the consideration that is paid to acquire a share in the CCIV. What constitutes ‘adequate provision’ will depend on the circumstances of the investment fund.

To minimise uncertainty, we have given relief to allow an investment fund operator to set the amount of the consideration to acquire an interest in a scheme or a share in a retail CCIV.

We encourage a responsible entity that does not rely on our relief, 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 134.23 The constitution of a registered scheme must make adequate provision for the consideration that is to be paid to acquire an interest in the scheme: see s601GA(1)(a). The constitution of a retail CCIV must make adequate provision for the consideration that is to be paid to acquire a share in the CCIV: see draft s1155(1)(a).
- RG 134.24 This requirement aims to ensure that members have rights in the constitution about the consideration to acquire an interest or share, because this consideration may affect the value of other members’ interests or shares, including by unfairly diluting them. In our view, the investment fund operator may be subject to a conflict between their interest in further issues of interests or shares, which may increase their remuneration and may be promoted by offering interests or shares at a discount, and the interests of members, which may be to avoid diluting the value of their interests or shares.
- RG 134.25 Because s601GA and draft s1155 are principles-based, what constitutes ‘adequate provision’ will depend on the circumstances of the investment fund.
- RG 134.26 We acknowledge that investment fund operators and their advisers might face uncertainty about whether a constitution makes adequate provision for the consideration to acquire an interest in a scheme or a share in a retail CCIV.

What relief is available?

- RG 134.27 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 ASIC Corporations (Managed investment product consideration) Instrument 2015/847* for registered schemes and similar relief for CCIVs. Investment fund operators can choose to:
- (a) rely on the relief by including provisions in the constitution that meet the requirements of the relief;
 - (b) make adequate provision in the constitution for the amount of the consideration to be paid in another way that does not meet all of the requirements in the relief but does comply with the requirement in s601GA(1)(a) or draft s1155(1)(a) (as applicable); or
 - (c) in the case of a scheme that was registered before 1 October 2013, include provisions that meet the requirements in [ASIC Corporations \(Managed investment product consideration\) Instrument 2015/847](#).

Note: We intend to grant similar relief for CCIVs as we do for registered schemes. This relief will be provided through legislative instruments.

- RG 134.28 We have also given additional specific exemptions from and made modifications to the requirement in s601GA(1)(a) for registered schemes under the following legislative instruments, and similar relief for CCIVs:
- (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*.

Relying on our relief

- RG 134.29 If an investment fund operator chooses to rely on all or any part of our relief in [CO 13/655] or similar relief for CCIVs, it can:
- (a) draft provisions in the constitution that reflect the content of the relevant legislative instrument; or
 - (b) incorporate the content of the relevant legislative instrument by referring to the instrument in a provision of the constitution.

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 134.30 An investment fund operator may incorporate the relevant legislative instrument by specifically referring to the provisions of that instrument as being taken to be incorporated in the constitution, or by referring generically to the provisions of any exemption or declaration as being taken to be incorporated in the constitution.

Requesting a review of provisions for scheme constitutions

RG 134.31 Given the 14-day registration period for schemes, 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 134.32 A written request for a review and a copy of the relevant draft provisions should be sent to applications@asic.gov.au.

Note 1: If the draft provisions do not comply with s601GA(1)(a) taking into account this guidance, 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 of the constitution of a registered scheme, other than provisions for the consideration to acquire an interest or calculation of the withdrawal amount, or on requests to review any draft provisions of the constitution of a CCIV.

RG 134.33 The request for review 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 effect and are otherwise consistent with the purpose of s601GA(1)(a).

RG 134.34 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 134.35 There is no fee for this service.

RG 134.36 A responsible entity or its advisers should allow enough time for us to review the draft provisions and provide any comments. 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 more time for consideration.

RG 134.37 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 the relevant provisions and we do not have sufficient time to consider whether they comply with s601GA(1)(a).

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- RG 134.38 An application to register a scheme that follows a review by our staff will not receive any priority or an expedited processing time on that account alone.
- RG 134.39 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 134.40 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, a responsible entity or its advisers do not need to apply for a review if the provision is the same. When lodging an application to register a 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 advisers to lodge a written request for a review.

Calculating the consideration

- RG 134.41 Under [CO 13/655] and similar relief for CCIVs, an investment fund operator can exercise certain discretions if the price is based on reasonably current market price for interests or shares in a quoted class (excluding the AQUA market) or net asset value for other interests or shares (including interests in registered schemes traded on the AQUA market).
- RG 134.42 The investment fund operator can decide on a matter that affects what is determined as the market price or net asset value per interest or share, 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 investment fund operator can:
- (a) add or deduct from the market price or net asset value per interest or share; and
 - (b) cover costs associated with acquiring or disposing of relevant assets.
- RG 134.43 However, our relief under [CO 13/655] and similar relief for CCIVs does not allow:
- (a) adjustments that are made to determine a particular amount as the consideration to acquire an interest or share (even if it is expressed in a form that refers to the net asset value per interest or share, or the 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 provision of the consideration for the issue of interests or shares; 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 investment fund operator could properly buy the asset.

- RG 134.44 Our relief under [CO 13/655] and similar relief for CCIVs takes into account the purpose of s601GA and draft s1155, respectively.

Unlisted investment funds

- RG 134.45 After the initial issue of interests in an unlisted investment fund, an investment fund operator will usually set the consideration to acquire an interest or share using the value of assets of the scheme or of the sub-fund of the CCIV.

- RG 134.46 Under [\[CO 13/655\]](#), a responsible entity of an unlisted registered 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 interests on issue in that class (this is referred to as a ‘class pricing’ provision).

Note: A responsible entity of an unlisted registered scheme can choose to rely on our relief under s601GAE in [\[CO 13/655\]](#) even if they are issuing an interest in a situation covered by s601GAD under this class order.

- RG 134.47 Under similar relief for CCIVs, the corporate director of an unlisted retail CCIV may include a provision for calculating the consideration using a formula or method that is based on the value of:
- (a) assets of a sub-fund, less any liabilities that may be met from those assets, divided by the number of shares on issue; or
 - (b) assets of a class of shares referable to a sub-fund, less any liabilities attributable to that class under the constitution that may be met from those assets, divided by the number of shares on issue in that class (a class pricing provision).

Note: The corporate director of a retail CCIV can rely on our relief under the relevant provision in the similar relief instrument for CCIVs even though they are issuing a share in a situation covered by another relevant provision under this instrument.

- RG 134.48 An example of a ‘class pricing’ provision is an interest or share in a particular class being issued at a price calculated, as at the close of business on the date of application, according to the formula in Figure 2 below:

Figure 2: Example class pricing provision

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

- RG 134.49 In this formula, ‘net asset value’, ‘transaction costs’ and ‘number of interests or shares on issue’ are proportionate to those variables the investment fund operator determines are properly referable to that class.
- RG 134.50 We consider that the best available information to determine the value of interests or shares or a class of interests or shares in an unlisted investment fund is the value of the market price of the assets after any transaction costs that may be expected. This is because the value of the interests or shares will depend on the acquisition or realisation of the assets.
- RG 134.51 While the consideration to acquire an unquoted interest or share in an investment fund must be based on the value of assets 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 investment fund operator’s discretion.
- Note: For example, a provision that gives the investment fund operator discretion to determine which of the two formulas specified in the constitution (each of which is based on the value of assets less liabilities) is to be used to set the consideration will be ‘based on’ the value of assets less liabilities.
- RG 134.52 Some investment fund operators will have partly paid interests or shares on issue, and may wish to include these in the formula or method to determine the consideration to acquire an interest or share. In our view, this type of provision can meet the requirements in [CO 13/655] and similar relief for CCIVs as long as the formula or method results in the partly paid interests or shares being counted as interests or shares of an investment fund, and the value to the investment fund of the entitlement to call is taken into account when valuing the assets.
- RG 134.53 We understand that there can be material costs involved in the acquisition and/or disposal of assets, 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 or share in calculating the amount of the consideration. The types of costs that may be incurred in acquiring or disposing of these assets will depend on the types of assets.
- RG 134.54 We consider that the inclusion of actual transaction costs or an estimate ensures that members who are not acquiring or disposing of interests or shares at a particular time are not disadvantaged by the investment fund bearing costs associated with the need to acquire and dispose of assets to satisfy such applications in the consideration.
- RG 134.55 We understand the investment fund operator may not always be able to include the actual costs associated with the acquisition and/or disposal of assets. In these circumstances, it is acceptable for the constitution to permit the investment fund operator to use an estimate of the acquisition or disposal costs to determine the transaction cost amount. If an investment fund operator uses an estimate, the

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estimate should seek to provide equity and fairness among members. If the investment fund is generally growing, any withdrawals will not normally involve additional transactional costs and this should be reflected in the adjustments. If the outlook is for withdrawals to exceed new issues, the reverse may apply.

Note 1: If the investment fund operator uses estimates, it should take into account its duties under s601FC and draft s1156.

Note 2: An investment fund operator has duties to act honestly and to act in the best interests of members. In our view, an operator may not be complying with these duties if it attributes costs to the acquisition or disposal of assets that do not reflect the expected costs of acquisition or disposal of the assets, after taking into account any netting of these costs with persons undertaking offsetting transactions with the fund that may be expected.

Schemes traded on the AQUA market

- RG 134.56 The AQUA market is a specialised market operated by ASX for exchange-traded funds, managed fund products and structured products. Under Schedule 10A of the [ASX Operating 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 134.57 The responsible entity of a registered scheme traded on the AQUA market will commonly choose to set the consideration to acquire an interest in the registered scheme using the value of scheme assets less liabilities following the initial issue of interests.
- RG 134.58 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 registered scheme traded on the AQUA market can choose to rely on our relief from s601GAE under [\[CO 13/655\]](#) even though they are issuing an interest in a situation covered by s601GAD under this class order.
- RG 134.59 These types of registered 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 134.60 The profit-making opportunities can 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 registered scheme is more accurately priced based on the value of scheme assets, less liabilities, rather than market price.

Listed investment funds

RG 134.61 After the initial issue of interests or shares in a listed investment fund, the investment fund operator may choose to set the consideration to acquire an interest or share, taking into account the market price of the interests or shares in the quoted class.

RG 134.62 We have given conditional relief under [CO 13/655] and similar relief for CClVs for investment fund operators to include a provision that means the amount of the consideration to acquire an interest or share is based on the reasonably current market price of the interests or shares in the relevant quoted class. However, this can be subject to discretions relating 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 based on it resulting in a particular outcome as to the amount of the consideration.

Note: An investment fund operator can choose to rely on our relief in s601GAE under [CO 13/655] or our similar relief for CClVs, even though they are issuing an interest in a situation covered by s601GAD under [CO 13/655] or a share in a situation covered by our similar relief for CClVs.

RG 134.63 We consider that the market price generally better reflects the underlying value of the interests or shares in the investment fund. 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 134.64 Our relief enables an investment fund operator to determine the exact point of time when 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 134.113 about 'reasonably current' market value.

RG 134.65 In our view, if the consideration to acquire an interest or share is based on the net asset value and that price is lower than the market price, it has the potential to unfairly dilute existing members' interests or shares. However, if that price is equal to or higher than the market value, using it will not dilute members' interests or shares.

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

RG 134.66 A listed investment fund may have a class of interests or shares on issue that is not quoted. In these circumstances, it is our opinion that the consideration to acquire an interest or share in that class should be priced using a formula or method based on the value of assets, less any liabilities that may be met from the assets referable to that class, divided by the number of interests or shares in that class on issue.

Nil or fixed price investment funds

RG 134.67 [\[CO 13/655\]](#) and our similar relief for CCIVs do not give any relief for investment funds where the amount of consideration to acquire an interest or share is a nil or a fixed price. This is because we do not consider there is likely to be much uncertainty for investment fund operators and their advisers about whether a constitution makes adequate provision for the consideration to acquire an interest or share at a nil or fixed price.

RG 134.68 We note that in some cases, an investment fund may initially issue interests or shares at a fixed price but subsequently issue any other interests or shares based on ‘assets less liabilities per interest or share’ or market value. Our relief in [\[CO 13/655\]](#) and similar relief for CCIVs still applies to the subsequent issue of interests or shares based on ‘assets less liabilities’ or ‘assets of a class less liabilities of a class’. However, if after an initial issue the interest or share of a member depends on the value of assets, the value of which varies over time, the amount of the consideration to acquire should reflect the changes in net asset value per interest or share, or market price.

Options

RG 134.69 An investment fund operator may wish to issue options to acquire an interest or a share in an investment fund. Where the investment fund operator wishes to issue options, they 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 134.70 Investment fund operators may issue interests in listed investment funds by way of placement. The consideration for the interests or shares is generally at a discount to the market price at which interests or shares are acquired. A placement allows an investment fund operator to raise capital reasonably quickly and cost effectively from targeted investors. However, as a placement excludes other existing members, it may dilute the economic and voting rights of non-participating members and has the potential to be unfair.

RG 134.71 We have given conditional relief under [\[CO 13/655\]](#) and similar relief for CCIVs allowing investment fund operators to determine the consideration to

acquire an interest or share where the interest or share is issued under a placement. The relief applies if:

- (a) the interests or shares are quoted on ASX or an approved foreign market;
- (b) quotation of the interests or shares in that class has not been suspended; and
- (c) where the interests or shares are quoted on an approved foreign market, either:
 - (i) the interests or shares, together with any related issue in the previous year, do not immediately before the issue comprise more than 15% of the interests or shares in that class; or
 - (ii) the following requirements are met:
 - (A) members who hold interests or shares in the same class approve the issue of the interests or shares by a placement resolution;
 - (B) unless the investment fund operator considers that the issue of interests or shares 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 or shares by placement resolution; and
 - (C) the notice convening a meeting to vote on the issue of interests or shares by placement contains particulars of how the money raised by the issue will be used by the investment fund operator.

- RG 134.72 A placement resolution means, in relation to an approval of an issue of interests or shares, a special resolution where votes are only cast for interests (eligible interests) or shares (eligible shares) that are held by a member:
- (a) who will not acquire any of the interests or shares that are to be issued or a legal or equitable interest in those interests or shares; or
 - (b) for the benefit of another person who will not acquire any of the interests or shares that are issued or a legal or equitable interest in those interests or shares.
- RG 134.73 By requiring that the interests or shares are listed on ASX or an approved foreign market, our relief in [CO 13/655] and similar relief for CClVs provides an independent pricing mechanism that helps investment fund operators assess the price on the issue under the placement and helps protect 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 or shares are adequately priced and the market is fully informed, interests or shares in the relevant class must not be suspended from quotation.
- RG 134.74 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 or shares in the relevant class. For ASX-listed investment funds, this requirement applies under Listing Rule 7.1. For foreign-listed registered 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 because it will either have limited materiality or be approved by members.

Note: Our relief in [CO 13/655] and similar relief for CClVs 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 an investment fund by way of placement, including:

- (a) the prohibition on the acquisition of more than 20% of a relevant interest in interests or shares of a listed registered 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) the duties of a responsible entity under s601FC and the duties of a corporate director under draft s1156; and
- (e) the prohibition on self-acquisition of interests by a responsible entity in s601FG.

Rights issues

- RG 134.75 Investment fund operators may issue interests or shares in investment funds by way of rights issue. As with an issue under a placement, the consideration for interests or shares is generally at a discount to the standard price at which interests or shares in the investment fund are acquired.
- RG 134.76 We have given relief under [CO 13/655] and similar relief for CClVs for investment fund operators to determine the consideration to acquire an interest or share in an investment fund where the interest or share is issued under a rights issue. The investment fund operator can choose to make the offer to all members 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) and draft s1156(d), whether by ASIC exemption or otherwise.
- Note: If an offer is restricted to members of a class, the investment fund operator must comply with the relevant obligation under s601FC(1)(d) or draft s1156(d) to treat members of different classes fairly.
- RG 134.77 Our relief in [CO 13/655] and similar relief for CClVs cover 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 134.78 The relief focuses on provisions for calculating the amount of consideration under a rights issue. We consider that it gives investment fund operators appropriate flexibility to structure a rights issue within the parameters of the Corporations Act to best meet the needs of the investment fund.

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 134.79 We have given additional relief from s601FC(1)(d) and draft s1156(d) under [\[CO 13/656\]](#) and similar relief for CCIVs to allow an investment fund operator 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 or shares 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 1: A responsible entity has a duty to treat all members of the same class equally and members of different classes fairly: see s601FC(1)(d). A corporate director has a duty to treat all members who hold shares of the same class equally, members who hold shares of different classes fairly, and members of different sub-funds fairly: see draft s1156(d).

Note 2: We are consulting on a proposal to exclude from the relief under [\[CO 13/656\]](#) and similar relief for CCIVs, as we do for New Zealand persons, persons in a host economy under which the operator has been allowed to make offers under the Asia Region Funds Passport.

RG 134.80 Our relief to exclude foreign members applies in the following situations:

- (a) If the investment fund is listed and the offer is one to which ASX Listing Rule 7.7 applies, the investment fund operator must comply with that rule for our relief to apply.
- (b) If the investment fund is not listed on ASX and the offer is renounceable, the investment fund operator must appoint a nominee to sell the rights to acquire the interests or shares not taken up and distribute the net proceeds for our relief to apply.
- (c) If neither of the situations in RG 134.80(a)–RG 134.80(b) applies, our relief will apply where the investment fund operator 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 or shares held by members that may be issued in a particular jurisdiction; and
 - (iii) the cost of complying with legal requirements and any requirements of a regulatory authority in making the offer in the relevant jurisdiction.

RG 134.81 We have granted relief from s601FC(1)(d) and draft s1156(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. An investment fund operator is also permitted to do this under s9A. If the investment fund is listed, our relief requires that foreign members 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 134.82 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 or shares 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 134.83 We grant this relief to allow offers of interests or shares 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. An investment fund operator 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 134.84 An investment fund operator may offer members an opportunity to acquire additional interests or shares by using some or all of any capital or income distributions to pay for those additional interests or shares. To increase the attractiveness for members, the consideration to acquire these additional interests or shares can be at some discount, and members pay no brokerage on their acquisition.
- RG 134.85 Under [CO 13/655] and similar relief for CCIVs, an investment fund operator may determine the amount of the consideration to acquire an interest or share in an investment fund where some or all of a distribution of capital or income payable to a member is applied to pay for the issue of the interests or shares to that member.
- RG 134.86 For the reasons above at RG 134.81, we have given additional relief from s601FC(1)(d) (under [CO 13/656]) and draft s1156(d) (under similar relief for CCIVs) to allow an investment fund operator to exclude foreign members from participating in a distribution reinvestment plan.

Interest and share purchase plans

- RG 134.87 An interest or share purchase plan generally provides members with a convenient means of obtaining additional interests in an investment fund. These additional interests or shares are often acquired at a discount to the market price and without brokerage fees or stamp duty.

- RG 134.88 Under [CO 13/655] and similar relief for CCIVs, an investment fund operator can set the consideration to acquire an interest or share under a purchase plan if it meets the requirements of [Class Order \[CO 09/425\] Share and interest purchase plans](#). [CO 09/425] applies to interest and share purchase plans where:
- (a) trading in the relevant class of interests or shares has not been suspended (beyond a minimum period) on ASX;
 - (b) we have not made certain determinations to prevent an issuer from relying on our relief; and
 - (c) there are no existing exemptions from particular provisions of the Corporations Act.
- RG 134.89 There are also certain conditions for the relief in [CO 09/425] that an investment fund operator 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 134.90 An investment fund operator may regularly negotiate lower fees with certain wholesale clients. These fees may be included in the calculation of the consideration at which interests or shares are issued. We recognise there are commercial benefits for investment fund operators in attracting wholesale clients by negotiating commercial rates of fees with them.
- RG 134.91 Under [CO 13/655] and similar relief for CCIVs, an investment fund operator may set the consideration to acquire an interest or a share that involves a negotiated fee arrangement, as long as it meets the requirements in [ASIC Corporations \(Registered Schemes—Differential Fees\) Instrument 2017/40](#) and similar relief for CCIVs.
- RG 134.92 ASIC Corporations (Registered Schemes—Differential Fees) Instrument 2017/40 and our similar relief for CCIVs provide a conditional exemption for investment fund operators where the operator 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 investment fund operator (or its related body corporate), that are regulated under the Corporations Act;
 - (b) the aggregation of holdings of a member and certain family members across a range of financial products offered or issued by the investment fund operator (or related body corporate) according to the value or period of time during which the aggregated interests or share have been held; or
 - (c) members who are employees of the investment fund operator (or its related body corporate), provided that the value of the employees' interests or shares relative to the other members does not exceed 5%.

- RG 134.93 To rely on this instrument, an investment fund operator 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 to receive the benefit of the arrangement.

Note: For more information on differential fees, see ASIC Corporations (Registered Schemes—Differential Fees) Instrument 2017/40 and our similar relief for CCIVs.

Forfeited interests

- RG 134.94 An acquisition that occurs as a result of sale on a forfeiture may be caught by s601GA(1)(a) or draft s1155(1)(a), and we have granted relief under [\[CO 13/655\]](#) and similar relief for CCIVs to allow investment fund operators to set the consideration to acquire a forfeited interest or share in a listed investment fund (other than a time-sharing scheme).

Note: For more information on time-sharing schemes, see [ASIC Corporations \(Time-sharing Schemes\) Instrument 2017/272](#) and [Regulatory Guide 160 Time-sharing schemes \(RG 160\)](#).

- RG 134.95 Our relief in [\[CO 13/655\]](#) and similar relief for CCIVs applies where the interests or shares have been forfeited by a member for failing to pay an outstanding amount due to, and called for by, the investment fund operator and:
- (a) on payment of the outstanding amount the interest or share would be in a class of interests or shares (respectively) quoted on ASX; and
 - (b) the sale occurs in accordance with s254Q (other than s254Q(1), (9) and (13)) as if the interest or share was a share in a no-liability company and the investment fund operator was a director of the company.

Additional relief for forfeited interests

- RG 134.96 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 for schemes

- RG 134.97 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 134.98 The formula 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 generally 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 134.99 [CO 13/655] limits the exercise of a discretion by the responsible entity to those discretions affecting the withdrawal amount.

RG 134.100 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 unless other relief applies (e.g. relief under ASIC Corporations (Time-sharing Schemes) Instrument 2017/272).

IDPS-like schemes and MDAs

RG 134.101 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 accounts (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 134.102 [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 that results in an equal amount being used on their behalf in the scheme.

RG 134.103 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.

Stapled securities

- RG 134.104 Some investment fund operators include one or more investment funds as components of stapled securities.
- RG 134.105 Generally, the investment fund operator 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 134.106 Under [CO 13/655] and similar relief for CCIVs, an investment fund operator may allocate the consideration to acquire an interest or share in an investment fund if that interest or share is a component part of a stapled security and the constitution contains:
- (a) adequate provision for the consideration to acquire the stapled securities; or
 - (b) provisions about the consideration to acquire the stapled securities that are permitted by our relief for the consideration to acquire interests.
- RG 134.107 The terms of a stapled security require that each of its component parts must be transferred together. ASX permits stapled securities to be quoted and traded like individual financial products. Stapled securities that are listed are generally acquired at market price. The component parts of the quoted stapled security are not individually quoted and, as such, each component does not have an individual market price. The consideration to acquire stapled securities that are not quoted is generally based on the net asset value. The issue price of a listed or unlisted stapled security will reflect the value of each of its components.
- RG 134.108 Our relief in [CO 13/655] and similar relief for CCIVs applies to stapled securities if:
- (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 that is not a retail CCIV and 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 or a share in an investment fund and no interests or shares may be transferred separately.

Schemes with limited or no pooling

- RG 134.109 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 worked out by dividing up a pool; or
- (c) used in common or pooled between joint tenants or tenants in common where:
 - (i) none of the tenants is the responsible entity or an associate of the responsible entity; and
 - (ii) each tenant is known to each other tenant before the offer to issue an interest is made.

Procedures for exercising a discretion

Valuation

- RG 134.110 Under [ICO 13/657](#) and similar relief for CCIVs, investment fund operators must meet certain requirements if they exercise a discretion that affects the determination or calculation of the:
- (a) consideration to acquire an interest or share; 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 134.111 If an investment fund operator exercises a discretion in relation to determining the value of scheme property or assets of a sub-fund of a retail CCIV, the method for calculating the value must:
- (a) be consistent with the range of ordinary commercial practice for valuing that type of asset;
 - (b) produce a value that is reasonably current at the time of issue or, in the case of registered schemes, withdrawal; and
 - (c) reflect the likely realisation price of the assets if they needed to be realised.
- RG 134.112 If the investment fund operator exercises a discretion in relation to determining the market price of interests or shares that are quoted on a financial market, the method for calculating the price must be consistent with the ordinary commercial practice for determining the market price of interests or shares of the same kind and produce a market price that is reasonably current at the time of issue or, in the case of registered schemes, withdrawal.

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- RG 134.113 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 investment fund, 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 investment fund:
 - (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 investment fund operator determines that a current valuation would not be materially different where the assets held are non-liquid or thinly traded.

Note: The investment fund operator must at a minimum conduct valuations at reasonable intervals appropriate to the relevant assets, unless an exemption applies: see s601FC(1)(j) for registered schemes and draft s1156(j) for CCIVs.

Record keeping

- RG 134.114 Under [CO 13/657] and similar relief for CCIVs, an investment fund operator must prepare and keep records relating to the exercise of discretions affecting the amount of consideration to acquire interests or shares in an investment fund, and payments for withdrawal. In particular, the investment fund operator 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 or share;
 - (b) the circumstances in which the operator may exercise the discretion;
 - (c) the policy the investment fund operator will apply in exercising the discretion, and the date when the policy was formulated;
 - (d) what records the investment fund operator 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 assets being valued or the market price of interests or shares being determined, an explanation of why the investment fund operator has been unable to follow ordinary practice.
- RG 134.115 Under [CO 13/657] and similar relief for CCIVs, the investment fund operator must keep any policy that documents the exercise of a discretion for seven years after it ceases to be current. The investment fund operator 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 134.116 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 investment fund operator or nominee. The investment fund operator must advise members of this right and include a statement to that effect in the PDS. For shorter PDSs, this information can be included using incorporation by reference.
- RG 134.117 We consider that requiring an investment fund operator to document its policies and procedures on how it calculates the consideration to acquire an interest or share, or withdrawal payment for a registered scheme, promotes efficiency, consistency and transparency. We also consider it is consistent with the investment fund operator's duty to exercise the degree of care and diligence that a reasonable person would exercise if they were in the position of the operator.

Note: For more information about good practice for unit pricing for registered schemes, see [Regulatory Guide 94 Unit pricing: Guide to good practice \(RG 94\)](#).

C Sub-funds of retail CClVs and class rights in registered schemes

Key points

This guidance in this section is relevant to investment funds.

The constitution of a retail CClV must make adequate provision for the establishment of sub-funds, and classes of shares referable to sub-funds.

We have modified the requirements for changing the constitution of a registered scheme to protect class rights.

Establishing sub-funds of CClVs

- RG 134.118 A CClV must have at least one sub-fund at all times: see draft s1141A(1). Each share in a CClV must be referable to only one sub-fund, although more than one class of shares may be referable to a single sub-fund: see draft s1141B.

Note: See draft s1141B(2)–(3) for when a share, or class of shares, is ‘referable’ to a sub-fund.

- RG 134.119 The constitution of a retail CClV must make adequate provision for the establishment of sub-funds, and classes of shares referable to sub-funds: draft s1155(1)(c).

- RG 134.120 To comply with draft s1155(1)(c), the constitution should provide for a mechanism by which a sub-fund will come into existence, and provide for any issue of classes of shares referable to sub-funds. The procedures in the constitution should ensure that a sub-fund, and any classes of shares referable to the sub-fund, are able to be identified against other sub-funds and their shares, and the CClV itself. The constitution should also set out any rights that apply to members of a sub-fund, or a class of shares referable to a sub-fund, that differ from those of other sub-funds, or classes of shares referable to sub-funds.

Protecting class rights in a scheme

- RG 134.121 The constitution of a registered scheme may set out a procedure for varying or cancelling rights of a class of members of the scheme, or the rights attached to a class of interests under the scheme.

- RG 134.122 We have modified s601GC to require that, if the constitution sets out such a procedure, those rights may only be varied or cancelled by a special resolution under s601GC(1)(a) if the responsible entity complies with that procedure: see [ASIC Corporations \(Amendment and Repeal\) Instrument 2017/545](#). Any such procedure is also not able to be modified without following the procedure itself.

D Powers and rights of an investment fund operator

Key points

The guidance in this section is relevant to investment funds.

An investment fund operator may determine the level of detail to include in the constitution about its powers of investment or dealing with property and assets, and any powers to borrow or raise money for the purposes of the investment fund.

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 investment fund operator is entitled, as long as all of the variables that affect the amount of any fee are specified.

Powers to deal with property and assets and raise money

- RG 134.123 The constitution of a registered scheme must make adequate provision for the powers of the responsible entity in making investments of, or otherwise dealing with, scheme property: see s601GA(1)(b).
 - RG 134.124 The constitution of a retail CCIV must make adequate provision for the powers of the corporate director in making investments of, or otherwise dealing with, assets of the CCIV: see draft s1155(1)(b).
 - RG 134.125 If the investment fund operator will have powers to borrow or raise money for the purposes of the investment fund:
 - (a) those powers must be specified in the constitution; and
 - (b) any other agreement or arrangement has no effect to the extent that it purports to confer such a power.
- Note: For registered schemes, see s601GA(3); for CCIVs, see draft s1155(3).
- RG 134.126 The powers that may be appropriate depend on the particular investment fund being operated. On this basis, we consider it is appropriate for an investment fund operator to have the flexibility to determine the level of detail to include about their powers, taking into account the particular investment fund. For registered schemes, this is consistent with current commercial practice.
 - RG 134.127 Because the provisions referred to in RG 134.123–RG 134.124 relate to the powers of investment, rather than how an investment fund operator intends to exercise these powers, we consider that it is not necessary for the investment strategy to be set out in the constitution.

- RG 134.128 However, an investment fund operator should make known their policy on how they will exercise their powers in the PDS and by reporting to members or under the continuous disclosure regime. If the investment or borrowing strategy is to change or not be followed, additional disclosure may be required and in some cases this may not be permitted under the terms on which investments have been accepted. A degree of detail about the investment strategy and borrowing strategy is information that we expect would be likely to influence persons considering investment or seeking to understand their investment. In implementing an investment strategy, an investment fund operator should also ensure they are acting within what is permitted under its Australian financial services (AFS) licence.

Fees and indemnities

- RG 134.129 If an investment fund operator will have any rights to be paid fees out of scheme property, or assets of a sub-fund of a retail CCIV, or to be indemnified out of these for liabilities or expenses incurred in relation to performing its duties, these rights must be:
- specified in the constitution; and
 - available only in relation to the proper performance of their duties.

Note: For registered schemes, see s601GA(2); for CCIVs, see draft s1155(2).

- RG 134.130 In our view, this requirement 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: see Section F. It is also intended to preclude the recovery of fees or the exercise of indemnity rights if an investment fund operator fails to properly perform their duties.

- RG 134.131 To ‘specify the right’, the constitution should either:
- expressly state that any such rights to fees or indemnification are subject to the proper performance by the investment fund operator of its duties under the provisions for fees and indemnities; or
 - 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 134.132 The constitution should not allow the right to fees or indemnification to be subject to the proper performance of the investment fund operator’s duties or powers. The right should be subject to the proper performance of duties only, or alternatively allowed to be exercised for any of the operator’s powers in the proper performance of its duties.

- RG 134.133 We do not consider that the words ‘specify the right’ require that the actual amount of the fee that will be paid by members be expressly identified. However, we consider 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 investment fund operator.

RG 134.134 We consider that a fee provision that includes a timing or performance period variable containing an uncertain expression will not sufficiently identify the relevant variable. For example, provisions including expressions such as ‘as determined by the operator’, ‘at least n days’, or ‘from time to time’ will not satisfy the requirement to ‘specify the right’.

RG 134.135 In our experience, investment fund operators often want to include provisions in a constitution that allow a maximum entitlement to a fee. This type of provision gives an operator the 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) for registered schemes and draft s1155(2) for CCIVs because the right is ‘specified’, even if in practice that right might be waived from time to time.

Note: For example, the constitution may include a provision that allows an investment fund operator to charge an application fee of up to 5% of funds under management. However, the investment fund operator may decide to limit the amount they charge to 1.5% of funds under management and disclose this to investors in the PDS.

RG 134.136 We have also seen that investment fund operators regularly want to include provisions in a constitution that calculate a variable fee with reference to an index benchmark. We also consider this type of provision can meet the requirements of s601GA(2) and draft s1155(2) because all the variables affecting the calculation of the fee can be clearly identified.

RG 134.137 Investment fund operators using an index benchmark should use one that is appropriate to the type of investment fund to be operated. This helps prevent the operator preferring their own interests over the best interests of members by calculating a fee using an inappropriate index.

RG 134.138 We recognise that investment fund operators 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 consider that it is generally appropriate to allow for the investment fund operator 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 134.139 An investment fund operator may purport to indemnify themselves from scheme property or the assets of a CCIV at an ‘hourly rate to be determined by them from time to time’ or ‘on standard commercial terms for work undertaken’ for performing functions in operation of the fund. 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 134.140 We also note that there is authority in the context of a registered scheme 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 134.141 We do not consider that s601GA(2) and draft s1155(2) allow for a right to payment of a fee in advance of the proper performance of the investment fund operator's duties to which the fee relates. Payment in advance is incompatible with the right to a fee only being available for proper performance of the duty to which it relates. An investment fund operator 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 or shares in an investment fund) even though obligations will arise from the issue that will only be performed after the fee is paid.

- RG 134.142 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 in a scheme is issued, money paid for the interest will be a contribution of money to the scheme and, so, 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 134.143 In the process of withdrawal from an investment fund, our experience is that money may be placed in a separate account to facilitate payments of withdrawal proceeds. We consider that the rights in such an account remain scheme property or an asset of the CCIV 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 investment fund operator, any right to such payments must comply with s601GA(2) and draft s1155(2).

E Complaints, disputes and remedies in registered schemes and Australian passport funds

Key points

The guidance in this section is relevant to registered schemes and Australian passport funds.

The constitution of a registered scheme must make adequate provision for handling complaints made by members. These provisions should ensure that complaints can be made by all members about all parts of the program or plan of action that constitute the scheme.

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

We have granted relief from s601FC(1)(d) to make it clear that responsible entities may treat retail and wholesale clients who are in the same class differently in relation to complaints handling.

Under the Australian Passport Rules, the constitution of an Australian passport fund must include provisions for certain matters in relation to remedies for loss, and actions against members.

Requirements for registered schemes

- RG 134.144 The constitution of a registered scheme must make adequate provision for the method by which complaints made by members in relation to the scheme are to be dealt with: see s601GA(1)(c).
- RG 134.145 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’.

Scope of complaints handling provisions

- RG 134.146 The Corporations Act defines a ‘member’ of a registered scheme as a person who holds an interest in the scheme. This means that, to comply with the requirement in s601GA(1)(c), the complaints provisions must apply to a person who holds an interest in the scheme, and not to a narrower class of persons.

- RG 134.147 Where ‘member’ (or another term used to refer to people to which the complaints provisions apply, such as ‘unitholder’) is defined in the constitution to mean a person listed in the register of members (or similar), the complaints provisions will not comply with s601GA(1)(c). This is because the constitution will not make adequate provision for the method by which complaints made by persons who hold an interest in the scheme, but are not entered on the register, are to be dealt with.

Note: This is despite any procedures the responsible entity has in place that mean, in practice, a person who holds an interest in the registered scheme is only likely to be not entered on the register as the result of circumstances such as error or fraud.

Retail clients

- RG 134.148 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 in s912A(2): see s912A(1)(g).
- RG 134.149 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 134.150 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 for internal dispute resolution procedures.
- RG 134.151 RG 165 explains the specific requirements for internal dispute resolution procedures. In RG 165.62, 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 165.78;
 - (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 165.82–RG 165.85; 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 165.130.

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

- RG 134.152 We recognise that the requirements in s601GA(1)(c) and 912A(2) do not directly align with each other. The requirement in s601GA(1)(c) applies to complaints made by members of the registered 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 134.153 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 134.154 To minimise the need for the responsible entity to have duplicate procedures for retail clients, 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.
- RG 134.155 If the registered 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.

Wholesale clients

- RG 134.156 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 134.157 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 consider 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 the scheme.
- RG 134.158 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.

- RG 134.159 If the registered scheme is only open to wholesale clients, there should be a provision in the constitution that the responsible entity will only issue interests in the scheme to wholesale clients.

Additional relief for complaints handling

- RG 134.160 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.

Requirements for Australian passport funds

- RG 134.161 Under the Australian Passport Rules, the Australian passport fund operator must ensure that the Australian passport fund has a compliant constitution at all times.

Note: The Australian Passport Rules will be made by the relevant Minister as a legislative instrument under draft s1211 and 1211A of the Corporations Act. Under draft s1211(2), the Australian Passport Rules must be substantially the same as the Passport Rules set out in Annex 3 to the Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Fund Passport.

Seeking remedy

- RG 134.162 Under the constitution, each member must be entitled to seek remedy against the Australian passport fund (if the fund is a legal entity) and its operator in certain circumstances.

- RG 134.163 The member must be entitled to seek remedy, including through compensation, in relation to loss suffered by the member due to the Australian passport fund or Australian passport fund operator breaching:
- the laws of Australia and associated regulations; or
 - any other regulatory requirements administered by ASIC that apply to investment funds or the Australian Passport Rules.

- RG 134.164 The member must be entitled to seek remedy in the member's choice of Australia or the host economy of the fund.

- RG 134.165 These provisions must apply unless:
- the member and the Australian passport fund or Australian passport fund operator have agreed in writing that the member is not entitled to seek remedy in that place in relation to the particular proceedings; and
 - that agreement is effected after the conduct that is or is to be subject to the proceedings has first occurred.

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Agreed forum

- RG 134.166 The constitution must set out that, if a member has commenced proceedings against the Australian passport fund (if it is a legal entity) or the Australian passport fund operator in a court in the member's economy, that court will be a convenient forum to hear the proceedings. This is unless:
- (a) a similar action has been commenced against the Australian passport fund or the Australian passport fund operator in another economy, and it would be reasonable for the member to participate in that action; or
 - (b) the member and the Australian passport fund or the Australian passport fund operator have agreed in writing that the court will not be a convenient forum for that particular proceeding and the agreement is effected after the conduct that is or is to be subject to the proceedings has first occurred.
- Note: The 'member's economy' is the economy in which the member was located when they applied to be a member of the Australian passport fund. That economy must either be a participating economy or Australia.
- RG 134.167 The constitution must also provide that the convenient forum for the Australian passport fund (if the fund is a legal entity) or the Australian passport fund operator to bring an action against a member will be the member's economy, unless:
- (a) the member and the Australian passport fund or the Australian passport fund operator have agreed in writing that the court will not be a convenient forum for the particular proceedings; and
 - (b) the agreement is effected after the conduct that is or is to be subject to the proceedings has first occurred.

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F Changing the constitution of an investment fund

Key points

The guidance in this section is relevant to investment funds.

The constitution of an investment fund may only be changed or replaced in certain circumstances. These changes must be lodged with ASIC, and do not take effect prior to lodgement.

We have granted relief from the requirements for changing the constitution in certain circumstances.

Requirements for investment funds

- RG 134.168 The constitution of an investment fund may be changed, or repealed and replaced, either by:
- special resolution passed by members; or
 - the investment fund operator, if the operator reasonably considers the change will not adversely affect members' rights: see s601GC and draft s1155A.

Note: In *360 Capital RE Ltd v Watts* (2012) 91 ACSR 328, the Victorian Court of Appeal considered the circumstances in which the responsible entity of a registered scheme may unilaterally change the constitution under s601GC(1)(b). The court held that a member's right to have the scheme managed in accordance with the constitution was a relevant right for the purposes of that provision.

- RG 134.169 When a change is made to the constitution, the investment fund operator must lodge a copy of the modified or new constitution with ASIC, and the modification or replacement will not take effect until the copy has been lodged: see s601GC(2) and draft s1155A(2).

- RG 134.170 We may review the copy of the new or amended constitution and:
- ask for further information about one or more specific provisions; and
 - suggest or require amendments to be made.

- RG 134.171 We may direct an investment fund operator to lodge a consolidated copy of the constitution.

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Relief available for registered schemes

- RG 134.172 We have provided relief from the requirements in s601GC to allow for changes of the constitution of a registered scheme in certain circumstances: see [Class Order \[CO 09/552\] Changing the constitution](#).
- RG 134.173 Our relief allows for changes to be made in the following situations:
- (a) the quorum requirement for a meeting of members cannot be met because the scheme has an insufficient number of members;
 - (b) no member is entitled to vote at a meeting of members because of the restrictions of s253E; or
 - (c) all interests were issued in situations that did not require a PDS.
- RG 134.174 For the relief to apply, the responsible entity must ensure material information has been provided to each member and relevant auditors, and each member gives their written consent. We have also provided relief to address any uncertainty for a responsible entity seeking to change the constitution of a registered scheme to allow the scheme to use the attribution managed investment trust regime without holding a meeting of members: see [ASIC Corporations \(Attribution Managed Investment Trusts\) Instrument 2016/489](#). This relief is available where:
- (a) the responsible entity publishes a notice on its website explaining the change and does not receive a sufficient number of requests for a meeting of members to consider the changes; or
 - (b) where all members are wholesale clients and the responsible entity takes reasonable steps to consult with each member about the changes before making them.

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G Withdrawal from registered schemes and CCIVs

Key points

The guidance in this section is relevant to registered schemes and CCIVs.

A right to withdraw from a registered scheme 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.

The constitution of a registered scheme should address the key aspects of the withdrawal process, including how the withdrawal 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 from a registered scheme 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.

Shares in a CCIV may only be redeemed where they are fully paid-up, where they are redeemed at the option of a member, and where each sub-fund to which the shares are referable is solvent immediately before the redemption and will not be insolvent immediately after the redemption.

The constitution of a retail CCIV that has redeemable shares must provide for redeemable shares in the CCIV to be redeemed. This provision must be consistent with requirements under the Corporations Act.

Withdrawal from a registered scheme

Members' right to withdraw

- RG 134.175 Under s601GA(4), if members have a right to withdraw from a registered scheme, the constitution must:
- specify the right;
 - if the right is to be exercised while the registered scheme is liquid, set out adequate procedures for making and dealing with these withdrawal requests; and
 - if the right may be exercised while the registered 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 withdrawal requests.

Note 1: In some circumstances, we have given relief from the requirements in RG 134.175(b)–RG 134.175(c). See, for example, [ASIC Corporations \(ASX-listed Schemes On-market Buy-backs\) Instrument 2016/1159](#) and Section C of draft updated Regulatory Guide 136 *Funds management: Discretionary powers*.

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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 for how withdrawal requests will be dealt with in certain circumstances. These procedures must be fair to all members.

Note 3: Our guidance on the scope of complaints handling provisions in light of the definition of ‘member’ also applies to any withdrawal provisions: see RG 134.146–RG 134.147.

RG 134.176 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 134.177 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 134.178 In our view, a member can acquire the right to withdraw at any time before the withdrawal occurs. We do not consider 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 134.179 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 134.180 This right to withdraw may arise regardless of how the withdrawal process is initiated by the member 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 134.181 A right to withdraw can also exist in circumstances where the responsible entity (including by a nominee) acquires a member’s interests by transfer at the member’s request.

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 ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/1159.

Making and dealing with withdrawal requests

- RG 134.182 What constitutes ‘adequate procedures’ for making and dealing with withdrawal requests will depend on the circumstances of the registered 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 134.183 While we do not consider it is necessary to state every aspect of the procedures, key rights about the process should be set out in the constitution so members can determine their right to withdraw from the registered scheme and be protected against adverse changes other than by special resolution.

- RG 134.184 In light of this view, we consider that the responsible entity and their 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. This will enable responsible entities to design provisions about withdrawing from schemes that best reflect their operational practices and product design.

- RG 134.185 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 134.186 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 I.

Triggering a withdrawal right

- RG 134.187 We consider how a withdrawal right is triggered is important. For this reason, 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 in a particular way) and what (if any) pre-conditions apply. 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 134.188 We consider that provisions that are too general and leave too much discretion to the responsible entity, such as allowing the responsible entity to determine ‘from time to time’ the form that a withdrawal request must take, will not provide sufficient information about how a member may trigger the right to withdraw. The constitution may require a withdrawal request to contain information as required by the responsible entity.
- RG 134.189 A provision that has the effect of allowing the responsible entity to ‘determine any pre-conditions from time to time or at their 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 the protection of such rights being adversely changed only by special resolution.

Amounts paid to members

- RG 134.190 We consider a key aspect of withdrawing from a registered scheme is any amount that will be paid or given to members. For this reason, 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 134.97–RG 134.100;
 - (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 withdrawal amounts, see RG 134.97–RG 134.113.

- RG 134.191 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, mean it should consider the rights and interests of all members (including the withdrawing member) when exercising any discretion in relation to:
- (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 134.210.

Restrictions on dealing with withdrawal requests

- RG 134.192 If a member's right to withdraw is restricted in certain circumstances or can be restricted at the discretion of the responsible entity, the constitution should describe these restrictions because these are important aspects of the withdrawal right.
- RG 134.193 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 134.194 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 s1017B or s675 if the scheme is a disclosing entity.
- RG 134.195 The constitution should not contain a provision that allows 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 134.196 A 'member' of a registered 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 registered scheme when they cease to hold an interest in it.
- RG 134.197 The constitution should not include provisions that treat withdrawing members as having ceased to be a member before the time when 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 134.198 If a member has ceased to hold an interest in the registered 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 134.199 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 registered scheme and the operational practices of the responsible entity, and may be subject to any permitted extension under suspension provisions.
- RG 134.200 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 134.201 Former members will generally have an expectation to receive payment within a reasonable time of withdrawing. For a non-liquid scheme, withdrawal requests must be satisfied within 21 days: see s601KD. We expect that to ensure fairness the constitution will generally provide that former members must be paid within 21 days of withdrawal. This period commences at the point when a member ceases to hold an interest in the registered scheme.
- RG 134.202 The constitution may provide for payment to a former member within a period longer than 21 days in certain circumstances, as long as it is fair and the relevant circumstances exist. Circumstances in which we consider a longer period may be fair and reasonable are:
- (a) *extreme market events*—we consider this type of provision will be fair if the event was not reasonably foreseen by the responsible entity at the time it accepted the withdrawal request while the circumstances still exist. However, we discourage the use of a provision that merely allows the responsible entity to delay payment where it is ‘in the best interests of members’. This is because such a provision fails to take into account the interests of the former member awaiting payment;
 - (b) *systems and processes are already in place for a longer period*—responsible entities who operate multiple registered schemes may want to have timeframes for payment of withdrawal amounts that are the same. In some cases, schemes that were registered before 1 October 2013 had timeframes of 30 days. We recognise that there are costs associated with making changes to systems and processes to reduce the timeframe to 21 days. However, we expect that these changes will be made if other changes to systems and processes are made; and
 - (c) *the registered scheme is a ‘feeder fund’*—if the registered scheme is a feeder fund for another scheme that has a longer timeframe to pay withdrawal amounts to former members, we consider that it will be difficult to have a timeframe for payment of the withdrawal amount that is shorter than the master fund.

Note: As this guidance relates to the period commencing at the point when a member ceases to hold an interest in the scheme, it does not relate to, for example, the overall period for processing withdrawal requests.

Non-liquid schemes

- RG 134.203 In our view, the constitution should only permit members' interests to be redeemed in accordance with the procedures that apply to liquid registered schemes if the registered scheme is liquid at the time when the value of scheme property is determined for the purposes of calculating the withdrawal price. If a registered scheme becomes non-liquid after a member has made a request to withdraw, but before the time at which the value of scheme property is to be determined for calculating the withdrawal price (even though the time when the valuation process may actually be 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 registered 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 registered schemes if this occurs before the time when the scheme property is valued for determining the withdrawal price.

- RG 134.204 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 registered scheme.

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

Fairness to members

- RG 134.205 In our view, provisions involving withdrawal procedures should not unreasonably disadvantage certain members or be otherwise inconsistent with the Corporations Act. We consider 'fairness' in the context of s601GA(4) means that the provisions in the constitution that affect the price which members will receive on withdrawal, and the procedures for satisfying withdrawal requests, must be fair to all members.
- RG 134.206 Withdrawals from a registered scheme will not only affect the entitlements of withdrawing members, but also the remaining assets to be attributed to the interests of non-existing 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 this right operates.

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

Note 2: See also RG 134.113 about 'reasonably current' market value.

- RG 134.207 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:
- (a) reasonably current; and
 - (b) consistent with the range of ordinary commercial practice for valuing that type of scheme property on the basis of its market value on realisation.
- RG 134.208 We consider this is essential for determining a price that results in a fair and equitable outcome for all members. It is also 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 1: For example, a provision for payment of a fixed amount that is contributed to the registered 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.
- Note 2: The valuation of a debt should reflect what the debt could be sold for if needed to realise cash to pay withdrawal amounts, and not the face value of the debt.
- RG 134.209 In our view, withdrawal offers should be made in a way that ensures 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 134.210 Appropriate valuations affect both the amount that a member is entitled to on withdrawal and the value of the remaining interests. As such, if a responsible entity chooses to make *in-specie* payments to satisfy a withdrawal request, to be fair to all members the constitution should include provisions that the relevant assets should be valued based on valuations that are:
- (a) reasonably current;
 - (b) consistent with the range of ordinary commercial practice for valuing assets of that type; and
 - (c) reflect the market value of the assets if they were to be sold within the time permitted for satisfying withdrawal requests.
- Note: A valuation will not be reasonably current if the responsible entity has reason to believe that a more up-to-date valuation would result in a materially different value.
- RG 134.211 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 134.212 A responsible entity may wish to include a provision giving it discretion to suspend a right to withdraw by suspending the processing of withdrawal requests. In this case, the constitution should set out the circumstances in which the responsible entity can exercise that discretion.
- RG 134.213 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. 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, if the valuations it has are not reasonably current, or if circumstances make it difficult to determine the withdrawal price.

Redemption of shares in a CCIV

General requirements for redemption of shares in a CCIV

- RG 134.214 A CCIV may issue shares that are redeemable at the member's option: see draft s1143.
- RG 134.215 A CCIV may only redeem redeemable shares if:
 - (a) the shares are fully paid-up;
 - (b) the shares are redeemed at the option of a member; and
 - (c) each sub-fund to which the shares are referable:
 - (i) is solvent immediately before the redemption; and
 - (ii) will not be insolvent immediately after the redemption: see draft s1144A(1).

Specific requirements for retail CCIVs

Redeemable shares

- RG 134.216 Additional requirements apply under the Corporations Act in relation to the redemption of shares in a retail CCIV.
- RG 134.217 Where all or some shares in a retail CCIV are issued on the terms that they are liable to be redeemed, the constitution must make provision for redeemable shares in the CCIV to be redeemed. The provision must be consistent with draft

s1160–1160F, including the restriction in draft s1160 on when shares may be redeemed: see draft s1159(2).

- RG 134.218 This means that the constitution must contain provisions that ensure shares are only redeemed where the redemption:
- is on the terms on which the shares are on issue;
 - is permitted by the constitution; and
 - is in accordance with Pt 3 Div 4 Subdiv B of Ch 7A: see draft s1160.

Liquid sub-fund

Unlisted CCIVs

- RG 134.219 While the sub-fund to which shares in a retail CCIV are referable is liquid and the CCIV is unlisted, the shares must be redeemable for a price determined by reference to the net asset value of the sub-fund: see draft s1160A. This requirement allows for reasonable adjustments to the amount paid on redemption (e.g. for transaction costs), while ensuring that members are able to redeem their shares at a fair and reasonable value.
- RG 134.220 In order for the price to be determined by reference to the net asset value of the sub-fund, we consider that the amount paid on redemption must be determined using valuations of the assets of the relevant sub-fund that are:
- reasonably current; and
 - consistent with the range of ordinary commercial practice for valuing those type of assets on the basis they were to be realised within the period for satisfying withdrawal requests.

Note: A valuation will not be reasonably current if the corporate director has reason to believe that a more up-to-date valuation would result in a materially different value.

- RG 134.221 We also consider it is consistent with a corporate director's duty under draft s1156(j) to ensure that the assets of a sub-fund are valued at regular intervals appropriate to the nature of the assets.

Listed CCIVs

- RG 134.222 While the sub-fund to which shares in a retail CCIV are referable is liquid and the CCIV is listed, the shares must be redeemable for a price determined by reference to their market price just before the redemption: see draft s1160B.

Non-liquid sub-fund

When redemption offers may be made

- RG 134.223 While the sub-fund to which shares in a retail CCIV are referable is not liquid, members may be offered an opportunity to redeem shares in the CCIV only if:

- (a) the offer is made to the extent particular assets of the sub-fund are available and able to be converted to money in time to satisfy redemption requests under the offer; and
- (b) no other redemption offer is open in relation to the particular sub-fund: see draft s1160D.

How redemptions offers must be made

- RG 134.224 While the sub-fund is illiquid, a redemption offer must be in writing and be made in accordance with any relevant procedures in the constitution for making the offer. If the constitution does not specify any relevant procedures, the offer must be made by giving a copy of the offer to all members of the retail CCIV whose shares are referable to the relevant sub-fund: see draft s1160D(2).
- RG 134.225 Under draft s1160D(3), the redemption offer must specify:
- (a) the period during which the offer will remain open, which must be at least 21 days after the offer is made;
 - (b) the assets that will be used to satisfy withdrawal requests;
 - (c) the amount of money that is expected to be available when those assets are converted to money; and
 - (d) the method for dealing with redemption requests if the money available is insufficient to satisfy all requests, which must comply with draft s1160E: see RG 134.227–RG 134.228.

- RG 134.226 A redemption offer made while the sub-fund is illiquid may be cancelled before it closes if it contains a material error, and must be cancelled before it closes if it is in the best interests of members to do so: see draft s1160F(1).

Satisfying redemption requests

- RG 134.227 Redemption requests made in response to an offer while the sub-fund is not liquid must be satisfied within 21 days after that offer closes: see draft s1160E(1). No request under the offer may be satisfied while the offer is still open: see draft s1160E(2).
- RG 134.228 Under draft s1160E(3), where there is an insufficient amount of money available from the assets specified in the redemption offer to satisfy all requests made under the offer, the requests must be satisfied in accordance with the formula in Figure 3:

Figure 3: Formula for redeeming shares in a retail CCIV where money from specified assets is insufficient

$$\frac{\text{Amount member requested to redeem}}{\text{Total of all amounts members request to redeem}} = \frac{\text{Amount of money available} \times}{\text{Total of all amounts members request to redeem}}$$

H Winding up a registered scheme

Key points

The guidance in this section is relevant to registered schemes.

The constitution of a registered scheme 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 134.229 The constitution of a registered scheme must make adequate provision for winding up the scheme: see s601GA(1)(d).

RG 134.230 However, Ch 5C does not prescribe what constitutes winding up a registered 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): see s601NE(2).

RG 134.231 We consider that winding up a registered 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 Justice Judd's views in *Environinvest Ltd* [2009] VSC 33 at [99].

RG 134.232 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 registered scheme.

RG 134.233 What constitutes 'adequate provision' will depend on the circumstances surrounding the registered 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 registered scheme as long as the provisions cover the process of winding up. We consider that this will enable responsible entities to preserve flexibility in provisions about winding up registered schemes to deal with unforeseen situations.

- RG 134.234 In our view, there are certain key steps in the process of winding up a registered scheme. These are:
- (a) dealing with assets, liabilities and scheme property;
 - (b) the distribution of proceeds;
 - (c) costs of winding up; and
 - (d) additional payments by members.

- RG 134.235 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 assets, liabilities and scheme property

- RG 134.236 We consider that a key aspect of winding up a registered 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: see s601FC(1)(i)(i).

- RG 134.237 In our view, this may require more specific treatment in some contract-based schemes where it may be difficult to easily distinguish scheme property and other assets of the registered 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 managed investment scheme operated by the same responsible entity.

Distribution of proceeds

- RG 134.238 We also consider that a key aspect of winding up a registered scheme is determining how proceeds will be apportioned. For this reason, the constitution should include provisions about the distribution of the net proceeds of realisation of the scheme.

- RG 134.239 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 134.240 We consider 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, 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 registered scheme that can be properly realised to meet the costs of winding up.

Payments to maximise proceeds

- RG 134.241 In our experience, a party winding up a registered 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 134.242 If there is any ability for members to continue making payments during the process of winding up the registered scheme to maximise the net proceeds of realisation or, alternatively, if members are or may be required to continue making payments, this should be included in the provisions on winding up the registered scheme.

Dealing with a ‘worst case scenario’

- RG 134.243 The winding up of a registered scheme can occur where the responsible entity is ‘insolvent’ and/or if the assets of the registered 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 134.244 If a registered scheme is ‘insolvent’, provisions that authorise payment out of the realisation of the assets of the scheme will be of less use because sufficient assets will not be available to meet the costs and expenses of winding up the scheme.

- RG 134.245 When drafting provisions about winding up, a responsible entity should consider whether to include provisions that might assist it to wind up the registered 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 registered scheme to include provisions that address winding up in insolvency.

- RG 134.246 Contract-based registered 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 registered scheme should consider adding provisions to deal with the situation of winding up the registered scheme where the scheme or the responsible entity is insolvent.

Independent audit

- RG 134.247 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 the registered scheme is wound up. This should require that the audit itself is an independent audit, and not merely that the auditor is independent. We do not consider that providing for an independent review in place of an independent audit is sufficient, in light of the different levels of assurance between the two.
- RG 134.248 On winding up a registered scheme, we consider it is an appropriate safeguard for the accounts to be independently audited to ensure there has been compliance with the Corporations Act.
- RG 134.249 In our view, 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.

Postponement of winding up

- RG 134.250 We recognise that a responsible entity may sometimes need to legitimately postpone the realisation of the registered scheme's assets on winding up to maximise the net proceeds of realisation attributable to members, and provision for a discretion to postpone may be included in the constitution. At the same time, we recognise that the discretion to postpone the realisation of a registered scheme on winding up might be improperly exercised to the detriment of members and may be used to avoid the timely winding up of a registered scheme.
- RG 134.251 If a responsible entity decides to postpone the realisation of registered scheme assets, it should take into account its duties under s601FC(1).

I Legal enforceability of a registered scheme's constitution

Key points

The guidance in this section is relevant to registered schemes.

The constitution of a registered 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 how it needs to be drafted and executed for it to be legally enforceable.

Enforceability between members and the responsible entity

RG 134.252 The constitution of a registered scheme must be contained in a document that is legally enforceable between the members and the responsible entity: see s601GB.

RG 134.253 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. Most constitutions take the form of a deed poll that 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 registered scheme to be issued.

RG 134.254 In either of these circumstances, we expect that the constitution will be expressed as binding between the responsible entity and the members.

RG 134.255 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 134.256 In our view, to be enforceable, the constitution must be contained in a document that is validly executed by the proposed responsible entity. We consider 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 134.257 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. 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 134.258 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 134.259 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.

Impact on s601GA content

- RG 134.260 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.

J Incorporation by reference in investment fund constitutions

Key points

The guidance in this section is relevant to investment funds.

The constitution of an investment fund must ‘make adequate provision for’ certain matters and ‘specify’ others. Making these matters subject to documents external to the constitution, in our view, means the constitution does not meet the relevant requirements.

We have provided relief to allow the constitution of a registered scheme to incorporate by reference the listing rules of approved financial markets in some circumstances.

Making adequate provision for and specifying matters

- RG 134.261 The constitution of an investment fund must ‘make adequate provision for’ certain matters or ‘specify’ other matters. We consider that making provisions of the constitution under s601GA and draft s1155 subject to other documents that may affect these provisions (e.g. by excluding or modifying them) means that the constitution does not ‘make adequate provision for’ or ‘specify’ the matters required by the Corporations Act.
- RG 134.262 Provisions that seek to incorporate the terms of issue of interests or shares, or material included in a PDS, without excluding any effect they may have on the provisions required under s601GA or draft s1155, in our view are not consistent with those requirements.

Relief to incorporate by reference listing rules of a financial market

- RG 134.263 Under [ASIC Corporations \(Chapter 5C—Miscellaneous Provisions\) Instrument 2017/125](#), a responsible entity may include certain provisions in the constitution of a registered scheme that incorporate by reference, and give overriding effect to, the listing rules of an approved financial market.
- RG 134.264 We consider that this relief is appropriate because, for each approved financial market:
 - (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 if the listing rules require those amendments in order to maintain listing.

Key terms

Term	Meaning in this document
ADI	<p>An authorised deposit-taking institution—a corporation that is authorised under the <i>Banking Act 1959</i>. Includes:</p> <ul style="list-style-type: none"> • banks; • building societies; and • credit unions
AFS licence	<p>An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services</p> <p>Note: This is a definition contained in s761A.</p>
AFS licensee	<p>A person who holds an AFS licence under s913B of the Corporations Act</p> <p>Note: This is a definition contained in s761A.</p>
ASIC	Australian Securities and Investments Commission
Asia Region Funds Passport	An agreement between economies in the Asia region that allows passport funds established and regulated in one participating economy to offer interests to investors in another participating economy
ASX	ASX Limited or the exchange market operated by ASX Limited
Australian passport fund	A registered scheme that is also registered as a passport fund under draft Pt 8A.3 of the Corporations Act
CCIV	<p>A corporate collective investment vehicle—a company that is registered as a corporate collective investment vehicle under the Corporations Act</p> <p>Note: This is a definition contained in draft s9 of the Corporations Act.</p>
[CO 13/655] (for example)	<p>An ASIC class order (in this example numbered 13/655)</p> <p>Note: Legislative instruments made from 2015 are referred to as ASIC instruments.</p>
corporate director	<p>The company named in ASIC's record of the CCIV's registration as the corporate director or temporary corporate director of the CCIV</p> <p>Note: This is a definition contained in draft s9 of the Corporations Act.</p>
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
home economy	The participating economy in which a passport fund is first registered, approved or authorised as a regulated collective investment scheme

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Term	Meaning in this document
host economy	<p>A participating economy that is not a passport fund's home economy and either:</p> <ul style="list-style-type: none"> • permits the fund to offer interests in the fund in that economy under the Asia Region Funds Passport; or • has accepted an application from the fund to offer interests in the fund in that economy under the Asia Region Funds Passport (but not to register the fund as a passport fund in that economy)
IDPS-like scheme	<p>An investor directed portfolio services-like scheme as defined in Class Order [CO 13/762] Investor directed portfolio services provided through a registered managed investment scheme, or any instrument that amends or replaces that class order</p>
investment fund	<p>A registered scheme or retail CCIV</p>
investment fund operator	<p>A responsible entity of a registered scheme or corporate director of a retail CCIV</p>
MDA	<p>Managed discretionary account</p>
member	<p>A member of a registered scheme or shareholder of a CCIV</p>
Memorandum of Cooperation	<p>The Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Fund Passport</p>
participating economy	<p>An economy that is a participant under the Memorandum of Cooperation (while it is in effect) and has:</p> <ul style="list-style-type: none"> • advised the Asia Region Funds Passport Joint Committee that it has implemented the Asia Region Funds Passport; and • not withdrawn from the Memorandum of Cooperation
passport fund	<p>A regulated collective investment scheme, or sub-fund of a regulated collective investment scheme, registered as a passport fund in a participating economy</p>
passport fund operator	<p>An entity that operates a passport fund</p>
Passport Rules	<p>The requirements in Annex 3 to the Memorandum of Cooperation, as incorporated into the domestic law of a participating economy</p>
	<p>Note: The Australian Passport Rules will be made by the relevant Minister as a legislative instrument under draft s1211 and 1211A of the Corporations Act.</p>
PDS	<p>A Product Disclosure Statement—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</p>
	<p>Note: See s761A for the exact definition.</p>

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Term	Meaning in this document
registered scheme	A managed investment scheme that is registered under s601EB of the Corporations Act
regulated collective investment scheme	A regulated collective investment scheme as defined by the Passport Rules for a participating economy
responsible entity	A responsible entity of a registered scheme as defined in s9 of the Corporations Act
retail CCIV	<p>A CCIV promoted by a person, or an associate of a person, who was, when the CCIV was promoted, in the business of promoting CCIVs to persons who are, or would be, retail clients or a CCIV that has at least one member that acquired one or more shares in the CCIV:</p> <ul style="list-style-type: none"> • as a retail client; or • under a custodial arrangement and a PDS had to be provided to the member before the acquisition <p>Note: See draft s1154A of the Corporations Act.</p>
retail client	A client as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of the Corporations Regulations
RG 138 (for example)	An ASIC regulatory guide (in this example numbered 138)
s601GA (for example)	A section of the Corporations Act (in this example numbered 601GA)
sub-fund	<p>A part of a CCIV that:</p> <ul style="list-style-type: none"> • is established as a sub-fund in the records of the CCIV by assigning a unique name to the sub-fund and identifying one or more classes of shares in the CCIV that are to be referable to the sub-fund; and • either relates to the entire business of the CCIV (in the case where there is one sub-fund) or relates solely to a particular part of the business of the CCIV (in the case where there are two or more sub-funds)
wholesale CCIV	A CCIV that is not a retail CCIV

Related information

Headnotes

Australian passport fund, Australian Passport Rules, complaints handling procedures, constitution, content requirements, corporate collective investment vehicle, corporate director, enforceability requirement, investment fund, investment fund operator, members, passport fund operator, registered managed investment scheme, responsible entity, retail CCIV, scheme constitution, shareholders

Legislative instruments

[ASIC Corporations \(ASX-listed Schemes On-market Buy-backs\) Instrument 2016/1159](#)

[ASIC Corporations \(Attribution Managed Investment Trusts\) Instrument 2016/489](#)

[ASIC Corporations \(Chapter 5C-Miscellaneous Provisions\) Instrument 2017/125](#)

[ASIC Corporations \(Managed investment product consideration\) Instrument 2015/847](#)

[ASIC Corporations \(Registered Schemes: Differential Fees\) Instrument 2017/40](#)

[ASIC Corporations \(Time-sharing Schemes\) Instrument 2017/272](#)

[\[CO 09/339\] 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 ASIC Corporations \(Managed investment product consideration\) Instrument 2015/847](#)

[\[CO 13/656\] 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](#)

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Regulatory guides

Draft RG 000 *Constitution requirements for schemes registered before 1 October 2013*

Draft RG 000 *Funds management: Establishing and registering a fund*

Draft updated RG 136 *Funds management: Discretionary powers*

[RG 51 Applications for relief](#)

[RG 94 Unit pricing: Guide to good practice](#)

[RG 125 Share purchase plans](#)

[RG 160 Time-sharing schemes](#)

[RG 165 Licensing: Internal and external dispute resolution](#)

Legislation

Corporations Act, Ch 5C, Pts 5C.6, 5C.7, s9, 9A, 127, 135, 253E, 254Q, 601EB, 601FC, 601FD, 601FG, 601GA, 601GAD, 601GAE, 601GB, 601GC, 601KD, 601NE, 601NF, 606, 675, 912A, 912A, 988A, 1017B, 1017E

Corporations Amendment (Asia Region Funds Passport) Bill 2017 (exposure draft), draft Ch 8A, draft s1211, 1211A

Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2017 (exposure draft), draft Ch 7A, draft s1137A, 1141A, 1141B, 1143, 1144A, 1155, 1155A, 1156, 1157, 1159, 1160–1160F, 1160A, 1160B, 1160D, 1160E, 1160F

Cases

360 Capital Re Ltd v Watts (as trustees for the Watts Family Superannuation Fund) [2012] VSCA 234

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](#)

[CP 296 Funds management](#)

[REP 347 Response to submissions on CP 188 Managed investments: Constitutions—Updates to RG 134](#)

Other documents

[AS ISO 10002–2006 Customer satisfaction—Guidelines for complaints handling in organizations \(ISO 10002:2004 MOD\)](#)

[Explanatory Memorandum to the Managed Investments Bill 1997](#)