

# Attachment 5 to CP 296: Draft regulatory guide



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 136

# Funds management: Discretionary powers

October 2017

### About this guide

This guide explains our approach to exercising our exemption and modification powers to grant individual relief from requirements under the Corporations Act and, where relevant, the Australian Passport Rules for managed investment schemes, corporate collective investment vehicles (CCIVs) and Australian passport funds.

It also explains:

- some of the more common situations when we have granted, and when we are likely to grant, relief; and
- when we will consider managed investment schemes as closely related so that they should be aggregated in determining if some exemptions for small schemes apply.

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- Superseded Policy Statement 136 *Managed investments: Discretionary powers and closely related schemes*, issued August 1998, reissued September 2000, rebadged as a regulatory guide 5 July 2007

### 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.

DRAFT

# Contents

<b>A</b>	<b>Overview .....</b>	<b>4</b>
	Purpose of this guide .....	4
	Our related reports and guidance .....	5
<b>B</b>	<b>Our approach to individual relief .....</b>	<b>8</b>
	Our powers to grant relief .....	8
	Our general approach to relief under RG 51 .....	9
	Our approach to relief for managed investment schemes, CCIVs and Australian passport funds .....	9
	Statutory preconditions for Australian Passport Rules relief .....	13
<b>C</b>	<b>Common forms of individual relief .....</b>	<b>15</b>
	Compliance plan audits and compliance committees .....	15
	Stapled securities .....	20
	Change of responsible entity .....	22
	Offers to foreign members in a restructure .....	26
	Withdrawal arrangements.....	26
	Deregistration of a registered scheme.....	33
	Closely related schemes: s601ED determination.....	34
	<b>Key terms .....</b>	<b>36</b>
	<b>Related information.....</b>	<b>39</b>

DRAFT

## A Overview

### Key points

This guide explains our approach to granting individual relief to managed investment schemes, corporate collective investment vehicles (CCIVs) and Australian passport funds.

It also explains:

- some of the more common situations when we have granted, and when we may grant, relief; and
- when we will consider managed investment schemes as closely related so that they should be aggregated in determining if some exemptions for small schemes apply.

### Purpose of this guide

RG 136.1 The creation, operation, termination and offer of interests in managed investment schemes and shares in CCIVs are regulated under the *Corporations Act 2001* (Corporations Act). Registered managed investment schemes (registered schemes) that are registered as Australian passport funds for the purpose of the Asia Region Funds Passport are also regulated by the Australian Passport Rules. This guide explains our approach to granting individual relief from the requirements under the Corporations Act and, where relevant, the Australian Passport Rules to managed investment schemes, CCIVs and registered schemes that are also Australian passport funds.

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](#) (Memorandum of Cooperation).

RG 136.2 We have discretionary powers to exempt a person or a class of persons from particular provisions and to modify the application of particular provisions to a person or class of persons under the laws we administer.

RG 136.3 Our general approach to relief—that is, how and when we might grant an exemption from, or modification to, the laws we administer—is set out in [Regulatory Guide 51 Applications for relief](#) (RG 51). RG 51 provides general guidance on:

- (a) the types of applications for relief that can be made;
- (b) how to lodge an application for relief and what information we may need from an applicant to consider the application;

DRAFT

- (c) our general approach to relief; and
- (d) the different types of relief that may be available.

RG 136.4 This guide supplements our general policy in RG 51. It is intended to generally improve the level of transparency and the quality of information available about how we exercise our exemption and modification powers under the Corporations Act and, where relevant, the Australian Passport Rules for managed investment schemes, CCIVs and Australian passport funds.

RG 136.5 Specifically, this guide will assist operators of managed investment schemes, CCIVs and Australian passport funds, and their advisers, understand:

- (a) some of the factors we may take into account in applying the principles under RG 51 when assessing applications for individual relief from the provisions in Ch 5C of the Corporations Act, and which we anticipate may also be relevant for assessing relief applications from provisions of draft Chs 7A and 8A and from the Australian Passport Rules: see Section B; and
- (b) the common types of individual relief we have granted to registered schemes, as well as when we will consider managed investment schemes as closely related so that they should be aggregated in determining if some registration exemptions for small schemes apply: see Section C.

Note: In the future, we intend to update Section C to include other common types of individual relief for managed investment schemes, CCIVs and Australian passport funds.

## Our related reports and guidance

RG 136.6 We aim to improve the level of transparency and the quality of publicly available information about decisions we make when asked to exercise our discretionary powers to grant relief: see our regular [reports on relief applications](#).

RG 136.7 We have also provided separate guidance on our approach to exercising our discretionary powers to grant relief for specific topics that may be relevant to managed investment schemes, CCIVs and Australian passport funds. Table 1 lists some of this guidance and provides a brief explanation of what is covered in each guide. You should ensure that you read and meet the guidance and relevant legislative requirements if you are seeking relief in relation to that specific topic.

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**Table 1: Our related guidance on relief**

Guidance	Description
Draft Regulatory Guide 000 <i>Foreign passport funds</i>	Provides guidance on our powers and responsibilities as a host regulator under the Asia Region Funds Passport, as well as our requirements for notified foreign passport funds and their operators seeking to enter, or operating in, Australia  Note: The draft guide is available on our website at <a href="http://www.asic.gov.au/cp">www.asic.gov.au/cp</a> under CP 296.
<a href="#">Regulatory Guide 43</a> <i>Financial reports and audit relief</i> (RG 43)	Provides guidance on the relief available from financial reporting requirements in the Corporations Act
<a href="#">Regulatory Guide 49</a> <i>Employee incentive schemes</i> (RG 49)	Provides guidance on the relief available from disclosure, Australian financial services (AFS) licensing, advertising, hawking, managed investment and on-sale provisions in the Corporations Act for an employee incentive scheme
<a href="#">Regulatory Guide 76</a> <i>Related party transactions</i> (RG 76)	Provides guidance on the relief available from certain requirements in the Corporations Act, as well guidance to promote better disclosure and governance for related party transactions
<a href="#">Regulatory Guide 77</a> <i>Property trusts and property syndicates</i> (RG 77)	Provides guidance on the relief available from provisions of the Corporations Act for property trusts, fixed term property syndicates and indirect property trusts
<a href="#">Regulatory Guide 80</a> <i>Managed investment schemes: Interests not for money</i> (RG 80)	Provides guidance on the relief available from the managed investment, AFS licensing, hawking and disclosure provisions of the Corporations Act for managed investment schemes that do not involve raising money
<a href="#">Regulatory Guide 87</a> <i>Charitable schemes and school enrolment deposits</i> (RG 87)	Provides guidance on the relief available from the fundraising, managed investment, debenture and AFS licensing provisions of the Corporations Act to charities that wish to raise funds by issuing debentures or interests in a managed investment scheme
<a href="#">Regulatory Guide 91</a> <i>Horse breeding schemes and horse racing syndicates</i> (RG 91)	Provides guidance on the relief available from the managed investment, AFS licensing and disclosure provisions of the Corporations Act for certain types of horse breeding schemes and horse racing syndicates
<a href="#">Regulatory Guide 140</a> <i>Strata schemes and management rights schemes</i> (RG 140)	Provides guidance on the relief available from the managed investment, AFS licensing and fundraising provisions of the Corporations Act for promoters and operators of management rights schemes and serviced strata schemes
<a href="#">Regulatory Guide 144</a> <i>Mortgage investment schemes</i> (RG 144)	Provides guidance on the relief available from certain Ch 5C provisions of the Corporations Act for mortgage investment schemes
<a href="#">Regulatory Guide 148</a> <i>Platforms that are managed investment schemes and nominee and custody services</i> (RG 148)	Provides guidance on the relief available from the managed investment, fundraising, disclosure and other investor rights requirements in the Corporations Act for operators of investor directed portfolio services (IDPSs) and responsible entities of IDPS-like schemes
<a href="#">Regulatory Guide 160</a> <i>Time-sharing schemes</i> (RG 160)	Provides guidance on the relief available from the managed investment and AFS licensing provisions of the Corporations Act for certain types of time-sharing schemes

DRAFT

Guidance	Description
<a href="#">Regulatory Guide 161</a> <i>Share and interest sale facilities</i> (RG 161)	Provides guidance on the relief available from the managed investment, AFS licensing and disclosure provisions in the Corporations Act for sale facilities and related purchase facilities
<a href="#">Regulatory Guide 174</a> <i>Relief for externally administered companies and registered schemes being wound up</i> (RG 174)	Provides guidance on the relief available from the financial reporting provisions of the Corporations Act for registered schemes being wound up
<a href="#">Regulatory Guide 195</a> <i>Group purchasing bodies for insurance and risk products</i> (RG 195)	Provides guidance on the relief available from the managed investment and AFS licensing provisions of the Corporations Act for group purchasing bodies

## B Our approach to individual relief

### Key points

This section explains our general approach under RG 51 to granting individual relief from requirements under the Corporations Act and the Australian Passport Rules for managed investment schemes, CCIVs and Australian passport funds.

RG 51 remains our primary guidance on our approach to individual relief applications.

This section also explains some of the factors we may take into account in applying the principles under RG 51 that we have identified from our experience in assessing applications for individual relief from the provisions in Ch 5C of the Corporations Act, and which we anticipate may also be relevant for assessing relief applications from provisions of draft Chs 7A and 8A and from the Australian Passport Rules.

### Our powers to grant relief

- RG 136.8 We have powers under the Corporations Act to exempt a person or a class of persons from particular provisions and to modify the application of particular provisions to a person or class of persons.
- RG 136.9 Some of these powers of exemption or modification apply in relation to provisions that specifically affect managed investment schemes, CCIVs and Australian passport funds only. These discretionary powers are to grant relief under:
- (a) s601QA from the provisions of Ch 5C (managed investment schemes);
  - (b) draft s1149B from the provisions of draft Ch 7A (CCIVs);
  - (c) draft s1217 from the provisions of draft Ch 8A (Australian passport funds); and
  - (d) draft s1217A from the provisions of the Australian Passport Rules (Australian passport funds).
- RG 136.10 There are also exemption or modification powers under the Corporations Act that apply in relation to other provisions that may affect managed investment schemes, CCIVs and Australian passport funds (as well as other entities), and their activities and operations. These include the discretionary exemption or modification powers in relation to:
- (a) the AFS licensing provisions: see s926A;
  - (b) the financial services disclosure provisions: see s951B;

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- (c) the conduct requirements relating to financial products and services: see s992B; and
- (d) the financial product disclosure provisions: see s1020F.

RG 136.11 If we grant an exemption or modification, the kind of relief that is granted, the extent of the relief and the situations in which the relief applies will depend on what is appropriate in the circumstances.

## Our general approach to relief under RG 51

RG 136.12 [RG 51](#) provides guidance on the types of applications for relief that can be made, how to lodge applications, our general approach to applications and the types of relief available.

RG 136.13 Under the general approach set out in RG 51, we will consider and determine all applications for relief on the basis of the facts, circumstances and merits of each individual application.

Note: For detailed information on the application process, our general approach to applications for relief and the types of relief available, see RG 51.

## Our approach to relief for managed investment schemes, CCIVs and Australian passport funds

RG 136.14 When applying the general principles under RG 51 in the context of assessing applications for individual relief from the provisions in Ch 5C, draft Ch 7A and draft Ch 8A, we may take into account:

- (a) the result of a cost and benefit analysis and the impact of the sought relief on affected persons: see RG 136.15–RG 136.19;
- (b) the impact of the sought relief on the regulatory objectives of our managed investment and CCIV regimes and the Asia Region Funds Passport regime: see RG 136.20–RG 136.25;
- (c) the relevance of any precedents: see RG 136.26;
- (d) the relevance of the nature, scale and complexity of the managed investment scheme, CCIV or Australian passport fund seeking relief, and its operator: see RG 136.27; and
- (e) the adequacy of any alternative regulation: see RG 136.28–RG 136.30.

Note: This list is not exhaustive. Relevant considerations will always depend on the applicable facts, circumstances and merits of each individual application. The weight given to any particular item or any other relevant consideration will also depend on the circumstances.

### **Cost and benefit analysis and impact on affected persons**

- RG 136.15 This factor involves identifying the stakeholders (including the applicant) and other parties whose interests may be affected (whether adversely or otherwise) if the sought relief is granted.
- RG 136.16 We then assess the likely impact of the sought relief on any such identified affected persons. This involves evaluating the direct financial impact to ensure we take into account all the relevant positive and negative consequences of granting relief.
- RG 136.17 We may consider whether, and to what extent, the persons subject to the sought relief (e.g. the applicant) will receive any benefits from the exercise of our relief powers.
- RG 136.18 We may also consider whether strict compliance with the Corporations Act and, where relevant, the Australian Passport Rules, would be impossible or disproportionately burdensome. This would also involve identifying the person(s) bearing the costs.
- RG 136.19 A further important consideration is whether the likelihood and extent of detriment to potential clients (in particular, retail clients) resulting from the sought relief is minimal. In part, this would involve considering whether people acquiring, holding or otherwise transacting interests or shares in a managed investment scheme, CCIV or an Australian passport fund would still have the protection intended by Parliament if the sought relief is granted.

### **Impact on regulatory objectives**

- RG 136.20 We may also consider whether the sought relief promotes, or is consistent with:
- (a) the general policy objectives of the Corporations Act; and
  - (b) the specific policy objectives underlying the relevant particular provision(s) of the Corporations Act and, where relevant, the Australian Passport Rules.
- RG 136.21 We will give appropriate weight to the value of promoting international harmonisation where relevant.

#### **Corporations Act**

- RG 136.22 Generally, the Corporations Act is intended to harmonise and raise standards of conduct.

#### **Managed investment schemes**

- RG 136.23 Specific regulatory objectives for managed investment schemes include:

- (a) promoting commercial stability and efficiency in capital raising and capital formation; and
- (b) providing an appropriate level of regulation that adequately and effectively protects the interests of investors.

### **CCIVs**

RG 136.24 Specific regulatory objectives for CCIVs include:

- (a) increasing the competitiveness of Australia's funds management industry through the introduction of internationally recognisable investment products under a regime comparable with Undertakings for the Collective Investment of Transferable Securities (UCITS), allowing Australian operators to offer funds management products using vehicles commonly used overseas;
- (b) expanding the range of collective investments products offered to Australian investors;
- (c) advancing regulatory alignment;
- (d) maximising the economic benefits of the Asia Region Funds Passport; and
- (e) providing an appropriate level of regulation that adequately and effectively protects the interests of investors.

### **Australian passport funds**

RG 136.25 Specific regulatory objectives for Australian passport funds include:

- (a) facilitating cross-border offerings of passport funds by supporting regulatory consistency across participating economies;
- (b) providing adequate regulatory standards for the management and distribution of passport funds that promote investor protection and fair, efficient and transparent markets;
- (c) providing Australian investors with a greater diversity of investment opportunities through the availability of interests in notified foreign passport funds; and
- (d) facilitating Australian fund managers seeking to offer their products and services in other participating economies.

### **Relevance of any precedents**

RG 136.26 We may consider whether the sought relief involves the same or similar in terms as any relief we have granted in comparable situations. We do so to promote consistency and predictability in our decision making when exercising our statutory exemption and modification powers to grant relief.

Note: Section C outlines some of the more common forms of relief we have granted.

### **Nature, scale and complexity of the operator and fund**

- RG 136.27 We may also assess whether the sought relief (including the scope of the relief and any applicable conditions) is appropriate and necessary having regard to the nature, scale and complexity of your business operations. At a minimum, we are likely to take into account:
- (a) the number of managed investment schemes or CCIVs and the size of your funds under management;
  - (b) whether you are a managed investment scheme, a CCIV or a sub-fund of a CCIV, and whether you are also registered as an Australian passport fund;
  - (c) the investment strategies of your managed investment scheme or CCIV, including the extent to which the fund will employ leverage;
  - (d) whether your managed investment scheme or CCIV is listed, traded or unlisted;
  - (e) the types of investments and investment location;
  - (f) the distribution model and investor base;
  - (g) the activities, including investment approach, you engage in;
  - (h) the extent to which you delegate material operational activities;
  - (i) the diversity and structure of your operations (including the geographical spread of your operations and the extent to which you outsource any of your functions);
  - (j) the volume and size of the transactions you are responsible for;
  - (k) whether your main business is undertaking funds management; and
  - (l) the number of people in your organisation.

### **'Adequacy' of alternative regulation**

- RG 136.28 We may also consider whether there would be any available adequate alternative regulation or protection if the sought relief is granted.
- RG 136.29 This is aimed at both assessing whether the impact of any relief will result in minimal regulatory detriment and considering whether relief can be granted to remove any unnecessarily duplicated legislative or regulatory requirements.
- RG 136.30 When considering whether an alternative regulatory regime is 'adequate', we may generally consider whether (and how effectively) the regime addresses:
- (a) efficient, honest and fair service provision;
  - (b) service provider resources and competence;
  - (c) compliance, conflicts management and risk management practices by service providers;

- (d) initial and ongoing disclosure to retail clients about the provision of a service;
- (e) protection of client assets;
- (f) financial and transaction record keeping;
- (g) access by retail clients to internal and external dispute resolution services; and
- (h) the provision of any advice to retail clients on a reasonable basis.

## Statutory preconditions for Australian Passport Rules relief

- RG 136.31 We can only grant exemptions and modifications in relation to the Australian Passport Rules for an Australian passport fund (as its home regulator) if:
- (a) all of the relevant host regulators of the Australian passport fund have agreed to the terms of the sought relief: see RG 136.32–RG 136.35; and
  - (b) we publish details of any relief granted on the register of passport funds that we maintain for Australia: see RG 136.36–RG 136.37.

### Agreement of all relevant host regulators

- RG 136.32 An exemption or modification in relation to the Australian Passport Rules can only be granted for an Australian passport fund if all of the host regulators for the Australian passport fund have agreed to the exemption being granted or the declaration being made: see draft s1217A(3)(a). The host regulators are the passport regulators of the participating economies where the Australian passport fund is permitted, or has applied, to offer interests.
- RG 136.33 This requirement is aimed at promoting the consistent and seamless application of the Passport Rules.
- RG 136.34 Where we receive an application seeking relief from the Australian Passport Rules, we may seek to confirm any information that you provide with your relevant host regulator(s). We may also share the application with other passport regulators and seek their views.
- RG 136.35 In your application you will need to explain whether you have obtained, and if not whether you have sought, agreement from the relevant host regulator(s) (including whether such agreement is pending), and if not, why not. We will seek this confirmation with the relevant passport regulators under the arrangements for cross-border supervisory cooperation under Annex 4 of the [Memorandum of Cooperation](#). It will not be appropriate for ASIC to grant relief from the Australian Passport Rules for an Australian passport fund until all relevant host regulators have agreed to the proposed relief.

### **Exemptions and modifications to be made publicly available**

- RG 136.36 We maintain a register of passport funds for Australia. If we grant an exemption or modification in our capacity as a home regulator for an Australian passport fund, its operator or a person responsible for compliance with a Passport Rule in relation to an Australian passport fund, we must make the details of the exemption or modification (including any variation or revocation) publicly available on the register of passport funds.
- RG 136.37 This requirement promotes transparency around how the Asia Region Funds Passport is being administered by all passport regulators.

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## C Common forms of individual relief

### Key points

This section outlines and explains some of the more common forms of individual relief we have granted.

While we will only assess applications for relief on a case-by-case basis and having regard to all the relevant circumstances of each application, the common forms of relief outlined in this section are provided to promote transparency on the material considerations we have taken into account in past decisions. As a result, prospective applicants for relief may gain a better insight into the factors we consider in deciding whether to exercise our discretion to grant relief.

This section also explains when we will consider managed investment schemes as closely related so that they should be aggregated in determining if some exemptions for small schemes apply.

## Compliance plan audits and compliance committees

- RG 136.38 We may consider granting:
- (a) relief from the obligation to prepare and lodge a compliance plan audit;
  - (b) an extension of time to establish a compliance committee; and
  - (c) an extension of time to replace a compliance committee member.

### Relief from the compliance plan audit requirements

- RG 136.39 Under s601HG(1) of the Corporations Act, the responsible entity of a registered scheme must ensure that at all times a registered company auditor, an audit firm or an authorised audit company is engaged to audit compliance with the scheme's compliance plan.
- RG 136.40 Subsection 601HG(3) sets out the auditor's powers and responsibilities, which are to:
- (a) examine the compliance plan;
  - (b) audit compliance by the responsible entity with the compliance plan; and
  - (c) report to the responsible entity on whether the responsible entity has complied with the compliance plan during the financial year and whether the plan continues to meet the requirements of Pt 5C.4 of the Corporations Act.
- RG 136.41 The auditor of the compliance plan must lodge the report for the audit of the compliance plan with ASIC at the same time as the financial statements and

reports for the registered scheme are to be lodged with ASIC: see s601HG(7).

- RG 136.42 The purpose of a compliance plan audit is to identify whether there has been any non-compliance by the responsible entity with the compliance plan and whether the plan continues to meet the requirements of Pt 5C.4.
- RG 136.43 We would generally only consider an application for individual relief from the requirement to conduct a compliance plan audit and lodge a compliance plan audit report with ASIC for a financial year if the responsible entity has:
- (a) complied with its compliance plan for the financial year to be covered by the sought relief;
  - (b) not had any significant reportable breaches for the financial year to be covered by the sought relief;
  - (c) lodged its compliance plan audit reports for previous financial years; and
  - (d) provided us with information on any concerns raised by an auditor in previous compliance plan audit reports.
- RG 136.44 The requirement for a compliance plan audit is a fundamental obligation of the managed investment regulatory regime. It ensures that adequate processes are in place to ensure that a registered scheme is operated in accordance with the obligations contained in the scheme's constitution and the law, and that the compliance plan meets the requirements of Pt 5C.4. We would generally only grant relief from a requirement under s601HG if an applicant could demonstrate that compliance with the compliance plan audit provisions would be impossible or disproportionately burdensome in the circumstances (e.g. if the scheme is being wound up or for a short period pending deregistration of a scheme).
- RG 136.45 Factors we may take into account when deciding whether to grant relief include:
- (a) whether the benefits of conducting the compliance plan audit and preparing the compliance plan audit report are outweighed by the associated burden and costs. When we consider the benefits, we will take into account the likely relevant users of such reports and the likely nature and extent of their use. When we consider the costs and burden, we will take into account the amount and who will bear the expected compliance costs;
  - (b) the ability of the likely relevant users of such information to independently obtain, in a timely manner, other reliable information about the registered scheme's compliance; and
  - (c) the underlying purposes of a compliance plan audit and audit report (as identified at RG 136.42 and RG 136.44).



RG 136.46 We will generally include a condition on any relief that requires the responsible entity to publish a notice explaining the relief in a prominent place on its website.

### **Extension of time for compliance committee establishment**

RG 136.47 Under s601JA(1) of the Corporations Act the responsible entity of a registered scheme is required to establish a compliance committee if ‘less than half of the directors of the responsible entity are external directors’. Section 601JA(2) provides a definition of an ‘external director’.

RG 136.48 The responsible entity must establish the compliance committee within 14 days after it is required to do so under s601JA(1), unless we have agreed in writing to a longer period: see s601JA(3). In agreeing to a longer period, we may include conditions that the responsible entity must comply with.

RG 136.49 We will consider granting an extension of time to establish a compliance committee if:

- (a) there are exceptional circumstances that justify relief; or
- (b) it may be impractical to establish a committee with a sufficient number of external members within the 14-day period for reasons other than due to the responsible entity’s default.

RG 136.50 However, we are not generally likely to grant an extension of time to establish a compliance committee when you are registering a scheme. You should not apply for registration unless you are in a position to establish a board or compliance committee immediately once your scheme is registered.

RG 136.51 Factors we may take into account in deciding whether to grant relief include:

- (a) whether the responsible entity is doing all it can reasonably do to appoint sufficient external directors or to establish a compliance committee; and
- (b) whether any reduction in investor protection from the lack of a compliance committee is minimised.

RG 136.52 If an extension of time is granted, we will generally include conditions on the responsible entity, requiring it to:

- (a) use its best endeavours to establish the compliance committee or appoint the required external directors to the board of the responsible entity as soon as practicable and, in any event, before the extended time limit ends; and
- (b) appoint external auditors to carry out substitute compliance monitoring for the period of relief.

RG 136.53 Extensions will be given only for a specified period and for as long as appears necessary.

### **Compliance committee membership**

RG 136.54 Under s601JB(1) of the Corporations Act, a compliance committee must have at least three members, and a majority of them must be ‘external members’, as defined under s601JB(2) and qualified by s601JB(3) and (4).

RG 136.55 The need for a compliance committee may also arise due to changes in the composition of the board of the responsible entity and an extension of time may be sought to reconstitute the board with sufficient external directors.

RG 136.56 We consider it is important that vacancies in the external members of a compliance committee are filled quickly so that investor protection is not reduced. Similarly, if at least half of the directors of a responsible entity are not external, a compliance committee should be established quickly. This is because a compliance committee with a majority of external (and so independent) members gives investors protection by regularly monitoring compliance.

RG 136.57 There will be costs associated with finding appropriate external compliance committee members. However, this is an intended cost associated with establishing appropriate investor protection and you should factor it into budgets at an early stage.

RG 136.58 The Corporations Act imposes significant restrictions on who may be an external member of a compliance committee or the board of the responsible entity. We consider that a member of a compliance committee must be a natural person. We also consider that an external member must not be, and may not within the previous two years have been, substantially involved in business dealings, or in a professional capacity, with the responsible entity or a related body corporate: see s601JB(2)(c). These restrictions, among others in s601JB(2), reflect the importance for investor protection and credibility of regulation for there to be oversight by persons who are manifestly independent.

RG 136.59 In our view, the reference to ‘substantial involvement’ means, for example, that a person who is employed by an entity that has had business dealings or a professional relationship with the responsible entity, or a related body corporate of the responsible entity, would not be excluded as an external member or director merely because they have had a trivial involvement with the dealings or relationship. We also consider the term ‘substantial’ qualifies the degree of an individual’s involvement, rather than the nature of the business dealings or professional relationship. In our view, the provisions should not be interpreted as meaning involvement in substantial business dealings.

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- RG 136.60 We consider the following persons are likely to be substantially involved in business dealings, or in a professional capacity, with the responsible entity:
- (a) an employee of the auditor of the responsible entity who has decision-making responsibility in relation to audits of the responsible entity, or may be exposed to any form of conflict of interest in acting as a compliance committee member because of involvement with the audits;
  - (b) an employee or officer of a custodian for the responsible entity who has had decision-making responsibility in relation to the dealings between the custodian and the responsible entity, or may be exposed to any form of conflict of interest in acting as a compliance committee member because of their involvement in the business relationship with the responsible entity; or
  - (c) a solicitor who is responsible for legal advice provided to the responsible entity.
- RG 136.61 A member of a partnership with a substantial involvement is also not eligible as an external member: see s601JB(2)(c).
- RG 136.62 As the requirements for being external are intentionally strict and are designed to ensure the unambiguous appearance of independence, as well as actual independence, we will not generally grant relief that allows a person who may not be external to be counted as external. We will not generally grant relief on the basis of submissions that:
- (a) there is no actual conflict of interest—for example, a partner of a firm of solicitors who has no business dealings with the responsible entity in the case where the firm has substantial involvement in business dealings with the responsible entity; or
  - (b) there are difficulties in finding alternative candidates.
- RG 136.63 Under s601JB(5), if the compliance committee ceases to satisfy the membership requirements under s601JB(1), the responsible entity must make appointments to the committee within 14 days after s601JB(1) is no longer satisfied, unless we have agreed in writing to a longer period. Our consent to a longer period may be made subject to conditions and there is a statutory obligation on the responsible entity to comply with those conditions: see s601JA(6).
- RG 136.64 When you need to constitute or reconstitute the compliance committee after your scheme is registered, we recognise that it may be impracticable to find suitable compliance committee members within 14 days (e.g. on the sudden death of an external member of the compliance committee or board of the responsible entity). It may be especially difficult for smaller specialised registered schemes and schemes based in remote locations. Similarly, when multiple vacancies occur in a compliance committee, we recognise that compliance is more likely to be impracticable.

- RG 136.65 You should apply promptly after it appears that an extension is likely to be necessary. We may, however, extend the time after the end of the 14-day period.
- RG 136.66 We will consider granting an extension of time if:
- (a) there are exceptional circumstances to justify relief; or
  - (b) it may be impractical to appoint a sufficient number of external members within the 14-day period for reasons other than due to the responsible entity's default (see the examples in RG 136.64).
- RG 136.67 Factors we may take into account in deciding whether to grant relief include:
- (a) whether the applicant is doing all it can reasonably do to appoint the external member(s); and
  - (b) whether any reduction in investor protection due to the compliance committee not having the required member composition is minimised.
- RG 136.68 If an extension of time is granted, we will generally include conditions on the relief that require the responsible entity to:
- (a) use its best endeavours to appoint the required external member(s) to the compliance committee as soon as practicable and, in any event, before the extended time limit ends; and
  - (b) ensure that the number of external members of the compliance committee as a proportion of the total number of members of the compliance committee does not become less than the proportion at the date the application for relief was made.

## Stapled securities

- RG 136.69 Subsection 601FC(1) of the Corporations Act prescribes the duties of the responsible entity, including to:
- (a) act in the best interests of members: see 601FC(1)(c); and
  - (b) not make use of information in order to gain an advantage for themselves and or any other person or cause detriment to the members of the scheme: see s601FC(1)(e).
- RG 136.70 Similar duties apply to the officers of the responsible entity: see s601FD(1)(c) and 601FD(1)(d). Paragraph 601FD(1)(e) imposes a duty on officers of the responsible entity not to make improper use of their position as an officer to gain an advantage for themselves and or any other person or to cause detriment to members of the scheme.

- RG 136.71 There is also a duty for employees of the responsible entity not to make improper use of their position as an employee to gain an advantage for themselves and or any other person or to cause detriment to members of the scheme: see s601FE(1)(a).
- RG 136.72 Section 601LC prohibits the giving of financial benefits by a responsible entity to a related party of the responsible entity unless a relevant exception is available.
- RG 136.73 We may consider granting relief for stapled securities, a component of which is an interest in a registered scheme, from the following provisions in Ch 5C:
- (a) s601FC(1)(c) and 601FC(1)(e) to allow a responsible entity to consider the interests of the members or to use information, having regard to them being stapled security holders;
  - (b) s601FD(1)(c), 601FD(d), 601FD(1)(e) and 601FE(1)(a) to allow officers or employees to consider the interests of the members or to use information or their position, having regard to them being stapled security holders; and
  - (c) s601LC to allow a responsible entity to give a financial benefit to itself or a related party where this increases stapled scheme property, although decreasing the property in the registered scheme.
- RG 136.74 We may consider granting relief for stapled securities where:
- (a) the stapled group consists of two or more financial products, including at least one interest in a registered scheme, where:
    - (i) under the terms on which each of the products are to be traded, they must be transferred together; and
    - (ii) there are no financial products in the same class as those financial products which may be transferred separately; and
  - (b) each interest in the scheme must, under the terms upon which it is to be traded, only be transferred with one or more shares or interests.
- RG 136.75 We may grant relief for stapled securities to facilitate the operation and management of the stapled group, rather than the component parts that make up the stapled group. We consider there is no detriment to members given they are also members of the other component parts of the stapled group.
- RG 136.76 Factors we may take into account when deciding whether to grant relief for stapled securities include:
- (a) whether all interests in the registered scheme remain stapled with shares in a company (or interests in another scheme) on a one-for-one basis and are traded on ASX as stapled securities;

- (b) whether there is any ‘leakage’—that is, the stapled security holders own all of the shares in the stapled company and no benefit leaks from the stapled structure for the benefit of others; and

Note: Benefits may be able to be paid from the scheme property to *wholly owned* subsidiaries of a company, which is wholly owned by the stapled security holders.

- (c) where the stapling occurs after members have acquired an interest in the scheme, we may request a copy of the proposed disclosure to be sent to members about resolutions to staple, to ensure that the disclosure is adequate.

## Change of responsible entity

- RG 136.77 If the responsible entity of a registered scheme wants to retire it must call a members’ meeting to explain its reasons for wanting to retire and to enable the members to vote on a resolution to choose a new responsible entity: see s601FL(1). The resolution must be an extraordinary resolution if the scheme is not listed.
- RG 136.78 Section 601FL provides registered scheme members with the opportunity to exercise voting rights to choose a new responsible entity to replace a retiring responsible entity. In our view, this is an important safeguard for the change of responsible entity, which cannot be effected by too few members.
- RG 136.79 We may consider granting relief from the requirement to hold a members’ meeting for a change of responsible entity under s601FL if:
- (a) the change is to a related body corporate of the responsible entity: see RG 136.80–RG 136.82;
  - (b) there are a small number of members: see RG 136.83–RG 136.86; or
  - (c) a significant percentage of the interests in the registered scheme are held by investment platforms that have a non-voting policy: see RG 136.87–RG 136.90.

## Change to a related body corporate

- RG 136.80 We will consider granting relief from the requirement to hold a members’ meeting for a change of responsible entity if the existing responsible entity and the proposed new responsible entity are related companies and:
- (a) the change of responsible entity is unlikely to have an adverse impact on the administrative, custodial or asset management of the registered scheme or give rise to any significant changes in the manner in which the scheme operates; and

- (b) the costs of strict compliance with the meeting requirements under s601FL(1) are disproportionately burdensome compared to the benefits of holding a meeting.

RG 136.81 Factors we may consider when deciding whether to grant relief include:

- (a) whether the current and replacement responsible entity are related companies within the same corporate group;
- (b) whether the current and replacement responsible entity share common resources (including key staff), corporate governance arrangements (particularly common directors and common compliance committee members) and control structures (for example, reporting lines and compliance systems, procedures for monitoring service providers and accounting, computer and IT systems);
- (c) whether there is any adverse impact on members' interests; and
- (d) whether, if relief is granted, there would be substantial cost savings for the responsible entity, and ultimately the members of the registered scheme.

RG 136.82 If relief is granted, we will generally include conditions on the relief that require the responsible entity to:

- (a) notify members of the proposed change of responsible entity and include in the notice all the information that members would reasonably require to make an informed assessment as to whether to request a vote of all members to choose a new responsible entity;
- (b) give members 21 days to consider the notice and, if they wish, request that the responsible entity hold a postal vote of all members to choose a new responsible entity;
- (c) if 100 members or members holding at least 5% of the total value of interests held by members eligible to vote request a postal vote, conduct the postal vote on conditions set out in the relief; and
- (d) effect the change of responsible entity within three months.

### **Small number of members**

RG 136.83 We may consider granting relief from the requirement to convene and hold a members' meeting to change a responsible entity if:

- (a) there are only a small number of members and all of those members would be prevented from voting under s252R or 253E; or
- (b) the only members comprise a small number of wholesale clients.

- RG 136.84 We may grant this relief to facilitate members being able to approve a change of responsible entity:
- (a) when it may not be possible to convene and hold a meeting of members; or
  - (b) due to the small number of members, the costs and effort of doing so are unnecessary—on the basis that the consent of members to the change of responsible entity can be obtained in a more cost effective way.
- RG 136.85 Factors we may consider when deciding whether to grant relief include:
- (a) whether the registered scheme is able to meet the quorum requirement of two members under s252R;
  - (b) whether all members would be unable to pass a resolution to change the responsible entity in a members' meeting because they would be prevented from voting on the resolution under s253E; and
- Note: Section 253E provides that the responsible entity of a registered scheme and its associates are not entitled to vote on a resolution at a meeting of scheme members if they have an interest in the resolution or matter other than as a member. This restriction applies to the resolutions for retirement and replacement of the responsible entity under s601FL.
- (c) whether the registered scheme would incur unnecessary costs and inconvenience to convene and hold a meeting of members.
- RG 136.86 If relief is granted, we will generally include conditions on the relief that require:
- (a) the responsible entity to give members materials dealing with the change of responsible entity which are similar to the explanatory memorandum that would have been provided with a notice of meeting; and
  - (b) unanimous member approval to ensure there is no diminution of members' rights due to a higher threshold for member approval than that required by s601FL.

### **Investment platforms that have a non-voting policy**

- RG 136.87 Member approval for a change of responsible entity under s601FL may be difficult to obtain when a significant proportion of the interests in the registered scheme are held by investment platforms that have a policy of not voting. This may make it difficult to obtain the requisite number of members to vote on a change of responsible entity, particularly for unlisted schemes that require a change to be approved by an extraordinary resolution under s601FL(1).

Note: For further information on investment platforms and the requirements for them to have and disclose a voting policy, see RG 148.56–RG 148.62.



RG 136.88 We will consider granting relief from s601FL(1) to facilitate a change of responsible entity when a significant percentage of the interests in the registered scheme are held by investment platforms that have a written policy of not voting, and so abstain from voting, by excluding these platform interests from the total votes that may be cast under an extraordinary resolution.

RG 136.89 Factors we may consider when deciding whether to grant relief include:

- (a) whether there is evidence provided by the applicant of the published voting policy of the relevant platform that demonstrates that the platform has a policy of not voting;

Note: For example, for an IDPS, we would ordinarily request the relevant extract from the IDPS Guide.

- (b) whether all members will have had the opportunity to vote on the resolution, subject to the self-imposed voting practices of the platform operators that have a written policy of not voting;
- (c) whether the responsible entity has demonstrated that it is not possible for a sufficient number of members to vote on the resolution after having held a members' meeting to consider the proposed resolution;
- (d) whether the platform operators have undertaken consultation with their own underlying clients about the proposed resolution;
- (e) whether the impact on members as a result of the change of responsible entity will be limited; and
- (f) whether there are other commercial benefits that would flow from granting relief, including any cost savings of pursuing alternatives and avoiding the entrenchment of a responsible entity that seeks to retire.

RG 136.90 If relief is granted, we will generally include conditions on the relief that require the responsible entity to:

- (a) notify all members in writing that if a platform operator has a policy of not voting, and abstains from voting, the vote will exclude them;
- (b) ensure a reasonable period of time elapses before the meeting can be reconvened and the vote counted (which would then exclude the votes of any non-voting platforms); and
- (c) ensure members who have previously submitted proxies for the original meeting may, for a period of at least 10 business days, withdraw or change their proxies after they have been given notice of the adjourned meeting.

## Offers to foreign members in a restructure

- RG 136.91 Under s601FC(1)(d) of the Corporations Act, a responsible entity has a duty to treat members who hold interests of the same class equally and members who hold interests of different classes fairly.
- RG 136.92 We will consider granting relief from s601FC(1)(d) so that foreign members in a registered scheme can be treated differently from other members if it is impracticable or unlawful to offer or issue interests to foreign members as part of a restructure of the scheme or similar proposal involving the scheme.
- RG 136.93 Factors we may consider when deciding whether to grant relief include:
- (a) whether the foreign members would have an equal opportunity to vote on the proposal;
  - (b) whether it would be disproportionately burdensome for the responsible entity to comply with foreign fundraising laws due to the number of foreign jurisdictions and the small number and percentage of foreign members relative to the total number of members in the registered scheme;
  - (c) whether any relevant costs of complying with such laws would be borne by all members of the registered scheme; and
  - (d) whether the foreign members receive cash or are entitled to participate in a cash-out facility to dispose of their existing interests, which other members receive.
- RG 136.94 If relief is granted, we will generally include conditions on the relief that require the responsible entity to:
- (a) fully inform foreign members of the proposed transaction; and
  - (b) give foreign members an equal opportunity to vote on the proposed transaction.

## Withdrawal arrangements

- RG 136.95 We may consider granting relief to enable:
- (a) withdrawal on hardship grounds for ‘frozen funds’: see RG 136.96–RG 136.104;
  - (b) ‘rolling’ withdrawal offers: see RG 136.105–RG 136.116; and
  - (c) registered schemes that provide marketplace lending products to offer withdrawals when the scheme is not liquid: see RG 136.117–RG 136.120.

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## Hardship relief for ‘frozen funds’

- RG 136.96 Under s601KA(3) of the Corporations Act, if a registered scheme is not liquid, a responsible entity must not allow a member to withdraw from the scheme except in accordance with the scheme’s constitution and s601KB–601KE.
- RG 136.97 The responsible entity of a registered scheme must treat the members who hold interests of the same class equally and members who hold interests of different classes fairly: see s601FC(1)(d).
- RG 136.98 We will consider granting relief to a responsible entity from the withdrawal provisions in s601KA(3)(b) and 601KB and the equal treatment provisions in s601FC(1)(d) to allow members suffering hardship to be paid in priority to other members if:
- (a) members invested in the registered scheme on the basis that the scheme would be liquid within the meaning of s601KA(4);
  - (b) the constitution gives members a right to withdraw;
  - (c) there is a reasonable expectation that members could ordinarily redeem their interests from time to time; and
  - (d) redemptions in the registered scheme are subsequently, and remain, suspended (also known as ‘frozen’).
- RG 136.99 This relief may apply if the payment meets one of the following hardship withdrawal criteria and conditions:
- (a) *severe financial hardship*—if the amount requested is needed to enable the person to meet reasonable and immediate living expenses for themselves and/or their dependants;
  - (b) *unemployment*—if the person has not been in gainful employment for a period of at least three months and has no other means of financial support (except government assistance, such as unemployment benefits);
  - (c) *compassionate grounds*—if the person does not otherwise have the financial capacity to meet one of following expenses and the amount requested is needed by the person and/or the person’s dependant to:
    - (i) help pay for medical costs (and transport costs) required to treat a life-threatening illness or injury, to alleviate acute or chronic pain, or to alleviate an acute or chronic mental disturbance where two registered medical practitioners (at least one of whom must be a specialist) have provided certified statements confirming the medical condition to this effect;
    - (ii) fund specific modifications to a principal place of residence or vehicle that are necessary to accommodate special needs arising from a severe disability;

- (iii) assist with funeral and other expenses related to the death of the person or the person's dependant;
  - (iv) enable the person to provide care for another person who is dying from a terminal illness, including home care;
  - (v) prevent the person's mortgagee (lender) from selling their principal place of residence;
  - (vi) meet a binding financial obligation entered into by the person before the responsible entity determined the registered scheme was non-liquid or otherwise determined that withdrawals should be suspended; or
  - (vii) meet expenses in other cases consistent with the grounds mentioned in paragraphs (i)–(vi); and
- (d) *permanent incapacity*—if the person has ceased gainful employment by reason of mental or physical ill-health and the responsible entity is satisfied that the person is unlikely ever again to engage in gainful employment of the type for which the person is reasonably qualified by education, training or experience.

RG 136.100 The relief allows a responsible entity to make hardship withdrawals to members. However, the decision to make such payments will be at the responsible entity's discretion because it will remain bound by its duties to act honestly, act in the best interests of members and to exercise a degree of care and diligence that a reasonable person would exercise in determining, for example, whether the fund has sufficient liquidity to make hardship withdrawals. The withdrawals remain subject to the provisions of the constitution.

RG 136.101 A decision by the responsible entity to allow members to withdraw from a registered scheme that is frozen must be based on hardship criteria specified in RG 136.99.

RG 136.102 Factors we may consider when deciding whether to grant relief include:

- (a) whether the fund is frozen (e.g. the scheme has become non-liquid or redemptions are suspended for an extended period);
- (b) whether retail client investors would have had a reasonable expectation when they invested that they could redeem on the basis that the fund is liquid;
- (c) whether a member has experienced hardship or is likely to experience hardship if the member is not allowed to withdraw;
- (d) the amount of available cash relative to the amount of registered scheme assets and funds under management;
- (e) the amount of anticipated hardship withdrawals that would need to be made and its impact on the fund's liquidity;

- (f) whether there would be sufficient remaining cash available for the day-to-day operation of the registered scheme;
- (g) whether the constitution allows the responsible entity to make hardship payments; and
- (h) the reasons why, and for how long, the fund has been frozen.

RG 136.103 Our consideration of the factor described in RG 136.102(c) also includes:

- (a) *where the member is an operator*—whether a person (‘instructor’) who has asked the operator to exercise a right to withdraw has experienced hardship or is likely to experience hardship if the operator is not allowed to withdraw; and

Note: An ‘operator’ in the context of RG 136.102(c) and RG 136.103(a) means a person who is a member of the scheme in its capacity as responsible entity or custodian of a registered scheme, a life company, trustee of a trust, trustee or custodian of a superannuation entity within the meaning of the *Superannuation Industry (Supervision) Act 1993* (SIS Act), trustee of a self-managed superannuation fund within the meaning of the SIS Act or provider or acquirer in relation to a custodial arrangement as defined in s1012IA.

- (b) *where the member is dead*—whether a beneficiary of the estate has experienced hardship or is likely to experience hardship if the executor or administrator of the estate is not allowed to withdraw.

RG 136.104 If relief is granted, we will generally include conditions on the relief that require the responsible entity to:

- (a) be satisfied on a reasonable basis that:
  - (i) following the withdrawal, the registered scheme property would include sufficient liquid assets for the day-to-day operation of the scheme;
  - (ii) satisfying the hardship withdrawal request would not result in breaching the applicable cap(s) on hardship withdrawals;
 

Note: For more on the applicable caps on hardship withdrawals, see [Information Sheet 111 Information for investors in frozen funds](#) (INFO 111).
  - (iii) any amount paid would not exceed the specific amount that is the subject of a hardship withdrawal request in respect of the hardship of the member, instructor or beneficiary (as applicable); and
  - (iv) any amount paid on withdrawal to an operator or an executor or administrator of the estate will be paid to the instructor or beneficiary after deduction of any fees and charges payable to the operator, executor or administrator (as applicable);
- (b) document how and why a decision to permit or refuse a hardship withdrawal was made; and
- (c) retain its decision documentation for seven years.

## Relief to enable 'rolling' withdrawal offers

- RG 136.105 Subsection 601KA(2) of the Corporations Act provides that if a registered scheme is not liquid (as defined under s601KA(4)), any withdrawal offer must satisfy the requirements of the constitution and s601KB–601KE. The responsible entity must not allow withdrawals to be made on any other basis: see s601KA(3)(a).
- RG 136.106 The requirements for a responsible entity to make a withdrawal offer to members while a registered scheme is non-liquid are outlined in Pt 5C.6. These requirements include:
- (a) a withdrawal offer may be made to the extent that particular assets are available and able to be converted to money in time to satisfy withdrawal requests that members may make;
  - (b) only one withdrawal offer may be open at any time; and
  - (c) if there is an insufficient amount of money available from the assets specified in the withdrawal offer to satisfy all withdrawal requests, the requests are to be satisfied proportionately.
- RG 136.107 We consider the non-liquid provisions provide an important distinction between withdrawal offers for non-liquid registered schemes and liquid registered schemes. Liquid schemes can offer at-call withdrawal provided:
- (a) the scheme has 80% of its assets in liquid assets; or
  - (b) the responsible entity reasonably believes that scheme property can be realised for market value within the period specified in the constitution for meeting redemption requests to meet the 80% test.
- RG 136.108 The non-liquid provisions were designed so that withdrawal offers for non-liquid registered schemes could only be made to the extent that particular assets are available and able to be converted to money in time to satisfy withdrawals.
- RG 136.109 Under s601KB(3), the withdrawal offer made to members must specify:
- (a) the period during which the offer will remain open (this period must be for 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 withdrawal requests if the money is insufficient to deal with all requests.
- RG 136.110 Under Pt 5C.6, a responsible entity is unable to make withdrawal offers unless there is sufficient information about the assets that will be used to satisfy the withdrawal offer and the amount of money available to satisfy

requests. This is to ensure that members have fair and equal access to liquidity.

- RG 136.111 The policy reason for the withdrawal offer specifying the assets that will be used to satisfy withdrawal requests, and the amount of money that is expected to be available when the assets are converted into money, is so that members will have a degree of certainty about whether they should participate in the withdrawal offer (and to what extent). Members are able to consider the assets that will be sold, the assets that will remain in the fund and the amount of cash available to satisfy requests.
- RG 136.112 We may consider granting relief from Pt 5C.6 to allow a responsible entity to implement a 12-month ‘rolling’ withdrawal offer where:
- (a) the registered scheme is frozen;
  - (b) the ‘rolling’ withdrawal offer has the following features:
    - (i) the offer exists for one calendar year and applies to all withdrawal opportunities made by the responsible entity over that calendar year;
    - (ii) all members can opt to provide withdrawal requests to the responsible entity, which may apply to all withdrawal opportunities offered by the responsible entity over the calendar year, or to those offered after the withdrawal request is received by the responsible entity, until it is withdrawn or amended by the member; and
    - (iii) all members can lodge a withdrawal request with the responsible entity at any time during the calendar year.
- RG 136.113 Factors we may consider when deciding whether to grant relief include:
- (a) whether the relief will improve members’ access to their money invested in a registered scheme; and
  - (b) the impact on members of changing or removing the content that is required to be specified in the withdrawal offer under s601KB(3)(b) and 601KB(3)(c).
- RG 136.114 Where we grant relief, we will require the rolling withdrawal offer to specify:
- (a) the number of withdrawal opportunities the responsible entity proposes to make over the 12-month term;
  - (b) how often the opportunities would be made and the terms on which the opportunities would be made;
  - (c) the period during which the rolling withdrawal offer would remain open;
  - (d) the basis on which money would be raised to pay for the withdrawal opportunities; and

- (e) the method for dealing with withdrawal requests if the money was insufficient to satisfy all requests.

RG 136.115 We may also limit the relief to a defined period or until the registered scheme becomes liquid.

RG 136.116 We will generally include conditions on the relief that require the responsible entity to:

- (a) provide all members with information about the amount of each withdrawal opportunity and how the withdrawal opportunity will be funded, before the withdrawal opportunity is open;
- (b) include reminders about members' ability to participate in the rolling withdrawal in member communications (e.g. in any correspondence, statement or disclosure provided to members);
- (c) notify all members in writing of the outcome of each withdrawal opportunity within a reasonable period after the outcome is known;
- (d) maintain a website that contains all relevant and up-to-date information on the rolling withdrawal offer;
- (e) distribute all available cash to members for so long as withdrawal requests exceed available cash; and
- (f) provide ASIC with details for each withdrawal opportunity, including the amount made available to satisfy each withdrawal opportunity, as soon as practicable after the withdrawal amounts are paid.

### **Relief for marketplace lending withdrawals**

RG 136.117 Subsection 601GA(4) of the Corporations Act requires that if members are to have a right to withdraw from a registered scheme, the constitution must specify the right and, if the scheme is non-liquid, provide for the right to be exercised under Pt 5C.6 and set out adequate procedures consistent with Pt 5C.6.

RG 136.118 We will consider granting relief from the requirements under s601GA(4) and Pt 5C.6 to facilitate cash withdrawals for a registered scheme that provides marketplace lending products where the scheme is not liquid. This means that the constitution would not be required to include provisions about a member's right to withdraw from a scheme while it is not liquid, and a withdrawal offer that complies with Pt 5C.6 would not need to be given to members who exercise their right to withdraw their cash.

RG 136.119 Factors we may consider when deciding whether to grant relief include:

- (a) whether the policy rationale for fair and equal access to liquidity behind the withdrawal provisions in Pt 5C.6 is compromised, having regard to the impact on a particular member, as well as the impact on the other members. When we consider whether the policy rationale is



compromised, we will generally consider whether the withdrawal request is made at the election of the member and whether the member has access to information about their available cash balance and the withdrawal process. When we consider the impact on other members, we will generally consider whether each member's interests comprise a separate class and are segregated from other members' investments;

- (b) whether the requirements under Pt 5C.6 would be relevant or necessary for a withdrawal of a cash component of a member's interest, having regard to the commercial structure of the registered scheme and whether cash is funding any withdrawal; and
- (c) whether the relief would facilitate providing members with a choice to withdraw their money in a timely manner, rather than having it remain invested in the registered scheme.

RG 136.120 If relief is granted, we will generally include conditions on the relief that require the responsible entity to ensure:

- (a) the procedures for withdrawal of the cash component to be specified in the registered scheme constitution;
- (b) disclosure in the Product Disclosure Statement (PDS) and on the relevant online platform of the withdrawal procedures and prominent disclosure of any restrictions on the withdrawal right (e.g. that any money invested in a loan cannot be withdrawn during the term of the loan or that if a request exceeds any available balance, a member can only withdraw up to that available balance);
- (c) on completion of a member's withdrawal request, a reminder to members about their standing arrangement (if any) and how this may be amended;
- (d) confirmation to a member in writing on how long it takes for a withdrawal request to be processed following a member's request; and
- (e) a determination by the responsible entity that satisfaction of a member's withdrawal request will not affect the assets of another member's portfolio.

## Deregistration of a registered scheme

RG 136.121 Under s601PA(1) of the Corporations Act, the responsible entity of a registered scheme may lodge an application for voluntary deregistration of the scheme with ASIC. The responsible entity may only apply if:

- (a) the scheme:
  - (i) has 20 or less members and all the members agree that the scheme should be deregistered; and
  - (ii) is not required to be registered by s601ED(1)(b) or (c); or

- (b) because of s601ED(2), the scheme is not required to be registered and all the members agree that the scheme should be deregistered; or
- (c) the scheme is not a managed investment scheme.

RG 136.122 We will consider granting relief to allow a responsible entity to lodge an application to deregister a scheme where all the members:

- (a) agree that the scheme should be deregistered;
- (b) were wholesale clients at the time they acquired (by way of issue or transfer) their interest in the scheme;
- (c) are wholesale clients at the time an application for deregistration is lodged; and
- (d) are each a body corporate.

RG 136.123 We may grant this relief because s601PA(2) does not appear to address the circumstances where retail client members of a registered scheme have exited and it becomes a scheme with only wholesale client members. The provisions of Ch 5C are directed to retail client protection, and granting relief in the circumstances where all of the members of the scheme are wholesale clients is not considered to compromise retail client protection.

## Closely related schemes: s601ED determination

RG 136.124 Under s601ED(3) of the Corporations Act we may determine in writing that a number of managed investment schemes are closely related and that each of them has to be registered at any time when the total number of members of all of the schemes exceeds 20.

RG 136.125 We will consider making a determination under s601ED(3) where:

- (a) the managed investment schemes are promoted by different persons but the circumstances and the similar nature of the schemes indicate that the promoters are likely to be associated; or
- (b) the businesses or activities of the managed investment schemes are similar, the schemes form part of a systematic promotion and there is doubt about whether the schemes fit within s601ED(1)(a) or (b). This doubt may arise because:
  - (i) the interests being offered relate to separate pools or common enterprises and might not all be part of one scheme; or
  - (ii) the schemes might not have been promoted as a business because the relevant activities in Australia may not be conducted with system, repetition and continuity to constitute a 'business'; or

- (c) the managed investment schemes are:
  - (i) so similar that the one PDS might reasonably relate to offers of interests in the schemes; and
  - (ii) structured as separate schemes so that the offers are ‘excluded offers’ because no more than 20 offers will be made in 12 months for each scheme.

RG 136.126 In our view, s601ED(3) is an anti-avoidance mechanism to prevent promoters avoiding the registration requirement by structuring their offers as separate managed investment schemes each having less than 20 members, but which in aggregate have more than 20 members. We consider it also allows us to prevent promoters from relying inappropriately on the ‘20 offers in 12 months’ exclusion by calculating the 20 offers separately for each separate but related scheme.

RG 136.127 A managed investment scheme must also be registered if it is promoted by a person who is in the business of, or whose associate is in the business of, promoting managed investment schemes: see s601ED(1)(b). We can determine that schemes are closely related and can require schemes to be registered when their total membership is over 20: see s601ED(1)(c) and 601ED(3).

RG 136.128 We may make a determination under s601ED(1)(c) to:

- (a) prevent avoidance by separate promoters offering similar schemes;
- (b) provide certainty when there are questions as to whether s601ED(1)(a) or (b) apply because it is not clear if:
  - (i) closely related common enterprises or pools may form part of one scheme; or
  - (ii) the promoters are in the business of promoting schemes; or
- (c) prevent use of the 20 offers in 12 months exclusion in s1012E when it is inappropriate. We think it is inappropriate to rely on that exclusion if the one disclosure document could cover the relevant schemes in a cost effective way, but schemes have been established separately for avoidance purposes. We will infer avoidance purposes unless a reasonable alternative explanation is provided to us.

RG 136.129 We will act with procedural fairness in relation to each promoter before making a determination. However, we consider that we have been given the power to make determinations so that we can make a prompt decision. We are not bound by the rules of evidence in considering a determination.

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## Key terms

Term	Meaning in this document
AFS licence	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  Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act  Note: This is a definition contained in s761A.
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
ASIC	Australian Securities and Investments Commission
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	A corporate collective investment vehicle—a company that is registered as a corporate collective investment vehicle under the Corporations Act  Note: This is a definition contained in draft s9 of the Corporations Act.
Ch 5C (for example)	A chapter of the Corporations Act (in this example numbered 5C), unless otherwise specified
corporate director	The company named in ASIC's record of the CCIV's registration as the corporate director or temporary corporate director of the CCIV  Note: This is a definition contained in draft s9 of the Corporations Act.
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
Div 2 (for example)	A division of the Corporations Act (in this example numbered 2), unless otherwise specified
foreign passport fund	A passport fund with a home economy other than Australia
home economy	The participating economy in which a passport fund is first registered, approved or authorised as a regulated collective investment scheme

DRAFT

Term	Meaning in this document
home regulator	The passport regulator in a passport fund's home economy
host economy	A participating economy that is not the passport fund's home economy and either: <ul style="list-style-type: none"> <li>permits the fund to offer interests in the fund in that economy under the Asia Region Funds Passport; or</li> <li>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)</li> </ul>
host regulator	The passport regulator in a passport fund's host economy
IDPS	An investor directed portfolio service as defined in <a href="#">Class Order [CO 13/763]</a> <i>Investor directed portfolio services</i> or any instrument that amends or replaces that class order
IDPS Guide	A document provided by an IDPS operator instead of a PDS to help retail clients decide whether they should use the IDPS
IDPS-like scheme	An investor directed portfolio services-like scheme as defined in <a href="#">Class Order [CO 13/762]</a> <i>Investor directed portfolio services</i> , provided through a registered scheme, or any instrument that amends or replaces that class order
managed investment scheme	Has the meaning given in s9 of the Corporations Act
Memorandum of Cooperation	The <a href="#">Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport</a>
participating economy	An economy that is a participant under the Memorandum of Cooperation (while it is in effect) and has: <ul style="list-style-type: none"> <li>advised the Asia Region Funds Passport Joint Committee that it has implemented the Asia Region Funds Passport; and</li> <li>not withdrawn from the Memorandum of Cooperation</li> </ul>
passport fund	A regulated collective investment scheme, or a sub-fund of a regulated collective investment scheme, registered as a passport fund in a participating economy
passport fund operator	An entity that operates a passport fund
passport regulator	The entity that regulates passport funds in a participating economy
Passport Rules	The requirements in Annex 3 to the Memorandum of Cooperation, as incorporated into the domestic law of a participating economy <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>

Term	Meaning in this document
PDS	<p>A Product Disclosure Statement—a document that must be given to a retail client for 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>
platform	<p>An investor directed portfolio service (IDPS) and IDPS-like scheme</p> <p>Note: This term does not extend to nominee and custody services, superannuation master trusts or other superannuation funds, self-managed superannuation funds, or managed discretionary accounts, as defined in <a href="#">Regulatory Guide 179</a> <i>Managed discretionary accounts</i> (RG 179).</p>
Pt 7.6 (for example)	A part of the Corporations Act (in this example numbered 7.6), unless otherwise specified
register of passport funds	A register of all current and deregistered passport funds in a home economy, maintained by the home regulator
registered scheme	A managed investment scheme that is registered under s601EB of the Corporations Act
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"> <li>• as a retail client; or</li> <li>• under a custodial arrangement and a PDS had to be provided to the member before the acquisition</li> </ul> <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 51 (for example)	An ASIC regulatory guide (in this example numbered 51)
s795B (for example)	A section of the Corporations Act (in this example numbered 795B), unless otherwise specified
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>
wholesale CCIV	A CCIV that is not a retail CCIV
wholesale client	A client who is not a retail client as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of the Corporations Regulations

## Related information

### Headnotes

AFS licence, AFS licensing, application for relief, Asia Region Funds Passport, Australian passport fund, Australian Passport Rules, CCIV, closely related schemes, compliance committee, compliance plan, corporate collective investment vehicle, corporate director, deregistration, discretionary powers, exemption, managed investment scheme, members, modification, operator, registered scheme, relief, responsible entity, stapled securities, withdrawal arrangements

### Regulatory guides

Draft RG 000 *Foreign passport funds*

[RG 43](#) *Financial reports and audit relief*

[RG 49](#) *Employee incentive schemes*

[RG 51](#) *Applications for relief*

[RG 76](#) *Related party transactions*

[RG 77](#) *Property trusts and property syndicates*

[RG 80](#) *Managed investment schemes: Interests not for money*

[RG 87](#) *Charitable schemes and school enrolment deposits*

[RG 91](#) *Horse breeding schemes and horse racing syndicates*

[RG 140](#) *Strata schemes and management rights schemes*

[RG 144](#) *Mortgage investment schemes*

[RG 148](#) *Platforms that are managed investment schemes and nominee and custody services*

[RG 160](#) *Time-sharing schemes*

[RG 161](#) *Share and interest sale facilities*

[RG 174](#) *Relief for externally administered companies and registered schemes being wound up*

[RG 195](#) *Group purchasing bodies for insurance and risk products*

## **Legislation**

Corporations Act, Pts 5C.4, 5C.6, 7.6–7.8, 7.9, Chs 5C, 7, s252R, 253E, 601ED, 601FC, 601FD, 601FL, 601GA, 601HG, 601JA, 601JB, 601KA, 601KB–601KE, 601LC, 601PA, 601QA, 926A, 951B, 992B, 1012E, 1020F, 1012IA

Corporations Amendment (Asia Region Funds Passport) Bill 2017 (exposure draft), draft Ch 8A, draft s1211, 1211A, 1217, 1217A

SIS Act

Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2017 (exposure draft), draft Ch 7A

## **Information sheets**

[INFO 111](#) *Information for investors in frozen funds*

## **Consultation papers**

[CP 296](#) *Funds management*

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