



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 77

On-market buy-backs by ASX-listed schemes

December 2006

What this paper is about

This consultation paper sets out our proposed policy on on-market buy-backs of interests in managed investment schemes that are listed on the Australian Securities Exchange (ASX). Following the consultation process, we propose to issue final policy.

The release of this paper has been prompted by industry concerns that the existing regulation of withdrawals from schemes makes it difficult for listed schemes to use the capital management techniques available to listed companies. For example, on-market buy-backs by listed 'non-liquid' schemes are difficult to implement because of the application of the withdrawal procedures in Pt 5C.6 of the Act. A comparison between companies and schemes is set out in the Appendix to this paper.

Our proposals are particularly relevant to ASX-listed property and infrastructure trusts.

We invite your comments on our proposals and questions in this paper. We would also like to receive any qualitative or quantitative information to support those comments, particularly in relation to costs.

All submissions will be treated as public documents unless you specifically request that we treat the whole or part of your submission as confidential.

Your comments

Comments are due by 12 March 2007 and should be sent to:

Grant Moodie
Senior Lawyer, Regulatory Policy Branch
Australian Securities and Investments Commission

GPO Box 9827
Sydney, NSW 2001
fax: 02 9911 2316
email: misbuyback_project@asic.gov.au

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

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Section 1: Our proposed relief

1.1 We propose to give relief from provisions of the Act to facilitate the responsible entity of a registered scheme listed on ASX to carry out an on-market buy-back of scheme interests. Specifically, relief will be granted from the following requirements:

- (a) adequate provisions in the constitution for withdrawal price (s601GA(4));
- (b) withdrawal procedures for non-liquid schemes (Pt 5C.6); and
- (c) takeover rules (an exception modelled on item 19 of s611).

1.2 We propose to give relief only to buy-backs carried out in the ordinary course of trading on ASX. We do not propose to give relief from the equal treatment rule in s601FC(1)(d) in relation to an on-market buy-back because we are of the view that relief is not necessary apart from ‘crossings’. We do not consider relief in relation to ‘crossings’ appropriate in any event.

Table 1: Summary of requirements for our proposed relief

<p>Scheme’s constitution must provide a formula or method for determining the withdrawal (buy-back) price</p>	<p>The formula or method must be based on the market price of interests (or stapled securities, if applicable) on ASX and may allow for a discount from or for a premium to that price by or up to an amount specified in the constitution. The requirements of Class Order [CO 05/26] <i>Constitutional provisions about the consideration to acquire interests</i> will apply to require that the responsible entity documents the exercise of any discretions in relation to the setting of the buy-back price.</p>
<p>Buy-back price must not be more than 5% above the average of the market price</p>	<p>The buy-back price must not be more than 5% above the average of the market price for the interests (or stapled securities), where the average is calculated over the last 5 days on which sales were recorded before the day on which the purchase was made.</p>
<p>Buy-back exceeds ‘10/12 limit’</p>	<p>If the buy-back exceeds the ‘10/12 limit’, member approval must be obtained. Members must be given all information known to the responsible entity that is material to the decision how to vote on the resolution.</p>
<p>Buy-back within the ‘10/12 limit’</p>	<p>If the buy-back is within the ‘10/12 limit’, member approval is not required but certain additional disclosures must be made to the market at the time of announcing the buy-back, and the buy-back must not commence until 21 days have elapsed from the date of making the announcement.</p>

Ordinary course of trading	The buy-back must be carried out in the ordinary course of trading on ASX. 'Crossings' will not be permitted.
Interests bought back must be cancelled	Any interests bought back must be cancelled as soon as reasonably practicable.
Lodgment of notice with ASIC not required	The ASX is obliged under the Act to pass information it makes available to the market to ASIC. This will provide ASIC with enough information about on-market buy-backs to fulfil its role regulating compliance without needing further information from the responsible entity.
No material prejudice to scheme creditors	The buy-back must not materially prejudice the responsible entity's ability to pay scheme creditors.

1.3 In developing our policy, we will be balancing two main factors. We will balance the special protections that the Act considers appropriate in relation to members of registered schemes, particularly in relation to withdrawals, with the desire to give listed schemes the opportunity to use a range of capital management techniques to serve the best interests of members, similarly to those that are available to listed companies. We have also considered the impact of our policy on creditors of the responsible entity as trustee for a scheme.

The schemes to which relief may apply

1.4 There are just over 100 schemes listed on the ASX. Of these, approximately 67 are property trusts and 21 are infrastructure funds. We expect these schemes to be 'non-liquid' schemes having regard to the nature of the assets they hold and the likelihood that there is no provision in the constitution for a period during which the responsible entity must allow withdrawal after a member requests it.

1.5 Furthermore, approximately 50% of all property trusts and almost all infrastructure funds form part of a stapled group.

1.6 There are approximately 50 schemes (either stand alone or which form part of a stapled group) that fall within the S&P/ASX 300 Index. The overwhelming majority of these are property trusts and infrastructure funds.

Your feedback

Q1 Should our proposals for relief also apply to schemes listed on other prescribed financial markets? If so, why? If not, why not?

Section 2: Withdrawals under Part 5C.6

Part 5C.6 and ASX market rules

2.1 The withdrawal procedures in Pt 5C.6 cannot operate consistently with the ASX market rules.

2.2 The procedures for withdrawal under Pt 5C.6 ensure that all members of a non-liquid scheme are given express notice of a withdrawal offer, certainty that the withdrawal offer will remain open for a minimum period of time (21 days), and an equal opportunity to make a withdrawal request in response to the withdrawal offer and to have their withdrawal request satisfied in full or on a proportional basis. ASIC regards this legislative policy as an important protection. The procedures under Part 5C.6 seek to strike an appropriate balance between the rights and interests of withdrawing and remaining members. An on-market buy-back of interests does not produce identical regulatory outcomes to Pt 5C.6.

2.3 On-market buy-backs by nature are continuous buy-backs. The rules of ITS and CHESSE require trades to be settled within 3 days of the transaction (known as T + 3 settlement). For an on-market buy-back, this means the responsible entity must make the purchase within 3 days. However, under s601KD, the responsible entity must not satisfy withdrawal requests until the close of the withdrawal offer period (which must be a minimum of 21 days) and the proportional satisfaction requirement could only be calculated at the end of the withdrawal offer period.

2.4 Payments by a responsible entity out of scheme property to members in return for the member's rights in the scheme being terminated may be a withdrawal for Pt 5C.6. Therefore, in the absence of relief, s601KD may have the effect of preventing an ASX-listed property or infrastructure trust from engaging in an on-market scheme buy-back.

2.5 We propose to give relief from Pt 5C.6 to non-liquid ASX-listed schemes to facilitate their carrying out an on-market buy-back.

2.6 The important policy objectives of Pt 5C.6 discussed in para 2.2 are arguably less relevant for non-liquid schemes which are listed because all members have the ability to liquidate their investment by selling on-market at any time.

Your feedback

Q2 Do you agree that our proposal to give relief from Pt 5C.6 for an on-market buy-back does not undermine the intended protective purpose of this Part, in the case of a non-liquid scheme which is listed on ASX? If not, why not?

Section 3: Buy-back price

Independently verifiable price

3.1 The Act requires that if members have a right to withdraw, the constitution must specify the right and set out adequate procedures for withdrawal in a way that is fair to all members. This requires the constitution to include a method for calculating the withdrawal price that is independently verifiable: s601GA(4) and Policy Statement 134 *Managed Investments: Constitutions*.

3.2 We propose to give relief from s601GA(4) by giving the responsible entity the discretion to set the buy-back price within certain limits. We believe this relief will facilitate the responsible entity carrying out an on-market buy-back of interests in a listed scheme.

3.3 We propose to require the scheme's constitution to provide a formula or method for determining the withdrawal (buy-back) price. The formula or method must be based on the market price of interests (or stapled securities, if applicable) on the ASX and may allow for a discount from, or addition of a premium to, that price by or up to an amount specified in the constitution. Any premium to market price must not be more than the ASX price ceiling (see below).

3.4 We propose that the requirements of s601GAC of the Act as modified by Class Order [CO 05/26] will apply to ensure the responsible entity documents its exercise of any discretion in relation to the setting of the buy-back price. We propose that the requirement for notification to members that they have the right to a copy of documentation the responsible entity produces on its discretion apply from 30 September 2008. This is intended to provide a sufficient period of time for the responsible entity to make arrangements to include this notification in the scheme's annual report. We also propose that the responsible entity must provide the documentation on request by a member unless the responsible entity is of the view that disclosure of the information at that time is not in the best interests of the members (eg where the request is made during a current buy-back).

Your feedback

Q3 Which factors influence the setting of the buy-back offer price/s over the course of an on-market buy-back?

Q4 How does the application of those factors result in the responsible entity satisfying itself that the buy-back price for a particular purchase is in the best interests of members?

- Q5** Would the release of information during an on-market buy-back concerning the responsible entity's buy-back pricing formula or method and any discretions exercised in relation to buy-back pricing, not be in the best interests of the members? If so, why and, if not, why not?
- Q6** What is your estimate of the record-keeping costs that are likely to be incurred in maintaining records in relation to the exercise of the responsible entity's discretions in setting the buy-back price? Are there any practical difficulties in preparing, keeping and making available copies of the documentation?

Market price v net asset backing per interest

3.5 The market price of an interest is not likely to be the same as the net asset backing price per interest at any particular point in time, particularly where the net asset backing price is calculated in accordance with the accounting standards. The market price of quoted interests in an ASX-listed scheme ordinarily changes on a daily basis. Net asset backing price of an interest in an ASX-listed scheme is not ordinarily calculated on a daily basis.

3.6 The buy-back offer price (withdrawal price) would be expected to change throughout the course of an on-market buy-back in line with the prevailing market price quoted on ASX. A scheme's constitution could satisfy s601GA(4) by making the buy-back price specifically referable to the market price. However, the responsible entity may wish to place buy orders which are above the prevailing market price of the interests to buy the interest it seeks under the buy-back and in so doing set a new market price. In doing so it would be exercising a discretion that would result in the price not being independently verifiable. The responsible entity, in exercising this discretion, must ensure that it is acting in the best interests of members in setting the buy-back offer price/s.

3.7 Under the ASX price ceiling in ASXLR 7.33, the buy-back price must not be more than 5% above the average of the market price for shares/interests, where the average is calculated over the last 5 days on which sales in the shares/interests were recorded before the day on which the purchase was made. The primary purpose of the ASX price ceiling is to prevent entities from using the buy-back as a means of artificially increasing or manipulating the market price.

3.8 To buy back interests at a price exceeding the net asset backing per interest may dilute the value of holdings of those members who do not participate in the buy-back. This is because the buy-back is being funded from scheme property and scheme members have a beneficial interest in all scheme property.

3.9 Accordingly, the view could be taken that a responsible entity which buys back interests at a price exceeding their net asset backing per interest would be in breach of its duty to act in the best interests of members. This view is premised on net asset backing per interest being the appropriate measure of the ‘true’ value of a quoted interest in an ASX-listed scheme for the purposes of assessing dilution to remaining members.

3.10 There is the countervailing view that the more appropriate measure of the ‘true’ value of a quoted interest in an ASX-listed scheme is the market price. A buy-back offer price exceeding the prevailing market price may still be in the best interests of members. This is because remaining members may benefit by many prospective sellers being taken out of the market and because higher returns may be able to be derived by the scheme on the remaining funds than would be derived on the funds applied in the buy-back.

Our preferred option for price setting

3.11 Our proposed policy is to impose the ASXLR price ceiling and not any test based on net assets. Our preliminary view is that the net asset backing ceiling is neither appropriate nor necessary for the following reasons:

- (a) a net asset backing test represents a historical assessment of value rather than a current valuation of the scheme priced through an efficient market. The latter could be argued to provide a more accurate measure of value;
- (b) even though the ASX price ceiling is imposed by ASX for the purpose of preventing entities from artificially increasing their market price, it also has the effect of limiting the potential for dilution to tolerable levels;
- (c) Class Order [CO 05/26] grants relief from the s601GA requirement for issues of interests, by way of placement, in a class of ASX-quoted interests. ASIC allows placements to be made at a discount to market price of up to 10%, without requiring member approval. This is the case even though placements at a discount may dilute the value of existing interests in the scheme. This policy is premised on the ‘true’ value of an ASX-quoted interest being determined by reference to market price. The market regulates the depth of any discount and establishes an appropriate reference point for measuring it. To the extent that a buy-back of interests at a price which is at a premium to market price may also dilute the interests of remaining members, it would be consistent with our policy on placements of ASX-quoted interests to assess that dilution risk by reference to market price.

3.12 The basis for reliance on the ASX price ceiling is that the price set can be relied on as a measure of value. This basis is weaker to the extent there is a less deep market that has produced the price. There is a view that our policy should be limited to entities whose securities have significant trading volumes, both in terms of size and frequency, e.g. the S&P/ASX 300 Index (ASX Top 300). The ASX Top 300 is based on market capitalisation and liquidity.

3.13 We are not satisfied that it is necessary for the purposes of our proposed relief to restrict the relief to a subset of ASX listed schemes. To restrict our policy to the schemes (including stapled entities which comprise a scheme) to the ASX Top 300 would have the practical effect of halving the number of schemes which may wish to rely on our proposed relief. Any restriction may result in some schemes being falling in and out of eligibility for the relief.

Your feedback

- Q7** Should we also impose a net asset backing price ceiling in order to ensure that the interests of remaining members are not diluted?
- Q8** If so, what is the appropriate method/s for calculating net asset backing per interest? Why is one method more appropriate than other methods?
- Q9** What other thresholds or criteria might be appropriate to ensure the market pricing mechanism operates in a way to constrain the responsible entity from influencing the market price?
- Q10** If we were to limit our relief to schemes which fall within the ASX Top 300, does this unreasonably restrict small and less-frequently traded ASX listed schemes from accessing relief? If so why, and if not, why not?
- Q11** Is reasonable to regard the ASX market price as a reliable reference to determine the appropriate buy-back price for the full range of ASX listed schemes or for schemes listed on other prescribed markets? If so why, and if not, why not?

Section 4: Buy-back approval

The '10/12 limit'

4.1 We propose that an on-market buy-back of interests which is within the '10/12 limit' will not require member approval. But where the buy-back will exceed the '10/12 limit', member approval will be necessary.

4.2 In our view, on-market buy-backs of interests which are within the '10/12 limit' are unlikely to raise significant implications so as to warrant member approval. However, buy-backs which exceed the '10/12 limit' may be more likely to give rise to significant control and dilution issues.

4.3 The greater the size of the buy-back, the greater the risk that it will entrench the responsible entity's control, should it and its associates not sell into the buy-back. Also, the greater the size of the buy-back, the greater the amount of scheme property which will be required to fund the buy-back and, depending on the buy-back price, the greater the risk of dilution of the value of interests of those members who do not sell into the buy-back. Therefore, it is considered appropriate to require member approval for buy-backs which exceed the '10/12 limit'.

Member meeting to approve buy-back

4.4 Listed schemes, unlike listed companies, are under no obligation to hold an annual general meeting (AGM). Therefore, it may be necessary to convene and hold a meeting of members specifically for the purpose of approving a proposed buy-back which exceeds the '10/12 limit'. We do not believe this is disproportionately burdensome for buy-backs which will exceed the '10/12 limit'. We also note that in the case of stapled groups where at least one of the stapled entities is an Australian company, a members' meeting would need to be held in any event, which would provide an opportunity for scheme members to vote on the buy-back resolution.

4.5 Our proposed policy is modelled on the rules that apply to on-market share buy-backs under Pt 2J.1 (discussed in the Appendix).

Your feedback

Q12 Is it appropriate to adopt a '10/12 limit' modelled on the share buy-back provisions? If not, why not?

Q13 For schemes that are not stapled to a company, please provide an estimate of the costs that are likely to be incurred in convening and holding a meeting to obtain scheme member approval?

Q14 For schemes that are stapled to a company (for which shareholder approval would be required under Pt 2J.1), please provide an estimate of the incremental costs that are likely to be incurred in obtaining scheme member approval?

Voting restrictions at members' meeting

4.6 A responsible entity and its associates are not permitted to vote their interests on a resolution at a meeting of scheme members if they have an interest in the resolution other than as a member: s253E. This is subject to one exception—a responsible entity and its associates can vote their interests on a resolution to replace the responsible entity if the scheme is listed.

4.7 In our view, the prohibition in s253E would apply if the resolution impacts on the responsible entity as responsible entity and not merely as a member. In certain circumstances, a buy-back resolution might impact on the responsible entity not only as a member but also as responsible entity, e.g. where the responsible entity and its associates jointly have a significant interest in the scheme but do not intend to participate in the buy-back. However, in other circumstances (e.g. where the responsible entity or its associates intend to participate in the buy-back), it might be the case that they have an interest in the resolution only in their capacity as members of the scheme and are therefore not prohibited from voting on the buy-back resolution.

4.8 We do not propose to impose additional voting restrictions on the responsible entity or its associates because the existing provisions of the Act appear adequate to regulate conflicts of interest.

Your feedback

Q15 What other voting restrictions ought to apply (if any)?

Information for notice of members' meeting

4.9 We propose that the information to accompany a notice of a members' meeting for an on-market buy-back of interests which exceeds the '10/12 limit' should include all information known to the responsible entity that is material to the decision how to vote on the resolution. The responsible entity need not disclose information if it would be unreasonable to do so because the responsible entity had previously disclosed the information to members.

4.10 This test is modelled on s257C(2) which applies to share buy-backs which require member approval. As a minimum, we would expect the responsible entity to disclose the following:

(a) the number of interests on issue;

- (b) the number and percentage of interests to be bought back;
- (c) the reasons for the buy-back;
- (d) the interests of the responsible entity and any associate of the responsible entity who may participate in the buy-back;
- (e) the financial effect of the buy-back on the scheme;
- (f) the source of funds for the buy-back;
- (g) the date the buy-back offer will commence and close;
- (h) the most recent set of financial statements for the scheme (unless they have been recently given to scheme members) or a statement that the most recent set of financial statements can be obtained from the scheme's or the ASX's website; and
- (i) information regarding the current market price of the interests and any additional information that the ASXLRs require to be disclosed.

4.11 These minimum disclosures are generally consistent with Policy Statement 110: *Share buy-backs*: see [PS 110.45]. In certain circumstances, it might be appropriate to disclose the voting intentions (if known) of any controlling member, the responsible entity and its associates because this might be material information to other scheme members in deciding how to vote. Also, whether those parties intend to participate in the buy-back and the effect on their voting power if they do not participate in the buy-back, might also be material information. Depending on the circumstances, the failure to disclose this type of information could lead to the making of a declaration of unacceptable circumstances by the Takeovers Panel: *Village Roadshow Limited 03* [2004] ATP 22.

Your feedback

Q16 Is it appropriate to specifically require disclosure of voting intentions, participation intentions and effect on voting power in relation to the responsible entity, its associates and any controlling member?

Q17 Are there any other disclosures that ought be made?

Conditions on buy-back where approval not required

4.12 Even where the on-market buy-back is within the '10/12 limit' such that member approval is not required, we are of the view that it is still appropriate to impose some conditions to ensure that members are given, to the extent possible having regard to the nature of an on-market buy-back, an equal opportunity to participate in the buy-back.

4.13 The ASXLRs do not require entities to send notices to members in relation to on-market buy-backs. We are not convinced that a

requirement to send notices to members ought be imposed. Instead, we propose that any additional disclosures which are considered appropriate be made to the market utilising the existing market notices under the ASXLRs, principally Appendix 3C: *Announcement of buy-back*. We propose that the following information must be included:

- (a) the interests of the responsible entity and any associate of the responsible entity who may participate in the buy-back; and
- (b) the source of funds for the buy-back.

4.14 We think this type of information is important, even for buy-backs of interests which are within the '10/12 limit'.

4.15 We considered proposing disclosure of the buy-back price or a simple formula or method to calculate the buy-back price and, if the formula allows the responsible entity to exercise discretion in relation to the buy-back price, how the responsible entity proposes to exercise that discretion. However, disclosure of this type of information might be inappropriate because it could interfere with the competitive and anonymous bid/offer processes of the market.

4.16 We also propose to impose a requirement that the buy-back must not commence until at least 21 days have elapsed after announcing the buy-back through ASXLR Appendix 3C. Scheme members, who will not be required to approve the buy-back, ought to be given sufficient time to be made aware of the intended buy-back. This is intended to promote an equal opportunity to participate in the buy-back, having regard to our proposed policy not to require notices or withdrawal offers to be sent to scheme members.

Your feedback

Q18 Please provide an estimate of the costs likely to be incurred in making the disclosures contemplated in paragraph 4.13 to the extent that they would not be required under the ASXLRs? To what extent do the cost savings in not having to send notices to members outweigh the costs of making these additional disclosures?

Q19 Does the proposed requirement to wait 21 days after the announcement before commencing the on-market buy-back cause commercial difficulties? If so, why?

Q20 Would disclosure of the responsible entity's buy-back pricing formula or method and information on how it intends to exercise any discretions in relation to buy-back pricing, cause distortions in market trading practices? If so, why and, if not, why not?

Section 5: Buy-backs in the ordinary course of trading

- 5.1** We propose that the relief to facilitate on-market buy-backs by ASX-listed schemes be limited to buy-backs carried out in the ordinary course of trading on ASX.
- 5.2** We do not propose to give relief from the equal treatment rule in s601FC(1)(d) in relation to an on-market buy-back because we are of the view that relief is generally not necessary and, in relation to ‘crossings’, not appropriate in any event.
- 5.3** Generally, buying back interests in the ordinary course of trading on ASX is a fair procedure. This is because trades on ITS operate according to price–time priority. This results in the better-priced orders taking priority. If there is more than one order at the same price, the order that was placed first takes priority, except in the case of ‘crossings’.
- 5.4** A ‘crossing’ is essentially a transaction where the broker acts for both the buyer and the seller. The ASX Market Rules do not permit ‘special crossings’ for on-market buy-backs (Market Rule 20.9.1).
- 5.5** The ASX Market Rules do not expressly prohibit ‘priority crossings’ during on-market buy-backs. There is some doubt as to whether ‘priority crossings’ on ITS are in the ordinary course of trading.
- 5.6** Even where crossings might be considered to be in the ordinary course of trading, they could amount to unequal treatment in contravention of s601FC(1)(d) because participation in the buy-back might be on unequal terms.
- 5.7** In a ‘priority crossing’, a broker acting on behalf of the responsible entity may come to an agreement with certain scheme members to purchase a specified volume of interests at a specified ‘crossing price’. To execute the order on ITS, the broker will enter a crossing order at the crossing price (buy-back price). If there is an offer to sell in ITS at a price which is one price point less than the crossing price, and that situation exists for at least 10 seconds, ITS will execute the trade by matching with the crossing order, offers to sell at prices less than the crossing price. Then, ITS will satisfy any remaining part of the crossing order at the crossing price. But ITS will not satisfy pre-existing sell orders which are at the crossing price and which would otherwise have time priority.
- 5.8** Therefore, scheme members who do not form part of the pre-arranged crossing (i.e. excluded sellers) but who wish to sell into the buy-back, would be denied an equal opportunity to participate in the buy-

back through ITS at the crossing price. Even though the excluded sellers may be successful in selling their interests into the buy-back by entering independent sell orders through ITS at a price which is less than the crossing price, they are denied an equal opportunity to participate in the buy-back because:

- (a) the excluded sellers will be required to speculate on the crossing price so they can enter sell orders at a lower price and thereby seek to have their orders transacted through ITS; and
- (b) their sell orders may later transact on ITS at a lower price than the buy-back price.

5.9 In our view, an on-market buy-back of interests carried out, partially or wholly, by way of a priority crossing is likely to contravene the equal treatment rule. We do not propose to give relief to facilitate priority crossings.

Your feedback

- Q21** Does the inability to engage in priority crossings when carrying out an on-market buy-back of interests cause commercial difficulties? If so, why?

Section 6: Takeovers provisions

6.1 The takeovers provisions in Ch 6 of the Act cover acquisitions of voting shares in listed companies and voting interests in listed schemes. The Takeovers Panel may have powers with respect to buy-backs to the extent they involve effects on control or potential control.

6.2 Section 606 prohibits certain acquisitions of relevant interests in voting shares. Section 611 sets out a list of exceptions to the main prohibition. An acquisition that results from a share buy-back authorised by s257A is one exception. The reason for the exception is to avoid duplication of regulation as between the takeover provisions and the share buy-back provisions.

6.3 On-market buy-backs do not ordinarily raise control issues. However, an on-market buy-back, particularly a buy-back which exceeds the '10/12 limit', could have the effect of entrenching the responsible entity's control, if the responsible entity and its associates do not sell into the buy-back. For that reason, we propose to require member approval where a buy-back exceeds the '10/12 limit' (see Section 4).

6.4 We propose to grant relief to exempt acquisitions that result from on-market buy-backs by listed schemes from the takeovers provisions when they otherwise comply with the terms of our proposed relief.

Your feedback

Q22 Do you agree that it is appropriate to apply the same takeovers exceptions made for share buy-backs to on-market interest buy-backs? If not, why not?

Section 7: Lodgments with ASIC

7.1 We propose that the responsible entity of an ASX-listed scheme will not be required to give separate notice to ASIC in relation to an on-market buy-back. This will apply to both liquid and non-liquid schemes and regardless of whether the buy-back is within or exceeds the '10/12 limit'.

7.2 We propose to adopt this position because we will receive this information from the ASX in any event, and this will be sufficient for us to perform our compliance role.

7.3 The ASX must give ASIC any information that the ASX makes available to the market: s792C. This would include the buy-back notices under the ASXLRs. Therefore, ASIC would be made aware of the commencement, ongoing status and cessation of any on-market buy-back through the ASX notices. This will also include a notice of meeting to consider a buy-back resolution and explanatory material accompanying the notice.

Notices by non-liquid schemes

7.4 The responsible entity of a non-liquid scheme which makes withdrawal offers under Pt 5C.6 must lodge a copy of the withdrawal offer with ASIC as soon as practicable after making the offer: s601KB(5).

7.5 In our view, the principal reason for requiring lodgment of withdrawal offers by non-liquid schemes is to enable ASIC to monitor whether the withdrawal offer complies with the Act.

7.6 Notices for share buy-backs (Forms 280/281) are intended to assist creditors or potential creditors seeking current information on a company's capital structure. We are of the view that it is inappropriate to impose similar requirements for on-market buy-backs by non-liquid schemes because creditors will be made aware of the on-market buy-back by the disclosures made through the ASX.

7.7 To the extent the notices are intended to allow ASIC to perform its compliance role, we think it is important for notifications to be made to ASIC. However, ASIC will receive the information from the ASX, rendering it unnecessary to impose any further and specific notification obligation on the responsible entity of the listed scheme.

Your feedback

Q23 Please provide an estimate of the costs likely to be incurred if our policy required you to separately notify ASIC of details of the on-market buy-back (including notice of meeting (if applicable), notice of commencement of buy-back and notice of cancellation of interests)?

Section 8: Interests of creditors

8.1 The share buy-back provisions in Ch 2J only allow companies to buy-back shares if the buy-back does not materially prejudice the company's ability to pay its creditors: s257A(a). There is no equivalent rule in relation to withdrawals from schemes under Pt 5C.6.

8.2 For schemes that form part of a stapled group involving a company, and who wish to engage in a buy-back of stapled securities, the buy-back of the shares would be subject to a creditor protection requirement but not the buy-back of the interest component of the stapled security.

8.3 The responsible entity will be liable for scheme debts, but is usually entitled to be indemnified from scheme property. A buy-back could therefore adversely affect creditors of the responsible entity as responsible entity of the scheme.

8.4 We propose that the responsible entity must be satisfied that the on-market buy-back will not materially prejudice the responsible entity's ability to pay scheme creditors from scheme property. This is consistent with the application of similar rules for buy-back of listed interests as applies to listed shares.

Your feedback

Q24 Would it be unreasonably burdensome to restrict buy-backs to those that do not materially adversely prejudice creditors relying on the responsible entity's rights of indemnity out of scheme property? If so why and, if not, why not?

Key terms

In this paper, unless a contrary intention appears, the following terms have the following meanings:

10/12 limit means 10% of the smallest number, at any time during the last 12 months, of votes attaching to voting shares (or voting interests) of the company (or scheme).

Act means the *Corporations Act 2001* including regulations made for the purposes of the Act.

ASIC means Australian Securities and Investments Commission.

ASX means ASX Limited (previously Australian Stock Exchange Limited), trading under the name Australian Securities Exchange.

ASXLRs means the ASX Listing Rules.

ASX price ceiling means the maximum price that an entity can purchase its shares or interests under an on-market buy-back under the ASXLRs.

CHESS means Clearing House Electronic Subregister System of ASX.

ITS means the Integrated Trading System of ASX (previously SEATS).

net asset backing per interest generally means the value of scheme property less any liabilities that may be met from scheme property divided by the number of interests on issue.

[PS 110] means (for example) an ASIC policy statement (in this example numbered 110).

s601KD means (for example) a section of the Act (in this example numbered 601KD).

SEATS means the Stock Exchange Automated Trading System of ASX.

Appendix: Comparison of companies and schemes

Shares and interests

Companies and schemes are both investment vehicles. A company is a separate legal entity. A scheme is not.

A share confers no legal or equitable interest in the assets of the company. An interest in a scheme which is structured as a trust confers on the holder an equitable proprietary interest in all of the trust property.

However, a share and an interest are both personal property and transferable as provided by the company's or scheme's constitution. Also, for the purposes of ASX trading and settlement, shares and interests trade and settle in the same way.

Regulation of companies and schemes

The Act regulates companies and registered schemes. In certain areas, schemes are regulated identically or near identically to companies. Examples include related party transactions (Ch 2E, Pt 5C.7); takeovers and compulsory acquisitions and buy-outs (Ch 6, 6A) and continuous disclosure (Ch 6CA).

In other areas, different rules apply. The provisions dealing with maintenance of capital in Ch 2J (buy-backs, reduction in capital, financial assistance, dividends may only be paid out of profits etc) apply to companies. The maintenance of capital rules do not apply to schemes.

Share buy-backs

On-market buy-back of shares by listed Australian companies are regulated by Pt 2J.1. The following rules apply to on-market share buy-backs:

- (a) buy-backs are only permitted where the buy-back does not materially prejudice the company's ability to pay its creditors;
- (b) buy-backs within the '10/12 limit' do not require shareholder approval, but ASIC must be given notice of the intended buy-back;
- (c) buy-backs which exceed the '10/12 limit' must be approved by shareholders by ordinary resolution and the notice of the meeting and any accompanying explanatory material must be lodged with ASIC; and

- (d) any shares bought back must be cancelled. ASIC must be notified of the share cancellation.

Chapter 2J does not apply to registered schemes.

Scheme withdrawals

A buy-back of interests by a responsible entity may amount to a withdrawal where the acquisition of the interests by the responsible entity is funded from scheme property.

A responsible entity of a registered scheme is under no obligation to offer withdrawal rights to scheme members. If members are to have a right to withdraw, the scheme's constitution must specify the right. The right to withdraw, and any procedures in the constitution setting out procedures for making and dealing with withdrawal requests, must be fair to all members: s601GA(4).

If the right to withdraw may be exercised while the scheme is liquid, the constitution must set out adequate procedures for making and dealing with withdrawal requests.

If the right to withdraw may be exercised while the scheme is non-liquid, the constitution must provide for the right to be exercised in accordance with Pt 5C.6 and set out adequate procedures that are to apply to making and dealing with withdrawal requests. These procedures require that:

- (a) the withdrawal offer period must be for at least 21 days;
- (b) withdrawal requests must not be satisfied while the offer period is still open; and
- (c) withdrawal requests must be satisfied proportionately in the event an insufficient amount of money is available from the assets to satisfy all withdrawal requests.

The procedures under Pt 5C.6 are intended to ensure all members of a non-liquid scheme are each given an equal opportunity to withdraw and to participate in any realisation of scheme assets to fund the satisfaction of withdrawal requests. The procedures also serve to protect the responsible entity from having to fully meet all withdrawal requests in the event there is an insufficient amount of money from the realisation of scheme assets.

Member approval is not required to carry out a withdrawal, regardless of its size.

The withdrawal provisions in Pt 5C.6 do not draw any distinction between listed and unlisted schemes.

ASX Listing Rules in relation to buy-backs

The ASXLRs generally regulate on-market buy-backs in the same way for companies and schemes.

Under the ASXLRs, a company may only buy back its shares under an on-market buy-back where:

- (a) transactions in the company's shares were recorded on the ASX on at least 5 days in the 3 months before the buy-back (ASXLR 7.29); and
- (b) the buy-back price is not more than 5% above the average of the market price for shares, where the average is calculated over the last 5 days on which sales in the shares were recorded before the day on which the purchase was made (ASXLR 7.33). We refer to this as the 'ASX price ceiling'.

The company is also required to report to ASX in relation to the commencement, progress and finalisation of the buy-back (ASXLR 3.8A).

Note: This includes Appendix 3C: Announcement of buy-back; Appendix 3D: Changes relating to buy-back; Appendix 3E: Daily share buy-back notice; Appendix 3F: Final share buy-back notice.

This information is passed on to ASIC by ASX.

ASX allows the responsible entity of a listed scheme to buy-back interests on-market if it consults with ASX before the buy-back and complies with any requirements set by ASX. Ordinarily, ASX imposes the same requirements for on-market buy-backs by schemes as it does for on-market share buy-backs (ASXLR 7.36).