



**ASIC**

Australian Securities & Investments Commission

REGULATORY GUIDE 134

# Funds management: Constitutions

July 2018

## About this guide

This guide is for:

- responsible entities of registered managed investment schemes (registered schemes);
- Australian passport fund operators; and
- their advisers.

It sets out our guidance on the requirements in the Corporations Act for the constitutions of registered schemes and Australian passport funds.

### About ASIC regulatory documents

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

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

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

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

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

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

### Document history

This guide was issued in July 2018 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Regulatory Guide 134, issued August 1998, updated November 1998, June 1999 and September 2000, reissued June 2013, February 2014, and October 2015

### Disclaimer

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

# Contents

<b>A</b>	<b>Overview</b> .....	<b>4</b>
	How our guidance applies .....	4
	Requirements for a constitution .....	4
	Complying with our guidance.....	6
	Our guidance by entity type .....	7
<b>B</b>	<b>Consideration to acquire interests</b> .....	<b>8</b>
	What is ‘adequate provision’? .....	8
	What relief is available? .....	8
	Calculating the consideration.....	11
	Procedures for exercising a discretion .....	26
<b>C</b>	<b>Class rights in registered schemes</b> .....	<b>29</b>
	Protecting class rights in a scheme .....	29
<b>D</b>	<b>Powers and rights of a responsible entity</b> .....	<b>30</b>
	Powers to deal with property and raise money.....	30
	Fees and indemnities.....	31
<b>E</b>	<b>Complaints, disputes and remedies in registered schemes and Australian passport funds</b> .....	<b>34</b>
	Requirements for registered schemes.....	34
	Requirements for Australian passport funds .....	37
<b>F</b>	<b>Changing the constitution of a registered scheme</b> .....	<b>39</b>
	Requirements for registered schemes.....	39
	Relief available for registered schemes.....	39
<b>G</b>	<b>Withdrawal from registered schemes</b> .....	<b>41</b>
	Withdrawal from a registered scheme .....	41
<b>H</b>	<b>Winding up a registered scheme</b> .....	<b>51</b>
	Procedures for winding up .....	51
	Independent audit .....	54
	Postponement of winding up .....	54
<b>I</b>	<b>Legal enforceability of a registered scheme constitution</b> .....	<b>55</b>
	Enforceability between members and the responsible entity .....	55
	Severance clauses .....	56
	Impact on s601GA content .....	56
<b>J</b>	<b>Incorporation by reference in a registered scheme constitution</b> 57	
	Making adequate provision for and specifying matters .....	57
	Relief to incorporate by reference listing rules of a financial market57	
	<b>Key terms</b> .....	<b>58</b>
	<b>Related information</b> .....	<b>62</b>

## A Overview

### Key points

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

This guide explains these requirements.

For managed investment schemes registered before 1 October 2013, we will not deregister the scheme or take any action against a responsible entity or its officers on the basis that a constitution does not comply with s601GA and 601GB of the Corporations Act if the constitution meets the requirements in [Regulatory Guide 137](#) *Constitution requirements for schemes registered before 1 October 2013* (RG 137).

### How our guidance applies

- RG 134.1 This guide is for:
- (a) responsible entities of registered schemes;
  - (b) Australian passport fund operators; and
  - (c) their advisers.
- RG 134.2 We will apply this guide when assessing constitutions that are part of applications lodged with ASIC to register:
- (a) a managed investment scheme; and
  - (b) a registered scheme as an Australian passport fund.

### Requirements for a constitution

#### Registered managed investment schemes

- RG 134.3 The constitution of a registered scheme must be a legally enforceable document between the responsible entity and members that sets out some or all of the rights, duties and liabilities of the responsible entity in its operation of the scheme.
- RG 134.4 Under s601GA of the Corporations Act, the constitution of a registered scheme must make adequate provision for, or specify, certain prescribed matters. These include:

- (a) the consideration to acquire and dispose of an interest in the scheme (see Section B);
- (b) the powers and rights of the responsible entity (see Section D), including:
  - (i) for making investments, borrowing or dealing with scheme property; and
  - (ii) to be paid fees or be indemnified out of scheme property;
- (c) the method for dealing with complaints about the scheme (see Section E);
- (d) any rights of members to withdraw from the scheme (see Section G); and
- (e) winding up the scheme (see Section H).

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

RG 134.5 The constitution of a registered scheme must be contained in a document that is legally enforceable between the members and the responsible entity of the scheme: see s601GB.

Note: For more information on what is required for a constitution to be legally enforceable, see Section I.

RG 134.6 In our view, making provisions of the constitution under s601GA subject to other documents that may affect these provisions means that the constitution does not 'make adequate provision for' or 'specify' the matters required by s601GA.

Note: For more information on making constitutions subject to other documents, see Section J.

RG 134.7 The constitution of a registered scheme may be changed only in certain circumstances: see s601GC.

Note: For information on changing the constitution, see Section F.

### **Australian passport funds**

RG 134.8 Under section 4 of the Australian Passport Rules, a passport fund operator must ensure an Australian passport fund has a constitution that at all times provides for:

- (a) a member to seek remedy, including through compensation, against the Australian passport fund and its operator; and
- (b) the agreed forum where:
  - (i) a member may commence proceedings against the Australian passport fund or its operator; and

- (ii) the Australian passport fund or its operator may commence proceedings against a member.

Note 1: The Australian Passport Rules are made under s1211 and s1211A by the Australian Minister responsible for the Asia Region Funds Passport (the responsible Minister).

Note 2: For more information on requirements for Australian passport funds, see RG 134.155–RG 134.161 in Section E.

## Complying with our guidance

RG 134.9 There are consequences if a registered scheme's constitution does not meet the requirements in the Corporations Act. In particular, non-compliance will be a potential breach of:

- (a) the duty of the responsible entity to ensure that the constitution meets the requirements in s601GA and 601GB (see s601FC(1)(f)); or
- (b) the duty of officers of the responsible entity to do what a reasonable person in the officer's position would do to ensure that the operator complies with the requirements in the Corporations Act (see s601FD(1)(f)(i)).

RG 134.10 We may also deregister a registered scheme if its constitution does not meet the requirements in s601GA or 601GB.

RG 134.11 In making a decision about whether to amend the constitution, the responsible entity must consider all implications and its duties under the Corporations Act.

Note: For information on the process for registering a managed investment scheme, including our assessment of the relevant constituent documents as part of that registration, see [Regulatory Guide 131 Funds management: Establishing and registering a fund](#) (RG 131).

RG 134.12 For schemes registered on or after 1 October 2013, we may deregister the registered scheme under s601PB(1)(b) or take action against the responsible entity and/or their officers if we consider that the constitution does not meet the requirements in s601GA or 601GB.

### Schemes registered before October 2013

RG 134.13 For schemes registered before 1 October 2013, if the constitution meets the requirements set out in [RG 137](#) we will not deregister the registered scheme or take any action against a responsible entity or their officers on the basis that a constitution does not comply with s601GA and 601GB.

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

- RG 134.14 We understand that there may be legal, operational and cost implications for responsible entities of schemes registered before 1 October 2013 in amending their constitutions to comply with this guide. Responsible entities of these schemes should assess whether the constitution complies with the Corporations Act and, if not, what action they should take to remedy any non-compliance.
- RG 134.15 Where a scheme registered before 1 October 2013 applies to become registered as an Australian passport fund, its constitution will have to be amended to comply with the Australian Passport Rules. We expect the responsible entity to make any changes needed to meet the requirements set out in this guide if they have not already made those amendments.

## Our guidance by entity type

- RG 134.16 Table 1 sets out the types of funds that each section of this guide relates to.

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

Topic	Relevant fund type(s)
<b>Section B: Consideration to acquire interests</b>	Registered schemes
<b>Section C: Class rights in registered schemes</b>	Registered schemes
<b>Section D: Powers and rights of a responsible entity</b>	Registered schemes
<b>Section E: Complaints, disputes and remedies in registered schemes and Australian passport funds</b>	Registered schemes Australian passport funds
<b>Section F: Changing the constitution of a registered scheme</b>	Registered schemes
<b>Section G: Withdrawal from registered schemes</b>	Registered schemes
<b>Section H: Winding up a registered scheme</b>	Registered schemes
<b>Section I: Legal enforceability of a registered scheme constitution</b>	Registered schemes
<b>Section J: Incorporation by reference in a registered scheme constitution</b>	Registered schemes

## B Consideration to acquire interests

### Key points

The guidance in this section is relevant to registered schemes.

The constitution of a registered scheme must make adequate provision for the consideration that is to be paid to acquire an interest in the scheme. What constitutes 'adequate provision' will depend on the circumstances of the registered scheme: see RG 134.17–RG 134.20.

To minimise uncertainty, we have given relief to allow a responsible entity to set the amount of the consideration to acquire an interest in a registered scheme: see RG 134.21–RG 134.115.

We encourage a responsible entity that does not rely on our relief, or proposes to include provisions giving a discretion about timing that affects payment of the consideration, to provide us with a draft of the relevant provisions before lodging an application to register the scheme: see RG 134.26–RG 134.35.

### What is 'adequate provision'?

- RG 134.17 The constitution of a registered scheme must make adequate provision for the consideration that is to be paid to acquire an interest in the scheme: see s601GA(1)(a).
- RG 134.18 This requirement aims to ensure that members have rights in the constitution about the consideration to acquire an interest, because this consideration may affect the value of other members' interests, including by unfairly diluting them. In our view, the responsible entity may be subject to a conflict between their interest in further issues of interests, which may increase their remuneration and may be promoted by offering interests at a discount, and the interests of members, which may be to avoid diluting the value of their interests.
- RG 134.19 Because s601GA is principles based, what constitutes 'adequate provision' will depend on the circumstances of the registered scheme.
- RG 134.20 We acknowledge that responsible entities and their advisers might face uncertainty about whether a constitution makes adequate provision for the consideration to acquire an interest in a registered scheme.

### What relief is available?

- RG 134.21 To minimise uncertainty, we have granted relief for registered schemes under [Class Order \[CO 13/655\]](#) *Provisions about the amount of consideration to acquire interests and withdrawal amounts not covered by*

*ASIC Corporations (Managed investment product consideration) Instrument 2015/847*. Responsible entities can choose to:

- (a) rely on the relief in [CO 13/655] by including provisions in the constitution that meet the requirements of this relief; or
- (b) make adequate provision in the constitution for the amount of the consideration to be paid in another way that does not meet all of the requirements in the relief but does comply with the requirement in s601GA(1)(a).

RG 134.22 If a scheme was registered before 1 October 2013 and the responsible entity has not published a notice that they will rely on [CO 13/655], the responsible entity may instead choose to include provisions that meet the requirements in [ASIC Corporations \(Managed investment product consideration\) Instrument 2015/847](#).

Note: For more information, see [RG 137](#).

RG 134.23 We have also given additional specific exemptions from and made modifications to requirements for registered schemes under the following legislative instruments:

- (a) [Class Order \[CO 13/656\]](#) *Equality of treatment impacting on the acquisition of interests*; and
- (b) [Class Order \[CO 13/657\]](#) *Discretions affecting the amount of consideration to acquire interests and withdrawal amounts*.

### **Relying on our relief**

RG 134.24 If a responsible entity chooses to rely on all or any part of our relief in [CO 13/655], they can:

- (a) draft provisions in the constitution that reflect the content of [CO 13/655]; or
- (b) incorporate the content of [CO 13/655] by referring to it in a provision of the constitution.

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

RG 134.25 A responsible entity may incorporate [CO 13/655] by specifically referring to the provisions of that instrument as being taken to be incorporated in the constitution, or by referring generically to the provisions of any exemption or declaration as being taken to be incorporated in the constitution.

### **Requesting a review of provisions for scheme constitutions**

RG 134.26 Given the 14-day registration period for schemes, we encourage any responsible entity that does not rely on our relief in [CO 13/655], or proposes to include provisions giving a discretion about timing that affects

payment of the consideration to acquire an interest, to give us a draft of the relevant provisions before lodging an application to register the scheme. This will help us in reviewing the proposed provisions and liaising with the responsible entity about them.

RG 134.27 A written request for a review and a copy of the relevant draft provisions should be sent to [applications@asic.gov.au](mailto:applications@asic.gov.au).

Note 1: If the draft provisions do not comply with s601GA(1)(a) (taking into account this guidance), the responsible entity should lodge an application for individual relief rather than asking for a review. For more information on how to apply for relief, see [Regulatory Guide 51 Applications for relief](#) (RG 51) and [Regulatory Guide 136 Funds management: Discretionary powers](#) (RG 136).

Note 2: Ordinarily, we will not act on requests to review draft provisions of the constitution of a registered scheme, other than provisions for the consideration to acquire an interest or calculation of the withdrawal amount.

RG 134.28 The request for review should include an explanation of:

- (a) how the draft provisions comply with s601GA(1)(a) (taking into account this guidance);
- (b) the impact of the provisions on the certainty of determining the consideration; and
- (c) why the provisions do not create an inappropriate risk of a dilutive effect and are otherwise consistent with the purpose of s601GA(1)(a).

RG 134.29 We will take all of this information into account in reviewing the draft provisions, and any provisions of a constitution lodged with an application for registration. We may also take into account other factors that appear relevant.

RG 134.30 There is no fee for this service.

RG 134.31 A responsible entity or its advisers should allow enough time for us to review the draft provisions and provide any comments. We will generally require at least 10 business days to review the provisions and provide our comments. However, if a provision is unusually complex or novel, we may require more time for consideration.

RG 134.32 When lodging a subsequent application to register the scheme, the responsible entity or its advisers should state that certain provisions have been reviewed before lodgement. We may refuse registration if the responsible entity or its advisers have not requested a review of the relevant provisions and we do not have sufficient time to consider whether the provisions comply with s601GA(1)(a).

RG 134.33 An application to register a scheme that follows a review by ASIC will not receive any priority or an expedited processing time on that account alone.

- RG 134.34 A review of the provisions in a constitution before lodgement does not preclude us from raising additional matters when assessing whether the constitution meets the requirements under s601EB.
- RG 134.35 We may publish reports on our view of particular kinds of provisions we have reviewed. Where we have published our view about a particular kind of provision, a responsible entity or its advisers do not need to apply for a review if the provision is the same. When lodging an application to register a scheme in these circumstances, the responsible entity or its advisers should state that a certain provision is the same as a provision in a published report. If there are some differences, we encourage responsible entities and their advisers to lodge a written request for a review.

## Calculating the consideration

- RG 134.36 Under [\[CO 13/655\]](#), a responsible entity can exercise certain discretions if the price is based on:
- (a) a reasonably current market price for interests in a class of interests that is able to be traded on a financial market where the scheme is listed on the financial market; or
  - (b) the net asset value for interests in a class of interests that is either not traded on a financial market or:
    - (i) for exchange traded funds, able to be traded on a financial market operated by ASX or Chi-X; or
    - (ii) for managed funds, able to be traded on a financial market operated by ASX.

Note: See the key terms for the definition of 'exchange traded fund' and 'managed fund'.

- RG 134.37 The responsible entity can decide on a matter that affects what is determined as the market price or net asset value per interest, or make an adjustment to the amount determined. This relief relates only to discretions affecting the amount of the consideration.
- RG 000.38 For example, when calculating the consideration, the responsible entity can:
- (a) add or deduct from the market price or net asset value per interest; and
  - (b) cover costs associated with acquiring or disposing of relevant assets.
- RG 134.39 However, our relief under [\[CO 13/655\]](#) does not allow:
- (a) adjustments that are made to determine a particular amount as the consideration to acquire an interest (even if it is expressed in a form that refers to the net asset value per interest, or the market price) as distinct from an adjustment based on something that affects the amount that is determined. This is because these types of adjustments can distort the consideration;

- (b) discretions affecting the timing for the provision of the consideration for the issue of interests; and
- (c) discretions about the form of consideration. However, consideration in the form of a non-monetary asset may be treated as being provided in relation to the monetary price at which the responsible entity could properly buy the asset.

RG 134.40 Our relief under [CO 13/655] takes into account the purpose of s601GA.

### Unlisted unitised schemes

RG 134.41 After the initial issue of interests in an unlisted unitised registered scheme, a responsible entity will usually set the consideration to acquire an interest using the value of assets of the scheme.

RG 134.42 Under [\[CO 13/655\]](#), a responsible entity of an unlisted registered scheme may include a provision for calculating the consideration using a formula or method that is based on the value of:

- (a) scheme property, less any liabilities that may be met from scheme property, divided by the number of interests on issue; or
- (b) the assets of a class of interests in the scheme, less any liabilities attributable to that class under the constitution that may be met from scheme property, divided by the number of interests on issue in that class (this is referred to as a ‘class pricing’ provision).

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

RG 134.43 An example of a ‘class pricing’ provision is an interest in a particular class being issued at a price calculated, as at the close of business on the date of application, according to the formula in Figure 1.

#### Figure 1: Example class pricing provision

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

RG 134.44 In this formula, ‘net asset value’, ‘transaction costs’ and ‘number of interests on issue’ are proportionate to those variables the responsible entity determines are properly referable to that class.

RG 134.45 We consider that the best available information to determine the value of interests or a class of interests in an unlisted registered scheme is generally the value of the market price of the assets after any transaction costs that

may be expected. This is because the value of the interests will depend on the acquisition or realisation of the assets.

- RG 134.46 While the consideration to acquire an interest in a registered scheme that is not traded on a financial market (or is in a class of interests referred to in RG 134.36(b)(i)–RG 134.36(b)(ii)) must be based on the value of assets less liabilities for our relief to apply, discretions may be exercised in calculating this. In addition, adjustments may be made to the amount determined in the responsible entity’s discretion.

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

- RG 134.47 Some responsible entities will have partly paid interests on issue, and may wish to include these in the formula or method to determine the consideration to acquire an interest. In our view, this type of provision may not meet the requirements in [CO 13/655] where the formula or method:

- (a) does not count the partly paid interests as interests in the registered scheme when determining the number of interests on issue; and

Note: For the purposes of counting the number of interests on issue, a partly paid interest should be counted as a fully paid interest (i.e. a partly paid interest should be counted as a ‘whole’ rather than a fractional interest in the denominator of the formula or method for calculating the consideration).

- (b) does not treat the value to the scheme of the right to make calls for the unpaid amount as an asset of the scheme. We consider that the current value to the scheme of the responsible entity’s right to make future calls for any unpaid amounts needs to be considered.

Note 1: The value of the right to make a call for unpaid amounts may be appropriately accounted for by:

- (a) making a separate adjustment in the numerator of the formula or method to account for the value; or  
 (b) treating the value as an asset in the definition of ‘net asset value’, where such a term is used in the numerator of the formula or method.

Note 2: In valuing the right to make calls for any unpaid amounts, the responsible entity should consider the risk that members may fail to pay an outstanding amount called for by the responsible entity, or to restrictions on the ability to make a call for a defined period (in which case, time value of money should be considered). The factors relevant to valuation may differ depending on the specific circumstances and nature of the scheme and the terms on which partly paid interests are issued.

- RG 134.48 Examples of pricing provisions that appropriately account for partly paid interests are shown in Figure 2 and Figure 3.

**Figure 2: Example pricing provision accounting for partly paid interests—Separate adjustment to the numerator**

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

RG 134.49 In this formula, ‘V’ is the value of the right to call for the unpaid amount. This excludes unpaid amounts already being treated as an asset of the scheme. In determining this value, the responsible entity should consider certain factors: see RG 134.47(b). In determining the number of interests on issue, a partly paid interest should be counted as a ‘whole’ interest: see RG 134.47(a).

**Figure 3: Example pricing provision accounting for partly paid interests—Adjustment to definition of ‘net asset value’**

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

RG 134.50 For this formula, the definition of ‘net asset value’ in the constitution includes a positive adjustment to account for the value of the right to call for the unpaid amount. This excludes unpaid amounts already being treated as an asset of the scheme. For example, it may treat the value of that right as an asset. In determining this value, the responsible entity should consider certain factors: see RG 134.47(b). In determining the number of interests on issue, a partly paid interest should be counted as a ‘whole’ interest: see RG 134.47(a).

RG 134.51 We understand that there can be material costs involved in the acquisition and/or disposal of assets, which may not necessarily be reflected in the valuation of these assets. These are often described as ‘transaction costs’. These costs are in addition to any fees that are reflected in an adjustment to the net asset value per interest in calculating the amount of the consideration. The types of costs that may be incurred in acquiring or disposing of these assets will depend on the types of assets.

RG 134.52 We consider that the inclusion of actual transaction costs, or an estimate, ensures that members who are not acquiring or disposing of interests at a particular time are not disadvantaged by the registered scheme bearing costs associated with the need to acquire and dispose of assets to satisfy such applications in the consideration.

RG 134.53 We understand the responsible entity may not always be able to include the actual costs associated with the acquisition and/or disposal of assets. In these circumstances, it is acceptable for the constitution to permit the responsible entity to use an estimate of the acquisition or disposal costs to determine the transaction cost amount. If a responsible entity uses an estimate, the estimate

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

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

Note 2: A responsible entity has duties to act honestly and in the best interests of members. In our view, a responsible entity may not be complying with these duties if they attribute costs to the acquisition or disposal of assets that do not reflect the expected costs of acquisition or disposal of the assets, after taking into account any netting of these costs with persons undertaking offsetting transactions with the fund that may be expected.

## Unlisted exchange traded funds and managed funds traded on financial markets

- RG 134.54 The AQUA market is a specialised market operated by ASX for exchange traded funds, managed fund products and structured products. Under Schedule 10A of the [ASX Operating Rules](#), admission to trading status on the AQUA market will only be granted where the underlying assets of these products are assets in a market that is transparent and has a robust price discovery mechanism. Chi-X may also operate a market for the quotation and trading of interests in exchange traded funds.
- RG 134.55 The responsible entity of an exchange traded fund or a managed fund that has a class of interests traded on a financial market operated by ASX (or, for an exchange traded fund, Chi-X) will set the consideration to acquire an interest in the registered scheme using the value of scheme assets less liabilities following the initial issue of interests.
- RG 134.56 We have given conditional relief under [\[CO 13/655\]](#) for responsible entities of exchange traded funds or managed funds to include a provision to allow the amount of the consideration to acquire interests in a class of interests that are, or will be, traded on a financial market operated by ASX (or, for an exchange traded fund, Chi-X) to be based on the value of scheme property, less any liabilities that may be met from scheme property, divided by the number of interests on issue.
- Note: A responsible entity can choose to rely on our relief under s601GAE in [\[CO 13/655\]](#), even if they are issuing an interest in a situation covered by s601GAD under this legislative instrument.
- RG 134.57 These types of registered schemes are required to have uncapped facilities for issue and withdrawal operating on each trading day. This is intended to ensure that arbitrage opportunities limit divergence between market price and a price based on the value of the scheme assets less liabilities. If the market price is lower, market participants could purchase interests at the

lower market price and withdraw through the continuous redemption facility at the higher price to make a profit.

- RG 134.58 The profit-making opportunities can attract market participants to continue with this process until the two prices equalise (within a certain spread) and any further profit-making opportunities are eliminated. In our view, the quality of the management of an unlisted registered scheme traded on a financial market operated by ASX or Chi-X does not substantially affect the value of its interests. In these circumstances, we consider that the consideration to acquire an interest in this type of registered scheme is more accurately priced based on the value of scheme assets, less liabilities, rather than market price.

### Listed schemes

- RG 134.59 After the initial issue of interests in a listed registered scheme, the responsible entity may choose to set the consideration to acquire an interest, taking into account the market price of the interests in the class that is traded.

- RG 134.60 We have given conditional relief under [\[CO 13/655\]](#) for responsible entities to include a provision that means the amount of the consideration to acquire an interest is based on the reasonably current market price of the interests in the relevant class that is traded. However, this can be subject to discretions related to determining the reasonably current market price or making an adjustment to it. The adjustment must be for an amount to be added to or deducted from the market price, rather than an amount that results in a particular outcome as to the amount of the consideration that is effectively not a market price.

Note: A responsible entity can choose to rely on our relief under s601GAE in [CO 13/655] even if they are issuing an interest in a situation covered by s601GAD under this legislative instrument.

- RG 134.61 We consider that the market price generally better reflects the underlying value of the interests in the scheme. Market pricing is an independent pricing mechanism that regulates the depth of any discount that could result in unfair economic dilution and establishes an appropriate reference point for measuring it.

- RG 134.62 Our relief enables a responsible entity to determine the exact point of time when the market price is determined. This includes whether it is based on completed trades or bids or offers on a date, or average prices over a period (e.g. using a volume weighted average). However, the market price that is used must be reasonably current.

Note: For more information on 'reasonably current' market value, see RG 134.111.

- RG 134.63 In our view, if the consideration to acquire an interest is based on the net asset value and that price is lower than the market price, it has the potential

to unfairly dilute existing members' interests. However, if that price is equal to or higher than the market price, using it will not dilute members' interests.

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

- RG 134.64 A listed scheme may have a class of interests on issue that is not traded. In these circumstances, it is our opinion that the consideration to acquire an interest in that class should be priced using a formula or method based on the value of assets, less any liabilities that may be met from the assets referable to that class, divided by the number of interests in that class on issue.

### Nil or fixed price schemes

- RG 134.65 [\[CO 13/655\]](#) does not give any relief for registered schemes where the amount of consideration to acquire an interest is nil or a fixed price. This is because we do not consider there is likely to be much uncertainty for responsible entities and their advisers about whether a constitution makes adequate provision for the consideration to acquire an interest at a nil or fixed price.
- RG 134.66 We note that in some cases, a registered scheme may initially issue interests at a fixed price but subsequently issue any other interests based on 'assets less liabilities per interest', or market value. Our relief in [\[CO 13/655\]](#) still applies to the subsequent issue of interests based on 'assets less liabilities' or 'assets of a class less liabilities of a class'. However, if after an initial issue the interest of a member depends on the value of assets, the value of which varies over time, the amount of the consideration to acquire should reflect the changes in net asset value per interest, or market price.

### Options

- RG 134.67 A responsible entity may wish to issue options to acquire an interest in a registered scheme. Where the responsible entity wishes to issue options, they should consider whether the constitution will need to include a provision about how the exercise price of the option is to be calculated. We do not consider that the constitution needs to include a provision about the premium payable on the option.

### Placements

- RG 134.68 Responsible entities may issue interests in listed registered schemes by way of placement. The consideration for the interests is generally at a discount to the market price at which interests are acquired. A placement allows a responsible entity to raise capital reasonably quickly and cost effectively from targeted investors. However, as a placement excludes other existing

members, it may dilute the economic and voting rights of non-participating members and has the potential to be unfair.

- RG 134.69 We have given conditional relief under [\[CO 13/655\]](#) allowing responsible entities to determine the consideration to acquire an interest where the interest is issued under a placement. The relief applies if:
- (a) the interests are traded on ASX or an approved foreign market;
  - (b) trading of the interests in that class has not been suspended; and
  - (c) where the interests are traded on an approved foreign market, either:
    - (i) the interests, together with any related issue in the previous year, do not immediately before the issue comprise more than 15% of the interests in that class; or
    - (ii) the following requirements are met:
      - (A) members who hold interests in the same class approve the issue of the interests by a placement resolution;
      - (B) unless the responsible entity considers that the issue of interests by the placement will not adversely affect the interests of members in another class, members of that class also approve the issue of the interests by placement resolution; and
      - (C) the notice convening a meeting to vote on the issue of interests by placement contains particulars of how the money raised by the issue will be used by the responsible entity.
- RG 134.70 A placement resolution means, in relation to an approval of an issue of interests, a special resolution where votes are only cast for interests (eligible interests) that are held by a member:
- (a) who will not acquire any of the interests that are to be issued or a legal or equitable interest in those interests; or
  - (b) for the benefit of another person who will not acquire any of the interests that are issued or a legal or equitable interest in those interests.
- RG 134.71 By requiring that the interests are listed on ASX or an approved foreign market, our relief in [\[CO 13/655\]](#) provides an independent pricing mechanism that helps responsible entities assess the price of the issue under the placement and helps protect members from unfair dilution. These markets regulate the depth of any discount and establish an appropriate reference point for measuring it. To ensure that the interests are adequately priced and the market is fully informed, interests in the relevant class must not be suspended from quotation.
- RG 134.72 Member approval of a placement is required if, together with any related issue under a placement in the previous year, it would exceed 15% of the interests in the relevant class. For ASX-listed registered schemes, this requirement applies under Listing Rule 7.1. For foreign-listed registered

schemes, this requirement applies as a condition of relief under the modified provisions in [CO 13/655]. This requirement ensures that the risk of unfair economic dilution is sufficiently addressed because it will either have limited materiality or be approved by members.

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

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

## Rights issues

RG 134.73 Responsible entities may issue interests in registered schemes by way of a rights issue. As with an issue under a placement, the consideration for interests is generally at a discount to the standard price at which interests in the registered scheme are acquired.

RG 134.74 We have given relief under [\[CO 13/655\]](#) for responsible entities to determine the consideration to acquire an interest in a registered scheme where the interest is issued under a rights issue. The responsible entity can choose to make the offer to all members, or members of a specific class. This relief also applies to issues on the exercise of an option, if the option was offered to all members or all members of a particular class at the time of the offer of the options. Our relief is subject to any statutory exclusion of a member permitted by s601FC(1)(d), whether by ASIC exemption or otherwise.

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

RG 134.75 Our relief in [CO 13/655] covers rights issues that meet the requirements in s9A. In our experience, this definition captures the features of the most common structure of a rights issue in the Australian market.

RG 134.76 The relief focuses on provisions for calculating the amount of consideration under a rights issue. We consider that it gives responsible entities appropriate flexibility to structure a rights issue within the parameters of the Corporations Act to best meet the needs of the registered scheme.

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

### Additional relief affecting rights issues

RG 134.77 We have given additional relief from s601FC(1)(d) under [\[CO 13/656\]](#) to allow a responsible entity to:

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

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

Note 2: We intend to vary the relief for foreign members so that it will not allow different treatment of members of an Australian passport fund who are in a host economy of the fund. We will vary the relief when the provisions of the Corporations Act relating to the Asia Region Funds Passport commence.

RG 134.78 Our relief to exclude foreign members applies in the following situations:

- (a) If the registered scheme is listed and the offer is one to which ASX Listing Rule 7.7 applies, the responsible entity must comply with that rule for our relief to apply.
- (b) If the registered scheme is not listed on ASX and the offer is renounceable, the responsible entity must appoint a nominee to sell the rights to acquire the interests not taken up and distribute the net proceeds for our relief to apply.
- (c) If neither of the situations in RG 134.78(a)–RG 134.78(b) applies, our relief will apply where the responsible entity determines that it would be unreasonable to make the offer to a foreign member, taking into account:
  - (i) the number of members in the relevant jurisdiction;
  - (ii) the number and value of interests held by members that may be issued in a particular jurisdiction; and
  - (iii) the cost of complying with legal requirements and any requirements of a regulatory authority in making the offer in the relevant jurisdiction.

RG 134.79 We have granted relief from s601FC(1)(d) to exclude foreign members. This is because there are often only small numbers of foreign members in a particular jurisdiction and/or legal or regulatory problems with offers to foreign members meeting that jurisdiction's requirements. A responsible entity is also permitted to do this in relation to members with an address outside Australia and New Zealand under s9A. If the scheme is listed, our relief requires that foreign members be given a fair opportunity to share in the benefit of any discount on a rights issue where possible. This applies

directly or indirectly through the requirement to comply with the ASX Listing Rules.

- RG 134.80 Our relief to allow an offer to be made to members who are wholesale clients before other members applies where the terms of the offer are such that interests will not be issued to any members before the date that any other member can elect to accept the offer to have the interest issued to them.
- RG 134.81 We grant this relief to allow offers of interests to occur at different times under a rights issue. This reflects the different timeframes in which it may be reasonable for members to make a decision. This type of rights issue is commonly referred to as an ‘accelerated’ or ‘jumbo’ rights issue. A responsible entity structuring a rights issue as an accelerated rights issue may be treating members of the same class differently because the different offer periods for institutional and retail members mean the offers may not be made on the same terms to each class.

### Distribution reinvestment plans

- RG 134.82 A responsible entity may offer members an opportunity to acquire additional interests by using some or all of any capital or income distributions to pay for those additional interests. To increase the attractiveness for members, the consideration to acquire these additional interests can be at some discount, and members pay no brokerage on their acquisition.
- RG 134.83 Under [\[CO 13/655\]](#), a responsible entity may determine the amount of the consideration to acquire an interest in a registered scheme where some or all of a distribution of capital or income payable to a member is applied to pay for the issue of the interests to that member.
- RG 134.84 For the reasons above at RG 134.79, we have given additional relief from s601FC(1)(d) (under [\[CO 13/656\]](#)) to allow a responsible entity to exclude certain foreign members from participating in a distribution reinvestment plan.

### Interest purchase plans

- RG 134.85 An interest purchase plan generally provides members with a convenient means of obtaining additional interests in a registered scheme. These additional interests are often acquired at a discount to the market price and without brokerage fees or stamp duty.
- RG 134.86 Under [\[CO 13/655\]](#), a responsible entity can set the consideration to acquire an interest under a purchase plan if it meets the requirements of [Class Order \[CO 09/425\]](#) *Share and interest purchase plans*. [\[CO 09/425\]](#) applies to interest purchase plans where:
- (a) the interests in the relevant class are traded and trading has not been suspended (beyond a minimum period) on ASX;

- (b) we have not made certain determinations to prevent an issuer from relying on our relief; and
- (c) there are no existing exemptions from particular provisions of the Corporations Act.

RG 134.87 There are also certain conditions for the relief in [CO 09/425] that a responsible entity must meet.

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

### Negotiated fees

RG 134.88 A responsible entity may regularly negotiate lower fees with certain wholesale clients. These fees may be included in the calculation of the consideration at which interests are issued. We recognise there are commercial benefits for responsible entities in attracting wholesale clients by negotiating commercial rates of fees with them.

RG 134.89 Under [\[CO 13/655\]](#), a responsible entity may set the consideration to acquire an interest that involves a negotiated fee arrangement, as long as it meets the requirements in [ASIC Corporations \(Registered Schemes: Differential Fees\) Instrument 2017/40](#).

RG 134.90 ASIC Corporations (Registered Schemes—Differential Fees) Instrument 2017/40 provides a conditional exemption for responsible entities where the responsible entity differentiates between members in relation to fees based on:

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

RG 134.91 To rely on this instrument, a responsible entity must ensure that:

- (a) a statement is disclosed to members and included in any Product Disclosure Statement (PDS):
  - (i) of the basis on which the differential fee will be calculated and which sets out the fees members will have to bear; or
  - (ii) where fees are negotiated with wholesale clients, that the fee arrangement is to be offered to certain wholesale clients;

- (b) the differential fee arrangement does not adversely affect the fees paid or to be paid by any member who is not entitled to participate; and
- (c) other than where fees are negotiated with wholesale clients, the differential fee arrangement is applied without discrimination to all members who satisfy the criteria to receive the benefit of the arrangement.

Note: For more information on differential fees, see ASIC Corporations (Registered Schemes: Differential Fees) Instrument 2017/40.

### Forfeited interests

RG 134.92 An acquisition that occurs as a result of sale on a forfeiture may be caught by s601GA(1)(a), and we have granted relief under [\[CO 13/655\]](#) to allow responsible entities to set the consideration to acquire a forfeited interest in a class that is able to be traded of a listed scheme (other than a time-sharing scheme).

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

RG 134.93 Our relief in [\[CO 13/655\]](#) applies where the interests have been forfeited by a member for failing to pay an outstanding amount due to, and called for by, the responsible entity and:

- (a) on payment of the outstanding amount the interest would be in a class of interests traded on ASX; and
- (b) the sale occurs in accordance with s254Q (other than s254Q(1), (9) and (13)) as if the interest was a share in a no-liability company and the responsible entity was a director of the company.

### Additional relief for forfeited interests

RG 134.94 We have given additional relief from s601FG under [\[CO 13/656\]](#) for responsible entities to acquire forfeited interests on trust for members on forfeiture of those interests if the sale of those interests is required.

### Withdrawal price

RG 134.95 Under [\[CO 13/655\]](#), a responsible entity or its nominee may exercise a discretion to:

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

RG 134.96 The formula used for calculating the withdrawal amount must be based on the value of scheme assets less liabilities, and can take into account the material costs involved in the disposal of scheme assets.

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

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

RG 134.98 In some circumstances, it may not be appropriate for the responsible entity to use a withdrawal amount based on the value of scheme assets less liabilities, as this may not be the best information as to value (e.g. for relinquishment of an interest in a time-sharing scheme). In those circumstances, the withdrawal amount should be able to be determined from the constitution unless other relief applies (e.g. relief under [ASIC Corporations \(Time-sharing Schemes\) Instrument 2017/272](#)).

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

RG 134.99 Registered schemes that operate like investor directed portfolio services (IDPS-like schemes)—also known as a type of ‘platform’—are arrangements for holding and dealing with investments selected by clients. Managed discretionary accounts (MDAs) are arrangements that involve a person managing a portfolio of assets for a retail client without pooling for investment purposes. Some platforms and MDAs are registered schemes.

RG 134.100 [\[CO 13/655\]](#) does not give any relief for IDPS-like schemes or MDAs that are registered schemes. This is because we do not consider there is likely to be much uncertainty for responsible entities and their advisers about whether a constitution makes adequate provision for the consideration to acquire an interest in these circumstances or for a right of withdrawal. Investors acquiring an interest in an IDPS-like scheme or MDA that is a registered scheme are making a contribution of money to the arrangement that results in an equal amount being used on their behalf in the scheme.

RG 134.101 This contribution varies depending on the minimum amount for investment and the desire of the investor. Generally, a responsible entity can address the requirement for the constitution to make adequate provision for the consideration to acquire an interest by including a provision that the amount contributed, including where a specified fee is deducted, is applied to the member’s account. We will not generally raise any issues with this type of provision.

## Stapled securities

- RG 134.102 Some responsible entities include one or more registered schemes as components of stapled securities.
- RG 134.103 Generally, the responsible entity will want to retain a discretion about the allocation of the issue price of the stapled security between its component parts for tax reasons.
- RG 134.104 Under [\[CO 13/655\]](#), a responsible entity may allocate the consideration to acquire an interest in a registered scheme if that interest is a component part of a stapled security and the constitution contains:
- (a) adequate provision for the consideration to acquire the stapled securities; or
  - (b) provisions about the consideration to acquire the stapled securities that are permitted by our relief for the consideration to acquire interests.
- RG 134.105 The terms of a stapled security require that each of its component parts must be transferred together. ASX permits stapled securities to be quoted and traded like individual financial products. Stapled securities of listed entities that are traded are generally acquired at market price. The component parts of the stapled security are not individually quoted and, as such, each component does not have an individual market price. The consideration to acquire stapled securities that are not traded is generally based on the net asset value. The issue price of a listed or unlisted stapled security will reflect the value of each of its components.
- RG 134.106 Our relief in [\[CO 13/655\]](#) applies to stapled securities if:
- (a) there are no financial products in the same class as those financial products that are stapled that may be transferred separately;
  - (b) one or more of the financial products is a share of a body corporate and the body corporate has not issued any share that may be transferred separately; and
  - (c) one or more of the financial products is an interest in a registered scheme and no interests may be transferred separately.

## Schemes with limited or no pooling

- RG 134.107 Under [\[CO 13/655\]](#), a responsible entity may set the amount of the consideration to acquire an interest in a scheme if the only contributions that may be used in common with or pooled with any other assets of the scheme are:
- (a) money placed in an authorised deposit-taking institution (ADI) account as scheme property pending disbursement of the money to pay fees or expenses, acquire investments, or carry on business;

- (b) not proprietary rights and no income in which a member has any interest is to be paid or worked out by dividing up a pool; or
- (c) used in common or pooled between joint tenants or tenants in common where:
  - (i) none of the tenants is the responsible entity or an associate of the responsible entity; and
  - (ii) each tenant is known to each other tenant before the offer to issue an interest is made.

## Procedures for exercising a discretion

### Valuation

- RG 134.108 Under [\[CO 13/657\]](#), responsible entities must meet certain requirements if they exercise a discretion that affects the determination or calculation of the:
- (a) consideration to acquire an interest; and
  - (b) withdrawal amount or removal in whole or part of liability of a member.
- Note: An example of a situation where removal of liability of a member occurs is where an interest is partly paid and withdrawal has the effect of terminating liability of the member for any future calls.
- RG 134.109 If a responsible entity exercises a discretion in relation to determining the value of scheme property, the method for calculating the value must:
- (a) be consistent with the range of ordinary commercial practice for valuing that type of asset; and
  - (b) produce a value that is reasonably current at the time of issue or withdrawal.
- RG 134.110 If the responsible entity exercises a discretion in relation to determining the market price of interests that are traded on a financial market, the method for calculating the price must:
- (a) be consistent with the ordinary commercial practice for determining the market price of interests of the same kind; and
  - (b) produce a market price that is reasonably current at the time of issue or withdrawal.
- RG 134.111 What is a 'reasonably current' valuation or market price will depend on the nature of the asset. However, we consider 'reasonably current' would generally be:
- (a) for a class of interests (of a listed registered scheme) that is traded, the price or an average price close to the time it is issued or the time an impending issue is announced. In our view, a market price from several

months before issue or announcement of the issue would not usually be 'reasonably current'; and

- (b) for other classes of interests in a registered scheme:
  - (i) on a daily basis, if the financial products held are traded on a market with regular daily transactions;
  - (ii) as determined within the last year or a longer period while the responsible entity determines that a current valuation would not be materially different where the assets held are non-liquid or thinly traded; and
  - (iii) when a reliable market price is available for an asset, based on the market price for the asset.

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

## Record keeping

- RG 134.112 Under [\[CO 13/657\]](#), a responsible entity must prepare and keep records relating to the exercise of discretions affecting the amount of consideration to acquire interests in a registered scheme, and payments for withdrawal. In particular, the responsible entity must prepare a document that includes:
- (a) a description of the formula or method that is applied to work out the consideration to acquire an interest;
  - (b) the circumstances in which the responsible entity may exercise the discretion;
  - (c) the policy the responsible entity will apply in exercising the discretion, and the date when the policy was formulated;
  - (d) what records the responsible entity will keep in relation to the exercise of the discretion; and
  - (e) if the exercise of the discretion is inconsistent with the ordinary practice of assets being valued or the market price of interests being determined, an explanation of why the responsible entity has been unable to follow ordinary practice.
- RG 134.113 Under [\[CO 13/657\]](#), the responsible entity must keep any policy that documents the exercise of a discretion for seven years after it ceases to be current. The responsible entity must ensure that the records it keeps under s988A are kept in a way that enables the exercise of the discretion to be identified.
- RG 134.114 A member or a person who is entitled to receive a PDS is also entitled to be given, free of charge, a copy of any policy that documents the exercise of a discretion by the responsible entity or nominee. The responsible entity must advise members of this right and include a statement to that effect in the

PDS. For shorter PDSs, this information can be included using incorporation by reference.

RG 134.115 We consider that requiring a responsible entity to document their policies and procedures on how they calculate the consideration to acquire an interest or withdrawal payment promotes efficiency, consistency and transparency. We also consider it is consistent with the responsible entity's duty to exercise the degree of care and diligence that a reasonable person would exercise if they were in the position of the responsible entity.

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

## C Class rights in registered schemes

### Key points

This guidance in this section is relevant to registered schemes.

We have modified the requirements for changing the constitution of a registered scheme to protect class rights: see RG 134.116–RG 134.117.

### Protecting class rights in a scheme

- RG 134.116 The constitution of a registered scheme may set out a procedure for varying or cancelling rights of a class of members of the scheme, or the rights attached to a class of interests under the scheme.
- RG 134.117 We have modified s601GC to require that, if the constitution sets out such a procedure, those rights may only be varied or cancelled by a special resolution under s601GC(1)(a) if the responsible entity complies with that procedure: see [ASIC Corporations \(Amendment and Repeal\) Instrument 2017/545](#). Any such procedure is also not able to be modified without following the procedure itself.

## D Powers and rights of a responsible entity

### Key points

The guidance in this section is relevant to registered schemes.

A responsible entity may determine the level of detail to include in the constitution about their powers of investment or dealing with property and assets, and any powers to borrow or raise money for the purposes of the registered scheme: see RG 134.118–RG 134.122.

The constitution does not need to expressly identify the actual amount of a fee that will be paid by members. It can identify a maximum fee to which the responsible entity is entitled, as long as all of the variables that affect the amount of any fee are specified: see RG 134.123–RG 134.137.

### Powers to deal with property and raise money

- RG 134.118 The constitution of a registered scheme must make adequate provision for the powers of the responsible entity in making investments of, or otherwise dealing with, scheme property: see s601GA(1)(b).
- RG 134.119 If the responsible entity will have powers to borrow or raise money for the purposes of the registered scheme:
- (a) those powers must be specified in the constitution; and
  - (b) any other agreement or arrangement has no effect to the extent that it purports to confer such a power (see s601GA(3)).
- RG 134.120 The powers that may be appropriate depend on the particular scheme being operated. On this basis, we consider it is appropriate for a responsible entity to have the flexibility to determine the level of detail to include about their powers, taking into account the particular scheme. This is consistent with current commercial practice.
- RG 134.121 Because s601GA(1)(b) relates to the powers of investment, rather than how a responsible entity intends to exercise these powers, we consider that it is not necessary for the investment strategy to be set out in the constitution.
- RG 134.122 However, a responsible entity should make known their policy on how they will exercise their powers in the PDS and by reporting to members or under the continuous disclosure regime. If the investment or borrowing strategy is to change or not be followed, additional disclosure may be required and in some cases this may not be permitted under the terms on which investments have been accepted. A degree of detail about the investment strategy and borrowing strategy is information that we expect would be likely to influence persons considering investment or seeking to understand their

investment. In implementing an investment strategy, a responsible entity should also ensure they are acting within what is permitted under their Australian financial services (AFS) licence.

## Fees and indemnities

- RG 134.123 If a responsible entity will have any rights to be paid fees out of scheme property or to be indemnified out of scheme property for liabilities or expenses incurred in relation to performing their duties, these rights must be:
- (a) specified in the constitution; and
  - (b) available only in relation to the proper performance of their duties (see s601GA(2)).

- RG 134.124 In our view, this requirement gives members an important protection by ensuring that the responsible entity's rights to be paid fees or to be indemnified are only amended in accordance with the processes for amending a constitution. It is also intended to preclude the recovery of fees or the exercise of indemnity rights if a responsible entity fails to properly perform their duties.

Note: For more information on changing the constitution, see Section F.

- RG 134.125 To 'specify the right', the constitution should either:
- (a) expressly state that any such rights to fees or indemnification are subject to the proper performance by the responsible entity of their duties under the provisions for fees and indemnities; or
  - (b) include a provision to the effect that incorporates this restriction (e.g. a provision which states that to the extent a provision of the constitution is inconsistent with the Corporations Act it will be of no effect).

- RG 134.126 The right should be subject to the proper performance of duties only. The constitution should not allow the right to be subject to the proper performance of powers, unless those powers are exercised in the proper performance of the responsible entity's duties.

Note: For example, the constitution may provide for the right to be subject to the proper performance of powers in the proper performance of the responsible entity's duties.

- RG 134.127 We do not consider that the words 'specify the right' require that the actual amount of the fee that will be paid by members be expressly identified. However, we consider that the time at which the fee accrues, the performance to which it relates and each variable (including timing variables) affecting the amount of the fee that is payable or when it is payable must be clearly identified in the constitution and not left to the determination of the responsible entity.

RG 134.128 We consider that a fee provision that includes a timing or performance period variable containing an indefinite expression will not sufficiently identify the relevant variable. For example, provisions including expressions such as ‘as determined by the responsible entity’, ‘at least  $n$  days’, or ‘from time to time’, or a provision that allows the responsible entity to determine the period over which performance is to be assessed against a performance benchmark, will not satisfy the requirement to ‘specify the right’.

RG 134.129 In our experience, responsible entities often want to include provisions in a constitution that allow a maximum entitlement to a fee. This type of provision gives a responsible entity the commercial flexibility to set fees without having to constantly amend the constitution. We consider this type of provision still meets the requirements of s601GA(2) because the right is ‘specified’, even if in practice that right might be waived from time to time.

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

RG 134.130 We have also seen that responsible entities regularly want to include provisions in a constitution that calculate a variable fee with reference to an index benchmark. We also consider this type of provision can meet the requirements of s601GA(2) because all the variables affecting the calculation of the fee can be clearly identified.

RG 134.131 Responsible entities using an index benchmark should use one that is appropriate to the type of registered scheme to be operated. This helps prevent the responsible entity preferring their own interests over the best interests of members by calculating a fee using an inappropriate index.

RG 134.132 We recognise that responsible entities that include provisions calculating fees using an index need flexibility to replace that index with another index if the original index becomes redundant or inappropriate. We consider that it is generally appropriate to allow for the responsible entity to replace an index with another index that is similar to the original index if the provision clearly identifies when the index can be replaced.

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

RG 134.133 A responsible entity may purport to indemnify themselves from scheme property at an ‘hourly rate to be determined by them from time to time’ or ‘on standard commercial terms for work undertaken’ for performing functions in the operation of the fund. In our view, this type of purported indemnity is better characterised as a fee. Each variable (including timing variables) affecting the amount of the fee that is payable or when it is payable must be clearly identified in the constitution.

RG 134.134 We also note that there is authority in the context of a registered scheme that a person in their capacity as trustee cannot contract with themselves in their personal capacity, and so this type of arrangement may be of no legal effect.

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

RG 134.135 We do not consider that s601GA(2) allows for a right to payment of a fee in advance of the proper performance of the responsible entity's duties to which the fee relates. Payment in advance is incompatible with the right to a fee only being available for proper performance of the duty to which it relates. A responsible entity can only form a view about whether the duty has been properly performed after having performed it.

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

RG 134.136 Money received for the issue of interests that are not immediately issued must generally be paid into an 'application money' account under s1017E, and can only be withdrawn to return it to the person who paid for the interests or on the issue of the interests. We consider that money cannot be withdrawn to pay fees except when an issue of interests occurs. In our view, when an interest in a scheme is issued, money paid for the interest will be a contribution of money to the scheme and, so, scheme property as defined in s9. This means any fees paid out of the application money account need to be permitted under s601GA(2).

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

RG 134.137 In the process of withdrawal from a registered scheme, our experience is that money may be placed in a separate account to facilitate payments of withdrawal proceeds. We consider that the rights in such an account remain scheme property if held for members. If any deductions from such an account are made for fees or to make payments by way of indemnity to the responsible entity, any right to such payments must comply with s601GA(2).

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

### Key points

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

The constitution of a registered scheme must make adequate provision for handling complaints made by members. These provisions should ensure that complaints can be made by all members about all parts of the program or plan of action that constitute the scheme: see RG 134.138–RG 134.142.

If a registered scheme is open to retail clients, the constitution can comply with s601GA(1)(c) by containing a provision that the responsible entity, as an AFS licensee, will comply with the dispute resolution requirements in s912A(2) for retail clients: see RG 134.143–RG 134.149.

If a registered scheme is open to wholesale clients, the responsible entity can either adopt the same procedures that apply to retail clients or can devise its own complaints handling procedures for these clients: see RG 134.150–RG 134.153.

We have granted relief from s601FC(1)(d) to make it clear that responsible entities may treat retail and wholesale clients who are in the same class differently in relation to complaints handling: see RG 134.154.

Under the Australian Passport Rules, the constitution of an Australian passport fund must include provisions for certain matters in relation to remedies for loss and actions against members: see RG 134.155–RG 134.161.

### Requirements for registered schemes

- RG 134.138 The constitution of a registered scheme must make adequate provision for the method by which complaints made by members in relation to the scheme are to be dealt with: see s601GA(1)(c).
- RG 134.139 In our view, the words ‘in relation to the scheme’ should be interpreted broadly so that complaints can be made by members about all parts of the ‘program or plan of action’ that constitute the scheme.
- RG 000.140 For example, we do not consider that a provision that seeks to restrict complaints being made solely about the conduct of the responsible entity would constitute adequate provision for complaints being made ‘in relation to the scheme’.

## Scope of complaints handling provisions

- RG 134.141 The Corporations Act defines a ‘member’ of a registered scheme as a person who holds an interest in the scheme. This means that, to comply with the requirement in s601GA(1)(c), the complaints provisions must apply to a person who holds an interest in the scheme, and not to a narrower class of persons.
- RG 134.142 The responsible entity will generally use a defined term in the constitution to refer to people to which the complaints provisions apply, such as ‘member’ or ‘unitholder’. Where that definition is more restrictive than the definition of ‘member’ in s9, the complaints provisions will not comply with s601GA(1)(c) because they will not apply to all people who meet the definition of ‘member’ in s9. In these circumstances, the constitution will not have made adequate provision for the method by which complaints made by persons who hold an interest in the scheme, but do not fall within the scope of the relevant defined term, are to be dealt with.

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

## Retail clients

- RG 134.143 A responsible entity is also an AFS licensee. As an AFS licensee, a responsible entity that provides financial services to retail clients must have a dispute resolution system that meets the requirements in s912A(2): see s912A(1)(g).
- RG 134.144 Under s912A(2), an AFS licensee must:
- (a) have in place an internal dispute resolution procedure that complies with the standards and requirements made or approved by ASIC, and covers complaints made by retail clients against the licensee in connection with the financial services provided under its licence; and
  - (b) be a member of the Australian Financial Complaints Authority (AFCA).

Note 1: Under transitional arrangements, AFS licensees that are members of an external dispute resolution scheme that is approved by ASIC have until 21 September 2018 to become members of AFCA and must retain their existing membership until further notice. For more information, see [Media Release \(18-123MR\) ASIC welcomes AFCA authorisation](#) (2 May 2018).

Note 2: For more information on what an AFS licensee must do to have a dispute resolution system in place to meet the requirements in s912A(2), see [Regulatory Guide 165 Licensing: Internal and external dispute resolution](#) (RG 165). [Class Order \[CO 09/339\] Internal dispute resolution procedures](#) also sets out our principles and requirements for internal dispute resolution procedures.

- RG 134.145 RG 165 explains the specific requirements for internal dispute resolution procedures. In RG 165.62, we state that the key requirements for internal dispute resolution procedures are that an AFS licensee:
- (a) adopts the definition of ‘complaint’ in [Australian Standard AS ISO 10002–2006 Customer satisfaction—Guidelines for complaints handling in organizations](#) (ISO 10002:2004 MOD) published by SAI Global Limited on 5 April 2006 (AS ISO 10002–2006) (see RG 165.78);
  - (b) satisfies the Guiding Principles in Section 4 of AS ISO 10002–2006, and follows Section 5.1—Commitment, Section 6.4—Resources, Section 8.1—Collection of information, and Section 8.2—Analysis and evaluation of complaints in this standard (see RG 165.82–RG 165.85); and
  - (c) has a system for informing complainants or disputants about the availability and accessibility of the relevant external dispute resolution scheme of which the AFS licensee is a member (see RG 165.130).

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

- RG 134.146 We recognise that the requirements in s601GA(1)(c) and 912A(2) do not directly align with each other. The requirement in s601GA(1)(c) applies to complaints made by members of the registered scheme. We note that ‘member’ is defined in s9 as a ‘person who holds an interest in the scheme’. This definition does not distinguish between a retail client and a wholesale client. However, the requirement in s912A(1)(g) only applies to retail clients.
- RG 134.147 We consider that the responsible entity will be able to meet the requirements of s601GA(1)(c) in part by having a dispute resolution system for retail clients that meets the requirements of s912A(2). This will allow responsible entities to avoid the need to have different sets of complaints handling procedures for retail clients to meet their obligations under s601GA(1)(c) and 912A(2).
- RG 134.148 To minimise the need for the responsible entity to have duplicate procedures for retail clients, the constitution could include a provision to the effect that the responsible entity will comply, as an AFS licensee, with the dispute resolution requirements in s912A(2) in dealing with member complaints in relation to the scheme. However, it is open to a responsible entity not to include a provision to that effect and instead separately set out complaints handling provisions for retail clients, provided these fully address all of the relevant requirements consistent with our guidance in RG 165.
- RG 134.149 If the registered scheme is only open to retail clients and the responsible entity relies on this as the basis on which the constitution makes adequate provision for dealing with complaints, the constitution must also include a provision that the responsible entity will only issue interests in the scheme to retail clients.

## Wholesale clients

- RG 134.150 Because s601GA(1)(c) is broader than s912A(1)(g), the responsible entity will also need to include provisions about complaints handling for wholesale clients. This is unless the constitution excludes the issue of interests to wholesale clients.
- RG 134.151 We acknowledge that responsible entities and wholesale clients may have in place informal arrangements to resolve disputes and/or agreements that provide assistance in resolving disputes. However, we consider that to meet their obligations under s601GA(1)(c), a responsible entity must include provisions about these arrangements to ensure that the constitution also makes adequate provision for dealing with complaints in relation to the scheme by wholesale clients.
- RG 134.152 It may be appropriate for different requirements to apply for wholesale clients who may have the knowledge, resources and bargaining power to have complaints effectively resolved, and may escalate issues through arbitration and the courts. In light of this, we consider the responsible entity should be able to:
- (a) devise and include its own complaints handling procedures for wholesale clients; or
  - (b) apply the same procedures to all members (both retail and wholesale).
- RG 134.153 If the registered scheme is only open to wholesale clients, and the responsible entity relies on this as the basis on which the constitution makes adequate provision for dealing with complaints, there should be a provision in the constitution that the responsible entity will only issue interests in the scheme to wholesale clients.

## Additional relief for complaints handling

- RG 134.154 We have granted relief from s601FC(1)(d) under [\[CO 13/656\]](#) to make it clear that responsible entities may treat retail and wholesale clients who may be in the same class differently in relation to complaints handling.

## Requirements for Australian passport funds

- RG 134.155 Under section 4 of the Australian Passport Rules, the Australian passport fund operator must ensure that the Australian passport fund has a compliant constitution at all times.

## Seeking remedy

- RG 134.156 Under the constitution, each member must be entitled to seek remedy against the Australian passport fund (if the fund is a legal entity) and its operator in certain circumstances.

- RG 134.157 The member must be entitled to seek remedy, including through compensation, in relation to loss suffered by the member due to the Australian passport fund or its operator breaching:
- (a) the laws of Australia and associated regulations administered by ASIC; or
  - (b) any other regulatory requirements administered by ASIC that apply to registered schemes or the Australian Passport Rules.
- RG 134.158 The member must be entitled to seek remedy in the member's choice of Australia or a host economy of the Australian passport fund.
- RG 134.159 These provisions must apply unless:
- (a) the member and the Australian passport fund or its operator have agreed in writing that the member is not entitled to seek remedy in that place in relation to the particular proceedings; and
  - (b) that agreement is effected after the conduct that is or is to be subject to the proceedings has first occurred.

### **Agreed forum**

- RG 134.160 The constitution must set out that, if a member has commenced proceedings against the Australian passport fund (if it is a legal entity) or its operator in a court in the member's economy, that court will be a convenient forum to hear the proceedings. This is unless:
- (a) a similar action has been commenced against the Australian passport fund or its operator in another economy, and it would be reasonable for the member to participate in that action; or
  - (b) the member and the Australian passport fund or its operator have agreed in writing that the court will not be a convenient forum for that particular proceeding and the agreement is effected after the conduct that is or is to be subject to the proceedings has first occurred.

Note: The 'member's economy' is the economy in which the member was located when they applied to be a member of the Australian passport fund. If that economy is not a participating economy, the member's economy is taken to be Australia.

- RG 134.161 The constitution must also provide that the convenient forum for the Australian passport fund (if the fund is a legal entity) or its operator to bring an action against a member will be a court in the member's economy. This is unless:
- (a) the member and the Australian passport fund or its operator have agreed in writing that the court will not be a convenient forum for the particular proceedings; and
  - (b) the agreement is effected after the conduct that is or is to be subject to the proceedings has first occurred.

## F Changing the constitution of a registered scheme

### Key points

The guidance in this section is relevant to registered schemes.

The constitution of a registered scheme may only be changed or replaced in certain circumstances. These changes must be lodged with ASIC, and do not take effect prior to lodgement: see RG 134.162–RG 134.165.

We have granted relief from the requirements for changing the constitution in certain circumstances: see RG 134.166–RG 134.169.

### Requirements for registered schemes

- RG 134.162 The constitution of a registered scheme may be changed, or repealed and replaced, either by:
- (a) a special resolution passed by members; or
  - (b) the responsible entity, if the responsible entity reasonably considers the change will not adversely affect members' rights (see s601GC).

Note: In *360 Capital RE Ltd v Watts* (2012) 91 ACSR 328, the Victorian Court of Appeal considered the circumstances in which the responsible entity of a registered scheme may unilaterally change the constitution under s601GC(1)(b). The court held that a member's right to have the scheme managed in accordance with the constitution was a relevant right for the purposes of that provision. See also *Lewski v Australian Securities & Investments Commission* [2016] FCAFC 96.

- RG 134.163 When a change is made to the constitution, the responsible entity must lodge a copy of the modified or new constitution with ASIC, and the modification or replacement will not take effect until the copy has been lodged: see s601GC(2).
- RG 134.164 We may review the copy of the new or amended constitution and:
- (a) ask for further information on one or more specific provisions; and
  - (b) suggest or require amendments to be made.
- RG 134.165 We may direct a responsible entity to lodge a consolidated copy of the constitution: see s601GC(3).

### Relief available for registered schemes

- RG 134.166 We have provided relief from the requirements in s601GC to allow for changes of the constitution of a registered scheme in certain circumstances: see [Class Order \[CO 09/552\]](#) *Changing the constitution*.

- RG 134.167 Our relief allows for changes to be made when:
- (a) the quorum requirement for a meeting of members cannot be met because the scheme has an insufficient number of members;
  - (b) no member is entitled to vote at a meeting of members because of the restrictions of s253E; or
  - (c) all interests were issued in situations that did not require a PDS.
- RG 134.168 For the relief to apply, the responsible entity must ensure material information has been provided to each member and relevant auditors, and each member gives their written consent.
- RG 134.169 We have also provided relief to address any uncertainty for a responsible entity seeking to change the constitution of a registered scheme to allow the scheme to use the attribution managed investment trust regime without holding a meeting of members: see [ASIC Corporations \(Attribution Managed Investment Trusts\) Instrument 2016/489](#). This relief is available where:
- (a) the responsible entity publishes a notice on its website explaining the change and does not receive a sufficient number of requests for a meeting of members to consider the changes; or
  - (b) all members are wholesale clients and the responsible entity takes reasonable steps to consult with each member about the changes before making them.

## G Withdrawal from registered schemes

### Key points

The guidance in this section is relevant to registered schemes.

A right to withdraw from a registered scheme is any right of a member to cease to hold an interest in the scheme at the request of the member and exercisable against the responsible entity or a person acting on their behalf: see RG 134.170–RG 134.176.

The constitution of a registered scheme should address the key aspects of the withdrawal process, including how the withdrawal right is triggered, any amount that is to be paid or given to members, restrictions on dealing with withdrawal requests and ceasing to be a member: see RG 134.177–RG 134.199.

The right to withdraw from a registered scheme and any provisions for making and dealing with withdrawal requests must be fair to members: see RG 134.200–RG 134.208.

If a responsible entity will have discretion to suspend the right to withdraw, the constitution should set out the circumstances in which they can exercise that discretion: see RG 134.209–RG 134.210.

### Withdrawal from a registered scheme

#### Members' right to withdraw

- RG 134.170 Under s601GA(4), if members have a right to withdraw from a registered scheme, the constitution must:
- (a) specify the right;
  - (b) if the right is to be exercised while the registered scheme is liquid, set out adequate procedures for making and dealing with these withdrawal requests; and
  - (c) if the right may be exercised while the registered scheme is not liquid, provide for the right to be exercised in accordance with Pt 5C.6 and set out any other adequate procedures that apply to making and dealing with these withdrawal requests.

Note 1: In some circumstances, we have given relief from the requirements in RG 134.170(b)–RG 134.170(c). For more information, see, for example, [ASIC Corporations \(ASX-listed Schemes On-market Buy-backs\) Instrument 2016/1159](#) and Section C of [RG 136](#).

Note 2: We have given relief from s601GA(4) for IDPS-like schemes. For more information, see [Class Order \[CO 13/762\] Investor directed portfolio services provided through a registered managed investment scheme](#). Under [CO 13/762], a constitution for an IDPS-like scheme must specify the right to withdraw and set out procedures for

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

Note 3: Our guidance on the scope of the complaints handling provisions in light of the definition of ‘member’ also applies to any withdrawal provisions—see RG 134.141–RG 134.142.

RG 134.171 Section 601GA(4) also requires that the right to withdraw and any provisions setting out procedures for making and dealing with withdrawal requests be fair to members.

RG 134.172 We note that s601GA does not require that members must be permitted to withdraw from a scheme. However, a responsible entity may wish to give members this right and include provisions in the constitution to allow them to withdraw from the scheme. If the right to withdraw may be exercised when the scheme is not liquid, the provisions of the constitution must be in accordance with the provisions of Pt 5C.6 that apply to schemes that are not liquid.

RG 134.173 In our view, a member can acquire the right to withdraw at any time before the withdrawal occurs. We do not consider the right to withdraw needs to exist when a request is made to trigger the application of s601GA(4).

Note: For more information on the right to withdraw, see paragraph 9.4 of the [Explanatory Memorandum to the Managed Investments Bill 1997](#).

RG 134.174 We consider that provisions that allow a member (at their request) to cease to be a member in relation to the interests that are the subject of the withdrawal request can confer a ‘right to withdraw’. This is even if the responsible entity has a discretion about whether to act on the request when it is received. When the request is made, there may be no right to withdraw. However, a right to withdraw will generally arise on the exercise of the discretion to allow withdrawal or at a later point before the withdrawal is effected.

RG 134.175 This right to withdraw may arise regardless of how the withdrawal process is initiated by the member or whether it is subject to conditions imposed by the responsible entity. We do not consider that a right to withdraw requires a member to have an automatic or unconditional right to withdraw from a scheme, because this would unduly limit the operation of s601GA(4) in a manner that is inconsistent with its legislative purpose.

RG 134.176 A right to withdraw can also exist in circumstances where the responsible entity (including by a nominee) acquires a member’s interests by transfer at the member’s request.

Note: We note that the member’s holding in the register must then be adjusted. It is a requirement under the modified provisions of [ASIC Corporations \(ASX-listed Schemes On-market Buy-backs\) Instrument 2016/1159](#) that any interests acquired through the on-market buy-back must be cancelled.

## Making and dealing with withdrawal requests

RG 134.177 What constitutes ‘adequate procedures’ for making and dealing with withdrawal requests will depend on the circumstances of the registered scheme.

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

RG 134.178 While we do not consider it necessary to state every aspect of the procedures, key rights about the process should be set out in the constitution. This is so members can determine their right to withdraw from the registered scheme and be protected against adverse changes other than by special resolution.

RG 134.179 In light of this view, we consider that the responsible entity and their advisers should be able to devise provisions that deal with the procedures for making and dealing with withdrawal requests. This is as long as the provisions deal with all of the key steps in the process from commencement to completion. This will enable responsible entities to design provisions about withdrawing from registered schemes that best reflect their operational practices and product design.

RG 134.180 In our view, it is not sufficient to merely state in the constitution that the key elements of the withdrawal procedures are set out in a separate document, such as a PDS.

RG 134.181 We consider that the key information on the withdrawal process will generally cover how the withdrawal right is exercised, any amount that will be paid or given to members, restrictions on dealing with withdrawal requests and ceasing to be a member. However, there may be other steps in the withdrawal process that a responsible entity will want to address, or must address for the procedures to be adequate.

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

### Triggering a withdrawal right

RG 134.182 We consider how a withdrawal right is triggered is important. For this reason, the constitution should provide enough information so that it is possible to determine how a member may trigger the right to withdraw and what (if any) preconditions apply. This should include all steps that a member will have to take and whether there are any prerequisites that need to be satisfied before a right arises and is satisfied.

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

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

Note 3: A further example is that, if members are able to make a withdrawal request in a number of different forms (e.g. in writing or by telephone), the constitution should set out all of the permissible forms that a withdrawal request can take.

RG 134.183 We consider that provisions that are too general and leave too much discretion to the responsible entity will not provide sufficient information on the steps and preconditions (if any) for how a member may trigger the right to withdraw. The constitution may require a withdrawal request to contain information as required by the responsible entity.

Note: For example, allowing the responsible entity to determine ‘from time to time’ the form that a withdrawal request must take will not provide sufficient information on the steps and preconditions (if any) for how a member may trigger the right to withdraw.

RG 134.184 A provision that allows the responsible entity to determine any preconditions at their discretion or from time to time does not give members information on how they may exercise the right to withdraw and the preconditions that will apply to the exercise of that right to comply with s601GA(4). In our view, the exercise of such discretions could undermine the right of members to withdraw, and remove such rights from the protection of requiring a special resolution to be adversely changed.

### Amounts paid to members

RG 134.185 We consider a key aspect of withdrawing from a registered scheme is any amount that will be paid or given to members. For this reason, there should be provisions about the amounts that will be given to members to satisfy withdrawal requests. This includes:

- (a) a price that will apply to the interests that are the subject of the withdrawal request (see RG 134.95–RG 134.98);
- (b) when the amount is paid to members and the maximum period for payment after withdrawal; and
- (c) the nature of the amount that members will receive and how non-monetary assets will be valued.

Note: For more information on relief in relation to withdrawal amounts and the discretions that affect withdrawal amounts, see RG 134.95–RG 134.101 and RG 134.108–RG 134.115.

RG 134.186 If the consideration may be paid *in-specie* or in more than one form (e.g. a combination of cash and other assets), we consider that the responsible entity’s duties under s601FC(1)(c) and (d), and their fiduciary relationship with members, mean they should consider the rights and interests of all members (including the withdrawing member) when exercising any discretion in relation to:

- (a) the nature of the consideration members will receive;

- (b) who bears liability for transaction costs associated with the transfer of assets; and
- (c) whether the consent of the withdrawing member is required (see also RG 134.207).

### **Restrictions on dealing with withdrawal requests**

- RG 134.187 If a member's right to withdraw is restricted in certain circumstances or can be restricted at the discretion of the responsible entity, the constitution should describe these restrictions because these are important aspects of the withdrawal right.
- RG 134.188 In our view, the type of restrictions that should be stated in the constitution include:
- (a) any circumstances in which a responsible entity may suspend and resume withdrawals;
  - (b) the right to impose minimum and maximum limits on the number or value of interests that may be withdrawn by a member;
  - (c) the ability to satisfy requests on a partial or staggered basis; and
  - (d) any other circumstance that restricts a member's right to withdraw.
- RG 134.189 We expect that any discretion would be exercised in a manner consistent with the responsible entity's statutory duties under s601FC and that, generally, any suspension that is material in duration would be disclosed to members under s1017B or 675 if the registered scheme is a disclosing entity.
- RG 134.190 The constitution should not contain a provision that allows the responsible entity to set out the circumstances in which it may suspend the right to withdraw in another document.

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

- RG 134.191 A 'member' of a registered scheme is a person who holds an interest in the scheme: s9. A person ceases to be a member in relation to the withdrawn interest of the registered scheme when they cease to hold an interest in it.
- RG 134.192 The constitution should not include provisions that treat withdrawing members as having ceased to be a member before the time when the scheme property is valued for determining the withdrawal price. This is because until that time the member can share in any increase in the value of scheme property, and so retains an interest in the scheme.

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

RG 134.193 If a member has ceased to hold an interest in the registered scheme but has not been paid the withdrawal amount, they do not have rights as a member, but are taken to be a creditor of the scheme.

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

RG 134.194 A responsible entity will often include a provision about the timeframe between acceptance of the withdrawal request and the date for payment of the withdrawal amount to a member whose interests have been redeemed (former member). We understand that this timeframe will vary depending on the characteristics of the registered scheme and the operational practices of the responsible entity.

RG 134.195 We consider that, to be fair to all members, the constitution needs to include a provision specifying the maximum payment period after a person ceases to be a member. This may be expressed as a period from the date of withdrawal of a member's interest in the scheme or a time before this time, such as acceptance of the withdrawal request.

Note: The time at which withdrawal of a member's interests occurs may be on or after the time as of which the interest is valued to determine the withdrawal amount.

RG 134.196 Members whose interests have been redeemed will generally expect to receive payment within a reasonable time of withdrawing. For a non-liquid registered scheme, withdrawal requests must be satisfied by payment within 21 days: see s601KD. For liquid registered schemes, we expect that to ensure fairness (as required by s601GA(4)), the constitution must provide that generally former members will be paid within 21 days from when they cease to hold an interest in the registered scheme.

RG 134.197 The constitution may provide for payment to a former member within a period that exceeds 21 days in certain circumstances, as long as it is fair and the relevant circumstances exist. Circumstances in which we consider a longer period may be fair are:

- (a) extreme market events—we consider a provision will be fair if it provides for an extended payment period due to an event that was not reasonably foreseen by the responsible entity at the time it accepted the withdrawal request and while the circumstances still exist. However, we do not consider it fair to use a provision that allows the responsible entity to delay payment merely on the basis that it is 'in the best interests of members'. This is because such a provision fails to take into account the interests of the former member awaiting payment;

Note: For example, the constitution may allow for the payment period to be extended for the duration of a securities exchange closure that is the result of an extreme event, or for the duration of a trading halt by a market operator where this was not reasonably foreseen by the responsible entity.

- (b) systems and processes are already in place for a longer period—responsible entities who operate multiple registered schemes may want to have timeframes for payment of withdrawal amounts that are the same for all registered schemes. In some cases, schemes that were registered before 1 October 2013 had payment timeframes of 30 days. We recognise that there are costs associated with making changes to systems and processes to reduce the timeframe to 21 days. However, if other changes to systems and processes are made, we expect the timeframe will be adjusted to a 21-day payment period; and
- (c) the registered scheme is a ‘feeder fund’—if the registered scheme is a feeder fund for another scheme (master fund) that has a longer timeframe to pay withdrawal amounts to former members, we consider that it will be difficult to have a timeframe for payment of the withdrawal amount that is shorter than the master fund.

Note: The 21-day timeframe in this guidance relates to the period commencing from the time when a member ceases to hold an interest in a liquid registered scheme until the withdrawal amount is paid to a former member; it does not relate to, for example, the overall period for acceptance of, or processing, withdrawal requests.

### Non-liquid schemes

RG 134.198 In our view, the constitution should only permit members’ interests to be redeemed in accordance with the procedures that apply to liquid registered schemes if the registered scheme is liquid at the time when the value of scheme property is determined for the purposes of calculating the withdrawal price. If a registered scheme becomes non-liquid after a member has made a request to withdraw, but before the time at which the value of scheme property is to be determined for calculating the withdrawal price (even though the time when the valuation process takes place may actually be later), we consider that the constitution may only allow that member to withdraw in accordance with the requirements in Pt 5C.6 for non-liquid registered schemes.

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

RG 134.199 Apart from any relief we give, a constitution must not contain provisions that allow a member to exercise a right to withdraw in circumstances other than in response to a current withdrawal offer while the scheme is non-liquid. This is because, in our view, Pt 5C.6 requires that the exercise of a right to withdraw should be made in reliance on a specific current offer. We consider that a provision that allows a member to make a withdrawal request ‘from time to time’, rather than in response to an offer by the responsible entity, is not a withdrawal request envisaged under Pt 5C.6 for a non-liquid registered scheme.

Note 1: An example is a provision to the effect that members can make a request to withdraw that the responsible entity may act on while the registered scheme is

non-liquid that is not in response to a current withdrawal offer made by the responsible entity.

Note 2: A provision that permits a responsible entity to treat a withdrawal request they have received before they make a withdrawal offer as an acceptance of that withdrawal offer at the time the offer is made is not consistent with Pt 5C.6, as the earlier withdrawal request will not have been made in response to the later withdrawal offer.

## Fairness to members

RG 134.200 In our view, provisions involving withdrawal procedures should not unreasonably disadvantage certain members or be otherwise inconsistent with the Corporations Act. We consider ‘fairness’ in the context of s601GA(4) means that the provisions in the constitution that affect the price which members will receive on withdrawal, and the procedures for satisfying withdrawal requests, must be fair to all members.

RG 134.201 Withdrawals from a registered scheme will not only affect the entitlements of withdrawing members, but also the remaining assets to be attributed to the interests of non-exiting members. The price at which members can withdraw, and the procedures that apply to the withdrawal, must be fair because these affect the right to withdraw and how this right operates.

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

Note 2: For information on ‘reasonably current’ market value, see RG 134.111.

RG 134.202 The constitution must provide for the withdrawal price to be determined in accordance with a method or manner that is fair to all members under s601GA(4). We consider that ‘fairness’ requires withdrawal provisions to specify that the withdrawal amount be determined on the basis of valuations of scheme property that are:

- (a) reasonably current; and
- (b) consistent with the range of ordinary commercial practice for valuing that type of scheme property.

RG 134.203 A valuation is reasonably current if it reflects current prices for the assets, rather than the cost at which they were acquired (e.g. when the amount was advanced for a loan). Where market prices cannot be used, the valuation for pricing should still reflect the fair value of assets, taking into account current market conditions that would apply to dealing in scheme assets, because the price needs to reflect the effect of potential dealings in assets that may result from issues or withdrawals.

RG 134.204 The International Organization of Securities Commission (IOSCO) has provided the following guidance:

In accordance with the general valuation principles applicable to collective investment schemes, responsible entities should ensure that the assets of the

collective investment scheme are valued according to current market prices, provided that those prices are available, reliable, and up-to-date.

Note: IOSCO, [Policy recommendations for money market funds](#) (PDF 8.45 MB), 9 October 2012.

RG 134.205 We consider this is essential for determining a price that results in a fair and equitable outcome for all members. It is also consistent with a responsible entity's duty under s601FC(1)(j) to ensure that scheme property is valued at regular intervals appropriate to the nature of the property.

Note 1: For example, a provision for payment of a fixed amount that is contributed to the registered scheme by a member is unlikely to be fair if the entitlement of members is to a share of a pool and the value of the pool varies due to a change in value of the assets.

Note 2: The valuation of a debt should reflect what the debt could be sold for if needed to realise cash to pay withdrawal amounts, and not the face value of the debt.

RG 134.206 In our view, withdrawal offers should be made in a way that ensures all members to whom the offer is made have access to a copy of the offer. If an offer is only made via the internet or other form of public communication (e.g. in a newspaper), a responsible entity should consider whether the procedure will be 'fair' and consistent with their duties under s601FC(1)(d).

RG 134.207 Appropriate valuations affect both the amount that a member is entitled to on withdrawal and the value of the remaining interests. As such, if a responsible entity chooses to make *in-specie* payments to satisfy a withdrawal request, to be fair to all members the constitution should include provisions that the relevant assets should be valued based on valuations that are:

- (a) reasonably current; and
- (b) consistent with the range of ordinary commercial practice for valuing assets of that type.

Note 1: A valuation will not be reasonably current if the responsible entity has reason to believe that a more up-to-date valuation would result in a materially different value.

Note 2: A reasonably current valuation will reflect current market prices for the assets, where available and reliable, and will reflect current market conditions that would affect dealing in the registered scheme's assets.

RG 134.208 To the extent that a responsible entity can select particular assets to satisfy payment, that selection must be made on a fair basis and take into account the responsible entity's duties under s601FC(1). This also applies to the deduction of transaction costs.

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

## Suspension of withdrawals

- RG 134.209 A responsible entity may wish to include a provision giving it discretion to suspend a right to withdraw by suspending the acceptance or processing of withdrawal requests (other than the timeframe for payment after withdrawal has occurred). In this case, the constitution should set out the circumstances in which the responsible entity can exercise that discretion.
- RG 134.210 This could be a limited range of circumstances or the responsible entity could be given the discretion whenever they think fit. We recognise that a responsible entity may need to suspend or defer the acceptance or processing of withdrawals for an extended period of time. Responsible entities should ensure that powers of suspension are exercised consistently with their duties under s601FC(1).

Note: For example, a responsible entity may need to suspend withdrawal if there is an unexpected demand for withdrawal requests, if the valuations they have are not reasonably current, or if circumstances make it difficult to determine the withdrawal price.

## H Winding up a registered scheme

### Key points

The guidance in this section is relevant to registered schemes.

The constitution of a registered scheme should address the following key aspects of the winding up process:

- how assets, liabilities and scheme property are dealt with (see RG 134.218–RG 134.219);
- distribution of the proceeds of winding up (see RG 134.220–RG 134.221);
- the costs of winding up (see RG 134.222); and
- any payments to maximise proceeds of winding up (see RG 134.223–RG 134.224).

The constitution should include a provision for an independent audit of the final accounts to be conducted by a registered company auditor or audit firm after a scheme is wound up: see RG 134.229–RG 134.231.

The constitution can include provisions allowing the responsible entity to postpone the realisation of a scheme on winding up: see RG 134.232–RG 134.233.

### Procedures for winding up

- RG 134.211 The constitution of a registered scheme must make adequate provision for winding up the scheme: see s601GA(1)(d).
- RG 134.212 However, Ch 5C does not prescribe what constitutes winding up a registered scheme, or what the process entails. The responsible entity of a registered scheme must ensure that the scheme is wound up in accordance with its constitution and any orders of the court under s601NF(2): see s601NE(2).
- RG 134.213 We consider that winding up a registered scheme is a process rather than an event. As such, we expect that provisions will deal with the process of winding up, rather than only the event of termination.
- Note: This is consistent with Justice Judd’s views in *Environinvest Ltd* [2009] VSC 33 at [99].
- RG 134.214 We also consider that the provisions need to deal with the process for winding up the whole ‘program or plan of action’ that constitutes the registered scheme.
- RG 134.215 What constitutes ‘adequate provision’ will depend on the circumstances surrounding the registered scheme. In light of this, we consider the responsible entity and their advisers should be able to devise provisions that

deal with winding up the scheme taking into account the characteristics of that registered scheme, as long as the provisions cover the process of winding up. We consider that this will enable responsible entities to preserve flexibility in provisions about winding up registered schemes to deal with unforeseen situations.

RG 134.216 In our view, there are certain key steps in the process of winding up a registered scheme. These are:

- (a) dealing with assets, liabilities and scheme property;
- (b) the distribution of proceeds;
- (c) costs of winding up; and
- (d) additional payments by members.

RG 134.217 These key steps in the process of winding up a scheme should be addressed in all constitutions. However, a responsible entity may also want to include additional provisions to assist in the winding up of the scheme.

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

RG 134.218 We consider that a key aspect of winding up a registered scheme is being able to identify and deal with assets and liabilities of the scheme and scheme property in order to realise them.

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

RG 134.219 In our view, this may require more specific treatment in some contract-based schemes where it may be difficult to distinguish scheme property and other assets of the registered scheme that are to be covered in winding up from assets that are outside any winding up, such as certain non-scheme property.

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

### **Distribution of proceeds**

RG 134.220 We also consider that a key aspect of winding up a registered scheme is determining how proceeds will be apportioned. For this reason, the constitution should include provisions about the distribution of the net proceeds of realisation of the scheme.

RG 134.221 The constitution should explain who will apportion the net proceeds of realisation between members who are entitled to receive a portion, what criteria will be used to apportion the net proceeds of realisation between members, and the priority of payment to relevant members and other relevant parties.

## Costs of winding up

RG 134.222 We consider that the identification of the party that will bear the costs of winding up the scheme is an important aspect of winding up the scheme. This will generally be the responsible entity. As such, the constitution should identify the party that will bear these costs and in what priority this party will be paid.

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

## Payments to maximise proceeds

RG 134.223 In our experience, a party winding up a registered scheme may require members to continue to make payments during the winding up to maximise the proceeds of realisation.

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

RG 134.224 If there is any ability for members to continue making payments during the process of winding up the registered scheme to maximise the net proceeds of realisation or, alternatively, if members are or may be required to continue making payments, this should be included in the provisions on winding up the registered scheme.

## Dealing with a ‘worst case scenario’

RG 134.225 The winding up of a registered scheme can occur where the responsible entity is ‘insolvent’ and/or if the assets of the registered scheme are no longer sufficient to indemnify the responsible entity for their liabilities.

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

RG 134.226 If a registered scheme is ‘insolvent’, provisions that authorise payment out of the realisation of the assets of the scheme will be of less use because sufficient assets will not be available to meet the costs and expenses of winding up the scheme.

RG 134.227 When drafting provisions about winding up, a responsible entity should consider whether to include provisions that might assist them to wind up the registered scheme if the scheme or the responsible entity is insolvent. For unitised schemes, established principles of trust law provide some assistance in determining the obligations of the responsible entity (or their successor) and the rights of members and third parties. This means there may be less of

a need for a responsible entity of this type of registered scheme to include provisions that address winding up in insolvency.

- RG 134.228 Contract-based registered schemes cannot rely on the established principles of trust law to provide a greater degree of clarity about winding up. Responsible entities of this type of registered scheme should consider adding provisions to deal with the situation of winding up the registered scheme where the scheme or the responsible entity is insolvent.

## Independent audit

- RG 134.229 We consider that the constitution needs to include a provision that provides for an independent audit of the final accounts, to be conducted by a registered company auditor or audit firm, after the registered scheme is wound up. This should require that the audit itself is an independent audit, and not merely that the auditor is independent. We do not consider that providing for an independent review in place of an independent audit is sufficient, in light of the different levels of assurance between the two.

- RG 134.230 On winding up a registered scheme, we consider it is an appropriate safeguard for the accounts to be independently audited to ensure there has been compliance with the Corporations Act.

Note: A registered scheme to which s601NFA (as notionally inserted by [ASIC Corporations \(Externally-Administered Bodies\) Instrument 2015/251](#)) applies is subject to alternative reporting obligations.

- RG 134.231 In our view, an audit of the final accounts provides greater oversight than a review as it involves performing procedures to obtain audit evidence about the amounts and disclosures in the accounts.

## Postponement of winding up

- RG 134.232 We recognise that a responsible entity may sometimes need to legitimately postpone the realisation of the registered scheme's assets on winding up to maximise the net proceeds of realisation attributable to members, and provision for a discretion to postpone may be included in the constitution. At the same time, we recognise that the discretion to postpone the realisation of a registered scheme on winding up might be improperly exercised to the detriment of members and may be used to avoid the timely winding up of a registered scheme.

- RG 134.233 If a responsible entity decides to postpone the realisation of registered scheme assets, they should take into account their duties under s601FC(1).

# I Legal enforceability of a registered scheme constitution

## Key points

The guidance in this section is relevant to registered schemes.

The constitution of a registered scheme must be contained in a document that is legally enforceable between the members of the scheme and the responsible entity. The particular form of the constitution will determine how it needs to be drafted and executed for it to be legally enforceable: see RG 134.234–RG 134.242.

## Enforceability between members and the responsible entity

- RG 134.234 The constitution of a registered scheme must be contained in a document that is legally enforceable between the members and the responsible entity: see s601GB.
- RG 134.235 The form of the constitution is not prescribed. Regardless of the form, the constitution must be legally binding between the responsible entity and the members. Most constitutions take the form of a deed poll that contains a provision that binds a person on becoming a member under the terms of the deed. Some constitutions may take the form of a deed poll combined with a pro forma of the contract arrangement between the responsible entity and a member, which the member and responsible entity must execute for the interests in the registered scheme to be issued.
- RG 134.236 In either of these circumstances, we expect that the constitution will be expressed as binding between the responsible entity and the members.
- RG 134.237 The particular form of the constitution will determine how it needs to be drafted and executed for it to be legally enforceable.

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

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

- RG 134.238 In our view, to be enforceable, the constitution must be contained in a document that is validly executed by the proposed responsible entity. We

consider this requires that the constitution be executed by the parties authorised to sign for the proposed responsible entity before the application for registration of the scheme is lodged with ASIC.

RG 134.239 In our experience, a constitution will generally contain a clause that binds the responsible entity and each present and future member as if each of them had been a party to the constitution. All constitutions should expressly bind the responsible entity and the members of the scheme from time to time. This is consistent with the legislative intention of s601GB that the constitution is contained in a document that is or documents that are lawful and binding between the responsible entity and the members.

RG 134.240 We consider that s601GB requires that the constitution continues to be contained in a document that is legally enforceable. This means that a method of effecting a modification chosen by the responsible entity when acting under s601GC(1)(b) will need to be one that ensures that, after the modification, the constitution continues to be wholly contained in a document that meets the requirements in s601GB.

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

## Severance clauses

RG 134.241 We encourage responsible entities to ensure that the constitution contains an overriding provision to the effect that, to the extent a provision of the constitution is inconsistent with the Corporations Act, it will be of no effect.

## Impact on s601GA content

RG 134.242 We also consider that a provision of the constitution will not make 'adequate provision' for, or 'specify', the matters prescribed by s601GA if it is not capable of being legally enforceable, as envisaged by s601GB.

## J Incorporation by reference in a registered scheme constitution

### Key points

The guidance in this section is relevant to registered schemes.

The constitution of a registered scheme must ‘make adequate provision for’ certain matters and ‘specify’ others. Making these matters subject to documents external to the constitution, in our view, means the constitution does not meet the relevant requirements: see RG 134.243–RG 134.244.

We have provided relief to allow the constitution of a registered scheme to incorporate by reference the listing rules of approved financial markets in some circumstances: see RG 134.245–RG 134.246.

### Making adequate provision for and specifying matters

- RG 134.243 The constitution of a registered scheme must ‘make adequate provision for’ certain matters or ‘specify’ other matters. We consider that making provisions of the constitution under s601GA subject to other documents that may affect these provisions (e.g. by excluding or modifying them) means that the constitution does not ‘make adequate provision for’ or ‘specify’ the matters required by the Corporations Act.
- RG 134.244 Provisions that seek to incorporate the terms of issue of interests, or material included in a PDS, without excluding any effect they may have on the provisions required under s601GA, in our view are not consistent with those requirements. This is regardless of how these terms of issue are described or defined in the constitution.

### Relief to incorporate by reference listing rules of a financial market

- RG 134.245 Under [ASIC Corporations \(Chapter 5C—Miscellaneous Provisions\) Instrument 2017/125](#), a responsible entity may include certain provisions in the constitution of a registered scheme that incorporate by reference, and give overriding effect to, the listing rules of an approved financial market.
- RG 134.246 We consider that this relief is appropriate because, for each approved financial market:
- (a) the listing rules are available to the public;
  - (b) amendments to the listing rules are subject to regulatory oversight; and
  - (c) amendments to the terms of the constitution are highly likely to be appropriate if the listing rules require those amendments in order to maintain listing.

## Key terms

Term	Meaning in this document
ADI	An authorised deposit-taking institution—a corporation that is authorised under the <i>Banking Act 1959</i> . ADIs include: <ul style="list-style-type: none"> <li>• banks;</li> <li>• building societies; and</li> <li>• credit unions</li> </ul>
AFCA	Australian Financial Complaints Authority—The external dispute resolution scheme for which an authorisation under Pt 7.10A of the Corporations Act is in force
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
ASIC	Australian Securities and Investments Commission
Asia Region Funds Passport	An agreement between economies in the Asia region that allows passport funds established and regulated in one participating economy to offer interests to investors in another participating economy
ASX	ASX Limited or the exchange market operated by ASX Limited
Australian passport fund	A registered scheme that is also registered as a passport fund under Pt 8A.3 of the Corporations Act
Australian Passport Rules	Annex 3 to the Memorandum of Cooperation as incorporated by legislative instrument into Australian law under s1211 and 1211A of the Corporations Act
Ch 5C (for example)	A chapter of the Corporations Act (in this example numbered 5C), unless otherwise specified
Chi-X	Chi-X Australia Pty Ltd
[CO 13/655] (for example)	An ASIC class order (in this example numbered 13/655)  Note: Legislative instruments made from 2015 are referred to as ASIC instruments.
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Div 2 (for example)	A division of the Corporations Act (in this example numbered 2), unless otherwise specified

Term	Meaning in this document
exchange traded fund	<p>A registered scheme, the name of which does not contain the expression 'managed fund' or 'hedge fund', where:</p> <ul style="list-style-type: none"> <li>• interests in the scheme are in a class that is able to be traded on a financial market operated by ASX or Chi-X but the scheme is not listed on either of those markets;</li> <li>• the responsible entity has the power and approval to issue interests in that class on any day that those interests are able to be traded on the relevant financial market;</li> <li>• the responsible entity allows applications for and redemptions of interests in that class on any day that those interests are able to be traded on the relevant financial market; and</li> <li>• the price or value of any financial product, index, currency, commodity or other thing that the scheme invests in or tracks is continuously disclosed or can be immediately ascertained</li> </ul>
foreign member	A member of a registered scheme with a registered address outside Australia or New Zealand
home economy	The participating economy in which a passport fund is first registered, approved or authorised as a regulated collective investment scheme
host economy	<p>A participating economy that is not a passport fund's home economy and either:</p> <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>
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 provided through a registered managed investment scheme</i> , or any instrument that amends or replaces that class order

Term	Meaning in this document
managed fund	<p>A registered scheme, the name of which contains the expression 'managed fund' or 'hedge fund', where:</p> <ul style="list-style-type: none"> <li>• interests in the scheme are in a class that is able to be traded on a financial market operated by ASX but the scheme is not listed on a financial market;</li> <li>• the responsible entity has the power and approval to issue interests in that class on any day that those interests are able to be traded on the relevant financial market;</li> <li>• the responsible entity allows applications for and redemptions of interests in that class on any day that those interests are able to be traded on the relevant financial market; and</li> <li>• the price or value of any financial product, index, currency, commodity or other thing that the scheme invests in or tracks is continuously disclosed or can be immediately ascertained</li> </ul>
MDA	A managed discretionary account
member	A member of a registered scheme
Memorandum of Cooperation	The <a href="#">Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport</a>
participating economy	<p>An economy that is a participant under the Memorandum of Cooperation (while it is in effect) and has:</p> <ul style="list-style-type: none"> <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	<p>A regulated collective investment scheme, or sub-fund of a regulated collective investment scheme, registered as a passport fund in a participating economy</p> <p>Note: Some regulated collective investment schemes, or sub-funds of regulated collective investment schemes, that have been deregistered as passport funds remain subject to obligations as if they were still a passport fund.</p>
passport fund operator	An entity that operates a passport fund
Passport Rules	The requirements in Annex 3 to the Memorandum of Cooperation, as incorporated into the domestic law of a participating economy
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>
Pt 7.9 (for example)	A part of the Corporations Act (in this example numbered 7.9), unless otherwise specified

<b>Term</b>	<b>Meaning in this document</b>
registered scheme	A managed investment scheme that is registered under s601EB of the Corporations Act
regulated collective investment scheme	A regulated collective investment scheme as defined by the Passport Rules for a participating economy
responsible entity	A responsible entity of a registered scheme as defined in s9 of the Corporations Act
retail 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)
s601GA (for example)	A section of the Corporations Act (in this example numbered 601GA)
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

Australian passport fund, Australian Passport Rules, complaints handling procedures, constitution, content requirements, enforceability requirement, fees, members, passport fund operator, redemption, registered managed investment scheme, responsible entity, scheme constitution, shareholders, winding up, withdrawal

### Legislative instruments

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

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

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

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

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

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

[ASIC Corporations \(Amendment and Repeal\) Instrument 2017/545](#)

[ASIC Corporations \(Externally-Administered Bodies\) Instrument 2015/251](#)

[\[CO 09/339\]](#) *Internal dispute resolution procedures*

[\[CO 09/425\]](#) *Share and interest purchase plans*

[\[CO 09/552\]](#) *Changing the constitution*

[\[CO 13/655\]](#) *Provisions about the amount of consideration to acquire interests and withdrawal amounts not covered by ASIC Corporations (Managed investment product consideration) Instrument 2015/847*

[\[CO 13/656\]](#) *Equality of treatment impacting on the acquisition of interests*

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

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

## Regulatory guides

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

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

[RG 125](#) *Share purchase plans*

[RG 131](#) *Funds management: Establishing and registering a fund*

[RG 136](#) *Funds management: Discretionary powers*

[RG 137](#) *Constitution requirements for schemes registered before 1 October 2013*

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

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

## Legislation

Australian Passport Rules, section 4

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

## Cases

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

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

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

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

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

*Lewski v Australian Securities & Investments Commission* [2016] FCAFC 96

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

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

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

## **Consultation papers and reports**

[CP 296](#) *Funds management*

[REP 582](#) *Response to submissions on CP 296 Funds management*

## **Media releases**

[18-123MR](#) *ASIC welcomes AFCA authorisation*

## **Other documents**

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

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

IOSCO, [Policy recommendations for money market funds](#) (PDF 8.45 MB) (IOSCOPD392), 9 October 2012

[Memorandum of Cooperation](#)