



ASIC
Australian Securities &
Investments Commission

CONSULTATION PAPER 320

Remaking ASIC class order on changing scheme constitutions: [CO 09/552]

August 2019

About this paper

This consultation paper sets out ASIC's proposal to remake our class order which modifies the requirements under the *Corporations Act 2001* regarding changing the constitutions of registered schemes. Under the *Legislation Act 2003*, this class order will expire ('sunset') on 1 October 2019 if not remade.

We are seeking feedback from responsible entities of registered schemes, law firms, industry and other interested people on our proposal to remake, without significant changes, [Class Order \[CO 09/552\] Changing scheme constitutions](#).

Note: The draft ASIC instrument is available on our website at www.asic.gov.au/cp under CP 320.

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 paper was issued on 2 August 2019 and is based on the Corporations Act as at the date of issue.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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The consultation process

Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our privacy policy at www.asic.gov.au/privacy for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by 23 August 2019 to:

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What will happen next?

Stage 1	2 August 2019	ASIC consultation paper released
Stage 2	23 August 2019	Comments due on the consultation paper
Stage 3	September 2019	Commencement of remade instrument

A Background

Key points

Legislative instruments, such as class orders, are repealed automatically, or 'sunset', after 10 years, unless action is taken to exempt or preserve them. We will consult on all sunseting legislative instruments that have more than a minor or machinery regulatory impact.

Purpose of 'sunseting' legislative instruments

- 1 Under the *Legislation Act 2003*, legislative instruments cease automatically, or 'sunset', after 10 years, unless action is taken to preserve them. Section 50(1) repeals a legislative instrument on either 1 April or 1 October—whichever date occurs first on or after the tenth anniversary of the instrument's registration on the Federal Register of Legislation (FRL). Repeal does not undo the past effect of the instrument.
- 2 To preserve its effect, a legislative instrument, such as a class order, must be remade before the sunset date. The purpose of sunseting is to ensure that instruments are kept up to date and only remain in force while they are fit for purpose, necessary and relevant.

Our approach to remaking legislative instruments

- 3 If it is necessary to remake a legislative instrument, our focus is on making it clear and user friendly. We will also, where possible, simplify and rationalise its content and conditions. For example, we will remove or reduce an obligation or burden in a legislative instrument if we are able to do so without undermining ASIC's vision of a fair, strong and efficient financial system for all Australians.
- 4 We will consult affected stakeholders on all ASIC legislative instruments that have more than a minor or machinery regulatory impact, and are subject to sunseting, to ensure:
 - (a) we carefully consider the continuing regulatory and financial impact of the instrument; and
 - (b) the instrument retains its effectiveness in addressing an identified issue or problem.
- 5 Generally, a Regulation Impact Statement (RIS) is required for new and amended policy that has a significant regulatory impact: see the [Australian Government Guide to Regulation](#). We will review, including following

public consultation, all class orders that have a significant regulatory impact before the scheduled sunset date. Where our review finds that a class order is not operating effectively and efficiently, we will prepare a RIS to assess our proposed changes to the class order. Where the class order is operating effectively and efficiently, we will remake the instrument without substantive changes and without preparing a RIS.

B Remaking ASIC class order

Key points

We are proposing to remake Class Order [CO 09/552] *Changing scheme constitutions*, which sunsets on 1 October 2019.

We have formed the preliminary view that this class order is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework.

The class order has been redrafted using ASIC's current style and format, while preserving the current effect of the instrument. The draft ASIC instrument, which reflects the minor amendments proposed in this paper, is available on our website at www.asic.gov.au/cp under CP 320.

Your feedback

- 6 You are invited to comment on our proposal to remake [CO 09/552], including whether [CO 09/552] is currently operating effectively and efficiently. This proposal is only an indication of the approach we may take and is not our final policy.

Class Order [CO 09/552] *Changing scheme constitutions*

Background

- 7 [CO 09/552] provides relief in specific scenarios from the requirements under s601GC of the *Corporations Act 2001* (Corporations Act) for amending the constitution of a registered managed investment scheme (registered scheme or scheme).

Note: In this paper, unless otherwise stated, references to sections (s) or parts (Pts) are references to the Corporations Act.

- 8 Under s601GC, the constitution of a registered scheme may only be modified, repealed or replaced with a new constitution, by one of two methods:
- (a) by a special resolution of the members of the scheme (see s601GC(1)(a)); or
 - (b) by the responsible entity if the responsible entity reasonably considers the change will not adversely affect members' rights (see s601GC(1)(b)).

9 The relief in [CO 09/552] is in the form of a declaration, modifying the application of s601GC as it applies to all persons in relation to a registered scheme. [CO 09/552] commenced on 23 September 2009 and will sunset on 1 October 2019. [CO 09/552] was issued following our targeted consultation process—we sought submissions from specific organisations, rather than issuing a consultation paper: see the explanation under the heading ‘Consultation’ on page 2 of the [Explanatory Statement for \[CO 09/552\]](#).

Scenarios where [CO 09/552] provides relief

10 As set out in the Explanatory Statement for [CO 09/552], [CO 09/552] originally provided relief from the requirement under s601GC(1)(a) for a special resolution of members to approve amendments to a registered scheme’s constitution when it is impossible or disproportionately burdensome to hold a members’ meeting to vote on the special resolution.

11 ASIC Corporations (Amendment and Repeal) Instrument 2017/545, issued on 4 July 2017, extended [CO 09/552] to accommodate special provisions for the variation or cancellation of class rights: see paragraphs 14–16. In ASIC Corporations (Amendment) Instrument 2018/697, issued on 18 September 2018, we extended [CO 09/552] again for the Asia Region Funds Passport provisions: see paragraphs 33–36.

12 [CO 09/552] does not apply when a responsible entity proposes to change a scheme constitution unilaterally under s601GC(1)(b). Under s601GC(1)(b), the responsible entity may change the constitution of a registered scheme if the responsible entity reasonably considers the change will not adversely affect members’ rights.

13 [CO 09/552] provides relief from, or varies, the special resolution requirement under s601GC(1)(a) in five alternative scenarios, detailed below.

Scenario 1: Protecting class rights

14 Scenario 1 is set out in s601GC(1A), inserted by [CO 09/552]. This is for when members of a specific class of interests in a registered scheme have rights that are particular to that class.

15 Under this scenario, if the constitution of a registered scheme sets out a procedure for varying or cancelling rights of a class of members of the scheme, or rights attached to a class of interests under the scheme, those rights may be varied or cancelled by a special resolution under s601GC(1)(a) only if the responsible entity complies with the procedure for varying or cancelling rights set out in the constitution.

16 In July 2017, we added this modification in Class Order [CO 98/60] *Protecting class rights in a managed investment scheme* to [CO 09/552] because [CO 98/60] was due to sunset on 1 April 2018.

Scenario 2: Insufficient quorum

17 Scenario 2 is set out in s601GC(1AAA)(a), inserted by [CO 09/552].

18 Under this scenario, the responsible entity may change the constitution where a meeting of members is unable to be held because the quorum requirement in s252R(2), or in the scheme's constitution, is not capable of being satisfied, or because the scheme has an insufficient number of members.

19 Scenario 2 addresses the impossibility of changing the constitution by special resolution under s601GC(1)(a) when there are insufficient members to hold a meeting due to a quorum requirement.

20 Subject to the terms of a scheme's constitution, the quorum for a meeting of a registered scheme's members is two members and the quorum must be present at all times during the meeting: see s252R(2).

21 The Explanatory Statement for [CO 09/552] provides example fact situations relevant to this scenario: when a scheme has a limited number of seed investors, or an infant scheme where the scheme is registered before the scheme's final features have been settled in advance of an offer.

22 Under s601GC(1AAB), as inserted by [CO 09/522], in order for the relief to be available under Scenario 2, the following requirements must be satisfied before the amendment of the scheme constitution, or the repeal and replacement of the constitution, as the case may be:

- (a) the responsible entity must provide to each member of the scheme, the auditor of the scheme and the auditor of the scheme's compliance plan, all the information that the responsible entity reasonably expects to be material to the decision of a member whether to consent to the modification, or repeal and replacement; and
- (b) after the information in paragraph 22(a) has been provided, every member of the scheme must have given their written consent to the modification, or repeal and replacement.

23 The two requirements outlined in paragraph 22 also apply to Scenarios 3 and 4.

Scenario 3: No members are entitled to vote

24 Scenario 3 is set out in s601GC(1AAA)(b), as inserted by [CO 09/552].

- 25 This scenario applies when all members of the scheme are not entitled to vote at a meeting of members because of s253E.
- 26 Under s253E, the responsible entity and its associates are not entitled to vote their interest on a resolution at a meeting of scheme members if they have an interest in the resolution or matter other than as a member.
- 27 If all members are either the responsible entity or its associates, s253E may make it impossible to pass a special resolution. This is because, subject to a higher majority requirement under the scheme's constitution, a special resolution is a resolution passed by at least 75% of votes cast by members entitled to vote on the resolution: see s9.
- 28 As with Scenario 2, this relief addresses a situation where it would not be possible to change the constitution by special resolution under s601GC(1)(a). Under this scenario, the responsible entity may change the constitution if member consent is obtained, as outlined in paragraph 22.

Scenario 4: No required disclosure document

- 29 Scenario 4 is set out in s601GC(1AAA)(c), as inserted by [CO 09/552].
- 30 Under this scenario, the relief applies when all interests in the scheme were issued in situations that did not require the responsible entity to give a Product Disclosure Statement (PDS), a prospectus or other disclosure document under Pt 6D.2, and without a prospectus under the predecessor provisions, namely Div 2 of Pt 7.12 of the old Corporations Law in force to 13 March 2000. In this scenario, the responsible entity may change the constitution if member consent is obtained, as outlined in paragraph 22.
- 31 The Explanatory Statement for [CO 09/552] provides example fact scenarios relevant to this element of relief—when there are a limited number of unrelated seed investors, being wholesale clients or other individuals not requiring a PDS.
- 32 Unlike Scenarios 2 and 3, which deal with situations where it is impossible to hold a members' meeting to change the constitution, this scenario deals with a situation where it may be disproportionately burdensome to hold a members' meeting. The restriction of this relief to schemes that did not require disclosure implies that these investors are more likely to be able to decide on changes to the constitution, or that these members had acquired their interests in circumstances—such as a personal offer within the small-scale offering limit—which suggests that direct dealings are an appropriate alternative to a members' meeting.

Scenario 5: Australian Passport Rules

- 33 Scenario 5 is set out in s601GC(1AAD), as inserted by [CO 09/552].

- 34 This scenario was added to [CO 09/552] in September 2018: see paragraph 11. Under this scenario, the responsible entity may amend the constitution to the extent the responsible entity reasonably considers necessary to ensure the constitution is consistent with the Australian Passport Rules and specify withdrawal provisions that are consistent with the Australian Passport Rules. An amendment of a scheme's constitution under this scenario may be made before a scheme has an Australian passport fund status, but will only have operative effect while the Australian Passport Rules apply to the scheme.
- 35 In broad terms, the Australian Passport Rules implement the Asia Region Funds Passport provisions, which allow the cross-border marketing of passport funds across participating economies in the Asia region. The Asia Region Funds Passport was established in April 2016 under the Asia Region Funds Passport Memorandum of Cooperation and was implemented through amendments to the Corporations Act.
- 36 Scenario 5 was added to [CO 09/552] to facilitate the operation of the Australian Passport Rules: see paragraphs 45–46 of [Consultation Paper 296 Funds management](#) (CP 296). This is because it may be disproportionately burdensome for a responsible entity to convene a members' meeting to consider a special resolution to amend the scheme's constitution for the Australian Passport Rules. As explained in [CP 296](#), this facilitation may extend to corporate collective investment vehicles if the proposed legislation is passed.

Remaking [CO 09/552]

Proposal

- B1** To preserve its effect beyond the sunset date of 1 October 2019, we propose to continue the relief currently given by [CO 09/552] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Changing Scheme Constitutions) Instrument 2019/XXX attached to this consultation paper. You can access the current instrument at www.legislation.gov.au by clicking on the following direct link: [\[CO 09/552\]](#).

The only changes proposed are to:

- (a) update the name of the legislative instrument; and
- (b) reflect current drafting practice and update the format of the current document.

Note: We intend to update cross-references to [CO 09/552] in [Regulatory Guide 134 Funds management: Constitutions](#) (RG 134).

Rationale

- 37 [CO 09/552] enables responsible entities of registered schemes to change a scheme's constitution in situations when:
- (a) passing a special resolution would be impossible or disproportionately burdensome;
 - (b) there is a proposal to change the scheme's constitution to vary or cancel the rights of members of a particular class of interests in a registered scheme—in this situation, the change will only be valid when, in addition to a special resolution being passed to implement the change, the responsible entity also complies with specific requirements in the scheme's constitution that deal with the variation or cancellation of class rights; or
 - (c) the scheme's constitution needs to be adapted for the Australian Passport Rules.
- 38 We consider that [CO 09/552] has been effective in enabling responsible entities, in appropriate circumstances, to change scheme constitutions without having to pass a special resolution at a members' meeting.
- 39 In situations where a responsible entity would otherwise have been required to pass a special resolution and this course would have been possible—namely, Scenarios 1, 4 and 5—the relief under [CO 09/552] enables the responsible entity to avoid the cost and administrative burden in convening a members' meeting to consider a special resolution to change the scheme's constitution.
- 40 In Scenarios 2 and 3, [CO 09/552] enables the responsible entity to lawfully change the constitution of a registered scheme in circumstances where this would not have otherwise been possible.
- 41 We are not aware of any significant concerns about the terms and operation of [CO 09/552], or about the suitability of the policy principles that underpin [CO 09/552].
- 42 As a result, our preliminary view is that the relief under [CO 09/552] is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. Therefore, the relief under [CO 09/552] should be continued in a new legislative instrument that is in substantially the same terms as [CO 09/552].

Alternative options

- 43 An alternative option is for us to grant, on a case-by-case basis, relief that is comparable to [CO 09/552]. However, we do not recommend this course because it would involve:
- (a) significant increases in compliance costs for responsible entities as a result of the need to apply to ASIC for individual relief in each instance; and
 - (b) ASIC using significant resources to consider these relief applications.
- 44 Another option is for the Parliament to pass legislation to modify the scheme constitution amendment requirements under the Corporations Act in ways that mirror [CO 09/552] or are consistent with [CO 09/552]. This option is not feasible because we understand that legislative amendments of this nature are unlikely to occur before the 1 October 2019 sunset date.

Key terms

Term	Meaning in this document
Asia Region Funds Passport	An agreement between economies in the Asia region that allows passport funds established and regulated in one participating economy to offer interests to investors in another participating economy
ASIC	Australian Securities and Investments Commission
Australian Passport Rules	The Corporations (Passport) Rules 2018 made under s1211 and 1211A of the Corporations Act
[CO 14/26] (for example)	An ASIC class order (in this example numbered 14/26) 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
Corporations Regulations	Corporations Regulations 2001
passport fund	A regulated collective investment scheme, or sub-fund of a regulated collective investment scheme, registered as a passport fund in a participating economy 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.
Passport Rules	The requirements in Annex 3 to the Memorandum of Cooperation , as incorporated into the domestic law of a participating economy
PDS	A Product Disclosure Statement or supplementary 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 Note: See s761A for the exact definition.
registered scheme or scheme	A managed investment scheme that is registered under s601EB of the Corporations Act
RG 134 (for example)	An ASIC regulatory guide (in this example numbered 134)
RIS	Regulation Impact Statement
s25 (for example)	A section of the Corporations Act (in this example numbered 25), unless otherwise specified
sunsetting	The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect