

29 June 2023

Investment Managers, Financial Services and Wealth  
Australian Securities and Investments Commission  
GPO Box 9827  
Brisbane QLD 4001

By email: [IM.sunsettingconsultation@asic.gov.au](mailto:IM.sunsettingconsultation@asic.gov.au)

Dear Sir or Madam

**Media Release 23-154—Consultation on remaking ‘sunsetting’ class orders on unit pricing discretions for managed investment schemes**

1. The Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**) thanks the Australian Securities and Investments Commission (**ASIC**) for the opportunity to respond to ASIC’s proposal set out in ASIC Media Release 23-154 (issued on 8 June 2023—the **Media Release**), and the draft legislative instrument made available under cover of the Media Release (the **Draft Instrument**).

**Background**

2. ASIC is proposing to remake the following managed investment scheme unit pricing class orders that are due to sunset on 1 October 2023 as a single legislative instrument in the form of the Draft Instrument:
  - (a) 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 2015/84 (Class Order 13/655)*; and
  - (b) Class Order [CO 13/657] *Discretions affecting the amount of consideration to acquire interests and withdrawal amounts (Class Order 13/657)*.
3. These class orders are due to expire on 1 October 2023. ASIC is proposing to replace these class orders with the Draft Instrument, which would expire on 1 October 2028.
4. The class orders notionally modify certain provisions of Chapter 5C and (in the case of Class Order 13/657) Part 7.9 of the *Corporations Act 2001* (Cth) (the **Corporations Act**).

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## Remaking of Class Order 13/655

5. The Draft Instrument would effectively continue the relief that Class Order 13/655 currently provides, with:
  - (a) some minor typographical changes; and
  - (b) updates to:
    - (i) the name of the financial market previously known as “Chi-X” to its current name “Cboe”; and
    - (ii) the name of the market operator previously known as “Chi-X Australia Pty Ltd” to its current name “Cboe Australia Pty Ltd”.
6. The Committee notes that ASIC considers the Class Order 13/655 relief to be necessary based upon ASIC’s interpretation of the obligation under paragraph 601GA(1)(a) of the Corporations Act for the constitution of a registered managed investment scheme to make adequate provision for the consideration to acquire an interest in the scheme.
7. Assuming that ASIC remains committed to the above interpretation of paragraph 601GA(1)(a), then the Committee agrees that the relief that Class Order 13/655 currently provides remains relevant.
8. Generally, the Committee considers that this relief is operating effectively, and supports the proposal to remake Class Order 13/655 in the form of the Draft Instrument.

### Sale of forfeited interests

9. The Committee wishes to share the following observations of some practical difficulties with the operation of notional subsection 601GAD(9). These may not have been raised with ASIC previously, as the subsection deals with forfeiture of partly paid interests, which are not a particularly common feature of funds.
10. Firstly, paragraph (b) of notional subsection 601GAD(9) applies section 254Q of the Corporations Act, subsection (3) of which requires the auction of forfeited interests to be advertised in a national newspaper. This requirement is inconsistent with changes proposed to certain other provisions of the Corporations Act (which would replace certain obligations to advertise in national newspapers), contained in the Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2023, which is currently before the Senate. The Committee suggests that, at a minimum, subsection (3) of section 254Q be disapplied by the proposed instrument.
11. Secondly, the scope of the relief for the sale of forfeited interests is very narrow. Notional paragraph 601GAD(9)(a) limits the relief only to registered schemes listed on the Australian Securities Exchange. Where an unlisted scheme issues partly paid interests, upon registration of the scheme, typically ASIC will have required that the scheme constitution only allows sale by the responsible entity of interests forfeited to it:
  - (a) at a strictly net asset value based price; or

- (b) under the terms of any applicable ASIC relief.

The Committee observes that it will often be the case that the responsible entity may only be able to find a buyer for the forfeited interests at a discounted price, but the constitution of the scheme will then not allow the responsible entity to sell those interests at that available price.

12. The Committee submits that, if the relief were to allow the sale of units in an unlisted scheme at the best price that the responsible entity could reasonably obtain, this would:
  - (a) enable the responsible entity to pay the balance of the disposal price after deducting the unpaid call amount to the defaulting member, rather than leaving them with no payment until the scheme is wound up, as is the present consequence of the inability to sell the interests; and
  - (b) produce a fairer result for investors who have defaulted, such as in circumstances of hardship.
13. Even if this cannot be achieved before 1 October 2023, the Committee would be appreciative if ASIC could consider the above observations in future, with a view to developing a more optimal solution.

#### **Remaking of Class Order 13/657**

14. The Draft Instrument would continue the relief currently contained in Class Order 13/657 under notional section 601FC(1A) of the Corporations Act with respect to the exercise of discretions.
15. The Draft Instrument would significantly simplify the obligations relating to documentation of the exercise of discretions under notional subsections 601FC(1B) to (1E).
16. The Committee notes that ASIC considers the Class Order 13/657 relief to be necessary based upon ASIC's interpretation of paragraph 601GA(4)(b) of the Corporations Act. This requires that, where members of a registered managed investment scheme have the right to withdraw, and that right may be exercised while the scheme is "liquid" (as defined in section 601KA), the constitution must set out adequate procedures for making and dealing with withdrawal requests and be fair to all members. This is used as the basis for imposing specific requirements in relation to the redemption price in Class Order 13/657.
17. Assuming that ASIC remains committed to the above interpretation of paragraph 601GA(4)(b), then the Committee agrees that the relief which Class Order 13/657 currently provides remains relevant.
18. Generally, the Committee considers that this relief is operating effectively, and supports the proposal to remake Class Order 13/657 in the form of the Draft Instrument.

#### **Simplification of requirements for documenting the exercise of discretions**

19. The Committee welcomes and strongly supports the proposed simplification of notional subsections 601FC(1B) to (1E)—to be replaced by a shorter

subsection 601FC(1B) in the Draft Instrument. The Committee believes this will produce more sensible and fairer outcomes for responsible entities without reducing member protection.

#### Transitional provisions for schemes registered on or before 30 September 2013

20. The Committee considers that ASIC should maintain the status quo to avoid causing disruption for responsible entities of schemes that were registered on or before 30 September 2013, which will have developed compliance arrangements which were in keeping with ASIC policy as at the time they became registered.
21. The Committee notes that the Media Release does not explain the background as to why managed investment schemes that became registered with ASIC on or before 30 September 2013 are (unless they otherwise opt in to rely on Class Order 13/657) subject to separate relief under *ASIC Corporations (Managed investment product consideration) Instrument 2015/847*.
22. The Committee considers the proposed insertion of notional section 601GAG into the Corporations Act itself (under section 8 of the Draft Instrument) to be unusual, particularly as it cross-refers to the relevant legislative instrument which the Draft Instrument would become.
23. The Committee sees no need for the transitional provisions to be made into notional Corporations Act provisions, and questions whether it might be more in keeping with legislative drafting principles and practice to maintain the approach currently reflected in section 6 of Class Order 13/657.

#### Combined legislative instrument

24. The Committee considers the consolidation of Class Order 13/655 and Class Order 13/657 into a single legislative instrument to be a sensible proposal.

#### Other observations

##### Location of relief

25. The Committee notes that, on 16 February 2023, Treasury released the exposure draft *Treasury Laws Amendment (Measures for Consultation) Bill 2023: Rationalisation of ending ASIC instruments (Tranche 2)* for consultation. Among other things, that exposure draft proposed to effectively incorporate the modified provisions of the Corporations Act, which are now set out in Class Order 13/655 and Class Order 13/657, into the Corporations Act. The Committee was not supportive of this proposal and assumes that it is not proceeding.
26. The Committee considers that it is more appropriate to deal with this issue by way of an ASIC legislative instrument than a Corporations Act amendment.

##### Form of consultation document

27. The Committee notes that, historically, ASIC typically has released a formal Consultation Paper setting out any proposal to remake sunseting legislative instruments in a more comprehensive fashion and with a greater level of background detail. This is helpful for anyone reviewing the document who may have limited

familiarity with the existing regime. The Committee is concerned that, where a formal Consultation Paper is not issued for this type of consultation:

- (a) it may limit the range of potentially impacted stakeholders who are able to comment meaningfully on the consultation if there are no explanatory materials;
- (b) it could be more difficult to locate the consultation document at a future point in time; and
- (c) the Consultation Papers, which are published on the ASIC website, will cease to be a complete record of all the matters upon which ASIC has engaged in public consultation.

In the interests of regulatory transparency and maintaining consistency in record keeping, the Committee would prefer to see this type of proposal documented in a formal Consultation Paper. Alternatively, at the very least, ASIC should ensure that the Media Release setting out the proposal is captured in the “Consultation Papers” section of the ASIC website for ease of future reference.

#### Related regulatory guidance

28. The Committee recommends that ASIC make a technical update to Regulatory Guide 134 *Funds management: Constitutions* when the new legislative instruments are made, to replace references to Class Order 13/655 and Class Order 13/657 with references to the new legislative instrument.

29. If ASIC has any questions or would like to further discuss with any matters raised in this submission with the Committee, please do not hesitate to contact the Committee Chair, [REDACTED]

Yours faithfully

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**Business Law Section**