



ASIC
Australian Securities &
Investments Commission

CONSULTATION PAPER 368

Remaking ASIC class orders: [CO 13/519] and [CO 13/656]

March 2023

About this paper

This consultation paper sets out ASIC's proposals to remake our class orders on changing responsible entities of listed schemes and the equal treatment obligations of a responsible entity and corporate director. Under the *Legislation Act 2003*, these class orders will expire ('sunset') if not remade.

We are seeking feedback on our proposals to remake, without significant changes, the following class orders, which are due to expire on 1 October 2023:

- [Class Order \[CO 13/519\]](#) *Changing the responsible entity*; and
- [Class Order \[CO 13/656\]](#) *Equality of treatment impacting on the acquisition of interests*.

Note: The draft ASIC instruments are available on our website at www.asic.gov.au/cp under CP 368.

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 21 March 2023 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.

Contents

The consultation process	4
A Background	5
Purpose of ‘sunsetting’ legislative instruments.....	5
Our approach to remaking legislative instruments	5
B Remaking ASIC class orders.....	7
Class Order [CO 13/519] <i>Changing the responsible entity</i>	7
Class Order [CO 13/656] <i>Equality of treatment impacting on the acquisition of interests</i>	9
Key terms	13
List of proposals and questions	14

The consultation process

You are invited to comment on the proposals in this paper to remake these ASIC class orders, including whether they are currently operating effectively and efficiently. These proposals are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, please describe any alternative approaches you think would achieve our objectives. We are keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account.

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 11 April 2023 to:

Investment Managers
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001
email: IM.sunsettingconsultation@asic.gov.au

What will happen next?

Stage 1	21 March 2023	ASIC consultation paper released
Stage 2	11 April 2023	Comments due on the consultation paper
Stage 3	29 September 2023	Latest proposed commencement date of new instrument(s)

A Background

Key points

Legislative instruments, such as class orders, are repealed automatically, or ‘sunset’, after 10 years, unless action is taken to 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 its registration on the Federal Register of Legislation. 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 that:
 - (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 Regulatory Impact Analysis](#). We will review, including following public consultation, all class orders that have a significant regulatory impact before the scheduled sunset date.
- 6 Where our review finds that a class order is not operating effectively and efficiently, we will undertake regulatory impact analysis 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 orders

Key points

We are proposing to remake:

- [Class Order \[CO 13/519\]](#) *Changing the responsible entity*, which sunsets on 1 October 2023; and
- [Class Order \[CO 13/656\]](#) *Equality of treatment impacting on the acquisition of interests*, which sunsets on 1 October 2023.

We have formed the preliminary view that these class orders are operating effectively and efficiently, and continue to form a necessary and useful part of the legislative framework.

Each class order has been redrafted using ASIC's current style and format, while preserving the current effect of the instrument.

We are proposing that the new legislative instruments will have an expiry date of 1 October 2028.

Class Order [CO 13/519] *Changing the responsible entity*

Background

- 7 Section 601FM of the *Corporations Act 2001* (Corporations Act) provides that members of a registered scheme who wish to remove and replace the responsible entity may take action under Div 1 of Pt 2G.4 of the Corporations Act. This provision sets out the process for calling meetings of members of registered schemes.
- 8 Under s601FM, extraordinary resolutions are required to remove and replace the responsible entity of an unlisted scheme. However, s601FM does not state what type of resolutions are required to remove and replace a responsible entity of a listed scheme.
- 9 The issue of what type of resolutions must be passed to remove and replace a responsible entity of a listed scheme was considered in *MTM Funds Management Ltd v Cavalane Holdings Pty Ltd* [2000] NSWSC 922. In this case, the court decided that s601FM requires an ordinary resolution to be passed. The court also concluded that the reference to taking action under Div 1 of Pt 2G.4 of the Corporations Act deals with procedures that must be followed to convene a members' meeting, but not the type of resolutions to be passed.
- 10 Following this case, ASIC initially made Class Order [CO 01/1541] *Changing the responsible entity* (revoked on 24 June 2013) to modify s601FM and make it clear that ordinary resolutions are required to remove and replace the responsible entity of a listed scheme.

- 11 In 2013, ASIC reviewed [CO 01/1541] and considered that the relief provided in the class order was still necessary and appropriate. ASIC issued [\[CO 13/519\]](#) to maintain the relief previously given under [CO 01/1541].
- 12 The purpose of [CO 13/519] is to clarify the interaction between s601FM and Div 1 of Pt 2G.4 of the Corporations Act for registered schemes that are listed. This is achieved by modifying s601FM to provide that the members of a listed scheme must pass ordinary resolutions to remove and replace the responsible entity (rather than special or extraordinary resolutions).
- Note: Section 252B also outlines steps for calling a meeting when requested by members and includes a reference to a special or extraordinary resolution being required.
- 13 Without this modification, there would be ambiguity under the current legislative provisions about the process and type of resolutions required for members to remove and replace the responsible entity of a listed scheme. Similar relief is not required for corporate collective investment vehicles (CCIVs), given that s1224U expressly states that special resolutions are required to replace the corporate director.
- 14 This paper does not seek feedback on the broader operation of s601FM and the resolutions required to change the responsible entity of a scheme that is not listed. This falls outside the scope of our review of [CO 13/519] and is a matter for law reform.

Proposal

- B1** To preserve its effect beyond the sunset date of 1 October 2023, we propose to continue the relief currently given by [\[CO 13/519\]](#), without any significant changes:
- (a) in a new legislative instrument that reflects current drafting practice and format; and
 - (b) with an expiry date of 1 October 2028.

See draft *ASIC Corporations (Changing the Responsible Entity) Instrument 2023/XX* at Attachment 1 to this consultation paper.

Your feedback

- B1Q1 Do you agree with our proposal? If not, why not?
- B1Q2 Are you aware of any significant issues with the operation of this class order? If so, please explain.

Rationale

- 15 We have reached the preliminary view that [\[CO 13/519\]](#) is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order.
- 16 We are proposing to remake the class order for a period of five years. We consider this period will provide sufficient certainty for industry.

Class Order [CO 13/656] *Equality of treatment impacting on the acquisition of interests*

Background

- 17 [\[CO 13/656\]](#) exempts, in certain circumstances:
- (a) a responsible entity from the requirement to treat members of a registered scheme of the same class equally (see s601FC(1)(d)); and
 - (b) a corporate director from the requirement to treat members of a retail CCIV who hold shares of the same class equally (see s1224D(2)(b)).
- 18 [CO 13/656] also exempts a responsible entity, in certain circumstances, from the requirement to acquire interests in a registered scheme for no less consideration than would apply to other persons: see s601FG(1)(a)).
- 19 The exemptions under [CO 13/656] are intended to provide certainty and appropriate flexibility for responsible entities and corporate directors in relation to the exercise of their powers and performance of their duties as a responsible entity of a registered scheme or a corporate director of a retail CCIV.
- 20 [CO 13/656] sets out the circumstances where responsible entities of registered schemes and corporate directors of retail CCIVs may be exempt from the equal treatment duty. It also sets out certain requirements for responsible entities when acquiring forfeited interests.
- 21 The equal treatment duty is detailed in:
- (a) section 601FC(1)(d), which requires that in exercising its powers and carrying out its duties, a responsible entity of a registered scheme must treat the members who hold interests of the same class equally and members who hold interests of different classes fairly; and
- Note: [CO 13/656] provides relief from the equal treatment duty but does not impact on the requirement to treat different classes fairly.

- (b) section 1224D(2)(b), which requires that in exercising its powers and carrying out its duties, a director of a retail CCIV (i.e. the corporate director) must treat members of the CCIV who hold shares of the same class equally.

22 In some situations, it may be appropriate to offer interests in a registered scheme or shares in a retail CCIV on the basis that some members are treated differently to other members. Under [CO 13/656], ASIC provides relief to exempt responsible entities and corporate directors from the requirement to comply with their duty to treat members equally in certain circumstances. The exemption means a responsible entity may treat members who hold interests in the same class differently, and a corporate director may treat members who hold shares in the same class differently.

23 The exemptions from s601FC(1)(d) (for registered schemes) and s1224D(2)(b) (for retail CCIVs) apply to the extent these provisions prevent a responsible entity or a corporate director from doing any or all of the following:

- (a) offering interests or shares to a member with a registered address outside Australia, New Zealand and, in the case of an Australian passport fund, each host economy of the fund if:
 - (i) the registered scheme is listed, the offer and issue of interests is one to which ASX Listing Rule 7.7 applies, and the responsible entity complies with the requirements of that rule;

Note: This paragraph currently applies to registered schemes only. There is no equivalent relief for CCIVs, because the [ASX Listing Rules](#) do not currently apply to CCIVs.

- (ii) the registered scheme or retail CCIV sub-fund is not listed, the offer is renounceable, and the responsible entity or corporate director appoints a nominee to sell the rights to acquire the interests or shares that are not offered to non-residents and distributes to each non-resident their proportion of the net proceeds of sale; or
 - (iii) it would otherwise be unreasonable because of other defined circumstances;
- (b) offering interests or shares to some members who would be acquiring as wholesale clients (priority offerees) at an earlier time than other members where:
 - (i) the terms of the offer require that the date of notification by priority offerees to the responsible entity or corporate director for the acceptance of an offer of interests or shares, occurs before other members;

- (ii) the interests or shares offered to the priority offerees must not be issued before the earliest date on which interests or shares may be issued to other members of the scheme or retail CCIV sub-fund; and
- (iii) the interests or shares are only issued to the priority offerees in accordance with the terms of the offers as described in (i) and (ii) above;
- (c) dealing with complaints made by wholesale clients differently from complaints made by other members;
- (d) offering and issuing interests or shares in accordance with [ASIC Corporations \(Share and Interest Purchase Plans\) Instrument 2019/547](#).

- 24 [\[CO 13/656\]](#) also provides an exemption from s601FG(1)(a) to the extent that it prevents the responsible entity of a registered scheme from acquiring forfeited interests on trust for members of the scheme in accordance with the requirements in s601GAD(9) (as inserted by [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](#)).

Note: [CO 13/655] sunsets on 1 October 2023. We plan to consult on the continuation of s601GAD(9) under a new legislative instrument (draft *ASIC Corporations (Issue Pricing) Instrument 2023/XX*) that will replace this class order.

- 25 The applicable requirements for the acquisition of interests on forfeiture are detailed in s601FG(1). It requires that if a responsible entity of a registered scheme acquires an interest in the scheme, it must only do so for not less than the consideration that would be payable if the interest were acquired by another person and subject to terms and conditions that would not disadvantage other members.

Note: There is a similar provision for retail CCIVs in s1224P, but we have not provided relief for corporate directors. This is because the current relief is premised on the operation of s601GAD(9), as inserted by [\[CO 13/655\]](#)—which only applies to registered schemes.

- 26 Under s601GAD(9), a responsible entity may set the consideration to acquire an interest in a registered scheme that has—in accordance with the scheme’s constitution—been forfeited by a member for failing to pay an outstanding amount due to, and called for by, the responsible entity. Section 601GAD(9) applies if:
- (a) on payment of the outstanding amount, the interest would be in a class of interests that are quoted on ASX;
 - (b) the sale of the interest occurs in accordance with s254Q (other than s254Q(1), (9), (10) and (13)), as if the interest was a share in the company and the responsible entity was a director of the company.

- 27 Section 601FG(1)(a) provides that a responsible entity may acquire and hold an interest in a scheme for not less than the consideration that would be payable if the interest were acquired by another person. [CO 13/656] provides relief from s601FG(1)(a) to allow responsible entities to acquire interests on trust for members on forfeiture of those interests without satisfying the requirements under s601FG(1)(a).

Proposal

- B2** To preserve its effect beyond the sunset date of 1 October 2023, we propose to continue the relief currently given by [CO 13/656], without any significant changes:
- (a) in a new legislative instrument that reflects current drafting practice and format; and
 - (b) with an expiry date of 1 October 2028.

See draft *ASIC Corporations (Equality of Treatment Impacting on the Acquisition of Scheme Interests and CCIV Shares) Instrument 2023/XX* at Attachment 2 to this consultation paper.

Your feedback

- B2Q1 Do you agree with our proposal? If not, why not?
- B2Q2 Are you aware of any significant issues with the operation of this class order? If so, please explain.

Rationale

- 28 We have reached the preliminary view that [CO 13/656] is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order.
- 29 We are proposing to remake the instrument for a period of five years. We consider this period will provide sufficient certainty for industry.

Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
CCIV	<p>A corporate collective investment vehicle—a company that is registered as a corporate collective investment vehicle under the Corporations Act</p> <p>Note: This is a definition contained in s9 of the Corporations Act.</p>
[CO 13/519] (for example)	<p>An ASIC class order (in this example numbered 13/519)</p> <p>Note: Legislative instruments made from 2015 are referred to as ASIC instruments.</p>
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Div 1 (for example)	A division of the Corporations Act (in this example numbered 1), unless otherwise specified
Pt 2G.4 (for example)	A part of the Corporations Act (in this example numbered 2G.4), unless otherwise specified
retail CCIV	<p>A CCIV that satisfies the retail CCIV test in s1222K of the Corporations Act or is notified as a retail CCIV under s1222L of the Corporations Act</p> <p>Note: This is a definition in s1222J.</p>
RIS	Regulation Impact Statement
s601FM (for example)	A section of the Corporations Act (in this example numbered 601FM), unless otherwise specified
sunsetting	The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect

List of proposals and questions

Proposal	Your feedback
<p>B1 To preserve its effect beyond the sunset date of 1 October 2023, we propose to continue the relief currently given by [CO 13/519], without any significant changes:</p> <ul style="list-style-type: none"> (a) in a new legislative instrument that reflects current drafting practice and format; and (b) with an expiry date of 1 October 2028. <p>See draft <i>ASIC Corporations (Changing the Responsible Entity) Instrument 2023/XX</i> at Attachment 1 to this consultation paper.</p>	<p>B1Q1 Do you agree with our proposal? If not, why not?</p> <p>B1Q2 Are you aware of any significant issues with the operation of this class order? If so, please explain.</p>
<p>B2 To preserve its effect beyond the sunset date of 1 October 2023, we propose to continue the relief currently given by [CO 13/656], without any significant changes:</p> <ul style="list-style-type: none"> (a) in a new legislative instrument that reflects current drafting practice and format; and (b) with an expiry date of 1 October 2028. <p>See draft <i>ASIC Corporations (Equality of Treatment Impacting on the Acquisition of Scheme Interests and CCIV Shares) Instrument 2023/XX</i> at Attachment 2 to this consultation paper.</p>	<p>B2Q1 Do you agree with our proposal? If not, why not?</p> <p>B2Q2 Are you aware of any significant issues with the operation of this class order? If so, please explain.</p>