

**Australian Securities and Investments Commission**  
**Corporations Act 2001 — Subsection 601QA(1) — Declaration, Exemption and**  
**Revocation**

**Enabling legislation**

1. The Australian Securities and Investments Commission makes the declaration, grants the exemption and effects the revocation set out in this instrument under subsection 601QA(1) of the *Corporations Act 2001* (the *Act*).

**Title**

2. This instrument is ASIC Class Order [CO 05/26].

**Commencement**

3. This instrument commences on the date it is registered under the *Legislative Instruments Act 2003*.

Note: An instrument is registered when it is recorded on the Federal Register of Legislative Instruments (*FRLI*) in electronic form: see *Legislative Instruments Act 2003*, s 4 (definition of *register*). The FRLI may be accessed at [www.frli.gov.au](http://www.frli.gov.au).

**Declaration - Consideration to acquire interest**

4. Chapter 5C of the Act applies to a responsible entity (except a responsible entity of a time-sharing scheme) as if provisions of that Chapter were modified or varied as follows:
  - (a) in paragraph 601GA(1)(a) before “the” (first occurring), insert “except as provided by section 601GAA,”; and
  - (b) after section 601GA insert:

**“601GAA Constitutional provisions about consideration for the  
acquisition of interests**

- (1) The constitution of a registered scheme does not have to make adequate provision for the consideration that is to be paid to acquire an interest in the scheme to the extent that it contains provisions that have the effect of enabling the responsible entity to set the acquisition price of interests in any of the circumstances set out in subsections (2) to (8).

*Placements*

- (2) The responsible entity may set the issue price of interests where all of the following apply:
  - (a) the interests are in a class of interests that are quoted on:
    - (i) the financial market of ASX; or
    - (ii) an approved foreign marketand the quotation of interests in that class is not suspended;

- (b) interests are not issued to the responsible entity or an associate of the responsible entity;
- (c) either of the following applies:
  - (i) both of the following apply:
    - (A) the issue, together with any related issue in the previous year does not, immediately before the issue, comprise more than 15% of the interests in that class;
    - (B) the amount by which the issue price for the interests is less than the current market price for the interests in the same class does not exceed 10% of the current market price; or
  - (ii) all of the following apply:
    - (A) members who hold interests in the same class approve the issue by a placement resolution;
    - (B) unless the responsible entity reasonably considers that the issue will not adversely affect the interests of members in another class (if any)—members in that other class approve the issue by a placement resolution;
    - (C) any notice convening a meeting to vote on the issue contains particulars of the use to be made of the money raised by the issue.

#### *Rights issues*

- (3) The responsible entity may set the issue price of interests where all of the following apply:
  - (a) the responsible entity offers the interests to persons who are members of the scheme on a date not more than 20 business days before the date of the offer, in proportion to the value of each member's interests in the scheme at that date (subject to paragraph (h), interests offered to, but not acquired by, members may be issued to other persons);
  - (b) the responsible entity offers the interests to all members of the scheme, except those foreign members (if any) it has excluded under subsection (11);
  - (c) all the interests offered are in the same class;
  - (d) the price of all the interests offered is the same;
  - (e) where the interests are options for the issue of interests—both of the following apply:
    - (i) the exercise price of all the options offered is the same;
    - (ii) the means of working out the exercise price is set out in the terms of issue of the option;

- (f) the amount by which the price of an interest (other than an option for the issue of interests) and the exercise price of an option is less than the amount that would otherwise apply under the constitution does not exceed a relevant maximum percentage specified in the constitution;
- (g) the responsible entity offers the interests to the members at substantially the same time;
- (h) the responsible entity only issues interests to its associates as members of the scheme.

*Interest purchase plans*

- (4) The responsible entity may set the issue price of interests where all of the following apply:
  - (a) the interests are in a class of interests which are quoted on the financial market of ASX and trading in the class is not suspended;
  - (b) the responsible entity offers the interests to each registered holder except those foreign members (if any) it has excluded under subsection (12);
  - (c) the responsible entity makes each offer on the same terms and conditions and on a non-renounceable basis;
  - (d) the issue price is less than the market price for the interests during a specified period in the 30 days before either the date of the offer or the date of the issue;
  - (e) no registered holder is issued with interests with an application price totaling more than \$5,000 in any 12 month period.

*Distribution reinvestment plans*

- (5) The responsible entity may set the issue price of interests (other than options for the issue of interests) where the whole or part of any money payable to a member under the constitution, by way of distribution of capital or income, is applied in payment for the issue of interests in the scheme and all of the following apply:
  - (a) each member of the scheme (except those foreign members (if any) that the responsible entity has excluded under subsection (12)), may from time to time elect to participate in the arrangement as to the whole, or some proportion, of the distributions which are, or would otherwise be, payable to that member;
  - (b) all the interests issued under the arrangement are in the same class;
  - (c) the price of each interest issued under the arrangement in relation to any particular distribution is the same;

- (d) all interests issued under the arrangement in relation to any particular distribution are issued at substantially the same time;
- (e) the amount by which the price of an interest is less than the amount that would otherwise apply under the constitution does not exceed a relevant maximum percentage specified in the constitution.

*Negotiated fees*

- (6) The responsible entity may set the issue price of interests where all of the following apply:
  - (a) the responsible entity and a person (the ***wholesale client***) as a wholesale client within the meaning of section 761G agree on an issue price that is equal to the price at which interests would be issued under the constitution, in the absence of this section, less a reduction (a ***fee reduction***) in the fees that are payable to the responsible entity for the issue of the interests;
  - (b) the responsible entity has given all members a statement that fees may be individually negotiated with wholesale clients on or before the first date when the responsible entity sends communication to all members after a fee reduction is first offered;
  - (c) each Product Disclosure Statement for interests in the scheme contains a statement that fees may be individually negotiated with wholesale clients;
  - (d) the fee reduction does not adversely affect the fees that are paid or to be paid by any other member of the scheme who does not have the benefit of a fee reduction.

*Schemes where there is limited or no pooling*

- (7) The responsible entity may set the issue price of interests where the only contributions that may be used in common with or pooled with any other asset in the scheme are:
  - (a) money placed in a bank account held by the responsible entity on trust; or
  - (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 a person known to each other tenant before being offered an interest for issue.

### *Forfeited interests*

- (8) The responsible entity may set the price for the sale of interests that have, in accordance with the constitution, been forfeited to the responsible entity on trust for members of the scheme where part (the ***outstanding amount***) of the issue price of the interest has not been paid when called and both of the following apply:
  - (a) on the payment of the outstanding amount, the interest would be in a class of interests that are quoted on the financial market of ASX;
  - (b) the sale of the forfeited interest is in accordance with section 254Q, other than subsections (1), (9), (10) and (13), as if the interests were shares, the scheme was the company and the responsible entity was each director of the company.

### *Stapled securities*

- (9) Subsections (2) to (5) and (8) apply in relation to an interest that forms part of a stapled security as if:
  - (a) references to an interest in paragraph (2)(a), subsubparagraph (2)(c)(i)(B) and paragraphs (3)(f), (4)(a), (4)(d), (5)(e) and (8)(a) and (8)(b) included a reference to the stapled security; and
  - (b) the reference to an interest in paragraph (4)(e) were a reference to the stapled security.

### *Interpretation*

- (10) For the purposes of subsection (4):
  - (a) registered holder means, subject to paragraphs (b) and (c), a person recorded in the register of members of a registered scheme as a member of that scheme; and
  - (b) if 2 or more persons are recorded in the register of members as jointly holding interests in the scheme they are taken to be a single registered holder; and
  - (c) if a trustee or nominee is expressly noted on the register of members as holding interests on account of another person (the ***beneficiary***):
    - (i) the beneficiary is taken to be the registered holder of those interests; and
    - (ii) any issue of interests to the trustee or nominee is taken to be an issue to the beneficiary.
- (11) The responsible entity may elect not to make an offer to a foreign member under subsection (3) if the responsible entity:
  - (a) where the scheme is included in the official list of the financial market operated by ASX—complies with the

requirements of Rule 7.7 of the listing rules of the ASX as at 1 January 2005 concerning the treatment of members with a registered address outside Australia and New Zealand that are applicable to the relevant offer and issue of interests; or

- (b) where the scheme is not included in the official list of the financial market of ASX and the offer is renounceable—appoints a nominee to sell the rights to acquire the interests that would otherwise have been offered to the foreign members and distribute to each foreign member their proportion of the proceeds of sale net of expenses; or
  - (c) in any other case—determines that it would be unreasonable to make the offer to the member having regard to each of the following:
    - (i) the number of members in the place (the ***relevant place***) where the registered address of the member is situated;
    - (ii) the number and the value of the interests that may be issued to members in the relevant place;
    - (iii) the cost of complying with legal requirements and the requirements of any relevant regulatory authority applicable to making the offer in the relevant place.
- (12) The responsible entity may elect not to make an offer of the kind referred to in subsection (4) or (5) to each foreign member with a registered address in a place if it determines that it is unreasonable to make the offer to those members having regard to each of the following:
- (a) the number of members in the place;
  - (b) the number and the value of the interests that may be issued under the arrangement to members in the place;
  - (c) the cost of complying with legal requirements and the requirements of any relevant regulatory authority applicable to offering the arrangement in the place.
- (13) For the purposes of this section:
- approved foreign market*** means each of the following:
- (a) American Stock Exchange;
  - (b) Borsa Italiana;
  - (c) Bourse de Paris;
  - (d) Eurex Amsterdam;
  - (e) Frankfurt Stock Exchange;
  - (f) Hong Kong Stock Exchange;
  - (g) London Stock Exchange;

- (h) NASDAQ National Market;
- (i) New York Stock Exchange;
- (j) New Zealand Stock Exchange;
- (k) Stock Exchange of Singapore;
- (l) SWX Swiss Exchange;
- (m) Tokyo Stock Exchange;
- (n) Toronto Stock Exchange;
- (n) Zurich Stock Exchange.

**ASX** means Australian Stock Exchange Limited.

**foreign member** means a member of a registered scheme who has a registered address outside of this jurisdiction.

**offer** includes, in relation to an issue of interests, inviting an application for the issue of interests.

**placement resolution** means, in relation to the approval of an issue of interests, a special resolution where both of the following apply:

- (a) votes are only cast in respect of interests (the **eligible interests**):
  - (i) that are held by a member who will not acquire any of the interests that are to be issued; or
  - (ii) that are held by a member for the benefit of another person who will not obtain beneficial ownership of any of the interests that are to be issued;
- (b) the value of the eligible interests held by the members who vote represents at least 25% of the total value of eligible interests.

**related issue** means, in relation to an issue of interests, an issue of interests in the same class at a price set by the responsible entity, which has not been approved or ratified by members in accordance with a provision in the constitution to the effect of subparagraph (2)(c)(ii) or issued in accordance with other provisions of the constitution.

**stapled security** means two or more financial products including at least one interest in a registered scheme where:

- (a) under the terms on which each of the products are to be traded, they must be transferred together; and
- (b) there are no financial products in the same class as those financial products which may be transferred separately.”.

### **Exemption—Equality of treatment**

5. A responsible entity of a registered scheme (except a responsible entity of a time-sharing scheme) does not have to comply with paragraph 601FC(1)(d) of the Act to the extent that it would prevent the responsible entity from:
  - (a) dealing with some members of the scheme in the way described in subsections 601GAA(11) and (12) as notionally inserted into the Act by this instrument; or
  - (b) treating some or all members who are professional investors differently to other members in either or both of the following ways:
    - (i) giving them a shorter period than other members to consider an offer made in accordance with subsection 601GAA(3) as notionally inserted into the Act by this instrument; or
    - (ii) issuing interests to them before they are issued to some other members.

Note: Relief from compliance with paragraph 601FC(1)(d) of the Act for differential fee arrangements of kind covered by notional subsection 601GAA(6) of the Act set out above is provided by ASIC Class Order [CO 03/217]: see especially paragraph 2 of Schedule B.

### **Revocation**

6. ASIC Class Order [CO 98/52] is revoked.

Dated this 4th day of May 2005

Signed by Brendan Byrne  
as a delegate of the Australian Securities and Investments Commission