

**Australian Securities and Investments Commission  
Corporations Act 2001—Paragraphs 601QA(1)(a), 741(1)(a), 951B(1)(a),  
1020F(1)(a) and 1020F(1)(c)—Amendment**

**Enabling Legislation**

1. The Australian Securities and Investments Commission makes this instrument under paragraphs 601QA(1)(a), 741(1)(a), 951B(1)(a), 1020F(1)(a) and 1020F(1)(c) of the *Corporations Act 2001* (the *Act*).

**Title**

2. This instrument is ASIC Class Order [CO 13/1411].

**Commencement**

3. This instrument commences on the later of:
  - (a) the date it is registered under the *Legislative Instruments Act 2003*;
  - (b) 2 January 2014.

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*, section 4 (definition of **register**). The FRLI may be accessed at <http://www.frli.gov.au/>.

**Amendment**

4. ASIC Class Order [CO 04/194] is amended by:
  - (a) inserting after paragraph 1.22 the following:
    - “1.22A From 2 January 2014 or, if the MDA operator has an Australian financial services licence that expressly authorises it to operate an MDA service under this instrument before 2 January 2014, 2 January 2015:
      - (a) paragraphs 1.22B to 1.22R apply; and
      - (b) paragraphs 1.22 and 1.23 do not apply.
    - 1.22B The MDA operator must do all things necessary to ensure that:
      - (a) if it holds a client’s portfolio assets, it holds those assets on trust for the client or the client and other clients of the MDA service it provides unless the client’s portfolio assets are held under Division 2 or 4 of Part 7.8; and
      - (b) a client’s portfolio assets held by a person the MDA operator directly or indirectly engages are held in a way

so that the client or the client and other clients of the MDA service have a beneficial interest in the client's portfolio assets (whether directly or indirectly) unless the assets are held under Division 2 or 4 of Part 7.8.

Note: Subparagraph (b) could be satisfied by a person holding the client's portfolio assets on trust for the operator and the operator holding the beneficial interest in those assets on trust for the client or the clients of the MDA service as a whole.

1.22C Paragraph 1.22B does not apply where either of the following apply:

- (a) where both of the following apply:
  - (i) the client's portfolio assets are located in a place outside of this jurisdiction where trusts are not known to the law;
  - (ii) it is reasonable for the assets to be held in accordance with the law in that place;
- (b) where both of the following apply:
  - (i) the client's portfolio assets are located in a place outside of this jurisdiction and it is not reasonable for the assets to be held on trust in accordance with the law in that place;
  - (ii) the MDA operator has documented in writing that:
    - (A) it is satisfied that the client's portfolio assets are held in a manner that, having regard to the relevant laws, provides reasonably effective protection in case of insolvency of the person holding the property; and
    - (B) the basis on which the MDA operator is satisfied.

1.22D The MDA operator must have reasonable procedures for giving instructions to the custodian or where there is no custodian, any custodial staff in relation to the client's portfolio assets that include how the instructions are given and reasonable controls to ensure that the instructions are properly authorised and carried out.

- 1.22E The MDA operator must ensure that it, and must do all things necessary to ensure that any person it directly or indirectly engages to hold client's portfolio assets:
- (a) as far as practicable identifies the client's portfolio assets as held on behalf of the person for whom they are held; and
  - (b) holds the client's portfolio assets separately from property in which the MDA operator or the person holding the client's portfolio assets has an interest and from the property of any other person other than the client and other clients of the MDA service except in relation to:
    - (i) Australian or foreign currency; or
    - (ii) a deposit taking facility of a body carrying on a business of accepting money on deposit including rights under that facility; or
    - (iii) securities; or
    - (iv) derivatives;

held separately from property in which the MDA operator or the person has an interest other than as a trustee for a person other than the MDA operator, except where property is not held separately to comply with subparagraph 1.22F(f).
- 1.22F The MDA operator must do all things necessary to ensure that, if the client's portfolio assets are not held separately from property in which the MDA operator or the person holding the client's portfolio assets has an interest and separately from the property of any other person other than the client and other clients of the MDA service:
- (a) the MDA operator has put in place and keeps for 7 years after it was last relied on a written policy in relation to not holding client's portfolio assets separately which sets out its reasons why that policy is appropriate having regard to any extent to which it might expose its clients to the risks arising from client's portfolio assets not being held separately and its duties to each client; and
  - (b) the MDA operator reviews the policy at least every 13 months, prepare a written record of the outcome of the review and keep that record for 7 years; and

- (c) adequate records are kept at all times showing each client's entitlement to property that includes the client's portfolio assets not held separately; and
- (d) reconciliation procedures are performed on each business day in relation to the client's portfolio assets not held separately or if because of the nature of the property, it is ordinary and reasonable commercial practice in the place where the property is located to reconcile property of that kind less frequently, as frequently as would be performed in accordance with that practice; and
- (e) not holding the client's portfolio assets separately does not restrict the ability of the MDA operator to exercise its powers in relation to the client's portfolio assets in accordance with its duties including in relation to voting rights; and
- (f) if the property that includes the client's portfolio assets is not sufficient to meet the entitlements of all persons in relation to that property, the insufficiency ceases by the second business day after the insufficiency arises, whether through the provision of additional property by the MDA operator or otherwise.

1.22G The MDA operator must do all things necessary to ensure that if it holds client's portfolio assets, it, and if a custodian holds those assets, the custodian, has an organisational structure that supports compliance with subparagraph 1.22E(b).

1.22H The MDA operator must do all things necessary to ensure that if it holds client's portfolio assets, it, and if a custodian holds those assets, the custodian, segregates custodial staff from staff performing other functions in a way that minimises the potential for conflict, if a conflict of interest exists or might arise between:

- (a) their duties as custodial staff; and
- (b) the interests served or advanced by persons who perform duties to make investment decisions, trading decisions or other discretionary decisions resulting in the transfer or disposal of client portfolio assets other than discretionary decisions in relation to holding a deposit account with a corporation that is regulated for the taking of deposits where the balance of the deposit account is payable on demand and discretionary decisions relating to transactions in foreign currency.

- 1.22I The MDA operator must do all things necessary to ensure that if it holds client's portfolio assets, it, and if a custodian holds the client's portfolio assets, the custodian, has a documented policy that is:
- (a) approved by its directors or governing body, or a senior manager authorised to give approval on behalf of the directors or governing body or in the case of a foreign company that is carrying on business in this jurisdiction or registered under Division 2 of Part 5B.2, its most senior officer or employee in this jurisdiction with responsibility for managing the functions of custodial staff; and
  - (b) designed to ensure that custodial staff are not influenced because of a conflict mentioned in paragraph 1.22H to act other than in accordance with their duties.
- 1.22J The MDA operator must do all things necessary to ensure that if it holds the client's portfolio assets, it, and if a custodian holds those assets, the custodian, undertake reasonable checks to find out and document if there has been any attempt to inappropriately influence custodial staff and take reasonable action in the event this happens.
- 1.22K The MDA operator must do all things necessary to ensure that if it holds the client's portfolio assets, it, and if a custodian holds those assets, the custodian, structure its business so that:
- (a) custodial staff can report to the MDA operator if the MDA operator is a natural person or otherwise the directors or governing body of the MDA operator directly or through other custodial staff; and
  - (b) the duties of:
    - (i) direct managers of custodial staff; and
    - (ii) indirect managers of custodial staff that are not the most senior officer or employee of the MDA operator or the custodian in this jurisdiction or the jurisdiction in which the MDA operator or the custodian is based; and
    - (iii) custodial staff;
- do not extend to other functions that may create conflicts of interest including that custodial staff and those managers are not responsible for investment decisions, trading decisions or other discretionary

decisions resulting in the transfer or disposal of client's portfolio assets, other than discretionary decisions in relation to holding a deposit account with a corporation that is regulated for the taking of deposits where the balance of the deposit account is payable on demand and discretionary decisions relating to transactions in foreign currency; and

- (c) custodial staff and persons involved in investment decisions, trading decisions or other discretionary decisions resulting in the transfer or disposal of client's portfolio assets other than discretionary decisions in relation to holding a deposit account with a corporation that is regulated for the taking of deposits where the balance of the deposit account is payable on demand and discretionary decisions relating to transactions in foreign currency are located sufficiently separately during the performance of their duties to reduce, so far as reasonably practicable, the risk of inappropriate influence on decisions relating to holding of those assets.

1.22L The MDA operator must, for its custodial staff ensure that, and for custodial staff of any custodian do all things necessary to ensure that the custodian ensures that:

- (a) custodial staff have the knowledge and skills necessary to perform their duties properly; and
- (b) ongoing training and educational programs are provided to custodial staff that provide reasonable assurance that they have knowledge that remains at a level necessary for performing their assigned duties including knowledge of the MDA operator's obligations under this instrument to the extent relevant to enable the custodial staff to perform their particular duties; and
- (c) custodial staff have the necessary time and authority to perform their duties as custodial staff; and
- (d) resources are made available to custodial staff to the extent necessary for them to adequately perform their duties as custodial staff.

1.22M The MDA operator must also comply with paragraphs 1.22G to 1.22L as if any sub-custodian were the custodian, except to the extent that, in relation to client's portfolio assets outside this jurisdiction, it is not reasonably practicable for the MDA operator to do all things necessary to ensure that the sub-custodian does a particular thing.

Note: For example, if the custodian engaged a sub-custodian, the operator would need to do all things necessary to ensure that the requirements of paragraphs 1.22G to 1.22L were satisfied in relation to the custodian, the sub-custodian and their custodial staff, subject to the exception in relation to assets outside this jurisdiction.

- 1.22N The MDA operator must keep for 7 years records demonstrating how it complies with paragraphs 1.22B to 1.22M.
- 1.22O The MDA operator must set out in writing and implement a reasonable process:
- (a) for determining if it should hold client's portfolio assets or engage a custodian, unless either choice is determined by its contractual obligations, and if it is to engage a custodian which person will be the custodian and on what terms. The process must involve the application of a reasonable written policy:
    - (i) approved by the directors or governing body, or a senior manager authorised to give approval on behalf of the directors or governing body or in the case of a foreign company that is carrying on business in this jurisdiction or registered under Division 2 of Part 5B.2, its most senior officer or employee in this jurisdiction with responsibility for managing the functions of custodial staff; and
    - (ii) which addresses potential conflict of interests and other considerations relevant to the interests of each client; and
  - (b) to monitor and assess any custodian's performance of its obligations as a custodian and do all things necessary to ensure that a custodian it engages sets out in writing and implements a reasonable process to monitor and assess the performance of its obligations by any sub-custodian.
- 1.22P The MDA operator must not permit a custodian or a sub-custodian to be involved in discretionary decisions concerning a deposit account, unless the MDA operator is satisfied that the custodian or sub-custodian has set out in writing and implements reasonable processes for:
- (a) determining which account to use; and

- (b) monitoring performance by the issuer of the account of the issuer's obligations in relation to that account; and
- (c) taking action in case of failure of the issuer of the account of the issuer's obligations in relation to that account.

1.22Q The MDA operator must ensure that it keeps records of client's portfolio assets in a way that enables the holding of those assets to be conveniently and properly audited by an auditor of the MDA service and do all things necessary to ensure that any custodian or sub-custodian keeps such records in relation to any asset that is held by the custodian or sub-custodian.

1.22R The MDA operator must:

- (a) review the appropriateness of the written policies and processes it is required to have under paragraph 1.22O and any written processes it relies on to comply with paragraph 1.22P at least once in every 13 months; and
- (b) as directed by ASIC in writing, arrange for a report on the effectiveness or reasonableness of any of the processes or policies to be prepared and given to ASIC.

The written direction may state who is to prepare the report or the time by which it must be given to ASIC.

1.22S From 2 January 2014 or, if the MDA operator has an Australian financial services licence that expressly authorises it to operate an MDA service under this instrument before 2 January 2014, 1 November 2015, an MDA operator that engages a custodian to hold client's portfolio assets must ensure that:

- (a) if the MDA operator holds a beneficial interest in the client's portfolio assets on behalf of the client, it has a written agreement with the custodian that meets the requirements of subparagraphs (c) to (e) except:
  - (i) to the extent that, in relation to client's portfolio assets held outside of this jurisdiction, the MDA operator holds documents that demonstrate that it is not reasonably practicable to engage another person to hold client's portfolio assets who is willing to include such matters in the agreement; or
  - (ii) where the custodian is controlled by the MDA operator and the MDA operator is liable to its client for the acts and omissions of the custodian



as if they were the acts or omissions of the MDA operator; and

- (b) if the MDA operator does not hold a beneficial interest in the client's portfolio assets on behalf of the client:
  - (i) it has a written agreement with the custodian that meets the requirements of subparagraphs (c) to (e); and
  - (ii) it does all things necessary to ensure that the custodian has a written agreement with each person that the custodian engages to hold client's portfolio assets and the written agreement meets the requirements of subparagraphs (c) to (e) as if the person were the custodian and the custodian were the MDA operator except:
    - (A) to the extent that, in relation to client's portfolio assets held outside of this jurisdiction, the MDA operator holds documents that demonstrate that it is not reasonably practicable to engage another person to hold the client's portfolio assets who is willing to include such matters in the agreement; or
    - (B) where the person is controlled by the custodian and the custodian is liable to its client for the acts and omissions of the person as if they were the acts or omissions of the custodian; and
- (c) the agreement with the custodian has provisions:
  - (i) specifying reasonable rights that the MDA operator has for the ongoing review and monitoring of the custodian and any sub-custodian and the standards against which their performance will be assessed; and
  - (ii) to the effect that the custodian must certify to the MDA operator in writing at least every 13 months that the custodian believes on reasonable grounds that the custodian and each sub-custodian have met since the date of the previous statement in writing or the commencement of the agreement, and the custodian has no reason to believe that the custodian and each sub-custodian will not continue to meet:

- (A) in the case of the custodian, the terms of the agreement; and
- (B) in any case, the requirements that the MDA operator must do all things necessary to ensure under paragraphs 1.22E to 1.22M, subparagraph 1.22O(b) and paragraph 1.22Q are met by the custodian or the sub-custodian in relation to the client's portfolio assets held by the custodian or a sub-custodian (except to the extent that the licensee is not complying with a requirement under paragraphs 1.22F(a) or (b) and the custodian is not aware of any non-compliance);

other than:

- (C) as disclosed in writing to the MDA operator; or
- (D) that the custodian reasonably believes are trivial, and

the custodian acknowledges that it or the sub-custodian must continue to meet those obligations; and

- (iii) to the effect that the custodian must acknowledge to the MDA operator on request that client's portfolio assets to which the agreement relates are held on trust and for whom they are held on trust and notify any other person where the custodian is aware to do so might protect the rights or equitable interest of the MDA operator or the client that the assets are so held unless the MDA operator directs in writing otherwise; and
- (iv) specifying how instructions will be given by the MDA operator to the custodian; and
- (v) to the effect that the custodian must not take or grant a security interest, mortgage, lien or other encumbrance over, or in relation to, the client's portfolio assets held under the agreement unless it is accordance with the agreement and does not cover unpaid fees of the custodian; and
- (vi) specifying how the custodian will maintain records of the client's portfolio assets to which

the agreement relates and the transactions in relation to those assets including by whom, when and how transactions were authorised; and

- (vii) specifying procedures for reconciliation each business day or if it is ordinary and reasonable commercial practice to reconcile certain assets less frequently, in accordance with that practice, by checking information the custodian is given as to the existence and quantity of client's portfolio assets against the records of the custodian and for reporting by the custodian concerning the outcomes of the reconciliation in case of any unreconciled matter; and
- (viii) to the effect that the custodian must provide all reasonable access and assistance to any auditor engaged to audit the MDA operator's financial statements or statements and records concerning clients' holdings or transactions; and
- (ix) to the effect that the custodian will provide the MDA operator with written notice and contact information of any other person holding client's portfolio assets or to be appointed by the custodian:
  - (A) as soon as reasonably practicable; and
  - (B) in any event before the assets are held, except in exceptional circumstances identified in the agreement; and
- (x) to the effect that the MDA operator may terminate the agreement without:
  - (A) payment other than in relation to entitlements previously accrued or the reasonable expenses involved in transfer of the assets to the MDA operator or another custodian; and
  - (B) limiting any right to damages the MDA operator may have under the agreement, including recovering expenses referred to in subparagraph (A) if the custodian is in breach;

if the MDA operator has reasonable grounds for believing that:

- (C) there is or has been an act or omission of the custodian or a sub-custodian that results in the custodian being in breach of the agreement; and
  - (D) as a result of the act or omission, to a material extent the custodian or a sub-custodian is not complying with or is unlikely to comply with the requirements that the MDA operator must do all things necessary to ensure under paragraphs 1.22E to 1.22M, subparagraph 1.22O(b) and paragraph 1.22Q are met by the custodian or the sub-custodian in relation to the client's portfolio assets held by the custodian or that the custodian arranged to be held, having regard to any remedy provided or that may be expected to be provided by the custodian or the sub-custodian; and
- (xi) to the effect that on termination of the engagement, client's portfolio assets must be transferred to the MDA operator or as the MDA operator directs within a reasonable period, subject to reasonable provisions for the obligations of the parties at termination, including the payment of outstanding fees and charges to the custodian and any costs of the transfer; and
  - (xii) to the effect that the custodian must notify material or systemic breaches of the agreement by it or by the MDA operator in writing to the MDA operator within a reasonable time of becoming aware of the breach; and
  - (xiii) specifying the terms on which the custodian is authorised to engage another person to hold the client's portfolio assets to which the agreement relates and providing that any such engagement must be either:
    - (A) under a written agreement meeting the requirements of subparagraphs (c) to (e) (including this sub-subparagraph and sub-subparagraph (B)) as if the person engaged were the custodian and the custodian were the MDA operator except to the extent that, in relation to assets

held outside of this jurisdiction, the custodian has provided written reasons to the MDA operator as to why it reasonably considers that it is not practicable to engage a person that is willing to include such matters in the agreement; or

- (B) an arrangement with a related body corporate of the custodian, where the custodian has a written agreement with the MDA operator that it is liable to the its client for the acts and omissions of the related body corporate as if those acts and omissions were the acts or omissions of the custodian; and
- (xiv) to the effect that the custodian must establish and maintain business continuity arrangements that are reasonable for a business of the nature, scale and complexity of the custodian's business; and
- (xv) to the effect that the custodian must not disclose any confidential information relating to client's portfolio assets, apart from any disclosure to ASIC or as required or permitted by law or by the MDA operator in writing; and
- (d) the agreement with the custodian has reasonable liability provisions and does not include provisions that exclude the liability of the custodian for direct loss that it would have if the exclusion were not included except in particular circumstances that the MDA operator considers to be reasonable and contains, if appropriate, reasonable indemnity provisions in relation to losses caused to the MDA operator or to the relevant client or clients by the custodian's acts and omissions that relate to that agreement; and
- (e) it does not, under the agreement with the custodian or otherwise, permit the granting of a security interest, mortgage, lien or other encumbrance in favour of the custodian or its associates unless the MDA operator reasonably believes, for reasons it has recorded in writing, that any conflict that may arise as a result of the security interest, mortgage, lien or encumbrance will not materially increase the risks that the custodian will fail to meet its obligations and the MDA operator must keep the written record of reasons for 7 years after the security interest has ceased."; and

(b) inserting after paragraph 2.8:

“2.8A From 2 January 2014 or, if the MDA operator has an Australian financial services licence that expressly authorises it to operate an MDA service under this instrument before 2 January 2014, from 2 January 2015:

- (a) paragraphs 2.8B and 2.8C apply; and
- (b) paragraphs 2.8, 2.9 and 2.10 do not apply.

2.8B The external MDA custodian must do all things necessary to ensure that:

- (a) a client’s portfolio assets it holds, other than when held under Division 2 or 4 of Part 7.8, are held on trust for the client or the client and other clients of the MDA service provided by the MDA operator; and
- (b) where a client of the MDA service has an entitlement as a client to payment out of a deposit taking facility the facility is an account that complies with section 981B; and
- (c) a client’s portfolio assets held by a person the external MDA custodian directly or indirectly engages are held in a way so that the client of the MDA service or the client and other clients of the MDA service have a beneficial interest in the client’s portfolio assets (whether directly or indirectly).

Note: Subparagraph (c) could be satisfied by a person holding the client’s portfolio assets on trust for the external MDA custodian who in turn holds the beneficial interest in those assets on trust for the operator who in turn holds the beneficial interest which it has on trust for the client or the clients of the MDA service as a whole.

2.8C Subparagraphs 2.8B(a) and (c) do not apply where either of the following apply:

- (a) where both of the following apply:
  - (i) the client’s portfolio assets are located in a place outside of this jurisdiction where trusts are not known to the law; and
  - (ii) it is reasonable for the property to be held in accordance with the law in that place;
- (b) where both of the following apply:

- (i) the client's portfolio assets are located in a place outside of this jurisdiction and it is not reasonable for the assets to be held on trust in accordance with the law in that place;
  - (ii) the external MDA custodian has documented in writing that it is satisfied that the property is held in a manner that, having regard to the relevant laws, provides reasonably effective protection in case of insolvency of the foreign asset holder and the basis on which the external MDA custodian is satisfied."; and
- (c) inserting after subparagraph 7.6(e):
  - “(ea) **custodial staff** means natural persons who under an arrangement with the MDA operator or a custodian have duties relating to holding client's portfolio assets, record keeping relating to those assets, checking authorisations for instructions to transact or functions incidental to these functions other than making investment decisions, trading decisions or other discretionary decisions resulting in the transfer or disposal of client's portfolio assets other than discretionary decisions in relation to holding a deposit account with a corporation that is regulated for the taking of deposits where the balance of the deposit account is payable on demand and discretionary decisions relating to transactions in foreign currency;
  - (eb) **custodian** means a person engaged by a MDA operator to hold client's portfolio assets or a beneficial interest in those assets;”; and
- (d) inserting after subparagraph 7.6(q):
  - “(qa) **sub-custodian** means a person that a custodian directly or indirectly engages to hold client's portfolio assets or a beneficial interest in those assets;”; and
- (e) inserting after paragraph 7.6:
  - “7.7 For this instrument:
    - (a) a person (**first person**) engages another person if the first person engages or authorises the other person; and
    - (b) a person (**first person**) indirectly engages another person (**second person**) if:
      - (i) the first person engages a person and that person engages the second person; or
      - (ii) a person who is indirectly engaged by the first person under sub-subparagraph (i) or this sub-subparagraph (ii) engages the second person.”.

Dated this 21<sup>st</sup> day of November 2013

Signed by Anthony Graham  
as a delegate of the Australian Securities and Investments Commission