



ASIC
Australian Securities &
Investments Commission

Replacement Explanatory Statement

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This is the Replacement Explanatory Statement for *ASIC Corporations (Changing Scheme Constitutions) Instrument 2019/700* and *ASIC Corporations (Repeal) Instrument 2019/885*.

The Replacement Explanatory Statement is approved by the Australian Securities and Investments Commission (**ASIC**).

Purpose of the Replacement Explanatory Statement

1. This Replacement Explanatory Statement replaces the initial explanatory statement (**Explanatory Statement**) for *ASIC Corporations (Changing Scheme Constitutions) Instrument 2019/700* (**Instrument**) and *ASIC Corporations (Repeal) Instrument 2019/885* (**Repeal Instrument**), in accordance with paragraph 15J(1)(b) of the *Legislation Act 2003 (Cth)*.
2. The purpose of this Replacement Explanatory Statement is to set out details of the matters relevant to the exercise of ASIC's modification powers in the Relevant Instruments.

General

3. After a public consultation process, ASIC issued the Instrument because [CO 09/552] was due to expire, or to 'sunset', under the *Legislation Act 2003* on 1 October 2019. ASIC concluded that the Instrument should be issued to replace [CO 09/552] because the relief under [CO 09/552] had operated effectively and the policy principles underpinning [CO 09/552] continued to apply. The decision to issue the Instrument before the sunset date required ASIC to revoke [CO 09/552]. The Repeal Instrument ceases the relief under [CO 09/552].
4. [CO 09/552] provided relief by modifying s601GC(1)(a) of the *Corporations Act 2001* (the **Act**). Under s601GC of the Act, the constitution of a registered scheme may only be modified, repealed, or replaced with a new constitution, by one of two methods: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: s601GC(1)(a); and

(b) by the responsible entity if the responsible entity reasonably considers the change will not adversely affect members' rights: s601GC(1)(b).

5. [CO 09/552] did not apply in the case where a responsible entity proposed 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.

Underlying policy principles

6. [CO 09/552] enabled responsible entities to change scheme constitutions under s601GC(1)(a) in situations where:
- (a) passing a special resolution would have been impossible or disproportionately burdensome; or
 - (b) there was a proposal to change the constitution to vary or cancel the rights of members of a particular class of interests – that the change to the constitution would only be valid when, in addition to a special resolution being passed to implement the change, the responsible entity had to also comply with specific requirements in the constitution that dealt with the variation or cancellation of class rights; or
 - (c) to facilitate the operation of the Australian Passport Rules, the responsible entity should be allowed to adapt the scheme constitution to accommodate the Australian Passport Rules.

Consultation

7. In August 2019, ASIC issued Consultation Paper 320 - *Remaking ASIC class order on scheme constitutions: [CO 09/552] (CP 320)*. CP 320 was issued because [CO 09/552] was due to sunset on 1 October 2019. CP 320 set out ASIC's preliminary position that the relief under [CO 09/552] should be continued on substantially the same terms as [CO 09/552]. This position was based on ASIC's preliminary assessment that the relief under [CO 09/552] has operated effectively since it was issued.
8. ASIC received no submissions in response to CP 320.

Options to change the Act rather than rely on delegated legislation

9. In October 2019 the Senate Regulations and Ordinances Committee (the **Committee**) sought an explanation from ASIC and Treasury regarding:
- (a) whether modifications to the Act were considered to remove the need for the relief under the Instrument; and

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- (b) if not, why it was considered necessary and appropriate to make the changes to the legal effect of s601GC(1)(a) of the Act by legislative instrument, a form of delegated legislation that is within the scope of the supervision of the Committee.
10. In the lead-up to the issue of CP 320 in August 2019, ASIC was not aware of planned changes to the Act or the *Corporations Regulations 2001* that would continue, or otherwise substantively address, the relief under [CO 09/552]. In light of the impending sunset date of 1 October 2019, legislative reform was not a reasonably practicable option to implement the continuation of the relief under [CO 09/552].
11. As no responses were received to CP 320, ASIC considered that the relief under [CO 09/552] continued to operate effectively, remained fit for purpose and promoted the efficient operation of the managed investment industry. ASIC implemented the position set out in CP 320 by issuing the Instrument. This had the effect of continuing the relief under [CO 09/552] in terms that are substantially similar to [CO 09/552].
12. ASIC considered it in the public interest to utilise powers given by Parliament to ASIC to modify the operation of the Act to preserve the effect of [CO 09/552], given that it is relied upon by a large proportion of responsible entities in certain circumstances. ASIC's continuation of the relief avoided the uncertainty of allowing the relief in [CO 09/552] to lapse or expire, which would have occurred if action was not taken prior to 1 October 2019.
13. As the matters contained in the Instrument are unlikely to change in the near future, it is appropriate for the instrument to be in force for the 10-year period allowed under the *Legislation Act 2003* (Cth).
14. The Instrument is a disallowable legislative instrument. This affords Parliament a level of scrutiny over the matters contained in it.

Provisions of the Instrument

15. Section 4(1) of the Instrument modifies s601GC of the Act by inserting ss601GC(1A) to 601GC(1E), inclusive. These subsections substantively replicate the five scenarios under [CO 09/552] in which relief from s601GC(1)(a) was available. The scenarios from [CO 09/552] are dealt with in turn.

Scenario 1 – Protecting class rights: s601GC(1B) of the Instrument

16. This scenario was previously set out in s601GC(1A) of the Act, inserted by [CO 09/552].
17. Under this scenario, if the constitution of a scheme set 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 could be varied or cancelled by a special resolution under s601GC(1)(a) only if the responsible entity also complied with the specific procedure for varying or cancelling class rights.

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18. In July 2017, ASIC modified [CO 09/552] by issuing *ASIC Corporations (Amendment and Repeal) Instrument 2017/545* to move this modification from ASIC 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 – Australian Passport Rules: s601GC(1C) of the Instrument

19. Previously, this scenario was set out in s601GC(1AAD), as inserted by [CO 09/552].
20. This scenario was added to [CO 09/552] in September 2018 by *ASIC Corporations (Amendment) Instrument 2018/697* in order to accommodate the Australian Passport Rules. Under this scenario, the responsible entity was allowed to amend the scheme's constitution to the extent the responsible entity reasonably considered it necessary to ensure the constitution was consistent with the Australian Passport Rules and specified withdrawal provisions that were consistent with the Australian Passport Rules. The amendment of a scheme's constitution under this scenario was allowed to be made before a scheme had an Australian Passport Fund status, but only had operative effect while the Australian Passport Rules for Australia applied to the scheme.
21. In broad terms, the Australian Passport Rules implemented 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 Act.
22. Scenario 2 was added to [CO 09/552] to facilitate the operation of the Australian Passport Rules: please refer to paragraphs 45 and 46 of ASIC Consultation Paper 296 – *Funds management* (October 2017) (**CP 296**). This facilitation could imply that it would be disproportionately burdensome for a responsible entity to convene a members' meeting to consider a special resolution to amend the scheme's constitution to accommodate the Australian Passport Rules. As explained in CP 296, this facilitation may extend to corporate collective investment vehicles if the proposed legislation is passed.

Scenario 3 – Insufficient quorum: s601GC(1D)(a) of the Instrument

23. Scenario 3 was set out in s601GC(1AAA)(a), inserted by [CO 09/552].
24. Under this scenario, the responsible entity was allowed to change the constitution where a meeting of members was unable to be held because the quorum requirement in s252R(2) of the Act, or the scheme's constitution, was not capable of being satisfied, or because the scheme had an insufficient number of members.
25. This scenario 3 addressed the impossibility of changing the constitution by special resolution under s601GC(1)(a) where there were insufficient members to hold a meeting due to a quorum requirement.

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26. Subject to the terms of a scheme's constitution, the quorum for a meeting of a registered scheme's members is 2 members and the quorum must be present at all times during the meeting: s252R(2) of the Act.
27. The Explanatory Statement for [CO 09/552] provided example fact situations relevant to this scenario: where a scheme had a limited number of seed investors, or an infant scheme where the scheme was registered before the scheme's final features were settled prior to an offer.
28. Under s601GC(1AAB), as inserted by [CO 09/522], in order for the relief to be available under this scenario 3, the following requirements had to 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 must have provided 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 expected 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 (a) was provided, every member of the scheme gave their written consent to the modification, or repeal and replacement, of the scheme's constitution.
29. The two requirements applied also to scenarios 4 and 5.

Scenario 4 – No members are entitled to vote: s601GC(1D)(b) of the Instrument

30. Scenario 4 was set out in s601GC(1AAA)(b), as inserted by [CO 09/552].
31. This scenario applied where every member of the scheme was not entitled to vote at a meeting of members because of s253E of the Act.
32. 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.
33. Where 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 defined as a resolution that must be passed by at least 75% of votes cast by members entitled to vote on the resolution: s9 of the Act.
34. As with scenario 3, this relief addressed a situation where it would not be possible to change the constitution by special resolution under s601GC(1)(a).

Scenario 5 – No required disclosure document: s601GC(1D)(c) of the Instrument

35. Scenario 5 was set out in s601GC(1AAA)(c), as inserted by [CO 09/552].

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36. Under this scenario, the relief applied where all interests in the scheme were issued in situations that did not require the responsible entity to give a Product Disclosure Statement (**PDS**), without a prospectus or other disclosure document under Part 6D.2 of the Act, and without a prospectus under the predecessor provisions, namely Division 2 of Part 7.12 of the old Corporations Law in force to 13 March 2000.
37. The Explanatory Statement for [CO 09/552] provided example fact scenarios relevant to this element of relief - where there were a limited number of unrelated seed investors, being wholesale clients or other individuals to whom a PDS was not required to be given.
38. Unlike scenarios 3 and 4, which dealt with situations where it was impossible to hold a members' meeting to change the constitution, this scenario dealt with a situation where it may have been disproportionately burdensome to hold a members' meeting. The restriction of this scenario to investors that did not require disclosure reflected the expectation that these investors were more likely to be able to decide whether to consent to changes to the constitution, or the investors acquired their interests in circumstances that would suggest that direct dealings were an appropriate alternative to a members' meeting, such as a personal offer within the small-scale offering limit.

Other parts of the Instrument

39. In relation to scenarios 3, 4 and 5, the consent requirements are detailed in s601GC(1E), as inserted by s4(1) of the Instrument.

Incorporation by reference

40. The Instrument and the Repeal Instrument do not incorporate any matters by reference.

Retrospective application

41. The Instrument and the Repeal Instrument do not apply retrospectively.

Legislative authority

42. The Instrument and the Repeal Instrument were made under s601QA(1) of the Act.
43. The Instrument and the Repeal Instrument are disallowable legislative instruments.

Statement of Compatibility with Human Rights

44. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the

Human Rights (Parliamentary Scrutiny) Act 2011. A Statement of Compatibility with Human Rights is in the Attachment.

Attachment

Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

ASIC Corporations (Changing Scheme Constitutions) Instrument 2019/700 (the **Instrument**)

ASIC Corporations (Repeal) Instrument 2019/885 (the **Repeal Instrument**)

Overview

1. The Instrument continues the relief previously provided under ASIC Class Order [CO 09/552] – *Changing scheme constitutions* ([**CO 09/552**]) to facilitate the responsible entity changing the constitution of a registered scheme in specific situations without the need for the change to be approved by a special resolution under s601GC(1)(a) of the *Corporations Act 2001*. The Repeal Instrument revokes [CO 09/552].

Assessment of human rights implications

2. The Instrument and the Repeal Instrument do not engage any of the applicable rights or freedoms

Conclusion

3. The Instrument and the Repeal Instrument are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.