

2022-2023

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TREASURY LAWS AMENDMENT (MEASURES FOR CONSULTATION) BILL
2023: RATIONALISATION OF ENDING ASIC INSTRUMENTS (TRANCHE 2)

EXPOSURE DRAFT EXPLANATORY MATERIALS

Table of Contents

Glossary.....	iii
Chapter 1: Rationalisation of ending ASIC instruments.....	5

Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

Abbreviation	Definition
ASIC	Australian Securities and Investments Commission
Bill	Treasury Laws Amendment (Measures for Consultation) Bill 2023: Rationalisation of ending ASIC instruments (Tranche 2)
Corporations Act	<i>Corporations Act 2001</i>
IPO	Initial public offer
National Credit Code	Schedule 1 to the <i>National Consumer Credit Protection Act 2009</i>

Chapter 1: Rationalisation of ending ASIC instruments

Table of Contents:

Outline of chapter	5
Context of amendments.....	6
Relevant interests, voting power and exceptions to the general prohibition (ASIC Class Order [CO 13/520])	7
Satisfying the requirement for Registered Schemes to make adequate provision for acquiring interests in and withdrawing from the scheme, in the Scheme constitution (ASIC Class Order [13/655] and ASIC Class Order [13/657])	15
ASIC Corporations (Superannuation and Schemes: Underlying Investments) Instrument 2016/378	23
ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835	26

Outline of chapter

- 1.1 Schedule 1 to the Bill makes amendments to laws in the Treasury portfolio to move matters currently in ASIC legislative instruments into the primary law. Amendments to the Corporations Act incorporate the following instruments:
 - ASIC Class Order [CO 13/520] (Part 1);
 - ASIC Class Order [CO 13/655] (Part 2);
 - ASIC Class Order [CO 13/657] (Part 2); and
 - section 6 of ASIC Corporations (Superannuation and Schemes; Underlying Investments) Instrument 2016/378 (Part 3).
- 1.2 Amendments in Part 4 to the *National Consumer Credit Protection Act 2009* insert regulation-making powers to support the incorporation of ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835 into the *National Consumer Credit Protection Regulations 2010*. Exposure draft regulations are being consulted on alongside the exposure draft of this bill.

Context of amendments

- 1.3 These amendments incorporate longstanding and accepted matters currently contained in ASIC-made legislation into the primary law. This is part of the regular care and maintenance of Treasury portfolio legislation and provides industry and consumers with greater certainty and clarity when interacting with Treasury laws.
- 1.4 Class orders and legislative instruments that notionally amend the primary law or regulations may cause complexity in the law and undermine accessibility. This may make it difficult for entities to identify and understand the law as it applies to them. Moving notional amendments and other matters out of ASIC-made legislation through this package goes towards addressing these concerns.

Relevant interests, voting power and exceptions to the general prohibition (ASIC Class Order [CO 13/520])

Context of amendments

- 1.5 Chapter 6 of the Corporations Act relates to takeovers. It regulates the acquisition of substantial interests in listed companies and bodies, listed registered managed investment schemes and unlisted companies with more than 50 members, by:
- imposing a general prohibition relating to the acquisition of relevant interests by, or on behalf of a person resulting in an increase of a persons' voting power in a regulated entity to, or from, a point above 20 per cent (the general prohibition) (section 606 of the Corporations Act); and
 - providing for a number of exceptions to the general prohibition under which otherwise prohibited acquisitions may be made (including, for example, acquisitions under a takeover bid) (section 611 of the Corporations Act).
- 1.6 Section 608 of the Corporations Act sets out the basic rule of when a person will have a relevant interest in securities. Broadly, a person's interest in securities will be a 'relevant interest' and regulated by the takeovers provisions if the person holds the securities, or has the power to control voting or the disposal of the security. Section 609 of the Corporations Act sets out a number of situations that will not give rise to a relevant interest in securities.
- 1.7 ASIC Class Order [CO 13/520] makes a number of modifications to Chapter 6 of the Corporations Act in relation to:
- situations that will not give rise to a relevant interest under section 609 of the Corporations Act;
 - securities that are the subject of an acceptance facility; and
 - exceptions to the general prohibition.
- 1.8 The modifications in ASIC Class Order [CO 13/520] relate to similar themes and modify similar parts of the Corporations Act, however the provisions generally operate independently of each other.¹

¹ ASIC has recently undertaken consultation on ASIC Class Order [CO 13/520]. Information about this consultation can be found at: <https://asic.gov.au/regulatory-resources/find-a-document/consultation-papers/cp-365-remaking-asic-class-orders-on-takeovers-compulsory-acquisitions-and-relevant-interests/>

Comparison of key features of new law and current law

Table 1.1 Comparison of new law and current law

New law	Current law
The definition of convertible securities in ASIC Class Order [CO 13/520] is included in section 9 of the Corporations Act.	ASIC Class Order [CO 13/520] substitutes an alternative definition of convertible securities into the Corporations Act.
Situations that will not give rise to a relevant interest in securities are directly set out in section 609 of the Corporations Act.	Section 609 of the Corporations Act sets out a number of situations that will not give rise to a relevant interest in securities. A number of modifications to these situations and additional situations, are set out in ASIC Class Order [CO 13/520]
Exemptions from the general prohibition are included in the table in section 611 of the Corporations Act.	Section 606 of the Corporations Act imposes a general prohibition relating to the acquisition of interests. Section 611 sets out relevant exemptions from this general prohibition. ASIC Class Order [CO 13/520] makes a number of modifications to the table items in section 611.
Section 615 of the Corporations Act provides that the exception in item 10 of the table in section 611 (which relates to rights issues) applies to foreign holders of a company’s securities that are specified in offers even when the conditions set out in item 10 are not satisfied in certain circumstances.	<p>Section 615 of the Corporations Act sets out:</p> <ul style="list-style-type: none"> • a procedure that allows foreign holders to participate in the benefits flowing from a rights issue that has control implications; and • seeks to minimise those control effects, while permitting non-foreign holders to rely on the relevant exceptions in section 611. <p>ASIC Class Order [CO 13/520] provides that the exception in item 10 of the table in section 611 (which relates to rights issues) applies to foreign holders of a company’s securities that are specified in offers even when the conditions set out in item 10 are not satisfied in certain circumstances.</p>

Detailed explanation of new law

Definitions

1.9 The Bill amends a number of definitions in the Corporations Act.

- 1.10 The definition of **convertible securities** is repealed and replaced with a new definition that provides that securities are convertible into another class of securities if the holder may, by the exercise of rights attached to those securities, have the other class of securities issued to them or have the securities transform into securities of that other class. The definition also states that an option may be a convertible security even if it is non-renounceable.
[Schedule 1, Part 1, item 1, section 9 of the Corporations Act]
- 1.11 The definition of **substantial holding** in section 9 of the Corporations Act is amended to include a reference to subsection 609(6) (market traded options), subsection 609(7) (conditional agreements), subsection 609(9B) (securities escrowed under listing rules) or subsections 6099B (securities subject to escrow agreement). The Bill makes identical amendments to subsection 671B(7) in relation to when a person will have a relevant interest in securities for the purpose of exchange traded options, conditional agreements, companies that issue restricted securities and securities that are subject to escrow agreement.
[Schedule 1, Part 1, items 3 and 18, sections 9 and 671B of the Corporations Act]
- 1.12 When calculating a person's voting power and when determining if a person has a substantial holding in a listed entity, it is necessary to consider the relevant interests both a person and any associates have in securities of the body. Section 12 of the Corporations Act provides the definition of associate for the purpose of Chapter 6 of the Corporations Act and subsection 12(2) specifies when a second person is an associate to a primary person, in relation to a designated body. The Bill amends the definition of associate to provide that a second person is not an associate of a primary person merely because they have entered into a relevant agreement and one of the persons has or will have a right under that agreement to dispose of securities in the designated body.
[Schedule 1, Part 1, items 4 and 5, section 12 of the Corporations Act]

Situations not giving rise to relevant interests

- 1.13 Section 608 of the Corporations Act sets out when a person will have a relevant interest in securities. Section 609 of the Corporations Act sets out situations that do not give rise to a relevant interest in securities. Subsection 609(1) relates to situations involving money lending and financial accommodation. Under the exception security interests taken or acquired in the ordinary course of a non-associated person's business of providing financial accommodation on ordinary commercial terms do not give rise to a relevant interest.
- 1.14 The Bill repeals and replaces subsection 609(1) to extend the exemption where:

- the security interest is acquired in the ordinary course of the person's business of the provision of financial accommodation by any means and on ordinary commercial terms; or
- the interest was acquired for the benefit of one or more persons in relation to financial accommodation provided by them in the ordinary course of their business of the provision of financial accommodation by any means and on ordinary commercial terms; and
- the person whose property is subject to the security interest is not an associate of any other person mentioned in this subsection.

[Schedule 1, Part 1, item 7, subsection 609(1) of the Corporations Act]

1.15 The Bill also clarifies that a reference to a security interest includes a reference to a negative pledge.

[Schedule 1, Part 1, item 7, subsection 609(1) of the Corporations Act]

1.16 Subsection 609(3) of the Corporations Act relates to situations where a financial services licensee does not have a relevant interest in securities merely because they hold securities on behalf of someone else in the ordinary course of their financial services business. The Bill repeals and replaces subsection 609(3) to provide that a financial services licensee does not have a relevant interest in the securities of their clients merely because they are instructed to dispose of the securities on the person's behalf or enter into a sold position in relation to the securities.

[Schedule 1, Part 1, item 8, subsection 609(3) of the Corporations Act]

1.17 The Bill inserts another situation that will not give rise to a relevant interest in securities in relation to securities escrowed under listing rules. This provides that a listed company does not have a relevant interest in securities merely because the company must apply restrictions on the disposal of the securities as part of a listing rule escrow under the listing rules of a prescribed financial market.

[Schedule 1, Part 1, item 9, subsection 609(9B) of the Corporations Act]

1.18 Additionally, the Bill provides that that an operator of a prescribed financial market does not have a relevant interest merely because it has the power to control the disposal of securities that are the subject of a listing rule escrow.

[Schedule 1, Part 1, item 9, subsection 609(9C) of the Corporations Act]

Securities the subject of an acceptance facility

1.19 An acceptance facility allows holders of target securities to provide a third-party facility agent with completed acceptance documents. The facility agent is then able to release the acceptances once a particular level of support has been achieved or once the bidder declares the bid free of all conditions or states they will do so no later than the time all facility acceptances are processed. The Bill provides that a bidder for a takeover bid will not have a relevant interest in bid class securities merely because those securities are the subject of an acceptance, in relation to a facility, that is given to the operator of the facility in certain circumstances. This includes that:

- the offer under the takeover bid for those securities has not been accepted;
- in the case where bid class securities are quoted on a prescribed financial market—for every movement of at least one per cent in the aggregate level of the bidder’s voting power and the votes attached to bid class securities the subject of acceptances in relation to the facility, the bidder provides to the relevant market operator, by 9.30 am on the next trading day after the movement, a notice that meets the relevant notice requirements; and
- in the case where bid class securities are not on a prescribed financial market—the bidder lodges with ASIC a notice within two business days after the aggregate level of the bidder’s voting power and the votes attached to bid class securities the subject of acceptances in relation to the facility rise or fall above or below a percentage listed in subsection 654C(1).

[Schedule 1, Part 1, item 10, subsection 609A(1) of the Corporations Act]

1.20 The relief will only be available to acceptance facilities that meet specific requirements set out in subsection 609A(2), including that:

- it is the only facility in relation to the bid class;
- the operator of the facility is a third party and is not the bidder or an associate of the bidder;
- a participant in the facility may give the operator acceptances in relation to the facility;
- the terms permit the operator to maintain custody of an acceptance until it is withdrawn by the participant or the triggering conditions are satisfied;
- the terms provide that the facility must be made available to all holders of bid class securities for unconditional bids or otherwise available to all or specified holders of bid class securities;
- the terms of the facility provide that the operator of the facility must provide information about acceptances in relation to the facility to the bidder sufficiently regularly to allow the bidder to comply with relevant reporting requirements; and
- the terms of the facility provide that all participants in the facility participate in the facility on the same terms.

[Schedule 1, Part 1, item 10, subsection 609A(2) of the Corporations Act]

1.21 The Bill sets out the definition of triggering conditions, acceptance and participant. The Bill also sets out the notice requirements for the notice provided by the bidder to the relevant market operator in relation to circumstances where bid class securities are quoted on a prescribed financial market.

[Schedule 1, Part 1, item 10, subsections 609A(3) and (4) of the Corporations Act]

Escrow agreement entered into by body corporate in connection with initial public offer

- 1.22 The Bill inserts another situation that will not give rise to relevant interests in relation to securities subject to escrow agreement in connection with an IPO.
- 1.23 When undertaking an IPO, a lead manager and an underwriter are often engaged to coordinate the process and manage the offer to ensure the success of the IPO. This can include the underwriter acquiring any securities which are not taken up. Under section 608 of the Corporations Act, a person who enters into an escrow arrangement with a security holder will have a relevant interest in those securities as they have the power to control the disposal of the securities. The Bill therefore provides that a body corporate, or an underwriter, lead manager or joint lead manager will not have a relevant interest in securities merely because they enter into an agreement in connection with an initial public offer. This relief only applies where the escrow securities are in the same class of securities as those that are covered by the IPO and the agreement satisfies certain conditions.

[Schedule 1, Part 1, item 10, subsection 609B(1) and (2) of the Corporations Act]

- 1.24 The conditions include:
- that the agreement does not restrict the exercise of voting rights attaching to the escrow securities;
 - that in relation to a takeover bid, the agreement allows holders of the escrow to accept into a successful takeover bid and allow the securities to be transferred or cancelled as part of a merger by way of a compromise or scheme of arrangement;
 - that the agreement terminates in relation to a body corporate 2 years after it is entered into or otherwise 1 year after it is entered into;
 - that if the agreement permits the holder to create a security interest in some or all of the escrow securities in favour of a person who does not have a relevant interest in the escrow securities because of subsection 609(1) – the agreement requires that the holder must not create a security interest in favour of the person unless the person has agreed in writing to take or acquire the security interest in the escrow securities subject to the terms of the agreement; and
 - if the agreement permits the holder to transfer their interests in the escrow securities to another person, it requires that they must not do so if that would result in a change in the beneficial ownership of the securities, an extension in the period of the agreement or if the transferee does not agree to be subject to the same restrictions on disposal of the escrow securities.

[Schedule 1, Part 1, item 10, subsection 609B(3) of the Corporations Act]

- 1.25 Consequential amendments to the definition of *relevant interest* and a note to subsection 606(1) ensure that new sections 609A and 609B are appropriately incorporated into other provisions of the Corporations Act that refer to a relevant interest.

[Schedule 1, Part 1, items 2 and 6, the definition of relevant interest in section 9 and note 2 to section 606 of the Corporations Act]

- 1.26 Subsection 610(3) of the Corporations Act provides that a person's voting power may be taken to have increased when acquiring securities in which they did not already have a relevant interest, from an associate. The Bill inserts subsection 610(3A) to provide that a subsidiary that acquires securities from its holding company is not taken to have increased its voting power as a result of the acquisition. However this will not apply if the acquisition results in an increase of another person's voting power in a designated body and that person is not a subsidiary of the ultimate holding company of the body corporate that issued those shares.

[Schedule 1, Part 1, item 11, subsection 610(3A) of the Corporations Act]

Amendments to exceptions to the General Prohibition

- 1.27 Section 606 of the Corporations Act imposes a general prohibition relating to the acquisition of interests by, or on behalf of a person resulting in an increase of a persons' voting power in a regulated entity to, or from, a point above 20 per cent (the general prohibition).

- 1.28 Section 611 of the Corporations Act sets out in table form the acquisitions of relevant exemptions from the general prohibition as set out in section 606 of the Corporations Act. The Bill makes a number of amendments to items in the table. Items 2 and 3 of the table relate to on-market purchases during the currency of a bid. The Bill amends items 2 and 3 to clarify that the acquisition of bid class securities will only occur under item 2 or 3 if the bid is subject only to the condition that an event which, if it occurs, permits a bidder under a market bid to withdraw their offers under subsection 652C(1) or (2); or is subject only to the statutory condition set out in paragraph 625(3)(c).

[Schedule 1, Part 1, item 12, table items 2 and 3 of section 611 of the Corporations Act]

- 1.29 Item 6 of the table contains an exception to the general prohibition which permits an acquisition that results from an exercise of power, or appointment as receiver, or receiver and manager, under an instrument or agreement creating or giving rise to a security interest. The Bill replaces item 6 of the table to provide that an acquisition will be exempt from the general prohibition if it results from the exercise of a power, or appointment of a receiver, under an instrument or agreement creating or giving rise to a security interest in certain circumstances. The Bill also clarifies, for consistency with the amendments to subsection 609(1) outlined above, that the exception applies to security trustees and that a security interest includes a negative pledge.

[Schedule 1, Part 1, item 13, table item 6 of section 611 of the Corporations Act]

- 1.30 Item 14 of the table provides that an acquisition will be exempt from the general prohibition where it results from another acquisition of relevant interests in voting shares in a body corporate that is included in the official list of a prescribed financial market, or a foreign body conducting a financial market approved by ASIC. The Bill modifies item 14 of the table to provide that the exemption only applies to primary listings on official lists.

[Schedule 1, Part 1, item 14, table item 14 of section 611 of the Corporations Act]

- 1.31 Section 615 of the Corporations Act sets out a procedure that allows foreign holders to participate in the benefits flowing from a rights issue that has control implications and seeks to minimise those control effects, while permitting non-foreign holders to rely on the relevant exceptions to the general prohibition notwithstanding foreign holders do not receive offers. The Bill inserts subsection 615(2) to provide that the exception in item 10 of the table in section 611 (which relates to rights issues) applies to foreign holders of a company's securities that are specified in offers even when the conditions set out in item 10 are not satisfied in certain circumstances. This includes that under the terms of the offer the company appoints a nominee for the specified foreign holders that is approved by ASIC and the company issues to the nominee the securities that would otherwise be issued to the specified foreign holders. The nominee must, under the terms of the offer, sell the securities and distribute to the specified foreign holders the relevant proportion of the proceeds of the sale net of expenses.

[Schedule 1, Part 1, items 15 to 17, section 615 of the Corporations Act]

Consequential amendments

- 1.32 The Bill repeals Class Order [CO 13/520] as it is no longer required.

[Schedule 1, Part 1, item 19]

Commencement, application, and transitional provisions

- 1.33 The amendments commence on the day after Royal Assent.

Satisfying the requirement for Registered Schemes to make adequate provision for acquiring interests in and withdrawing from the scheme, in the Scheme constitution (ASIC Class Order [13/655] and ASIC Class Order [13/657])

Context of amendments

- 1.34 Part 5C.3 of the Corporations Act sets out the constitutional requirements of a registered scheme (that is, a managed investment scheme that is registered with ASIC and subject to the legal requirements of a registered scheme).
- 1.35 Paragraph 601GA(1)(a) requires the constitution of a registered scheme to make adequate provision for the consideration to be paid in order to acquire an interest in the scheme.
- 1.36 Subsection 601GA(4) requires the constitution of a registered scheme to specify the right (if there is a right) to withdraw from the scheme, as well as set out adequate procedures for making and dealing with withdrawal requests.
- 1.37 ASIC Class Order [CO 13/655] and ASIC Class Order [CO 13/657] were created to mitigate any perceived uncertainty with regard to what constitutes ‘adequate provision’ and ‘adequate procedures’, by providing a prescribed means to satisfy the requirements.

Comparison of key features of new law and current law

Table 1.2 Comparison of new law and current law

New law	Current law
No change. Notional section 601GAD has not been incorporated.	ASIC Class Order [CO 13/655] inserts notional section 601GAD into the Corporations Act which exempts the constitution from making adequate provision for acquisition price in certain circumstances, if provisions are included that enable the responsible entity to set the acquisition price.
The provisions are incorporated without any operative change.	ASIC Class Order [CO 13/655] inserts notional subsections 601GAE(1) and

New law	Current law
<p>Sections 601GD and 601GE allow a scheme to satisfy its obligations under paragraph 601GA(1)(a) and subsection 601GA(4) by providing in its constitution a formula or method to determine the amount of consideration to acquire interests in the scheme or the amount to be paid on a withdrawal from a scheme.</p> <p>The constitution can also provide responsible entities with the discretion to decide certain matters relating to the formula or method provided for in the constitution.</p> <p>Responsible entities are not mandated to follow the constitutional requirements set out in sections 601GD and 601GE and may make ‘adequate provision’ or set out ‘adequate procedures’ by alternate means if they choose to do so.</p>	<p>601GAF(1) into the Corporations Act which allow a scheme to satisfy its obligations under paragraph 601GA(1)(a) and subsection 601GA(4) by providing in its constitution a formula or method to determine the amount of consideration to acquire interests in the scheme or the amount to be paid on a withdrawal from a scheme.</p> <p>The constitution can also provide responsible entities with the discretion to decide certain matters relating to the formula or method provided for in the constitution.</p> <p>Responsible entities are not mandated to follow the constitutional requirements set out in ASIC Class Order [CO 13/655] and may make ‘adequate provision’ by alternate means if they choose to do so.</p>
<p>Responsible entities have a duty to not exercise a discretion in order to set a particular acquisition price or withdrawal payment amount.</p> <p>Responsible entities that contravene this duty contravene a civil penalty provision.</p>	<p>Responsible entities have a duty to exercise a discretion in order to set a particular acquisition price or withdrawal payment amount (Notional subsection 601GAE(3) in ASIC Class Order [CO 13/655]).</p>
<p>The formula or method used to determine the:</p> <ul style="list-style-type: none"> • acquisition price for interests that are not traded on a financial market; • acquisition price for interests that are able to be traded on an ASX Ltd or Chi-X Limited financial market but the scheme is not listed on those markets; or • withdrawal price <p>must, excluding the application of any discretions, equal the value of scheme property less any liabilities, divided by the number of interests.</p> <p>Adjustments allowed by discretions are disregarded in determining whether the formula or method meets the requirement. This ensures that the acquisition or withdrawal amount has a basis in the</p>	<p>The formula or method set out in the constitution must be based on the value of scheme property less any liabilities, divided by the number of interests, when used to determine:</p> <ul style="list-style-type: none"> • acquisition price for interests that are not traded on a financial market (notional subsection 601GAE(2) inserted by ASIC Class Order [CO 13/655]); or • acquisition price for interests that are able to be traded on an ASX Ltd or Chi-X Limited financial market but the scheme satisfies all of the following requirements: <ul style="list-style-type: none"> – it is not listed on those markets; – on any day those interests are able to be traded, the responsible entity can issue those interests and

Treasury Laws Amendment (Measures for Consultation) Bill 2023: Rationalisation of ending ASIC instruments (Tranche 2)

New law	Current law
underlying value of each interest before any discretion is exercised.	<p>allows applications for and redemptions of those interests;</p> <ul style="list-style-type: none"> the price or value of anything the scheme invests in is continuously disclosed or can be immediately ascertained (notional subsection 601GAE(2) inserted by ASIC Class Order [CO 13/655]).
There is no requirement for responsible entities to publish and maintain on their website a notice that they will rely upon the ‘formula or method’ means of satisfying their constitutional obligations.	A responsible entity may only rely upon the ‘formula or method’ means of satisfying its constitutional obligations as set out in ASIC Class Order [CO 13/655], if it publishes and maintains on its website a notice that it will do so.
<p>A responsible entity must ensure a discretion that affects the acquisition or withdrawal price is exercised, as far as practicable, consistent with ordinary commercial practice and with producing a reasonably current price. The discretion must also not be exercised in a way that would pre-determine the amount set as the acquisition or withdrawal amount.</p> <p>Responsible entities that contravene these duties contravene a civil penalty provision.</p>	A responsible entity must ensure a discretion that affects the acquisition or withdrawal price is exercised, as far as practicable, consistently with ordinary commercial practice and with producing a reasonably current price (Subsection 601FC(1A) as inserted by ASIC Class Order [CO 13/657]).
Responsible entities are not required to document the exercise of a discretion.	<p>When a discretion that affects the acquisition or withdrawal price is exercised, the responsible entity must document the exercise of that discretion (subsections 601FC(1B) and (1C) as inserted by ASIC Class Order CO [13/657]).</p> <p>The records kept must be identifiable, retained for seven years after they cease to be current, and made available to members of the scheme and Product Disclosure Statement holders on request at no charge (subsections 601FC(1D) and (1E) and notional section 1013DAA as inserted by ASIC Class Order CO [13/657]).</p>

Detailed explanation of new law

Means of making adequate provision in a registered scheme constitution for the acquisition price of interests

- 1.38 New section 601GD sets out a means for responsible entities to meet the requirement for the constitution of their registered scheme to make “adequate provision” for the acquisition price of interests in the scheme. This provides certainty by prescribing requirements for registered schemes where that may not otherwise have been clear.
[Schedule 1, Part 2, item 22, section 601GD of the Corporations Act]
- 1.39 The constitution will satisfy the constitutional requirements if it provides a formula or method that is to be used to determine the acquisition price of interests in the scheme and the formula or method meets certain requirements, subject to any discretion able to be exercised by the responsible entity.
[Schedule 1, Part 2, item 22, section 601GD of the Corporations Act]
- 1.40 However, the formula or method approach is not the only way a registered scheme can meet its constitutional requirements. Registered schemes can make adequate provision via alternative means if they so choose.
[Schedule 1, Part 2, item 22, subsection 601GD(2) of the Corporations Act]
- 1.41 The basis of the formula or method depends on whether the class of interests are able to be traded on a financial market and whether the registered scheme is listed on a financial market. The formula or method can also allow the responsible entity discretion in ascertaining the acquisition price of an interest. These discretions may affect the inputs to the calculation required by subsection 601GD(3) or can be applied after calculation has been completed. This approach ensures that the acquisition price has a basis in the underlying value of the relevant interest, but allows the responsible entity to adjust the acquisition amount to account for other factors.
[Schedule 1, Part 2, item 22, subsections 601GD(3)-(6) of the Corporations Act]
- 1.42 Interests that are able to be traded on a financial market include interests that are currently traded on a financial market as well as interests that could be traded on a financial market but are not currently traded. For example, because the scheme has not yet been listed and is engaging in an initial issue of interests.
- 1.43 Where the acquisition price is being determined for interests that are able to be traded on a financial market, and the scheme is listed on that financial market, to comply with the ‘adequate provision’ requirement the formula or method must ensure that the issue price is the current market price for interests of that class. This amount is not the final acquisition amount, which is determined subject to any discretions that are exercised by the responsible entity.
[Schedule 1, Part 2, item 22, subsection 601GD(5) of the Corporations Act]

Box 1: Consultation question

The class of scheme targeted by subsection 601GD(6) is intended to be the same class of scheme targeted by notional subparagraph 601GAE(2)(a)(ii) inserted by ASIC Class Order [CO 13/655]. The definition of exchange traded fund has been partially incorporated on the basis that elements of the definition are unnecessary to appropriately target the same class of scheme. The definition of managed fund has not been incorporated on the same basis.

Is this appropriate?

- 1.44 Where the acquisition price is being determined for interests that are not traded on a financial market, or that are able to be traded but are not currently listed, no clear market price is available.
- 1.45 In these circumstances the basis of the formula or method used to determine acquisition price must be the value of scheme property (or relevant scheme property if the scheme has multiple classes of interests), less any relevant scheme liabilities, divided by the number of interests on issue. Consistent with the requirements for other interests, the final acquisition price will be subject to discretions exercised by the responsible entity.
[Schedule 1, Part 2, item 22, subsection 601GD(4) of the Corporations Act]

Means of specifying withdrawal rights and adequate procedures for dealing with withdrawal requests in a registered scheme constitution

- 1.46 New section 601GE sets out a means for responsible entities to meet their constitutional requirements to specify the right of a member to withdraw from the scheme (if such a right exists) and to set out adequate procedures for making and dealing with a withdrawal request.
[Schedule 1, Part 2, item 22, section 601GE of the Corporations Act]
- 1.47 As with the acquisition amount, to satisfy the constitutional requirements, the constitution may provide a formula or method that is to be used to determine the amount that will be paid to a member making a withdrawal. Registered schemes are not required to use the arrangements in these amendments and can set out alternative adequate procedures in the constitution for making and dealing with a withdrawal request .
[Schedule 1, Part 2, item 22, subsections 601GE(1)-(2) of the Corporations Act]
- 1.48 The formula or method used to determine the amount paid must ensure that the withdrawal payment per interest withdrawn is based on the value of scheme property (or relevant scheme property if the scheme has multiple classes of interests), less any relevant scheme liabilities, divided by the number of interests on issue. As with the arrangements for the acquisition price, the actual

withdrawal amount can be subject to discretions by the responsible entity and still comply.

[Schedule 1, Part 2, item 22, subsections 601GE(3)-(5) of the Corporations Act]

Discretions relating to a formula or method

- 1.49 A formula or method can comply with the adequate provision or adequate procedure provisions in sections 601GD or 601GE if it allows the responsible entity to exercise one or more discretions that would affect the acquisition or withdrawal amount. This allows a responsible entity to, for example, ensure that the withdrawal amount accounts for the cost of disposing of scheme property necessary to facilitate a withdrawal from the scheme.
[Schedule 1, Part 2, item 22, sections 601GD and 601GE of the Corporations Act]
- 1.50 Where the formula or method includes discretion as to the values included in a formula, that discretion is disregarded when determining if the amount is equal to the value of the interests. This ensures that the formula or method always has a basis in the value (however calculated) of the underlying interest, but allows discretion to the responsible entity to adjust as appropriate. The responsible entity's discretion is restricted by the overarching obligations that apply to a responsible entity of a registered scheme and the duties set out in new section 601FCA.
[Schedule 1, Part 2, items 21-22, section 601FCA, subsections 601GD(6) and subsection 601GE(5) of the Corporations Act]
- 1.51 New Section 601FCA sets out duties that responsible entities must comply with if exercising a discretion that is provided to them as part of the formula or method means of satisfying the registered schemes constitutional requirements, and where the discretion relates to working out the value of scheme property or the market price of an interest.
[Schedule 1, Part 2, item 21, section 601FCA(1) of the Corporations Act]
- 1.52 Responsible entities must not exercise such discretions in a manner that sets a particular amount for acquisition price or withdrawal payment. That is, a discretion cannot be exercised to bypass the proper outcome of the function of the formula or method set out in the constitution.
[Schedule 1, Part 2, item 21, subsection 601FCA(2) of the Corporations Act]
- 1.53 Responsible entities must also, as far as is practicable, exercise such discretions in a way that is consistent with ordinary commercial practice for working out a value or price and consistent with ordinary commercial practice for producing a value or price that is reasonably current.
[Schedule 1, Part 2, item 21, subsections 601FCA(3) and (4) of the Corporations Act]
- 1.54 Where the duties included in section 601FCA conflict with any duty an officer or employee of the responsible entity has under Part 2D.1 of the Corporations Act, the duties under section 601FCA prevail.
[Schedule 1, Part 2, item 21, subsection 601FCA(5) of the Corporations Act]

- 1.55 Where a responsible entity has appointed an agent or engaged a person to exercise the discretion on their behalf, the responsible entity retains these duties as well as responsibility for compliance (section 601FB of the Corporations Act).
- 1.56 If a responsible entity contravenes one of these duties, the responsible entity contravenes a civil penalty provision. Any person involved in that contravention also contravenes a civil penalty provision. The existing law defines the circumstances in which a person may be ‘involved’ in a contravention under section 79 of the Corporations Act – including whether the person aided, abetted, counselled, or procured the contravention. The inclusion of a civil penalty provision is appropriate to ensure the integrity of the registered scheme and protect members interests relating to acquisition price and withdrawal payments. This penalty is consistent with the existing civil penalty provision that a responsible entity is subject to for existing duties (see section 601FC of the Corporations Act). *[Schedule 1, Part 2, items 21 and 23, subsection 601FCA(6) and new table item in subsection 1317E(3) of the Corporations Act]*
- 1.57 The documentation requirements that responsible entities must comply with when exercising a discretion (as set out in ASIC Class Order [CO 13/657]) will not be incorporated and will no longer apply.

Box 2: Consultation question

Is repeal of the documentation requirements appropriate?

- 1.1. In particular, do the documentation requirements provide consumers with important information or safeguards, the repeal of which would cause harm?**
- 1.2. Do the documentation requirements place an unnecessary administrative burden upon responsible entities?**
- 1.3. Are there any appropriate alternative approaches?**

ASIC Corporations (Managed investment product consideration) Instrument 2015/847

- 1.58 ASIC Corporations (Managed investment product consideration) Instrument 2015/847 sets out similar arrangements as ASIC Class Order [CO 13/655] and ASIC Class Order [CO 13/657] for registered schemes that were registered before 1 October 2013. It also exempts those registered schemes, in certain circumstances, from complying with their duty to treat members equally (under paragraph 601FC(1)(d)). Similar exemption provisions are available to all registered schemes, regardless of when they were registered, in ASIC Class Order [CO 13/656].

Box 3: Consultation question

Is ASIC Corporations (Managed investment product consideration) instrument 2015/847 still necessary? Could it be repealed? Would any transitional provisions be required?

Consequential amendments

- 1.59 Item 1 of Part 2 to Schedule 1 inserts a definition of ‘able to be traded’ into Section 9 of the Corporations Act, which applies the definition of ‘able to be traded’ from Chapter 7 of the Corporations Act to the rest of the Act, and thus the amendments included in Part 2 to Schedule 1. ‘Able to be traded’ is defined in Chapter 7 as “in relation to a market, includes (but is not limited to) admitted to quotation on the market.”
- [Schedule 1, Part 2, item 20, the definition of able to be traded section 9 of the corporations Act]*

Commencement, application, and transitional provisions

- 1.60 The amendments commence on 1 October 2023 or the day after Royal Assent, whichever is later.

ASIC Corporations (Superannuation and Schemes: Underlying Investments) Instrument 2016/378

Context of amendments

- 1.61 The Corporations Act sets out a legislative framework for providing Financial Services Guides to retail clients.
- 1.62 Section 941A and section 941B of the Corporations Act require Australian financial services licensees to provide a Financial Services Guide that contains information about the entity providing a financial service.
- 1.63 Subsections 941C(2) and 941C(3) of the Corporations Act provide exemptions for operating a registered scheme and dealing by a responsible entity in scheme interests, however these two exemptions do not extend to the underlying dealings of superannuation trustees or responsible entities of registered schemes.
- 1.64 Section 6 of ASIC Corporations (Superannuation and Schemes: Underlying Investments) Instrument 2016/378 provides exemptions to the trustee of a superannuation fund or the responsible entity of a registered scheme from the requirement to provide a Financial Services Guide for dealing in a financial product in the ordinary course of the operation of the scheme.

Comparison of key features of new law and current law

Table 1.3 Comparison of new law and current law

New law	Current law
New section 941C(2A) exempts the trustee of a superannuation entity from providing a Financial Services Guide where the financial service is dealing in the ordinary course of operation of the superannuation entity.	ASIC Corporations (Superannuation and Schemes: Underlying Investments) Instrument 2016/378 exempts the trustee of a superannuation fund from the requirement to provide a Financial Services Guide where the trustee deals in a financial product in the ordinary course of the operation of the fund.

New law	Current law
<p>New section 941C(2B) exempts the responsible entity of a registered scheme from providing a Financial Services Guide where the financial service is dealing in the ordering course of operation of the scheme.</p>	<p>ASIC Corporations (Superannuation and Schemes: Underlying Investments) Instrument 2016/378 exempts the responsible entity of a registered scheme from the requirement to provide a Financial Services Guide to a member of the scheme to the extent that the requirement would apply to the responsible entity dealing in a financial product in the ordinary course of the operation of the scheme.</p>

Detailed explanation of new law

- 1.65 Subsection 941C(3B) of the Corporations Act exempts trustees of a registerable superannuation fund from providing a Financial Services Guide where the financial service consists only of providing superannuation trustee services. Subsection 941C(3) provides a similar exemption for the responsible entities for a registered scheme the financial service consists only of the operation of that scheme.
- 1.66 However, neither of these exemptions address the dealing in the underlying investments or assets of the scheme or fund, which is a financial service according to paragraph 766A(1)(b) of the Act. As underlying dealing is a necessary part of the ordinary operation of a scheme or fund, the existing exemptions have little practical effect if a trustee or responsible entity is still required to provide a Financial Services Guide for the underlying dealing that forms part of the exempted services.
- 1.67 New subsection 941C(2A) inserts an exemption for trustees of superannuation entities from their obligation to provide members of the superannuation entity with a Financial Services Guide related to dealing in the ordinary course of operation of the fund. This exemption is necessary, as requiring a Financial Services Guide for the underlying dealing of the fund would undermine the intent of the existing exemption.
[Schedule 1, Part 3, item 24, subsection 941C(2A) of the Corporations Act]
- 1.68 New subsection 941C(2B) inserts an exemption for responsible entities of a registered scheme from their obligation to provide members of the scheme with a Financial Services Guide related to dealing in the ordinary course of operation of the scheme, to likewise address the underlying dealing not covered by the existing exemption.
[Schedule 1, Part 3, item 24, subsection 941C(2B) of the Corporations Act]

Consequential amendments

- 1.69 The Bill repeals ASIC Corporations (Superannuation and Schemes: Underlying Investments) Instrument 2016/378 as it is no longer required.
[Schedule 1, Part 3, item 25]

Commencement, application, and transitional provisions

- 1.70 The amendments commence on the day after Royal Assent.

ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835

Context of amendments

- 1.71 The National Credit Code sets out a legislative framework for credit contracts.
- 1.72 Section 16 of the National Credit Code requires a credit provider to give debtors a precontractual statement and an information statement prior to entering into a contract.
- 1.73 Regulation 28L of the *National Consumer Credit Protection Regulations 2010* sets out how certain documents that are required to be provided to consumers by Australian credit licensees (under the *National Consumer Credit Protection Act 2009*) are to be provided. This includes allowing electronic document retrieval as a manner of giving, and setting, conditions that must be met when documents are given other than personally (including via electronic communication).
- 1.74 Regulation 28L does not apply to precontractual statements and information statements required by section 16 of the National Credit Code.
- 1.75 ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835 applies the prescribed manners of giving documents set out in Regulation 28L to all credit providers (not all of whom are licensees) for the purposes of section 16 precontractual and information statements.

Comparison of key features of new law and current law

Table 1.4 Comparison of new law and current law

New law	Current law
A regulation-making power supports the insertion of regulations in the <i>National Consumer Credit Protection Regulations 2010</i> that incorporate the effect of ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835.	Credit providers may give debtors precontractual statements and information statements through an electronic document retrieval system, or other electronic communication, if they meet the conditions, set out in ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835.
A regulation-making power supports the insertion of regulations in the <i>National Consumer Credit Protection Regulations 2010</i> that incorporate the effect of ASIC	Where a credit provider gives precontractual statements and information statements indirectly (via electronic communication or otherwise), they must be reasonably satisfied, as set out in ASIC Credit

New law	Current law
Credit (Electronic Precontractual Disclosure) Instrument 2020/835.	(Electronic Precontractual Disclosure Instrument 2020/835), that the debtor has received the documents prior to entering into a contract with the debtor.

Detailed explanation of new law

- 1.76 New subsections in section 16 to the National Credit Code insert a power to make regulations that prescribe ways in which credit providers may give precontractual disclosure documents to debtors. This regulation-making power is necessary as the *National Consumer Credit Protection Act 2009* does not contain an appropriate regulation-making power to support the incorporation of the effect of ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835.
- 1.77 Regulations may specify additional ways in which a credit provider may give a document to a debtor.
[Schedule 1, Part 4, item 26, subsection 16(8) of the National Credit Code]
- 1.78 The regulations may also set out conditions that must be satisfied in order for a document to be given in a certain way.
[Schedule 1, Part 4, item 26, subsection 16(9) of the National Credit Code]
- 1.79 If a credit provider is required to give a precontractual disclosure by section 16 of the National Credit Code, and gives it in a way that is contrary to regulations made for the purposes of new subsection 16(8), the requirement to give the document will not be satisfied.
[Schedule 1, Part 4, item 26, subsection 16(10) of the National Credit Code]

Commencement, application, and transitional provisions

- 1.80 The amendments commence on the day after Royal Assent.