

Australian Securities and Investments Commission
Corporations Act 2001 — Subsections 601QA(1) and 655A(1) — Declarations

Enabling legislation

1. The Australian Securities and Investments Commission (*ASIC*) makes this instrument under subsections 601QA(1) and 655A(1) of the *Corporations Act 2001* (the *Act*).

Title

2. This instrument is ASIC Class Order [CO 07/422].

Commencement

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

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

Declaration – Requirements for on-market buy-backs

4. Chapter 5C of the Act applies to a responsible entity as if provisions of that Chapter were modified or varied by, after Part 5C.6, inserting:

“Part 5C.6A—On-market buy-backs by listed schemes

Division 1—Preliminary

601KF Application of this Part

- (1) This Part applies to the purchase of interests in a listed managed investment scheme by the responsible entity of the scheme where the purchase takes place in the ordinary course of trading on the financial market of ASX Limited (*ASX*) and the purchase price is paid from scheme property. For the purposes of this Part, such a purchase is referred to as a *buy-back*.
- (2) This Part does not apply to a listed scheme that has more than one class of interest.

Division 2—Requirements for buy-backs

601KG Constitutional provisions about buy-backs

If the responsible entity of the scheme is to have the power to buy-back an interest in the scheme, the power must be specified in the scheme’s constitution.

601KH Procedural requirements for buy-backs

- (1) A responsible entity must not buy-back an interest in the scheme otherwise than in accordance with the scheme's constitution and this section.
- (2) A responsible entity may buy-back an interest if it does not materially prejudice the responsible entity's ability to pay its creditors in relation to liabilities incurred by it as responsible entity of the scheme.
- (3) A responsible entity that buys-back an interest in the scheme:
 - (a) must only buy the interest:
 - (i) in the ordinary course of trading on the financial market of ASX and not by way of a special crossing or priority crossing; and
 - (ii) if the buy-back is covered by subsections (5) to (7) or subsection (8); and
 - (b) must comply with the listing rules of ASX (as in force on the date of commencement of this section) that apply to buy-backs as if:
 - (i) the scheme were a company included in the official list of the financial market of ASX; and
 - (ii) interests in the scheme were shares in the company; and

Note: The listing rules of ASX that apply to buy-backs include:

 - Listing Rule 3.8A (company making a buy-back), including Appendix 3C: Announcement of buy-back; Appendix 3D: Changes relating to buy-back; Appendix 3E: Daily share buy-back notice; and Appendix 3F: Final share buy-back notice; and
 - Listing Rule 7.29 (pre-condition for an on-market buy-back); and
 - Listing Rule 7.33 (purchase price under an on-market buy-back).
 - (c) must not dispose of the interest it buys-back.
- (4) Immediately after registration of the transfer to the responsible entity of the interests bought-back, the interests are cancelled.

Buy-backs within the 10/12 limit

- (5) If the responsible entity proposes to buy-back an interest in the scheme within the 10/12 limit, the responsible entity must give a notice to ASX which:
 - (a) discloses the responsible entity's intention to buy-back interests in the scheme within the 10/12 limit; and

- (b) sets out:
 - (i) the number of interests in the scheme held by the responsible entity and any associate of the responsible entity; and
 - (ii) the source of funds to pay for any interests bought-back.
- (6) The responsible entity:
 - (a) must not buy-back an interest for at least 14 days after giving the notice; and
 - (b) must start buying-back interests:
 - (i) if a date is specified in the notice by which the responsible entity will start to buy-back interests—by that date;
 - (ii) otherwise—within 2 months of the date of the notice; and

Note: If the responsible entity does not start buying-back interests within the period referred to in paragraph (b) but the responsible entity wishes to proceed with the buy-back, it will need to give another notice to ASX in accordance with subsection (5).
 - (c) must not buy-back an interest which would exceed the 10/12 limit except in accordance with subsection (8).
- (7) The responsible entity may buy-back an interest in the scheme for a period of 12 months from the date of the giving of the notice. If the responsible entity proposes to buy-back an interest in the scheme beyond that period it must give ASX a further notice:
 - (a) disclosing the responsible entity's intention to continue to buy-back interests;
 - (b) setting out the matters referred to in paragraph (5)(b).

Each notice extends the period in which the responsible entity may continue to buy-back interests in the scheme by 12 months provided it is given to ASX before the expiry of the period covered by the previous notice.

Buy-backs which would exceed the 10/12 limit

- (8) If the responsible entity proposes to buy-back an interest in the scheme which would exceed the 10/12 limit it must have:
 - (a) obtained, by resolution at a meeting of members of the scheme in the last 12 months, the approval of members to carry out the proposed buy-back; and

- (b) included with the notice of meeting a statement setting out all information known to the responsible entity that was material to the decision how to vote on the resolution other than information that it would be unreasonable to require the responsible entity to disclose because it had previously disclosed the information to the scheme's members.

Interpretation

- (9) The **10/12 limit** for a responsible entity of a scheme proposing to make a buy-back is 10% of the smallest number, at any time during the last 12 months, of interests in the scheme.
- (10) A proposed buy-back would exceed the 10/12 limit if the number of:
 - (a) interests in the scheme that have been bought-back during the last 12 months; and
 - (b) interests that will be bought-back if the proposed buy-back is made; would exceed the 10/12 limit.
- (11) For the purposes of this section, a **priority crossing** and **special crossing** have the respective meanings given by the operating rules of ASX (as in force on the date of commencement of this section).

601KI Making and recording decisions about buy-backs

Exercise of discretion must be reasonable

- (1) Where a responsible entity or a person (the **nominee**) nominated by the responsible entity may exercise a discretion as to the price at which the responsible entity offers to buy-back an interest in the scheme, the responsible entity or its nominee must act reasonably in exercising the discretion.

Documentation of exercise of discretion

- (2) The responsible entity must prepare one or more documents that:
 - (a) set out:
 - (i) what policy (the **documented policy**) (if any) the responsible entity or its nominee has set dealing with how it proposes to exercise the discretion and the date on which the policy was set; and
 - (ii) what records the responsible entity will keep about the exercise of the discretion; and

- (b) if the discretion is to be exercised by a nominee—state that the discretion will be so exercised and identify the nominee; and
 - (c) in relation to each discretion for which a documented policy has been set—explain why it is reasonable to exercise the discretion in accordance with the policy.
- (3) When the responsible entity or its nominee exercises a discretion:
- (a) in relation to which there is no documented policy that is current at the time of exercise; or
 - (b) in a way that involves a departure from the documented policy relating to the discretion that is current at the time of exercise,
- they must prepare a document which sets out all of the following:
- (c) the date on which the discretion is exercised;
 - (d) if the discretion is exercised by a nominee—a statement to that effect which identifies the nominee;
 - (e) how the discretion is exercised;
 - (f) an explanation of why it was reasonable to exercise the discretion the way it was exercised.
- (4) The responsible entity must ensure that the records which it keeps under section 988A are kept in such a way as will enable:
- (a) any documented policy that was applied in the exercise of the discretion; and
 - (b) any exercise of a discretion of a kind covered by subsection (3),
- that relates to any particular buy-back of an interest from a member to be identified.
- (5) The documented policy relating to a discretion of the kind referred to in subsection (1) must be the only policy applicable to the exercise of the discretion at any one time.

Retention of documents

- (6) The responsible entity must retain the documents covered by subsections (2) and (3) for seven years after they cease to be current.

601KJ Interaction with other provisions of this Chapter

For the avoidance of doubt, subsection 601GA(4) and Part 5C.6 do not apply to a buy-back under this Part.”.

Declaration – Takeovers

5. Chapter 6 of the Act applies to a responsible entity as if the table in section 611 were modified or varied by, after item 19, inserting:

“19A An acquisition that results from the responsible entity of a registered scheme buying interests in the scheme in accordance with Part 5C.6A.”.

Dated this 13th day of November 2007

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