

ASIC CLASS ORDER [CO 09/552]

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (ASIC) makes ASIC Class Order [CO 09/552] under s601QA(1)(b) of the *Corporations Act 2001* (the Act).

Section 601QA(1)(b) provides that ASIC may declare that Chapter 5C applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

1. Background

Section 601GC(1)(a) provides that the constitution of a registered scheme may be modified, or repealed and replaced with a new constitution by special resolution of the members of the scheme.

2. Purpose of the class order

The purpose of the class order is to give relief from the requirement for a special resolution of members to approve amendments to a registered scheme's constitution where it is impossible or disproportionately burdensome to hold a meeting to vote on the special resolution. The class order allows the responsible entity to make amendments to the constitution with the unanimous written consent of the members of the registered scheme.

Examples of typical fact scenarios where this might occur are:

- (a) Infant schemes – where the scheme is registered before the scheme's final features have been settled (ie further professional advice is being sought as to how an offer should proceed).
- (b) Schemes with a limited number of seed investors – covering cases where there are one or two related parties on the register after having acquired a nominal number of units, as well as unrelated seed investors (provided the seed investors are wholesale clients or other individuals not requiring the provision of a PDS when they invested).

3. Operation of the class order

The class order permits a registered scheme to change its constitution without requiring a special resolution, in circumstances where:

- (a) a meeting of members is unable to be held because the quorum requirement in either subsection 252R(2) or the scheme's constitution is not capable of being satisfied because the scheme has an insufficient number of members;
- (b) every member of the scheme is not entitled to vote at a meeting of members because of section 253E; or
- (c) all interests in the scheme were issued:
 - (i) in situations that did not require the responsible entity to give a Product Disclosure Statement; and
 - (ii) without disclosure to investors under Part 6D.2; and
 - (iii) without a prospectus under Division 2 of Part 7.12 of the old Corporations Law.

The responsible entity may only change the constitution if:

- (a) the responsible entity has 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 expects 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) has been provided, every member of the scheme has given their written consent, to the modification, or repeal and replacement.

4. Consultation

ASIC undertook targeted consultation with the relevant industry bodies: the Australian Direct Property Investment Association, the Investment and Financial Services Association and the Alternative Investment Management Association.