

ASIC CLASS ORDER [CO 13/519]

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 13/519] under section 601QA of the *Corporations Act 2001* (the *Act*).

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

1. Background

This class order relates to section 601FM of the Act which allows members of a listed registered scheme to vote on a resolution to remove and replace the responsible entity by taking action under Division 1 of Part 2G.4. Division 1 of Part 2G.4 deals with calling meetings of members of registered schemes (*Meetings Procedure Provision*).

In the case of *MTM Funds Management Ltd v Cavalane Holdings Pty Ltd* [2000] NSWSC 922, an issue was raised about the interaction between section 601FM and the Meetings Procedure Provision. The Meetings Procedure Provision set out the procedures for convening members' meetings to consider and vote on special or extraordinary resolutions. Unlike an ordinary resolution which requires a simple majority of votes in favour of it to be passed, these kinds of resolutions require a greater majority. For example, to pass a special resolution requires 75% of the votes cast by members entitled to vote on the resolution.

The issue in the case was whether a resolution under section 601FM could be an ordinary resolution or whether a special resolution was required. If a special resolution were required, it could be difficult for members of a listed registered scheme to change the responsible entity, thereby potentially entrenching control in the incumbent responsible entity. The Court decided that section 601FM required an ordinary resolution to be passed and that the reference to taking action under the Meetings Procedure Provision related to the procedure required to convene the meeting and not the kind of resolution required.

In 2001, ASIC made Class Order [CO 01/1541] to clarify the interaction between section 601FM and the Meetings Procedure Provision. The class order made it clear that if members of a listed registered scheme wanted to change the responsible entity, they could request or call a meeting to consider and vote on an ordinary, rather than a special or extraordinary, resolution. This is consistent with the position for changing company directors. The class order also clarified how the procedural aspects of convening a members meeting under the Meetings Procedure Provision applied in this context.

ASIC has recently reviewed the policy underlying Class Order [CO 01/1541] as part of a wider review of class orders relating to the takeover provisions in Chapters 6-6C. The review of the class order was within the scope of this wider review as, in broad terms, the takeover provisions relate to changes in control of both companies and listed registered schemes. ASIC considers that the relief provided in the class order is still both necessary and appropriate. ASIC has decided to reissue the relief underlying the class order in Class Order [CO 13/519].

The *Legislative Instruments Act 2003* (the **LIA**) provides for the periodic expiry of legislative instruments ('sunsetting') to ensure that they are kept up to date and only remain in force for so long as they are needed. Class Order [CO 01/1541] (which is a legislative instrument) was scheduled to eventually expire under the LIA's sunsetting provisions and has been revoked by Class Order [CO 13/518]. ASIC's reissuing of the relief underlying the class order has provided an opportunity to deal with its eventual expiry.

2. Purpose of the class order

Class Order [CO 13/519] maintains the relief previously given under Class Order [CO 01/1541]. Its purpose is to clarify the interaction between section 601FM and the Meetings Procedure Provision by making it clear that the kind of resolution that members of a listed registered scheme must pass to change the responsible entity is an ordinary resolution, and not a special or extraordinary resolution.

3. Operation of the class order

Class Order [CO 13/519] modifies section 601FM. It includes procedures for convening a meeting of members of a listed registered scheme to consider and vote on resolutions to remove and replace the responsible entity. It makes it clear that the resolutions are ordinary resolutions.

4. Consultation

On 14 November 2012 ASIC released Consultation Paper 193 *Takeovers, compulsory acquisitions and substantial holdings: Update to ASIC guidance (CP 193)* seeking feedback on proposals to update and consolidate a number of regulatory guides relating to Chapters 6-6C of the Act. CP 193 also sought feedback on proposals to reissue the class orders (including Class Order [CO 01/1541]) associated with ASIC's updated guidance and to make new class orders addressing a number of discrete policy issues. The consultation period closed on 22 February 2013.

While CP 193 invited general feedback on the renewal of ASIC's class orders, the process did not include any specific consultation on Class Order [CO 13/519] because the relief raised no new policy considerations. ASIC received 7 submissions in response to CP 193. Details of the submissions received are contained in REP 350 *Response to submissions on CP 193 Takeovers, Compulsory acquisitions and substantial holdings* which is available on ASIC's website at www.asic.gov.au.

Notwithstanding ASIC's general consultation on the re-issue and update of its takeovers class orders, ASIC considers that Class Order [CO 13/519] is of a minor or machinery nature and does not substantially alter existing arrangements.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

ASIC Class Order [CO 13/519]

This class order is 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*.

Overview of the class order

ASIC Class Order [CO 13/519] relates to section 601FM of the *Corporations Act 2001* which allows members of a listed registered scheme to vote on a resolution to remove and replace the responsible entity by taking action under Division 1 of Part 2G.4 of that Act, which deals with meetings of members of schemes. That Division sets out the procedures for convening members' meetings to consider and vote on special or extraordinary resolutions.

The class order deals with the interaction between section 601FM and that Division. It makes it clear that if members of a listed registered scheme want to change the responsible entity, they are able to request or call a meeting to consider and vote on an ordinary resolution rather than a special or extraordinary resolution.

Human rights implications

This class order does not engage any of the applicable rights or freedoms.

Conclusion

This class order is compatible with human rights as it does not raise any human rights issues.