

**Australian Securities and Investments Commission
Corporations Act 2001—Paragraph 926A(2)(c)—Declaration**

Enabling legislation

1. The Australian Securities and Investments Commission makes this instrument under paragraph 926A(2)(c) of the *Corporations Act 2001* (the *Act*).

Title

2. This instrument is ASIC Class Order [CO 13/1406].

Commencement

3. This instrument commences on the later of:
 - (a) the date it is registered under the *Legislative Instruments Act 2003*; and
 - (b) 2 January 2014.

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*, section 4 (definition of *register*). The FRLI may be accessed at <http://www.frli.gov.au/>.

Declaration

4. Part 7.6 (other than Divisions 4 and 8) of the Act applies in relation to a responsible entity of a registered scheme that offers to issue, or invites an application for the issue of, an interest in the scheme to a person as a retail client as if that Part were modified or varied by inserting the following section in its relative order in Division 3 of Part 7.6:

“Section 912AAB Land used in primary production schemes

- (1) This section applies to a financial services licensee that is authorised to operate a registered scheme that involves:
 - (a) agricultural production, including forestry; or
 - (b) obtaining entitlements to legal or commercial benefits that arise from sequestering carbon dioxide, including by geosequestration, biosequestration or soil sequestration; or

- (c) selling energy produced by the wind or sun that is obtained through fixtures on land where this is not an incidental part of income producing activities; or
- (d) the use of animals;

where at a particular time the use of, or a right arising from the sequestration of carbon dioxide in relation to, particular land (*primary production land*) is reasonably required for the benefits to be produced by the scheme in relation to an activity (*primary production activity*) referred to in paragraphs (a) to (d).

(2) The licensee must:

- (a) take reasonable steps to ensure that any regulatory approvals that are necessary to carry out the primary production activities that the scheme involves are obtained and maintained; and
- (b) lodge for registration under State or Territory land titles law one or more instruments in registrable form that it reasonably believes will be registered that:
 - (i) confer on a person (*interest holder*), or will confer when the instruments are registered, a legal estate or interest in the primary production land; and

Note: Where more than one instrument is lodged for registration, it is not necessary for each instrument to confer a legal estate or interest in the primary production land.

- (ii) confer on the interest holder or will confer when the instruments are registered and all necessary regulatory approvals are obtained:
 - (A) the right to use the primary production land to the extent required for the purposes of the scheme when reasonably required; and
 - (B) if the scheme involves obtaining entitlements to legal or commercial benefits that arise from sequestering carbon dioxide on the primary production land, the exclusive legal right to obtain the benefit (whether present or future) of sequestration of carbon dioxide; and

Note: Registrable instruments will generally include instruments of transfer of a freehold estate or interest in land and certain leases and subleases. The interest holder in relation to an instrument of transfer of a freehold estate or interest in land will be the registered proprietor following registration of the instrument.

The interest holder in relation to a registered lease or sublease will be the registered proprietor of a leasehold estate or interest.

- (c) ensure that each instrument is lodged for registration by the later of:
 - (i) 1 July 2014; or
 - (ii) immediately after any contribution from a member whose benefits will be affected by the use of the primary production land is accepted for the scheme; and
- (d) do all things that it can do that are necessary to ensure that each instrument is registered promptly after it is lodged; and
- (e) not accept any contributions from members whose interests will be affected by the use of the primary production land unless it reasonably believes that:
 - (i) if an instrument has not already been registered, the instrument will be registered promptly after it is lodged; and
 - (ii) any regulatory approvals that are outstanding will be obtained promptly after the contributions are accepted; and
- (f) ensure that the rights conferred on the interest holder (whether by the instrument or otherwise) include, where relevant for the purposes of the scheme, rights of access to the primary production land and rights of cultivation, transmission, maintenance, protection, repair, refurbishment and harvesting in relation to the primary production land; and

Note: If the interest holder is the registered proprietor, certain rights will be conferred as an incidence of ownership.

- (g) ensure that the interest holder under each instrument is or are:
 - (i) the members as tenants in common; or
 - (ii) in respect of primary production land the use of which only affects the benefits produced for a particular member, that member or their nominee; or
 - (iii) a person whom the licensee, in accordance with its duties, has engaged or could engage to hold scheme property, provided that the person holds the property interest to which the instrument relates on trust:

- (A) for members; or
 - (B) if the use of the primary production land only affects the benefits produced for a particular member, that member; or
 - (C) for the licensee if the licensee holds the beneficial interest in the property interest on trust:
 - (I) for the members; or
 - (II) if the use of the primary production land only affects the benefits produced for a particular member, that member; or
- (iv) the licensee on trust:
- (A) for members; or
 - (B) if the use of the primary production land only affects the benefits produced for a particular member, that member; or
- (v) a company if:
- (A) all the issued shares in the company are held by the members of the scheme; and
 - (B) the proportion of the shares held by each member of the scheme is the same as the proportion of the interests in the scheme (by number) held by that member; and
 - (C) the constitution of the company contains provisions that can only be modified by a resolution agreed to, at a general meeting, by all members of the company that prohibit:
 - (I) disposing of, or otherwise dealing with, the property interest in whole or part, except in conjunction with the winding up of the scheme; and
 - (II) the conduct by the company of any business or activity other than making the primary production land available for the operation of the scheme, enforcing any rights or performing any obligations in relation to the instruments or the property interest for this purpose or any other business or activity that the company may be required to conduct by law; and

Note: If the interest in the primary production land is scheme property, additional requirements will apply in relation to how the interest must be held, including under sections 601FCAA and 601FCAB (as notionally inserted by ASIC Class Order [CO 13/1409]).

- (h) before registration of the instruments—do all things it can do that are necessary to ensure that, and reasonably believe that it will be able to ensure that, following registration, the property interest of the interest holder cannot be adversely affected in a way that is material to the operation of the scheme by the interest of any other person in the primary production land, or the right of any other person to use the primary production land, existing at the time the instruments are registered, other than an interest or right:
 - (i) of the Crown not included in the Crown grant of the primary production land; or
 - (ii) that applies generally in relation to land in the State or Territory in which the primary production land is located, provided that, having made reasonable inquiries, the licensee is not aware that any rights in relation to the interest or right are being exercised or are proposed to be exercised in relation to the primary production land in a way that may result in a substantial part of the benefits intended to be produced by the scheme being unable to be produced; and

Note 1: For example, subparagraph (ii) would generally apply to a right in relation to land granted to carriers under Schedule 3 of the *Telecommunications Act 1997*, but would not apply if the licensee was aware that a carrier proposed to exercise the right in relation to the primary production land in a way that may substantially deprive the members of the scheme of the intended benefits from its operation.

Note 2: The licensee may need to enter into arrangements with the holders of other interests in the land or rights in relation to the land to have the required reasonable belief.

- (i) do all things it can do that are necessary to ensure that, following registration, the property interest of the interest holder cannot be adversely affected in a way that is material to the operation of the scheme by any subsequent interest that may be created or rights that may be conferred in relation to the primary production land, other than an interest or a right:
 - (i) that is created, conferred or consented to by the licensee in accordance with its duties as responsible entity of the scheme; or

- (ii) that may be created or conferred under a law that applies generally to land in the State or Territory in which the primary production land is located; and
 - (j) if an instrument is not an instrument of transfer of a freehold estate or interest in land, ensure that the constitution of the scheme gives the licensee the power to require members to make payments to, or as directed by, the licensee to enable the payment of any amounts that may be required to be paid under the instrument or at law; and
 - (k) if an instrument is an instrument of transfer of a freehold estate or interest in land, ensure that the constitution of the scheme gives the licensee the power to require members to make payments to, or as directed by, the licensee to enable the payment of any rates, land tax or other taxes or other expenses that may be required to be paid in relation to the primary production land; and
 - (l) hold, or cause its agent to hold, any amounts paid by members under the constitution of the scheme as affected by paragraph (j) or (k) on trust for the paying members or the members of the scheme until used to meet the relevant payment obligation; and
 - (m) if an instrument is not an instrument of transfer of a freehold estate or interest in land, ensure that the terms of the instrument:
 - (i) are not less favourable to the interest holder than they would be if the terms had been negotiated on an arm's length basis between the other parties to the instrument and the licensee acting in accordance with its duties; and
 - (ii) exclude any action by any other party to the instrument in connection with the instrument that would materially adversely affect the interests of the interest holder without the licensee having at least 3 months notice in writing; and
 - (n) on receipt of a notice under subparagraph (m)(ii), the licensee must promptly notify all members whose benefits may be affected by the use of the primary production land in writing and inform them of members' rights to requisition a meeting.
- (3) A licensee that complies with subsection (2) in relation to a registered scheme is taken to comply in relation to that scheme with any condition in its Australian financial services licence that requires the lodgement of an instrument relating to land on which primary production will occur in the operation of a scheme.

(4) In this section:

instrument includes an instrument of transfer of a freehold estate or interest in land, a lease, sublease or other agreement or document that confers a legal estate or interest in land and an instrument that transfers or confers the exclusive legal right to obtain the benefit (whether present or future) of sequestration of carbon dioxide.

property interest means, in relation to an interest holder under an instrument:

- (a) the rights of the interest holder to use land or obtain benefits in relation to land conferred by the instrument; and
- (b) the rights conferred on the interest holder by registration of the instrument under State or Territory land titles law.

regulatory approval means:

- (a) an approval, declaration, permission, consent, waiver, exemption, permit, authorisation, certification licence, recommendation or other similar decision that is or may be given or made by or on behalf of the Crown in any of its Australian capacities or a local government body or other statutory authority of the Crown, in any of those capacities; and
- (b) in relation to anything that could be prohibited or restricted by law if the Crown in any of its Australian capacities or a local government body or other statutory authority of the Crown, in any of those capacities, acts in any way within a specified period, the expiry of that period without that action being taken;

but excluding registration of an instrument under State or Territory land titles law.

statutory authority means, in relation to the Crown in right of the Commonwealth, a State or a Territory, any authority or body (including a corporation sole) established by a law of the Commonwealth, the State or Territory other than a general law allowing incorporation as a company or body corporate.”.

Dated this 21st day of November 2013

Signed by Anthony Graham
as a delegate of the Australian Securities and Investments Commission