
EXPLANATORY STATEMENT for
ASIC Corporations (Attribution Managed Investment Trusts)
Instrument 2016/489

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (ASIC) makes *ASIC Corporations (Attribution Managed Investment Trusts) Instrument 2016/489* under subsection 601QA(1) of the *Corporations Act 2001 (Act)*.

Subsection 601QA(1) of the Act provides that ASIC may exempt a person from a provision of Chapter 5C of the Act or declare that Chapter 5C applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

1. Background

Subsection 601GC(1) of the Act provides that the constitution of a registered managed investment scheme may be modified, or repealed and replaced with a new constitution either:

- (a) by special resolution of the members of the scheme; or
- (b) by the responsible entity if the responsible entity reasonably considers the change will not adversely affect members' rights.

Paragraph 601FC(1)(d) of the Act requires that in exercising its powers and carrying out its duties, the responsible entity of a registered scheme must treat members who hold interests of the same class equally and members who hold interests of different classes fairly.

On 5 May 2016, the *Tax Laws Amendment (New Tax System for Managed Investment Trusts) Act 2016* (and supporting legislation) created a new tax system for managed investment trusts.

The new tax system will apply to a registered scheme where it qualifies as an attribution managed investment trust, and the responsible entity has made a choice to apply the new tax system.

Responsible entities will need to determine whether changes should be made to the constitution for a registered scheme in order for it to qualify and be operated as an attribution managed investment trust under the new tax system.

2. Purpose of the instrument

The purpose of the instrument is to address issues that a responsible entity may encounter in implementing the new tax system for managed investment trusts for a registered scheme. In particular, a responsible entity may need to incur the costs of holding a members' meeting to allow members to consider and vote on changes to the scheme constitution to implement the new tax system where there is uncertainty as to which changes require member approval.

In addition, a responsible entity's duty to treat members who holds interests of the same class equally may prevent the responsible entity from making an attribution in accordance with the *Income Tax Assessment Act 1997* (ITA Act) where there is uncertainty about whether doing so may breach this duty.

The instrument addresses these issues by providing relief to responsible entities in the form of:

- (a) a modification of subsection 601GC(1) to provide for an alternative method by which the responsible entity may modify the constitution to enable the scheme to be able to be operated as an attribution managed investment trust in a manner permitted by the ITA Act; and
- (b) an exemption from the duty to treat members who hold interests of the same class equally where the responsible entity is making an attribution in accordance with the ITA Act.

The instrument is intended to provide certainty to responsible entities and allow those that choose to implement the new tax system for a scheme to be able to do so in a cost-effective and efficient manner, including by making changes to the constitution that enable the scheme to be operated optimally where it is in the best interests of members, as an attribution managed investment trust.

3. Operation of the instrument

Exemption

Section 5 of the instrument exempts a responsible entity of a registered scheme from the requirement to comply with paragraph 601FC(1)(d) of the Act to the extent that it requires the responsible entity to treat the members of the scheme who hold interests of the same class equally when making an attribution of a determined trust component of a particular character to the interests held by a member of the scheme in accordance with section 276-210 of the ITA Act. Section 276-10 of the ITA Act requires, among other things, that the attribution be worked out on a fair and reasonable basis, in accordance with the constituent documents of the scheme. The constituent documents of the scheme include the scheme constitution.

Modification

Section 6 of the instrument modifies the application of Chapter 5C of the Act to a responsible entity to provide for an additional procedure that a responsible entity may follow to change the constitution of registered scheme in connection with the implementation of the new tax system for managed investment trusts.

Paragraphs 6(1)(a) and (1)(b) of the instrument modify subsection 601GC(1) of the Act to provide that the constitution of a registered scheme may be modified, or repealed and replaced with a new constitution by the responsible entity in accordance with section 601GCA.

Paragraph 6(1)(c) of the instrument inserts new sections 601GCA and 601GCB of the Act.

Section 601GCA

Section 601GCA sets out an additional procedure by which a responsible entity may change the constitution.

Subsection 601GCA(1) sets out the types of changes that may be made. Specifically, a responsible entity may change the constitution to the extent that it reasonably considers that the modification is necessary for or incidental to the scheme being able to be operated as an attribution managed investment trust in a manner permitted by the ITA Act. This may include changes necessary for the scheme to qualify as an attribution managed investment trust or for the responsible entity to be eligible to make a choice to apply the new tax system. The responsible entity may change the constitution subject to satisfying the requirements under subsection 601GCA(3).

Subsection 601GCA(2) provides, without limiting the types of changes that may be made under subsection 601GCA(1), particular types of modifications that may be made to the extent that the responsible entity reasonably considers them necessary for or incidental to the scheme being able to be operated in a manner permitted by the ITA Act as an attribution managed investment trust. These are modifications that have the effect of:

- (a) enabling the responsible entity to make a choice under subparagraph 276-10(1)(e)(i) of the ITA Act to apply the new tax system to a registered scheme or a choice under paragraph 276-20(1)(d) of the ITA Act to apply the attribution regime separately to each class of interests;
- (b) where applicable, enabling the responsible entity to treat each separate class of interests in the scheme as a separate attribution managed investment trust; and
- (c) ensuring the responsible entity is indemnified out of scheme property for certain liabilities incurred by the responsible entity in relation to the proper performance of its duties because the scheme is operated as an attribution managed investment trust.

Subsection 601GCA(3) sets out the circumstances in which a responsible entity may modify the constitution of a registered scheme under s601GCA(1). For all schemes, paragraph 601GCA(3)(b) allows for the responsible entity to modify the constitution under s601GCA(1) where it has both:

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- (a) published on its website a notice that meets the requirements of subsection 601GCA(4) for a period of at least 7 days (the *relevant period*) in a way that it is likely to come to the attention of a person looking for information about the scheme on its website; and
 - (b) during the relevant period, not received requests from members with at least 5% of the votes that may be cast on the resolution to call and arrange to hold a meeting as specified in the notice.

Subsection 601GCA(4) sets out the content requirements of the notice that must be posted on the website of a responsible entity in order to rely on paragraph 601GCA(3)(b) to change the constitution under s601GCA(1). A notice will comply with subsection 601GCA(4) where it:

- (a) sets out a summary of the reasons for the proposed modification and the effect of the proposed modification; and
- (b) states that the responsible entity will modify the constitution as proposed unless it receives requests by a specified date (that is the last day of the relevant period) to call and arrange to hold a meeting of the scheme's members to consider and vote on a special resolution to modify the constitution as proposed from members with at least 5% of votes that may be cast on the resolution; and
- (c) states that a request from members referred to in (b) must be made in writing and may be sent to a specified email address of the entity; and
- (d) is worded and presented in a clear, concise and effective manner.

In addition to the option available to all schemes under paragraph 601GCA(3)(b), paragraph 601GCA(3)(a) allows the responsible entity of a scheme where all members are wholesale clients to change the constitution under subsection 601GCA(1) where it has taken reasonable steps to consult with each member about the proposed modifications. Taking reasonable steps to consult may include contacting each member by telephone to discuss the proposed amendments or sending an email to each member explaining the proposed changes, coupled with an invitation to seek further information and a request to raise any concerns.

Subsection 601GCA(5) provides that a responsible entity may repeal and replace the constitution instead of modifying it where the replacement constitution has the same effect as the constitution would have had if it had been modified under subsection 601GCA(1) and the responsible entity has complied with subsections 601GCA(3) and (4) in respect of the proposed repeal and replacement of the constitution as if references in those provisions to modifying the constitution were references to repealing and replacing the constitution.

Subsection 601GCA(6) clarifies that a constitution may be modified, or repealed and replaced under section 601GCA even if the constitution contains provisions that require the responsible entity to follow the procedures for changing a constitution under paragraphs 601GC(1)(a) or (b) or provisions that have the effect of requiring that changes be made in accordance with procedures to the effect of those in paragraphs 601GC(1)(a) or (b).

Subsection 601GCA(8) clarifies that:

- (a) the consultation with members referred to in paragraph 601GCA(3)(a) may take place (partly or wholly) before the instrument takes effect; and
- (b) the relevant period under paragraph 601GCA(3)(b) may include a period that occurs (partly or wholly) before the instrument takes effect.

Section 601GCB

Section 601GCB applies if a responsible entity modifies, or repeals and replaces the constitution of a registered scheme in accordance with the procedure in section 601GCA.

Section 601GCB requires the responsible entity to give to each member a written notice that sets out a summary of the reasons for, and the effect of the modification or how the replacement constitution is different from that of the constitution before its repeal (as relevant). This notice must be given to members no later than the date when the responsible entity gives its first communication to all members after the constitution has been modified, or repealed and replaced. This notice must be worded and presented in a clear, concise and effective manner.

4. Consultation

ASIC undertook consultation with the Financial Services Council and the Property Funds Association in relation to applications made for ASIC to exercise its powers to grant relief to address issues associated with the implementation of the new tax system for managed investment trusts and in relation to the proposed terms of our relief. Consultation was also undertaken with a responsible entity that had made an application for ASIC to exercise its powers to grant similar relief on an individual basis. ASIC did not undertake a broader public consultation because it was not considered reasonably practicable given the timeframe in which the relief was required to be implemented.

ASIC also consulted with the Australian Taxation Office.

Statement of Compatibility with Human Rights

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

ASIC Corporations (Attribution Managed Investment Trusts) Instrument 2016/489

ASIC Corporations (Attribution Managed Investment Trusts) Instrument 2016/489 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

With the introduction of a new tax system for a managed investment trusts, responsible entities of registered schemes may need to amend scheme constitutions to implement the new tax system. Under the *Corporations Act 2001* (Cth), changes to the constitution of a registered scheme must be made in a certain manner. Responsible entities are also required to comply with a duty to treat members who hold interests of the same class equally.

The legislative instrument provides relief to enable responsible entities of registered schemes to amend scheme constitutions without the need for a members' meeting to approve the amendments and also exempts responsible entities from having to comply with the duty to treat members who hold interests of the same class equally so that attributions of amounts related to the income and tax offsets of the scheme to members may be made in accordance with the requirements under the new tax system.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.