
EXPLANATORY STATEMENT for
ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument
2016/1159

and

ASIC Corporations (Repeal) Instrument 2016/1209

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes *ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/1159* under subsections 601QA(1) and 655A(1) of the *Corporations Act 2001* (the **Act**).

Paragraph 601QA(1)(b) of the Act provides that ASIC may declare that Ch 5C of the Act applies to a person or a specified class of persons as if specified provisions were omitted, modified or varied.

Paragraph 655A(1)(b) of the Act provides that ASIC may declare that Ch 6 of the Act applies to a person or a specified class of persons as if specified provisions were omitted, modified or varied.

ASIC makes *ASIC Corporations (Repeal) Instrument 2016/1209* under subsections 601QA(1) and 655A(1) of the Act.

1. Background

Although the Act does not specifically prohibit on-market buy-backs by responsible entities of registered managed investment schemes, certain requirements in the Act have the effect of preventing or making it commercially difficult for schemes to engage in on-market buy-backs of interests.

Relief from the requirements for withdrawal rights in section 601GA(4)

Section 601GA(4) of the Act requires that if members have a right to withdraw, the scheme's constitution must specify the right and set out adequate procedures for withdrawal in a way that is fair to all members. However, the right to withdraw in an on-market scheme buy-back arises from the market contract rather than being specified in the constitution.

We have given relief from section 601GA(4) of the Act because in our view compliance with this provision would be impracticable for an on-market scheme buy-back.

Relief from withdrawal procedures in Part 5C.6

A payment by a responsible entity out of scheme property to a member, where there is an act of volition by the member, in return for the member's rights in the scheme will generally be treated as a withdrawal for the purposes of Part 5C.6 of the Act. If the right to withdraw may be exercised while the scheme is non-liquid, the constitution must provide for the right to be exercised in accordance with the withdrawal procedures in Part 5C.6 of the Act.

Many schemes listed on a financial market of ASX Limited (**ASX**) may be classified as non-liquid schemes for the purposes of Part 5C.6 of the Act because of the nature of the assets held by the scheme.

In the absence of relief, section 601KD of the Act may have the effect of preventing a non-liquid listed scheme from engaging in an on-market buy-back. On-market buy-backs by nature are continuous buy-backs rather than proportional. Trading system rules require trades to be settled within a certain number of days of the transaction. However, under section 601KD of the Act, the responsible entity must not satisfy withdrawal requests until the close of the withdrawal offer period (which must be a minimum of 21 days) and the proportional satisfaction requirement can only be calculated at the end of the withdrawal offer period.

We consider the policy objectives of Part 5C.6 of the Act of fair and equal access to liquidity to be less relevant for non-liquid listed schemes because all members are likely to have the ability to liquidate their investment by selling on-market at any time.

Takeovers relief from section 606

Section 606 of the Act prohibits certain acquisitions of relevant interests in voting interests. We consider this prohibition could make it difficult for listed schemes to engage in a scheme buy-back because it might mean that there is an increase in the proportionate share of those members who do not participate. The holding of those members could exceed the permitted threshold when there is not a takeover offer.

For consistency with our policy on share buy-backs, we have given relief from the prohibition in section 606 of the Act on certain acquisitions of relevant interests in listed schemes. Consequently, an acquisition of relevant interests in a listed scheme that results from a scheme buy-back complying with the terms of our relief is exempt from the prohibition in section 606 of the Act.

Under the *Legislation Act 2003*, legislative instruments cease automatically, or 'sunset', after 10 years, unless action is taken to exempt or preserve the instrument. ASIC Class Order [CO 07/422] *On-market buy-backs by listed schemes* (**[CO 07/422]**) is due to sunset on 1 April 2018. ASIC has reviewed [CO 07/422] and has decided to extend the operation of [CO 07/422] by making the *ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/1159*. ASIC has formed the view that [CO 07/422] continues to form a necessary and useful part of the legislative framework.

2. Purpose of the instrument

ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/1159 grants relief from section 601GA(4), Part 5C.6 and section 606 of the Act to allow the responsible entity of a registered scheme listed on the ASX to carry out on-market buy-backs of interests on a similar basis as applies to buy-backs of shares in companies listed on ASX. Its purpose is to ensure on-market buy-backs by ASX-listed schemes are regulated in a way that ensures that the regulatory protections that Parliament intended for registered schemes are not undermined but operate in a commercially sensible manner.

The purpose of *ASIC Corporations (Repeal) Instrument 2016/1209* is to repeal [CO 07/422].

3. Operation of the instrument

ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/1159 modifies section 601GA(4), Part 5C.6 and section 606 of the Act for on-market buy-backs of interests to allow the buy-back to be operated without contravening the Act. The relief is available when all of the following requirements are satisfied:

- (a) the scheme's constitution gives the responsible entity power to buy-back interests in the scheme;
- (b) the buy-back 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;
- (c) the buy-back is carried out in the ordinary course of trading on the financial markets of the ASX;
- (d) the responsible entity complies with the ASX Listing Rules in relation to the buy-back as if the scheme were a company listed on the ASX;
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: Change relating to buy-back; Appendix 3E: Daily notification; and Appendix 3F: Final 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).
- (e) the responsible entity does not dispose of the interests it buys-back;
- (f) immediately after registration of the transfer to the responsible entity of interests bought back, the interests are cancelled;
- (g) member approval is obtained where the buy-back exceeds the '10/12 limit' (defined in notional section 601KH(9) of the Act); and
- (h) a buy-back within the '10/12 limit' is disclosed to the ASX.

The '10/12 limit' for a responsible entity of a registered 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.

4. Consultation

ASIC consulted with stakeholders through Consultation Paper 269 *Remaking ASIC class order on managed investment scheme buy-backs and updating related guidance (CP 269)* which was issued for comment from 12 October 2016 until 23 November 2016. No submissions were received by ASIC in response to CP 269.

Statement of Compatibility with Human Rights

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

ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/1159

and

ASIC Corporations (Repeal) Instrument 2016/1209

ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/1159 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*.

ASIC Corporations (Repeal) Instrument 2016/1209 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

ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016/1159 grants relief from section 601GA(4), Part 5C.6 and section 606 of the *Corporations Act 2001* to allow the responsible entity of a registered scheme listed on the ASX to carry out on-market buy-backs of interests on a similar basis as applies to buy-backs of shares in companies listed on ASX.

ASIC Corporations (ASX-listed Schemes On-market Buy-backs) Instrument 2016 remakes ASIC Class Order [CO 07/422] as a new legislative instrument. *ASIC Corporations (Repeal) Instrument 2016/1209* repeals ASIC Class Order [CO 07/422].

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.

Australian Securities and Investments Commission