

EXPLANATORY STATEMENT for ASIC Corporations (Chapter 5C – Miscellaneous Provisions) Instrument 2017/125

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (ASIC) makes the *ASIC Corporations (Chapter 5C – Miscellaneous Provisions) Instrument 2017/125* (Instrument) 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 (s601QA(1)(a)) or declare that Chapter 5C of the Act applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration (s601QA(1)(b)).

The Instrument commences on the day after it is registered on the Federal Register of Legislation.

1. Background

The Instrument remakes and consolidates relief previously given by the following class orders:

- Class Order [CO 98/50] *Incorporating parts of other compliance plans*, which was due to expire ('sunset') on 1 April 2018;
- Class Order [CO 98/1806] *Related bodies corporate and external members of compliance committee*, which was due to sunset on 1 October 2017; and
- Class Order [CO 98/1808] *Allowing constitutions to use Appendix 15A of the ASX Listing Rules*, which was due to sunset on 1 October 2017.

Note: Relief previously given by ASIC Class Order [CO 98/60] *Protecting class rights in a managed investment scheme* has been remade as a separate amendment to ASIC Class Order [CO 09/552] *Changing scheme constitutions*: see ASIC Corporations (Amendment and Repeal) Instrument 2017/545.

Allowing constitutions to use Appendix 15A of the ASX Listing Rules - [CO 98/1808]

Where a registered scheme is listed or seeking admission, under the ASX Listing Rules, its constitution must be consistent with the listing rules. This does not apply if

the constitution includes the provisions in Appendix 15A of the ASX Listing Rules which provide an alternative mechanism for consistency.

[CO 98/1808] allowed the inclusion of a provision to the effect of Appendix 15A of the ASX Listing Rules (as at 1 July 1998) in the constitution, and provided that any change in the constitution as a result of such a provision is not treated as a modification of the constitution for the purposes of s601GC of the Act.

Without the relief under [CO 98/1808], a constitution that contained such a provision may be inconsistent with requirements in s601GA of the Act that the constitution make adequate provision for, or specify, certain matters.

The Instrument continues the effect of the relief from s601GA given by [CO 98/1808] without substantial changes and extends it so that it also applies in relation to the Sydney Stock Exchange Listing Rules and may in the future be more easily applied to the listing rules of other financial markets, where considered appropriate. ASIC does not consider the relief from s601GC given by [CO 98/1808] is legally necessary and so it has not been continued by the Instrument.

Incorporating parts of other compliance plans - [CO 98/50]

Under s601HB of the Act, the compliance plan of a registered scheme may incorporate provisions as in force at a specified time of a compliance plan of another registered scheme of which the responsible entity is also the responsible entity.

[CO 98/50] provided relief to allow a compliance plan to incorporate parts of the compliance plan of another scheme that is registered and of which the responsible entity is also the responsible entity, as amended from time to time. This relief means that the incorporated parts of a compliance plan are in effect also amended when the previously lodged compliance plan is amended.

Relief under [CO 98/50] only applied where the compliance plan contained a statement to the effect that the responsible entity will review the appropriateness of the compliance plan when any amendment is made to a part of a compliance plan that is incorporated by reference in it.

The modification was effective only while the compliance plan, the provisions of which are incorporated by reference from time to time, is the compliance plan of a scheme that is registered under Chapter 5C of the Act and that is operated by the same responsible entity.

The Instrument remakes the relief given by [CO 98/50] without substantial changes.

Related bodies corporate and external members of compliance committee - [CO 98/1806]

Under s601JB(1) of the Act, a majority of members of a compliance committee must be external members. A member of a compliance committee is an external member if

they, among other things, are not, and have not been in the previous 2 years substantially involved in business dealings, or in a professional capacity, with the responsible entity or a related body corporate.

Under s601JB(4), a person who is, or has been, either an external director of the responsible entity, or a member of a compliance committee for the scheme or another registered scheme operated by the responsible entity is not, merely because of that position, taken to be or to have been, substantially involved in business dealings, or in a professional capacity, with the responsible entity.

[CO 98/1806] provided relief so that a person is not taken to have been substantially involved in business dealings, or in a professional capacity, with a responsible entity merely because they are an external director of a related body corporate or a member of a compliance committee of a registered scheme operated by a related body corporate.

Relief was provided because ASIC considers that holding an external directorship of, or membership of the compliance committee of a registered scheme operated by, a related body corporate is not likely to lead to any greater risk of loss of independence, and these circumstances should not cause the loss of external director or member status.

The Instrument remakes the relief given by [CO 98/1806] without substantial changes.

Repeal of [CO 98/50], [CO 98/1806] and [CO 98/1808]

[CO 98/50], [CO 98/1806] and [CO 98/1808] are repealed by ASIC Corporations (Amendment and Repeal) Instrument 2017/545 on the basis that they are no longer necessary where the relief is continued in effect by the Instrument.

2. Purpose of the instrument

The purpose of the Instrument is to continue the relief given by [CO 98/50], [CO 98/1806] and [CO 98/1808], with minor changes.

3. Operation of the instrument

Relief to permit constitutional provisions incorporating listing rules by reference

Section 5 of the Instrument remakes the relief given by [CO 98/1808] by modifying s601GA as it applies to all persons.

Section 5 modifies s601GA by notionally inserting ss601GA(5)–(6). Subsection 601GA(5) provides that, despite the requirements in ss601GA(1)–(4), the constitution of a registered scheme may include a 'listing rule consistency provision' if the scheme is admitted (or the responsible entity is proposing to seek such admission) to the

official list of a market listed as an 'eligible Australian market' in s601GA(6) and is required or permitted by the relevant listing rules to include such a provision.

Subsection 601GA(6) defines 'listing rule consistency provision' in relation to a registered scheme and an eligible Australian market to mean a provision in the constitution of the scheme that has the following effect where the scheme is admitted to the official list of the market:

- (a) notwithstanding anything contained in the constitution, if the listing rules of the market prohibit an act being done, the act shall not be done;
- (b) nothing contained in the constitution prevents an act being done that the listing rules of the market require to be done;
- (c) if the listing rules of the market require an act to be done or not to be done, authority is given for that act to be done or not to be done (as the case may be);
- (d) if the listing rules of the market require the constitution to contain a provision and it does not contain such a provision, the constitution is taken to contain that provision;
- (e) if the listing rules of the market require the constitution not to contain a provision and it contains such a provision, the constitution is taken not to contain that provision;
- (f) if any provision of the constitution is or becomes inconsistent with the listing rules of the market, the constitution is taken not to contain that provision to the extent of the inconsistency.

Compliance plan may incorporate provisions from another scheme's plan as amended from time to time

Section 6 of the Instrument remakes the relief given by [CO 98/50] by making a minor modification to s601HB as it applies to a responsible entity of a registered scheme.

Section 6 modifies s601HB(1) by notionally inserting the words 'or from time to time' after the word 'time'.

Section 6 also modifies s601HB(2) by notionally inserting the words 'or from time to time as the case may be' after the word 'time'.

This allows for incorporation by reference of provisions as they exist from time to time, rather than merely at a particular point in time.

This modification only applies where the compliance plan for the scheme (excluding any part incorporated by reference under section 601HB) contains a statement to the effect that the responsible entity will review the appropriateness of the compliance

plan when any amendment is made to a part of a compliance plan that is incorporated by reference in it.

The modification is effective only while the compliance plan, the provisions of which are incorporated by reference from time to time, is the compliance plan of a scheme that is registered under Chapter 5C of the Act and that is operated by the same responsible entity.

Related bodies corporate and external members of compliance committee

Section 7 of the Instrument remakes the relief given by [CO 98/1806] by making a minor modification to s601JB as it applies to a responsible entity of a registered scheme and to a member of a compliance committee of a registered scheme.

Section 7 modifies s601JB(3) by notionally inserting the words "and paragraph (4)(a)" after the words "(2)(a)".

Section 7 also modifies s601JB(4) by notionally inserting the words "or a related body corporate" after every use of the words "responsible entity" in that subsection.

The effect of this modification is that a person is not taken to have been substantially involved in business dealings, or in a professional capacity, with a responsible entity merely because they are an external director of a related body corporate or a member of a compliance committee of a registered scheme operated by a related body corporate.

4. Consultation

ASIC sought feedback on proposals to remake the relief provided by [CO 98/50], [CO 98/60], [CO 98/1806] and [CO 98/1808] in Consultation Paper 270 *Remaking ASIC class orders on registered schemes* (CP 270).

No submissions were made in response to CP 270.

Statement of Compatibility with Human Rights

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

ASIC Corporations (Chapter 5C – Miscellaneous Provisions) Instrument 2017/125

ASIC Corporations (Chapter 5C – Miscellaneous Provisions) Instrument 2017/125 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 (Chapter 5C – Miscellaneous Provisions) Instrument 2017/125 continues the effect of ASIC class orders [CO 98/50], [CO 98/1806] and [CO 98/1808] with non-substantive changes, and consolidates that relief into a single instrument. Those instruments each made amendments to the provisions in Chapter 5C of the Corporations Act 2001, which relate to registered managed investment schemes.

In relation to [CO 98/1808], the remade relief has been extended to apply also in relation to the listing rules of the Sydney Stock Exchange, and remade in a way that provides for flexibility for any future extensions to the listing rules of other financial markets.

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