

## EXPLANATORY STATEMENT for ASIC Corporations (Amendment and Repeal) Instrument 2017/545

Prepared by the Australian Securities and Investments Commission

### *Corporations Act 2001*

The Australian Securities and Investments Commission (ASIC) makes the *ASIC Corporations (Amendment and Repeal) Instrument 2017/545* (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 relief previously given by ASIC Class Order [CO 98/60] *Protecting class rights in a managed investment scheme*, which was due to expire ('sunset') on 1 October 2017. The Instrument repeals [CO 98/60] on the basis that it is no longer necessary where the relief has been remade.

The Instrument also repeals the following class orders, which were remade separately under ASIC Corporations (Chapter 5C-Miscellaneous Provisions) Instrument 2017/125:

- Class Order [CO 98/50] *Incorporating parts of other compliance plans*, which was due to 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.

### **Protecting class rights in a managed investment scheme - [CO 98/60]**

Subsection 601GC(1) of the Act provides that the constitution of a registered scheme may be modified, or repealed and replaced with a new constitution either: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

The provisions in Pt 2F.2 of the Act that protect class rights of members of companies do not apply to, and are not replicated for, class rights of members of a registered scheme.

Our relief in [CO 98/60] modified s601GC so that the constitution of a registered scheme may protect the rights of members of a class by requiring that modifications of the constitution that impact on class rights are subject to compliance with any relevant procedure set out in the constitution.

In particular, [CO 98/60] provided that if the constitution of a registered scheme sets out a procedure for varying or cancelling rights of a class of members of the scheme, or rights attached to a class of interests under the scheme, those rights may be varied or cancelled by special resolution of the members of the scheme only if that procedure is complied with.

The effect of [CO 98/60] included that any such procedure in the constitution was not itself able to be modified without following the relevant procedure.

The Instrument remakes the relief given by [CO 98/60] without substantial changes.

## **2. Purpose of the instrument**

The purpose of the Instrument is to continue the relief given by [CO 98/60] with minor drafting changes, and repeal [CO 98/50], [CO 98/60], [CO 98/1806] and [CO 98/1808].

## **3. Operation of the instrument**

### **Section 4**

Section 4 of the Instrument provides that each instrument specified in a schedule to the Instrument is amended or repealed as set out in the relevant item in the schedule, and any other item in a schedule to the Instrument has effect according to its terms.

### **Schedule 1 – Amendment of [CO 09/552]**

Schedule 1 of the Instrument provides for the remake of [CO 98/60] by way of an amendment to ASIC Class Order [CO 09/552].

Schedule 1 modifies paragraph (b) in section 4 of [CO 09/552]. The effect of this modification is that [CO 09/552] notionally inserts a new subsection s601GC(1A) which requires that if the constitution of a scheme sets out a procedure for varying or cancelling rights of a class of members of the scheme, or rights attached to a class of interests under the scheme, those rights may be varied or cancelled by a resolution under paragraph 601GC(1)(a) only if that procedure is complied with.

If the constitution sets out a procedure for varying or cancelling rights of a class of members of the scheme, or rights attached to a class of interests under the scheme, that procedure itself is not able to be modified without following the relevant procedure.

#### **Schedule 2 – Repeals**

Schedule 2 of the Instrument repeals [CO 98/50], [CO 98/60], [CO 98/1806] and [CO 98/1808].

#### **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 (Amendment and Repeal) Instrument 2017/545**

*ASIC Corporations (Amendment and Repeal) Instrument 2017/545 (the Instrument) 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**

The Instrument continues the effect of ASIC Class Order [CO 98/60] with non-substantive changes. [CO 98/60] amended Chapter 5C of the *Corporations Act 2001*, to allow for the constitution of a registered scheme to protect class rights of members.

The Instrument repeals ASIC Class Orders [CO 98/50], [CO 98/60], [CO 98/1806] and [CO 98/1808] on the basis that the relief provided by each has been remade.

#### **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**