



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Discretions for Setting the Issue Price and Withdrawal Price for Interests in Managed Investment Schemes) Instrument 2023/693 and ASIC Corporations (Amendment and Repeal) Instrument 2023/694

This is the Explanatory Statement for *ASIC Corporations (Discretions for Setting the Issue Price and Withdrawal Price for Interests in Managed Investment Schemes) Instrument 2023/693* (the **Instrument**) and *ASIC Corporations (Amendment and Repeal) Instrument 2023/694* (the **Amendment/Repeal Instrument**).

The Explanatory Statement is approved by the Australian Securities and Investments Commission (**ASIC**).

Summary

1. The Instrument modifies the requirements in section 601GA of the *Corporations Act 2001* (**the Act**) in relation to the provision to be made in the constitution of a registered scheme for the issue price and withdrawal price for interests in managed investment schemes. The Instrument provides that:
 - (a) in certain circumstances the constitution of a registered scheme does not have to make adequate provision for the issue price;
 - (b) the constitution of a registered scheme may provide that a formula or method is used to determine the issue price or withdrawal price of interests and the responsible entity may exercise permitted discretions;
 - (c) if the responsible entity of the registered scheme exercises discretion to set the issue price or withdrawal price, it must comply with additional duties, including to exercise the discretion in a manner that is consistent with ordinary commercial practice.
2. The Instrument preserves the effect of Class Order [CO 13/655] *Provisions about the amount of consideration to acquire interests and withdrawal amounts not covered by ASIC Corporations (Managed investment product consideration) Instrument 2015/847* (**CO 13/655**) and Class Order [CO 13/657] *Discretions affecting the amount of consideration to acquire interests and withdrawal amounts* (**CO 13/657**). The Instrument combines CO 13/655 and CO 13/657 into a single legislative instrument with a minor drafting changes, including

simplification of the requirement to document exercises of discretion that affect the pricing of interest, while preserving the current effect of the instrument.

3. CO 13/655 and CO 13/657 were due to expire or ‘sunset’ on 1 October 2023. Following consultation, ASIC considered that CO 13/655 and CO 13/657 were each operating effectively and efficiently to achieve its objectives and continued to form a necessary and useful part of the legislative framework. As a result, under the Instrument, we have extended the provisions in CO 13/655 and CO 13/657 for a five-year period to 1 October 2028.
4. As the Instrument preserves the effect of CO 13/655 and CO 13/657 with no significant changes, this Explanatory Statement should be read in conjunction with the Explanatory Statements for [CO 13/655](#) and [CO 13/657](#).
5. The Amendment/Repeal Instrument repeals CO 13/655 and CO 13/657 ahead of their automatic repeals on 1 October 2023, as these instruments are superseded by the Instrument upon its commencement. In addition, the Amendment/Repeal Instrument amends two legislative instruments to change cross-references to CO 13/655 to the Instrument.
6. ASIC makes the Instrument under subsections 601QA(1) and 1020F(1) of the Act. Subsection 601QA(1) of the Act provides that ASIC may 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. Subsection 1020F(1) of the Act provides that ASIC may declare that Part 7.9 of the Act applies in relation to a person or a financial product, or a class of persons or financial products, as if specified provisions were omitted, modified or varied as specified in the declaration. ASIC makes the Amendment/Repeal Instrument:
 - (a) under subsections 601QA(1) and 1020F(1) in respect of the repeal of CO 13/655 and CO 13/657; and
 - (b) under subsections 283GA(1), 601QA(1), 655A(1), 741(1), 926A(2), 992B(1), 1020F(1) and 1100ZK(2) in relation to the amendment of *ASIC Corporations (Managed investment product consideration) Instrument 2015/847 (LI 2015/847)* and *ASIC Corporations (Definition of Approved Foreign Market) Instrument 2017/669 (LI 2017/669)*.

Purpose of the instrument

7. The purpose of the Instrument is to continue the provisions set out in CO 13/655 and CO 13/657 in substantially the same form.
8. The Instrument was issued because CO 13/655 and CO 13/657 were due to sunset under the *Legislation Act 2003* (the **Legislation Act**) on 1 October 2023. Under the Legislation Act, legislative instruments (such as class orders) cease automatically, or sunset, after 10 years, unless action is taken to preserve them.
9. The purpose of sunseting is to ensure that instruments are kept up to date and only remain in force while they are fit for purpose, necessary and relevant.

Following consultation, ASIC formed the view that CO 13/655 and CO 13/657 were operating effectively and efficiently, and continued to form a necessary and useful part of the legislative framework. Therefore, these legislative instruments were remade using ASIC's current style and format, while preserving the current effect of the instrument.

10. The Instrument remade CO 13/655 and CO 13/657 subject to the following minor changes:
 - (a) simplified the requirement to document exercises of discretion that affect the pricing of interest;
 - (b) updated the name of the legislative instrument;
 - (c) reflected current drafting practice and updated the format of the current document;
 - (d) provided an expiry date of 1 October 2028;
 - (e) updated legislative references and definitions; and
 - (f) corrected any minor drafting errors.
11. The provisions of the Instrument provide responsible entities with an appropriate level of flexibility in setting the consideration for the issue and withdrawal price of interests in managed investment schemes and provides a greater degree of certainty on how to comply with unit pricing discretions in the scheme's constitution.
12. The purpose of the Amendment/Repeal Instrument is to repeal CO 13/655 and CO 13/657 as these instruments ahead of their automatic repeal on 1 October 2023 in accordance with section 50 of the Legislation Act, as these superseded by the Instrument upon its commencement. The Amendment/Repeal Instrument also amends LI 2015/847 to set out, in the alternative to a notice of reliance under CO 13/655, a notice of reliance under the Instrument. The Amendment/Repeal Instrument amends LI 2017/669 to replace a cross-reference to CO 13/655 with a cross-reference to the Instrument.

Consultation

13. In June 2023, ASIC consulted on re-making CO 13/655 and CO 13/657 in media release 23-154MR ASIC consults on remaking 'sunsetting' class orders on unit pricing discretions for managed investment schemes (**23-154MR**). ASIC proposed to re-make CO 13/655 and CO 13/657 in a combined legislative instrument, for a period of five years. ASIC proposed a minor change to CO 13/657 to simplify the requirement to document exercises of discretion that affect the pricing of interest and reduce the level of prescription in the provisions.

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14. ASIC received one submission in response to 23-154MR. The feedback generally supported our proposals to remake CO 13/655 and CO 13/657, including the minor amendment to simplify the documentation requirements.
 15. ASIC has self-certified that it is not required to prepare a Regulatory Impact Statement for the Instrument. This is because, following a consultation process with affected stakeholders, ASIC has assessed that CO 13/655 and CO 13/657 are operating effectively and efficiently.

Operation of the instrument

16. Paragraph 5 of the Instrument inserts sections 601GAD to 601GAF of the Act to facilitate a responsible entity to have discretion in setting the issue price and withdrawal price of interests in a registered scheme.
17. Paragraph 6 of the Instrument inserts subsections 601FC(1A) and (1B) of the Act to impose additional duties on the responsible entity in respect of the exercise of pricing discretions.
18. Paragraph 7 of the Instrument inserts section 1013DAA of the Act to require statements to be included in the Product Disclosure Statement regarding member access to discretion documentation.

Circumstances where the constitution does not have to make adequate provision for the issue price

19. The Instrument provides that in certain circumstances set out in section 601GAD, the constitution of a registered scheme does not have to make adequate provision for the issue price and the responsible entity has flexibility to set the issue price. The circumstances include (amongst others) placements, rights issues, interest purchase plans and distribution reinvestment plans (subsections 601GAD(1) to 601GAD(9)).

Discretions in constitutional provisions that relate to the general pricing of interests

20. The instrument allows the constitution of a registered scheme to provide for a formula or method for determining the issue price or withdrawal price of interests and that the responsible entity may exercise permitted discretions (subsection 601GAE for issue price and subsection 601GAF for withdrawal price).
21. A responsible entity must not exercise a permitted discretion on the basis that it will result in a particular amount being set as the price for the interest (subsections 601GAE(3) and 601GAF(3)).
22. If the formula or method:
 - (a) relates to the issue price of interests in registered schemes that are not in a class of interests that is traded on a financial market or for exchange traded funds or managed funds that are in a class of interests that are able

to be traded on a financial market operated by ASX or Cboe (paragraph 601GAE(2)(a)); or

- (b) relates to the withdrawal price of interests in registered schemes (subsection 601GAF(1));

it must be based on the value of scheme property attributable to interests in that class at the time of issue less any liabilities that under the constitution may be met from that property attributable to interests in that class divided by the number of interests on issue in that class.

23. For interests in the scheme that are in a class of interests that are able to be traded on a financial market and the scheme is listed on the financial market, the formula or method for must be based on the market price of the interests in that class on the market at or around the time of issue (paragraph 601GAE(2)(b)).

Duties imposed on the responsible entity

24. A responsible entity must ensure that discretion affecting unit pricing on acquisition or withdrawal from a registered scheme is exercised consistent with ordinary commercial practice and produces a value or price that is reasonably current at the time of issue or withdrawal (subsection 601FC(1A)).
25. If a discretion affecting the pricing of interests in a registered scheme is exercised, the responsible entity must only exercise the discretion if it is reasonable to do so (subsection 601FC(1B)).
26. The responsible entity must also exercise the discretion in accordance with a current written policy or prepare a written explanation of how the discretion was exercised and why such exercise was reasonable (subsection 601FC(1B)).

Statements to be included in the Product Disclosure Statement

27. If a responsible entity of a registered scheme may exercise a discretion affecting the pricing of interests, the Product Disclosure Statement of the registered scheme must include statements to the effect that copies of documents relating to discretions about pricing of interests are available from the responsible entity (section 1013DAA).

Application

28. The Instrument applies to responsible entities of registered managed investment schemes that were registered after 30 September 2013 or in relation to which a responsible entity that has published on its website that it will rely on this instrument or CO 13/655.
29. For a responsible entity of a managed investment scheme that was registered before 1 October 2023 and has published on its website that it will rely CO 13/655, a transition period applies so that it may rely on the Instrument until the earlier of the day the responsible entity publishes a notice on its website that it is relying on this instrument in relation to the scheme and 30 June 2024.

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30. This Instrument does not apply to responsible entities of registered managed investment schemes that were registered before 1 October 2013 and in relation to which the responsible entity that has *not* published on its website that it will rely on the Instrument or CO 13/655. Responsible entities of those schemes may instead rely on LI 2015/847.

Incorporation by reference

31. The Instrument incorporates by reference *ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547*, which facilitates the offer of share and interest purchase plans to existing registered holders, and *ASIC Corporations (Registered Schemes—Differential Fees) Instrument 2017/40* which allows the responsible entity of a registered scheme to administer differential fee arrangements in certain circumstances. The Amendment/Repeal Instrument does not incorporate by reference any documents.

Retrospective application

32. The Instrument and the Amendment/Repeal Instrument do not have retrospective application.

Legislative instrument and primary legislation

33. The subject matter and policy implemented by this instrument is more appropriate for a legislative instrument rather than primary legislation because:
- (a) the modifications made by the Instrument are specific amendments designed to ensure the application of primary legislation is consistent with the intended policy and the enabling provisions in the primary legislation;
 - (b) the Instrument preserves the effect of CO 13/655 and CO 13/657, which were otherwise due to sunset on 1 October 2023; and
 - (c) following consultation, ASIC considered that CO 13/655 and CO 13/657 were operating effectively and efficiently to achieve their objectives and continued to form necessary and useful parts of the legislative framework.

Duration of the instrument

34. ASIC considers that five years is the appropriate duration for the Instrument.

Legislative authority

35. The source of power to make the instrument is subsections 601QA(1) and 1020F(1) of the Corporations Act. The sources of power to make the Amendment/Repeal Instrument are subsections 283GA(1), 601QA(1), 655A(1), 741(1), 926A(2), 992B(1), 1020F(1) and 1100ZK(2) of the Corporations Act.
36. The Instrument and the Amendment/Repeal Instrument are disallowable legislative instruments.

Statement of Compatibility with Human Rights

37. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is in the Attachment.

Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

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Overview

1. The Instrument modifies the requirements in s 601GA of the *Corporations Act 2001 (the Act)* in relation to the provision to be made in the constitution of a registered scheme for the issue price and withdrawal price for interests in managed investment schemes. The Instrument provides that:
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 - (c) if the responsible entity of the registered scheme exercises discretion to set the issue price or withdrawal price, it must comply with additional duties, including to exercise the discretion in a manner that is consistent with ordinary commercial practice.
2. The Amendment/Repeal Instrument repeals CO 13/655 and CO 13/657 as these instruments are superseded by the Instrument upon its commencement. The Amendment/Repeal Instrument repeals CO 13/655 and CO 13/657 ahead of their automatic repeal on 1 October 2023. In addition, the Amendment/Repeal Instrument amends *ASIC Corporations (Managed investment product consideration) Instrument 2015/847* and *ASIC Corporations (Definition of Approved Foreign Market) Instrument 2017/669* so that cross-references to CO 13/655 are replaced with cross-references to the Instrument.

Assessment of human rights implications

3. The Instrument and the Amendment/Repeal Instrument do not engage any of the applicable rights or freedoms.

Conclusion

4. The Instrument and the Amendment/Repeal Instrument are 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*.