



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Equality of Treatment Impacting on the Acquisition of Scheme Interests and CCIV Shares) Instrument 2023/697 and ASIC Corporations (Repeal) Instrument 2023/698

This is the Explanatory Statement for *ASIC Corporations (Equality of Treatment Impacting on the Acquisition of Scheme Interests and CCIV Shares) Instrument 2023/697* and the *ASIC Corporations (Repeal) Instrument 2023/698*.

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

Summary

1. *ASIC Corporations (Equality of Treatment Impacting on the Acquisition of Scheme Interests and CCIV Shares) Instrument 2023/697* (the **Instrument**) maintains the relief previously given under ASIC Class Order [\[CO 13/656\]](#) - *Equality of treatment impacting on the acquisition of interests (CO 13/656)*. It sets out the circumstances where responsible entities of registered schemes and corporate directors of retail corporate collective investment vehicles (**CCIVs**) may be exempt from the equal treatment and acquiring interests on forfeiture requirements. Some of the relief provided by the Instrument is extended to apply to corporate directors of retail CCIVs.
2. CO 13/656 was due to sunset on 1 October 2023. Following consultation, ASIC considered that CO 13/656 was operating effectively and efficiently to achieve its objectives and continued to form a necessary and useful part of the legislative framework.
3. As a result, CO 13/656 has been remade in a new legislative instrument, with only minor drafting changes to reflect ASIC's current style and format, remove redundant provisions and update definitions, while preserving the current effect of the instrument. In light of there being no significant changes, this Explanatory Statement should be read in conjunction with the [Explanatory Statement for \[CO 13/656\]](#).
4. *ASIC Corporations (Repeal) Instrument 2023/698* (the **Repeal Instrument**) repeals CO 13/656 as it is superseded by the Instrument upon its commencement. The Repeal Instrument repeals CO 13/656 ahead of its automatic repeal on 1 October 2023.

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5. ASIC makes the Instrument under paragraph 601QA(1)(a) and subparagraph 1243(2)(a)(i) of the *Corporations Act 2001* (the ***Corporations Act***) and makes the Repeal Instrument under subsections 601QA(1) and 1243(2). Under paragraph 601QA(1)(b), ASIC may exempt a person from complying with a provision of Chapter 5C of the Corporations Act. Under subparagraph 1243(2)(a)(i) of the Corporations Act, ASIC may exempt a specific CCIV, a specified class of CCIV or all CCIVs from complying with various provisions of Part 8B of the Corporations Act, including Part 8B.3 in relation to the corporate governance of CCIVs.

Purpose of the instrument

6. The purpose of the relief set out in the Instrument is to provide certainty and appropriate flexibility for responsible entities and corporate directors in relation to the exercise of their powers and performance of their duties as responsible entity of a registered managed investment scheme or corporate director of a retail CCIV. The Instrument is also intended to provide certainty and appropriate flexibility for responsible entities in relation to the acquisition of interest in a registered managed investment scheme for which they are the responsible entity.
7. The Instrument was issued because CO 13/656 was 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.
8. 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 13/656 was operating effectively and efficiently, and continued to form a necessary and useful part of the legislative framework. Therefore, this legislative instrument was remade using ASIC's current style and format, while preserving the current effect of the instrument.
9. The purpose of the Repeal Instrument is to repeal CO 13/656 as it is superseded by the Instrument upon its commencement. The Repeal Instrument repeals CO 13/656 ahead of its automatic repeal on 1 October 2023 in accordance with section 50 of the Legislation Act.

Consultation

10. On 21 March 2023, ASIC released Consultation Paper 368 *Remaking ASIC class orders on managed investment schemes: [CO 13/519] and [CO 13/656] (CP 368)* proposing to continue the relief currently given by the Instrument, without any significant changes. Aside from extending part of the relief to CCIVs, no material changes were made to the relief under CO 13/656.
11. The consultation period closed on 11 April 2023. ASIC received one submission in response to CP 368. The submission supported the remaking of CO 13/656 in substantially the same form, subject to an amendment to provide equal treatment relief to the corporate director of a wholesale CCIV. The Instrument implements

this change. Previously, CO 13/656 provided equal treatment relief to corporate directors of retail CCIVs only.

12. ASIC has self-certified to the Office of Impact Analysis that it is not required to prepare an Impact Analysis for the Instrument. This is because, following the consultation process, ASIC has assessed that CO 13/656 is operating effectively and efficiently.
13. ASIC did not specifically or separately consult on the Repeal Instrument, as ASIC proposed to remake the instrument rather than to revoke the instrument.

Operation of the Instrument

Background

14. Paragraph 601FC(1)(d) of the Corporations Act requires that the responsible entity of a registered scheme, in exercising its powers and carrying out its duties, must treat the members who hold interests of the same class equally and members who hold interests of different classes fairly.
15. Paragraph 1224D(2)(b) of the Corporations Act requires that the corporate director of a retail CCIV, in exercising its powers and carrying out its duties, must treat the members who hold shares of the same class equally.
16. Paragraph 601FG(1)(a) of the Corporations Act requires that if the responsible entity of a registered scheme acquire an interest in the scheme it must only do so for not less than the consideration that would be payable if the interests were acquired by another person.
17. The introduction on 1 July 2022 of the CCIV regime, as an alternative to the managed investment scheme structure, also raised the requirement for a form of relief analogous to the relief currently offered to responsible entities of retail managed investment schemes for corporate directors of retail CCIVs.

Provisions of the Instrument

18. Paragraph 5(a) of the Instrument exempts a responsible entity of a registered scheme from the requirements in paragraph 601FC(1)(d) of the Corporations Act to the extent that it prevents the responsible entity from making an offer of interests to a member with a registered address outside Australia and New Zealand where:
 - (a) the scheme is included in the official list of the financial market operated by ASX Limited and the offer complies with the requirements of relevant listing rules of ASX Limited that are applicable to the relevant offer and issue of interests;
 - (b) where the scheme is not included in the official list of the financial market operated by ASX Limited and the offer is renounceable—appoints a nominee to sell the rights to acquire the interests that are not offered to the

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- non-residents and distribute to each non-resident their proportion of the net proceeds of sale; and
- (c) in other cases where it would be unreasonable because of defined circumstances.
19. Paragraph 5(b) of the Instrument exempts a responsible entity of a registered scheme from the requirements in paragraph 601FC(1)(d) of the Corporations Act to the extent that it prevents the responsible entity from requiring that the date of notification for the acceptance of an offer of interests by a wholesale client occurs before another member. Subparagraph 5(b)(ii) requires that interests offered to wholesale clients must not be issued before the earliest date on which interests may be issued to other members of the scheme.
20. Paragraph 5(c) of the Instrument exempts a responsible entity of a registered scheme from the requirements in paragraph 601FC(1)(d) of the Corporations Act where the responsible entity deals with a complaint made by wholesale clients differently from complaints by other members.
21. Paragraph 5(d) of the Instrument exempts a responsible entity of a registered scheme from the requirements in paragraph 601FC(1)(d) of the Corporations Act where the responsible entity makes offers and issues of interest in a way that is permitted by *ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547*.
22. Paragraph 6(a) of the Instrument exempts a corporate director of a retail CCIV from the requirements in paragraph 1224D(2)(b) of the Corporations Act to the extent that it prevents the corporate director from making an offer of shares to a member with a registered address outside Australia and New Zealand where:
- (a) the sub-fund is included in the official list of the financial market operated by ASX Limited and the offer complies with the requirements of relevant listing rules of ASX Limited that are applicable to the relevant offer and issue of shares;
- (b) where the sub-fund is not included in the official list of the financial market operated by ASX Limited and the offer is renounceable—appoints a nominee to sell the rights to acquire the shares that are not offered to the non-residents and distribute to each non-resident their proportion of the net proceeds of sale; and
- (c) in other cases where it would be unreasonable because of defined circumstances.
23. Paragraph 6(b) of the Instrument exempts a corporate director of a retail CCIV from the requirements in paragraph 1224D(2)(b) of the Corporations Act to the extent that it prevents the corporate director from requiring that the date of notification for the acceptance of an offer of shares by a wholesale client occurs before another member. Subparagraph 6(b)(ii) requires that shares offered to wholesale clients must not be issued before the earliest date on which shares may be issued to other members of the sub-fund.

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24. Paragraph 6(c) of the Instrument exempts a corporate direction of a retail CCIV from the requirements in paragraph 1224D(2)(b) of the Corporations Act where the corporate director deals with a complaint made by wholesale clients differently from complaints by other members.
 25. Paragraph 6(d) of the Instrument exempts a corporate direction of a retail CCIV from the requirements in paragraph 1224D(2)(b) of the Corporations Act where the corporate director makes offers and issues of shares in a way that is permitted by *ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547*.
 26. Section 7 of the Instrument exempts a corporate director of a wholesale CCIV from the requirement under paragraph 1224D(3)(b) of the Corporations Act to treat members of the CCIV who hold shares of the same class equally to the extent that it prevents the corporate director from making an offer of shares to a member with a registered address outside Australia and New Zealand where:
 - (a) in the case where the offer is renounceable—the corporate director appoints a nominee to sell the rights to acquire the shares that are not offered to the non-residents and distribute to each non-resident their proportion of the proceeds of sale net of expenses; or
 - (b) in any other case—the corporate director determines that it is unreasonable, having regard to specific factors, to make the offer to the non-resident.
 27. Section 8 of the Instrument exempts a responsible entity of a registered scheme from the requirements in paragraph 601FG(1)(a) of the Corporations Act to the extent that it prevents the responsible entity from relying on the provision for a responsible entity acquiring interests as a result of forfeiture of interests by a member where the constitution of the scheme requires the interests be offered for sale in accordance with the requirements in subsection 601GAA(8) of the Corporations Act, as notionally in force because of *ASIC Corporations (Managed investment product consideration) Instrument 2015/847*, or subsection 601GAD(9) of the Corporations Act, as notionally in force because of *ASIC Corporations (Discretions for Setting the Issue Price and Withdrawal Price of Interests in Managed Investment Schemes) Instrument 2023/693*.
 28. Section 9 of the Instrument provides that the Instrument will be repealed on 1 October 2028.

Incorporation by reference

29. The Instrument incorporates by reference the following documents:
 - (a) Rule 7.7 of the Listing Rules of the ASX Limited on 1 December 2019. The relevant listing rule, permits the exclusion of members outside Australia and New Zealand from an offer of interests in a registered scheme and shares in a retail CCIV in defined circumstances. The rule requires that in the event of exclusion notification must be given of the offer and the exclusion of the member to the excluded member and if the

offers are made on a pro rata renounceable basis a nominee for sale of the interest or share that would have been issued must be appointed and the net proceeds paid to the member. The Listing Rules are available at www.asxgroup.com.au;

- (b) *ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547* which gives conditional exemption from the requirement for a Product Disclosure Statement to be given by:
- i) responsible entities of registered schemes when offering interests in a registered scheme under an interest purchase plan. An interest purchase plan is an arrangement under which members may acquire additional interests in a registered scheme up to a maximum monetary amount.
 - ii) corporate directors of a retail CCIV when offering shares in the retail CCIV or a sub-fund of the retail CCIV under a share purchase plan where the retail CCIV or sub-fund is admitted to the official list of ASX Limited. A share purchase plan is an arrangement under which members may acquire additional shares in a body up to a maximum monetary amount.

This document is registered on the Federal Register of Legislative Instruments; and

- (c) *ASIC Corporations (Discretions for Setting the Issue Price and Withdrawal Price of Interests in Managed Investment Schemes) Instrument 2023/693* which modifies or varies Chapter 5C of the Corporations Act to provide for circumstances in which a responsible entity of a registered scheme may set the consideration to acquire an interest in a registered scheme. This document is registered on the Federal Register of Legislative Instruments.

Retrospective application

30. The Instrument and the Repeal Instrument do not have retrospective application.

Legislative instrument and primary legislation

31. The subject matter and policy implemented by the Instrument is more appropriate for a legislative instrument rather than primary legislation because:
- (a) the modifications made by the Instrument are highly 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 13/656, which was otherwise due to sunset on 1 October 2023;

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- (c) following consultation, ASIC considered that CO 13/656 was operating effectively and efficiently to achieve its objectives and continued to form a necessary and useful part of the legislative framework; and
 - (d) ASIC understands that the Government will consider whether to make future amendments to the Corporations Act to incorporate the Instrument into primary law or regulations. Therefore, the Instrument has been made for a term of five years to allow sufficient time for this to occur.

Duration of the Instrument

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

Legislative authority

- 33. The sources of power to make the Instrument and the Repeal Instrument are subsections 601QA(1) and 1243(2) of the Corporations Act.
- 34. The Instrument and the Repeal Instrument are disallowable legislative instruments.
- 35. The Repeal Instrument is automatically repealed in accordance with section 48A of the Legislation Act.

Statement of Compatibility with Human Rights

- 36. 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*.

ASIC Corporations (Equality of Treatment Impacting on the Acquisition of Scheme Interests and CCIV Shares) Instrument 2023/697 and ASIC Corporations (Repeal) Instrument 2023/698

Overview

1. *ASIC Corporations (Equality of Treatment Impacting on the Acquisition of Scheme Interests and CCIV Shares) Instrument 2023/697* (the **Instrument**) sets out the circumstances where responsible entities of registered schemes and corporate directors of retail CCIVs may be exempt from the equal treatment duty and certain requirements when acquiring forfeited interests.
2. *ASIC Corporations (Repeal) Instrument 2023/698* (the **Repeal Instrument**) repeals CO 13/656 as it is superseded by the Instrument upon its commencement. The Repeal Instrument repeals CO 13/656 ahead of its automatic repeal on 1 October 2023.

Assessment of human rights implications

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

Conclusion

4. This Instrument and the 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*.