



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Changing the Responsible Entity) Instrument 2023/681

ASIC Corporations, Credit and Superannuation (Amendment and Repeal) Instrument 2023/699

This is the Explanatory Statement for *ASIC Corporations (Changing the Responsible Entity) Instrument 2023/681* and *ASIC Corporations, Credit and Superannuation (Amendment and Repeal) Instrument 2023/699*.

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

Summary

1. *ASIC Corporations (Changing the Responsible Entity) Instrument 2023/681* (the **RE Change Instrument**) clarifies the interaction between section 601FM and Division 1 of Part 2G.4 of the *Corporations Act 2001* which deals with calling meetings of members of registered schemes (**Meetings Procedure Provision**) by making it clear that the kind of resolution that members of a listed registered scheme must pass to change the responsible entity is an ordinary resolution, and not a special or extraordinary resolution.
2. The *Legislative Instruments Act 2003* (the **LIA**) provides for the periodic expiry of legislative instruments ('sunsetting') to ensure that they are kept up to date and only remain in force for so long as they are needed. [Class Order \[CO 13/519\]](#) *Changing the responsible entity* ([CO 13/519]) is a legislative instrument and was scheduled to eventually expire under the sunsetting provisions of the LIA. ASIC's reissuing of the relief underlying [CO 13/519] has given ASIC the opportunity to deal with its eventual expiry. The modifications in the RE Change Instrument are the same as to those in [CO 13/519].
3. *ASIC Corporations, Credit and Superannuation (Amendment and Repeal) Instrument 2023/699* (the **Amendment and Repeal Instrument**) repeals the following legislative instruments that were due to expire on 1 October 2023 and that are being remade (with the exception of [Class Order \[CO 13/520\]](#) *Relevant interests, voting power and exceptions to the general prohibition* which is being repealed but is not being remade for the reasons explained at paragraph 18):

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- (a) [CO 13/519], the predecessor to the RE Change Instrument;
 - (b) [Class Order \[CO 13/520\]](#) *Relevant interests, voting power and exceptions to the general prohibition*;
 - (c) [Class Order \[CO 13/521\]](#) *Takeover bids*;
 - (d) [Class Order \[CO 13/522\]](#) *Compulsory acquisitions and buyouts*;
 - (e) [Class Order \[CO 13/524\]](#) *Bidder giving substantial holding notice*;
 - (f) [Class Order \[CO 13/525\]](#) *On-sale disclosure relief for scrip bids and schemes of arrangement*;
 - (g) [Class Order \[CO 13/526\]](#) *Warrants: Relevant interests and associations*; and
 - (h) [Class Order \[CO 13/528\]](#) *Changes to a bidder's statement between lodgement and dispatch*.
4. The Amendment and Repeal Instrument also repeals other ASIC instruments that are spent, namely [Class Order \[CO 13/898\]](#) *Representative proceedings and proof of debt arrangements funded by conditional costs agreements*, [Class Order \[CO 14/1252\]](#) *Technical modifications to Schedule 10 of the Corporations Regulations ([CO 14/1252])*, [ASIC Credit \(Repeal\) Instrument 2016/1087](#), [ASIC Superannuation \(RSE Websites\) Instrument 2017/570](#), and [ASIC Corporations \(Repeal and Transitional—Relief for Providers of Retirement Estimates\) Instrument 2022/204](#). The Amendment and Repeal Instrument also updates references to new ASIC legislative instruments in *ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968*, and to new sections of the *Corporations Act 2001* in *ASIC Corporations (Relevant interests, ASIC and ASIC Chairperson) Instrument 2023/194* to reflect the changes described at paragraph 18.

Purpose of the RE Change Instrument

5. In the case of *MTM Funds Management Ltd v Cavalane Holdings Pty Ltd* [2000] NSWSC 922, an issue was raised about the interaction between section 601FM and the Meetings Procedure Provision. The Meetings Procedure Provision set out the procedures for convening members' meetings to consider and vote on special or extraordinary resolutions. Unlike an ordinary resolution which requires a simple majority of votes in favour of it to be passed, these kinds of resolutions require a greater majority. For example, to pass a special resolution requires 75% of the votes cast by members entitled to vote on the resolution.
6. The issue in the case was whether a resolution under section 601FM could be an ordinary resolution or whether a special resolution was required. If a special resolution were required, it could be difficult for members of a listed registered scheme to change the responsible entity, thereby potentially entrenching control in the incumbent responsible entity. The Court decided that section 601FM

required an ordinary resolution to be passed and that the reference to taking action under the Meetings Procedure Provision related to the procedure required to convene the meeting and not the kind of resolution required.

7. In 2001, ASIC made [Superseded Class Order \[CO 01/1541\]](#) *Changing the responsible entity (ISCO 01/1541)* to clarify the interaction between section 601FM and the Meetings Procedure Provision. The class order made it clear that if members of a listed registered scheme wanted to change the responsible entity, they could request or call a meeting to consider and vote on an ordinary, rather than a special or extraordinary, resolution. This is consistent with the position for changing company directors. The class order also clarified how the procedural aspects of convening a members meeting under the Meetings Procedure Provision applied in this context.
8. In 2013, ASIC reviewed the policy underlying [SCO 01/1541] as part of a wider review of class orders relating to the takeover provisions in Chapters 6-6C. The review of the class order was within the scope of this wider review as, in broad terms, the takeover provisions relate to changes in control of both companies and listed registered schemes. ASIC considered that the relief provided in the class order was still both necessary and appropriate. ASIC decided to reissue the relief underlying the class order in [CO 13/519].
9. ASIC recently reviewed the policy underlying [CO 13/519] as part of another wider review of legislative instruments relating to takeover provisions in Chapters 6–6C. ASIC considers that the relief provided in [CO 13/519] is still both necessary and appropriate. ASIC has decided to reissue the relief underlying [CO 13/519] in the RE Change Instrument.

Purpose of the Amendment and Repeal Instrument

10. The purpose of the Amendment and Repeal Instrument is to repeal [CO 13/519], [CO 13/520], [CO 13/521], [CO 13/522], [CO 13/524], [CO 13/525], [CO 13/526], and [CO 13/528] to ensure there is no overlap between these instruments and those that replace them, and in the case of [CO 13/520] to ensure there is no overlap between that instrument and the *Treasury Laws Amendment (2023 Law Improvement Package No. 1) Act 2023* as explained below at paragraph 18.
11. The Amendment and Repeal Instrument also repeals the other ASIC instruments that are named in paragraph 4 above, as they are spent and so can be removed from the Federal Register of Legislation.

Consultation

12. On 30 November 2022, ASIC released Consultation Paper 365 (**CP 365**) seeking feedback on proposals to remake nine class orders relating to takeovers, compulsory acquisitions and relevant interests (including [CO 12/1209], [CO 13/519], [CO 13/520], [CO 13/521], [CO 13/522], [CO 13/524], [CO 13/525], [CO 13/526], and [CO 13/528]). The consultation period closed on 23 January 2023.

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13. CP 365 invited feedback as to whether [CO 13/519] was operating effectively and efficiently, or whether there were issues or improvements that should be considered to improve its operation.
 14. ASIC received 4 submissions in response to CP 365, one of which addressed [CO 13/519]. We took that submission into account in making the RE Change Instrument. Details of the submissions received are contained in REP 773 Response to submissions on CP 365 which is available on ASIC's website at www.asic.gov.au.

Operation of the RE Change Instrument

15. The RE Change Instrument modifies section 601FM. It includes procedures for convening a meeting of members of a listed registered scheme to consider and vote on resolutions to remove and replace the responsible entity. It makes it clear that the resolutions are ordinary resolutions.

Legislative instrument and primary legislation

16. The subject matter and policy implemented by the RE Change Instrument is more appropriate for a legislative instrument rather than primary legislation because it provides administrative relief in circumstances where strict compliance with the primary legislation produces an unintended or unforeseen result.
17. It will be a matter for the Government and for Parliament as to whether the *Corporations Act 2001* or *Corporations Regulations 2001* may be amended in future to include the relief in the RE Change Instrument.
18. On 21 September 2023, Schedule 5 of the *Treasury Laws Amendment (2023 Law Improvement Package No. 1) Act 2023* commenced and transferred the relief contained in [CO 13/520] into the *Corporations Act 2001*, to improve navigability of the law and provide industry and consumers with greater certainty and clarity. Since the relief provided in [CO 13/520] is now contained in the *Corporations Act 2001*, it is unnecessary for ASIC to remake [CO 13/520].

Duration of the RE Change Instrument

19. The RE Change Instrument expires after 5 years. This allows sufficient time for the Government and for Parliament to determine whether to amend the primary legislation or regulations to include the relief.

Legislative authority

20. The RE Change Instrument is made under section 601QA of the *Corporations Act 2001*. Paragraph 601QA(1)(b) provides that Chapter 5C of the Act applies as if specified provisions were omitted, modified or varied as specified in the declaration

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21. The RE Change Instrument commences on the day after it is registered on the Federal Register of Legislation and continues in force for 5 years until 1 October 2028.
 22. The Amendment and Repeal Instrument is made under subsections 601QA(1), 655A(1), 669(1), 673(1), 741(1), 926A(2), 951B(1), 992B(1) and 1020F(1) of the Act, paragraph 163(3)(d) of the *National Consumer Credit Protection Act 2009 (Credit Act)* and subsection 203A(3) of the National Credit Code found in Schedule 1 to the Credit Act, and section 335 of the *Superannuation Industry (Supervision) Act 1993*.
 23. Under subsection 33(3) of the *Acts Interpretation Act 1901* (as in force as at 1 January 2005 and as applicable to the relevant powers because of section 5C of the Act), where an Act confers a power to make any instrument, the power is to be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to amend any such instrument.
 24. As legislative instruments, each of the RE Change Instrument and the Amendment and Repeal Instrument are disallowable under section 42 of the *Legislation Act 2003*.

Statement of Compatibility with Human Rights

25. 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 (Changing the Responsible Entity) Instrument 2023/681

ASIC Corporations, Credit and Superannuation (Amendment and Repeal) Instrument 2023/699

Overview

1. The RE Change Instrument relates to section 601FM of the *Corporations Act 2001* which allows members of a listed registered scheme to vote on a resolution to remove and replace the responsible entity by taking action under Division 1 of Part 2G.4 of that Act, which deals with meetings of members of schemes. That Division sets out the procedures for convening members' meetings to consider and vote on special or extraordinary resolutions.
2. The RE Change Instrument deals with the interaction between section 601FM and that Division. It makes it clear that if members of a listed registered scheme want to change the responsible entity, they are able to request or call a meeting to consider and vote on an ordinary resolution rather than a special or extraordinary resolution.
3. The Amendment and Repeal Instrument repeals [Class Order \[CO 13/519\]](#) *Changing the responsible entity*, the predecessor to the RE Change Instrument, as well as [Class Order \[CO 13/520\]](#) *Relevant interests, voting power and exceptions to the general prohibition*, [Class Order \[CO 13/521\]](#) *Takeover bids*, [Class Order \[CO 13/522\]](#) *Compulsory acquisitions and buyouts*, [Class Order \[CO 13/524\]](#) *Bidder giving substantial holding notice*, [Class Order \[CO 13/525\]](#) *On-sale disclosure relief for scrip bids and schemes of arrangement*, [Class Order \[CO 13/526\]](#) *Warrants: Relevant interests and associations*, and [Class Order \[CO 13/528\]](#) *Changes to a bidder's statement between lodgement and dispatch*.
4. The Amendment and Repeal Instrument also repeals five other ASIC instruments that are spent, namely [Class Order \[CO 13/898\]](#) *Representative proceedings and proof of debt arrangements funded by conditional costs agreements*, [Class Order \[CO 14/1252\]](#) *Technical modifications to Schedule 10 of the Corporations Regulations*, [ASIC Credit \(Repeal\) Instrument 2016/1087](#), [ASIC Superannuation \(RSE Websites\) Instrument 2017/570](#) and [ASIC Corporations \(Repeal and Transitional—Relief for Providers of Retirement Estimates\) Instrument 2022/204](#).

Assessment of human rights implications

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5. The RE Change Instrument and the Amendment and Repeal Instrument do not engage any of the applicable rights or freedoms.

Conclusion

6. The RE Change Instrument and the Amendment and 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*.