

6 April 2023

Investment Managers
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001

By email: IM.sunsettingconsultation@asic.gov.au

Dear Sir or Madam

Consultation Paper 368: Remaking ASIC class orders [CO 13/519] and [CO 13/656] (CP 368)

1. The Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**) has prepared this submission in response to Consultation Paper 368 (**CP 368**), which was released by the Australian Securities and Investments Commission (**ASIC**) on 21 March 2023. The Committee thanks ASIC for this opportunity to respond to the proposals set out in CP 368.
2. CP 368 sets out ASIC's proposals to remake the following legislative instruments, which are due to sunset on 1 October 2023:
 - (a) Class Order [CO 13/519] *Changing the responsible entity (Class Order 13/519)*; and
 - (b) Class Order [CO 13/656] *Equality of treatment impacting on the acquisition of interests (Class Order 13/656)*,each of which would have effect until 1 October 2028.
3. The Committee notes that ASIC:
 - (a) has formed the preliminary view that each of the class orders is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework; and
 - (b) is not proposing to make substantive changes to the relief conferred by either class order.
4. The Committee's comments relating to each respective proposal and its corresponding class order are set out below.

Proposal B1—Class Order 13/519

5. The Committee has reviewed Attachment 1 to CP 368, which contains the draft proposed replacement instrument for Class Order 13/519 (**Attachment 1**).
6. The Committee notes that the provisions of the *Corporations Act 2001* (Cth) that create the issue that Class Order 13/519 (and its predecessor ASIC Class Order [CO 01/1541] *Changing the responsible entity*) seeks to resolve, are sections 252B, 252D and 252E.
7. These provisions are located in Part 2G.4 of the Corporations Act. ASIC does not have the power to modify the operation of Part 2G.4. It is for this reason that ASIC has exercised its power under section 601QA in Class Order 13/519 (and proposes to continue to exercise this power by issuing a replacement instrument for Class Order 13/519).
8. The Committee submits that, rather than extending the relief in Class Order 13/519 as contemplated in Attachment 1, a more appropriate permanent solution would be for Parliament to instead make amendments to sections 252B, 252D and 252E of the Corporations Act to make it clear that, in order to remove and replace the responsible entity of a listed registered scheme, members must pass an ordinary resolution (rather than a special or extraordinary resolution).

Proposal B2—Class Order 13/656

9. The Committee has reviewed Attachment 2 to CP 368, which contains the draft proposed replacement instrument for Class Order 13/656 (**Attachment 2**).
10. The Committee has no concerns about continuing the equal treatment relief that Class Order 13/656 currently provides to responsible entities of registered schemes and corporate directors of retail corporate collective investment schemes (**CCIVs**).
11. However, the Committee submits that similar equal treatment relief ought also to be granted to the corporate director of a wholesale CCIV from its duty under paragraph 1224D(3)(b) of the Corporations Act to act in the best interests of the members of the CCIV and, if there is a conflict between the interests of those members and its own interests, to give priority to the members' interests.
12. The Committee cannot see any logical reason why the corporate director of a wholesale CCIV should not be regulated in a similar manner to the corporate director of a retail CCIV in this regard.
13. The Committee notes that, if ASIC is minded to extend such relief to the corporate director of a wholesale CCIV, the drafting of Attachment 2 should be adapted as appropriate to reflect the fact that it is not possible for a wholesale CCIV to ever be listed on a financial market.

Expiry dates

14. The Committee notes that Class Order 13/519 and Class Order 13/656 have been in force for the maximum ten-year period since 2013, and ASIC is only seeking to extend the relevant relief for a further five years, until October 2028.

15. The Committee does not believe it is optimal for ASIC to continue to have to consult on, and remake, legislative instruments that are operating effectively. The Committee submits that it would be more efficient for the Corporations Act to be amended to reflect the relief provided in these class orders instead (in which case the relevant legislative instruments could be revoked prior to October 2028, with the revocation to take effect when the corresponding amendments to the Corporations Act commence).

Other comments

16. Separately from issuing the new legislative instruments, the Committee suggests that, to improve the ease of navigability of the regulatory regime and reduce potential confusion, ASIC should:
- (a) update its regulatory guides, which currently cross-refer to Class Order 13/519 and Class Order 13/656, and insert the names of the replacement legislative instruments in their place; and
 - (b) clearly show its current legislative instruments together with references to the former iterations of similar relief which those legislative instruments replaced.
17. Finally, the Committee notes that ASIC only provided for a three-week consultation period, and does not perceive any urgency to implement the proposals (as any replacement relief for the class orders does not need to be in effect until October 2023). Due to the Easter long weekend occurring during the consultation period (Friday 7 April and Monday 10 April are public holidays), the aggregate number of business days of the consultation period is less than 15. The Committee submits that, generally, it is better to allow a consultation period of at least 20 business days. In this case, a longer consultation period would have allowed time for all relevant committees of the Business Law Section of the Law Council to consider the draft submission internally and thereby achieve a broader perspective and consensus.
18. If ASIC has any questions, or would like to further discuss with any matters raised in this submission with the Committee, please do not hesitate to contact Pip Bell, Chair of the Financial Services Committee (pbell@pmclegal-australia.com).

Yours faithfully

A handwritten signature in black ink, appearing to read 'P. Argy', with a long, sweeping flourish extending to the right.

Philip Argy
Chairman
Business Law Section