





# **Managed Investments Act 1998**

**Act No. 62 of 1998 as amended**

This compilation was prepared on 29 March 2000

**[This Act was amended by Act No. 156 of 1999]**

[Schedule 9 (item 2) repealed and substituted the heading to Part 2 of Schedule 2.

This amendment commenced on 29 June 1998.]

Prepared by the Office of Legislative Drafting,  
Attorney-General's Department, Canberra



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# **An Act to amend the Corporations Law, and for related purposes**

## **1 Short title**

This Act may be cited as the *Managed Investments Act 1998*.

## **2 Commencement**

This Act commences immediately after all the items in Schedules 1, 2, 3 and 4 of the *Company Law Review Act 1998* have commenced.

## **3 Review of operation of Act**

- (1) The Minister must cause a review of the operation of this Act to be undertaken as soon as possible after the third anniversary of the commencement of this Act.
- (2) A person who undertakes such a review must give the Minister a written report of the review, including any recommendations for changes to the regulation of managed investments.
- (3) The Minister must cause a copy of the report to be tabled in each House of the Parliament within 6 months after the third anniversary of the commencement of this Act.

## **4 Schedules**

Subject to section 2, the Corporations Law and each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

## **Schedule 1—New managed investments provisions and transitional provisions**

### *Corporations Law set out in section 82 of the Corporations Act 1989*

#### **1 After Chapter 5B**

Insert:

### **Chapter 5C—Managed investment schemes**

#### **Part 5C.1—Registration of managed investment schemes**

##### **601EA Applying for registration**

- (1) To register a managed investment scheme, a person must lodge an application with the ASC.
- (2) The application must state:
  - (a) the name, and the address of the registered office, of the proposed responsible entity; and
  - (b) the name and address of a person who has consented to be the auditor of the compliance plan.
- (3) The applicant must have the consent referred to in paragraph (2)(b) when the application is lodged. After the scheme is registered, the applicant must give the consent to the responsible entity. The responsible entity must keep the consent.
- (4) The following must be lodged with the application:
  - (a) a copy of the scheme's constitution
  - (b) a copy of the scheme's compliance plan
  - (c) a statement signed by the directors of the proposed responsible entity that:
    - (i) the scheme's constitution complies with sections 601GA and 601GB; and

- (ii) the scheme's compliance plan complies with section 601HA.

Note: Section 601HC requires that the copy of the compliance plan be signed by the directors of the responsible entity.

### **601EB Registration of managed investment scheme**

- (1) The ASC must register the scheme within:
  - (a) 28 days if the application is lodged within 2 years after commencement of this Chapter; or
  - (b) 14 days if the application is lodged later than that; unless it appears to the ASC that:
    - (c) the application does not comply with section 601EA; or
    - (d) the proposed responsible entity does not meet the requirements of section 601FA; or
    - (e) the scheme's constitution does not meet the requirements of sections 601GA and 601GB; or
    - (f) the scheme's compliance plan does not meet the requirements of section 601HA; or
    - (g) the copy of the compliance plan lodged with the application is not signed as required by section 601HC; or
    - (h) arrangements are not in place that will satisfy the requirements of section 601HG in relation to audit of compliance with the plan.
- (2) If the ASC registers the scheme, the ASC must give it an ARSN.
- (3) The ASC must keep a record of the registration of the scheme.
- (4) For the purpose of determining whether subsection (1) is satisfied in relation to the scheme:
  - (a) references in Parts 5C.3, 5C.4 and 5C.5 to a registered scheme are taken to include a reference to the scheme; and
  - (b) references in those Parts to the responsible entity of a registered scheme are taken to include a reference to the proposed responsible entity of the scheme.

**601EC All documents etc. lodged with ASC to bear ARSN**

After a managed investment scheme is registered, the scheme's ARSN must appear on all documents relating to the scheme that are lodged with the ASC.

**601ED When a managed investment scheme must be registered**

- (1) Subject to subsection (2), a managed investment scheme must be registered under section 601EB if:
  - (a) it has more than 20 members; or
  - (b) it was promoted by a person, or an associate of a person, who was, when the scheme was promoted, in the business of promoting managed investment schemes; or
  - (c) a determination under subsection (3) is in force in relation to the scheme and the total number of members of all of the schemes to which the determination relates exceeds 20.
- (2) A managed investment scheme does not have to be registered if all the issues of interests in the scheme that have been made were excluded issues (disregarding paragraph 66(2)(da)) when they were made.
- (3) The ASC may, in writing, determine that a number of managed investment schemes are closely related and that each of them has to be registered at any time when the total number of members of all of the schemes exceeds 20. The ASC must give written notice of the determination to the operator of each of the schemes.
- (4) For the purpose of this section, when working out how many members a scheme has:
  - (a) joint holders of an interest in the scheme count as a single member; and
  - (b) an interest in the scheme held on trust for a beneficiary is taken to be held by the beneficiary (rather than the trustee) if:
    - (i) the beneficiary is presently entitled to a share of the trust estate or of the income of the trust estate; or
    - (ii) the beneficiary is, individually or together with other beneficiaries, in a position to control the trustee.

- (5) A person must not operate a managed investment scheme that this section requires to be registered under section 601EB unless the scheme is so registered.
- (6) For the purpose of subsection (5), a person is not operating a scheme merely because:
  - (a) they are acting as an agent or employee of another person; or
  - (b) they are taking steps to wind up the scheme or remedy a defect that led to the scheme being deregistered.
- (7) A person who would otherwise contravene subsection (5) because an interest in a scheme is held in trust for 2 or more beneficiaries (see paragraph (4)(b)) does not contravene that subsection if they prove that they did not know, and had no reason to suspect, that the interest was held in that way.

#### **601EE Unregistered schemes may be wound up**

- (1) If a person operates a managed investment scheme in contravention of subsection 601ED(5), the following may apply to the Court to have the scheme wound up:
  - (a) the ASC
  - (b) the person operating the scheme
  - (c) a member of the scheme.
- (2) The Court may make any orders it considers appropriate for the winding up of the scheme.

## **Part 5C.2—The responsible entity**

### **Division 1—Responsibilities and powers**

#### **601FA Responsible entity to be public company and hold dealers licence**

The responsible entity of a registered scheme must be a public company that holds a dealers licence authorising it to operate a managed investment scheme.

#### **601FB Responsible entity to operate scheme**

- (1) The responsible entity of a registered scheme is to operate the scheme and perform the functions conferred on it by the scheme's constitution and this Law.
- (2) The responsible entity has power to appoint an agent, or otherwise engage a person, to do anything that it is authorised to do in connection with the scheme. For the purpose of determining whether:
  - (a) there is a liability to the members; or
  - (b) the responsible entity has properly performed its duties for the purposes of subsection 601GA(2);

the responsible entity is taken to have done (or failed to do) anything that the agent or person has done (or failed to do) because of the appointment or engagement, even if they were acting fraudulently or outside the scope of their authority or engagement.

Note: A scheme's constitution may provide for the responsible entity to be indemnified for liabilities—see subsection 601GA(2).

- (3) An agent appointed, or a person otherwise engaged, by:
  - (a) the agent or person referred to in subsection (2); or
  - (b) a person who is taken under this subsection to be an agent of the responsible entity;to do anything that the responsible entity is authorised to do in connection with the scheme is taken to be an agent appointed by the responsible entity to do that thing for the purposes of subsection (2).

(4) If:

- (a) an agent holds scheme property on behalf of the responsible entity; and
- (b) the agent is liable to indemnify the responsible entity against any loss or damage that:
  - (i) the responsible entity suffers as a result of a wrongful or negligent act or omission of the agent; and
  - (ii) relates to a failure by the responsible entity to perform its duties in relation to the scheme;

any amount recovered under the indemnity forms part of the scheme property.

### **601FC Duties of responsible entity**

- (1) In exercising its powers and carrying out its duties, the responsible entity of a registered scheme must:
  - (a) act honestly; and
  - (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity's position; and
  - (c) act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests; and
  - (d) treat the members who hold interests of the same class equally and members who hold interests of different classes fairly; and
  - (e) not make use of information acquired through being the responsible entity in order to:
    - (i) gain an improper advantage for itself or another person; or
    - (ii) cause detriment to the members of the scheme; and
  - (f) ensure that the scheme's constitution meets the requirements of sections 601GA and 601GB; and
  - (g) ensure that the scheme's compliance plan meets the requirements of section 601HA; and
  - (h) comply with the scheme's compliance plan; and
  - (i) ensure that scheme property is:
    - (i) clearly identified as scheme property; and

- (ii) held separately from property of the responsible entity and property of any other scheme; and
- (j) ensure that the scheme property is valued at regular intervals appropriate to the nature of the property; and
- (k) ensure that all payments out of the scheme property are made in accordance with the scheme's constitution and this Law; and
- (l) report to the ASC any breach of this Law that:
  - (i) relates to the scheme; and
  - (ii) has had, or is likely to have, a materially adverse effect on the interests of members;as soon as practicable after it becomes aware of the breach; and
- (m) carry out or comply with any other duty, not inconsistent with this Law, that is conferred on the responsible entity by the scheme's constitution.

Note: Subsection (1) is a civil penalty provision as defined by section 1317DA and Part 9.4B provides for civil and criminal consequences of contravening it.

- (2) The responsible entity holds scheme property on trust for scheme members.

Note: Under subsection 601FB(2), the responsible entity may appoint an agent to hold scheme property separately from other property.

- (3) A duty of the responsible entity under subsection (1) or (2) overrides any conflicting duty an officer or employee of the responsible entity has under section 232.

*Investment of scheme property in other managed investment schemes*

- (4) The responsible entity may only invest scheme property, or keep scheme property invested, in another managed investment scheme if that other scheme is registered under this Chapter.

**601FD Duties of officers of responsible entity**

- (1) An officer of the responsible entity of a registered scheme must:
  - (a) act honestly; and

- (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position; and
- (c) act in the best interests of the members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests; and
- (d) not make use of information acquired through being an officer of the responsible entity in order to:
  - (i) gain an improper advantage for the officer or another person; or
  - (ii) cause detriment to the members of the scheme; and
- (e) not make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme; and
- (f) take all steps that a reasonable person would take, if they were in the officer's position, to ensure that the responsible entity complies with:
  - (i) this Law; and
  - (ii) any conditions imposed on the responsible entity's dealers licence; and
  - (iii) the scheme's constitution; and
  - (iv) the scheme's compliance plan.

Note: Subsection (1) is a civil penalty provision as defined in section 1317DA and Part 9.4B provides for civil and criminal consequences of contravening it.

- (2) A duty of an officer of the responsible entity under subsection (1) overrides any conflicting duty the officer has under section 232.

### **601FE Duties of employees of responsible entity**

- (1) An employee of the responsible entity of a registered scheme must not:
  - (a) make use of information acquired through being an employee of the responsible entity in order to:
    - (i) gain an improper advantage for the employee or another person; or

- (ii) cause detriment to members of the scheme; or
- (b) make improper use of their position as an employee to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme.

Note: Subsection (1) is a civil penalty provision as defined in section 1317DA and Part 9.4B provides for civil and criminal consequences of contravening it.

- (2) A duty of an employee of the responsible entity under subsection (1) overrides any conflicting duty the employee has under section 232.

### **601FF Surveillance checks by ASC**

- (1) The ASC may, from time to time, check whether the responsible entity of a registered scheme is complying with the scheme's constitution and compliance plan and with this Law.

Note: For this purpose the ASC may exercise the powers set out in Division 3 of Part 3 of the *Australian Securities Commission Act 1989*.

- (2) The responsible entity and its officers must take all reasonable steps to assist the ASC in carrying out a check under subsection (1).

### **601FG Acquisition of interest in scheme by responsible entity**

The responsible entity of a registered scheme may acquire and hold an interest in the scheme, but it must only do so:

- (a) for not less than the consideration that would be payable if the interest were acquired by another person; and
- (b) subject to terms and conditions that would not disadvantage other members.

Note 1: If the responsible entity holds an interest in the scheme, it does so subject to section 253E (certain members cannot vote or be counted).

Note 2: This section is a civil penalty provision as defined in section 1317DA and Part 9.4B provides for civil and criminal consequences of contravening it.

**601FH Liquidator etc. of responsible entity entitled to exercise indemnity rights**

If the company that is a registered scheme's responsible entity is being wound up, is under administration or has executed a deed of company arrangement that has not terminated:

- (a) a provision of the scheme's constitution, or of another instrument, is void against the liquidator, or the administrator of the company or the deed, if it purports to deny the company a right to be indemnified out of the scheme property that the company would have had if it were not being wound up, were not under administration, or had not executed a deed of company arrangement; and
- (b) a right of the company to be indemnified out of the scheme property may only be exercised by the liquidator or the administrator of the company or the deed.

## **Division 2—Changing the responsible entity**

### **601FJ Changes only take effect when ASC alters record of registration**

- (1) Despite anything in this Division, the company named in the ASC's record of registration as the responsible entity or temporary responsible entity of a registered scheme remains the scheme's responsible entity until the record is altered to name another company as the scheme's responsible entity or temporary responsible entity.
- (2) A purported change of the scheme's responsible entity is ineffective unless it is in accordance with this Division.

### **601FK Requirements of section 601FA must be met**

A company cannot be chosen or appointed as the responsible entity or temporary responsible entity of a registered scheme unless it meets the requirements of section 601FA.

### **601FL Retirement of responsible entity**

- (1) If the responsible entity of a registered scheme wants to retire, it must call a members' meeting to explain its reason for wanting to retire and to enable the members to vote on an extraordinary resolution to choose a company to be the new responsible entity.
- (2) If the members choose a company to be the new responsible entity and that company has consented, in writing, to becoming the scheme's responsible entity:
  - (a) as soon as practicable and in any event within 2 business days after the resolution is passed, the current responsible entity must lodge a notice with the ASC asking it to alter the record of the scheme's registration to name the chosen company as the scheme's responsible entity; and
  - (b) if the current responsible entity does not lodge the notice required by paragraph (a), the company chosen by the members to be the new responsible entity may lodge that notice; and

- (c) the ASC must comply with the notice when it is lodged.
- (3) If the members do not choose a company to be the new responsible entity, or the company they choose does not consent to becoming the scheme's responsible entity, the current responsible entity may apply to the Court for appointment of a temporary responsible entity under section 601FP.
- (4) A person must not lodge a notice under subsection (2) unless the consent referred to in that subsection has been given before the notice is lodged.

**601FM Removal of responsible entity by members**

- (1) If members of a registered scheme want to remove the responsible entity, they may take action under Division 1 of Part 2G.4 for the calling of a members' meeting to consider and vote on:
  - (a) an extraordinary resolution that the current responsible entity should be removed; and
  - (b) an extraordinary resolution choosing a company to be the new responsible entity.
- (2) If the members vote to remove the responsible entity and, at the same meeting, choose a company to be the new responsible entity that consents, in writing, to becoming the scheme's responsible entity:
  - (a) as soon as practicable and in any event within 2 business days after the resolution is passed, the current responsible entity must lodge a notice with the ASC asking it to alter the record of the scheme's registration to name the chosen company as the scheme's responsible entity; and
  - (b) if the current responsible entity does not lodge the notice required by paragraph (a), the company chosen by the members to be the new responsible entity may lodge that notice; and
  - (c) the ASC must comply with the notice when it is lodged.
- (3) A person must not lodge a notice under subsection (2) unless the consent referred to in that subsection has been given before the notice is lodged.

Note: If the members vote to remove the responsible entity but do not, at the same meeting, choose a company to be the new responsible entity, or the company they choose does not consent to becoming the scheme's responsible entity, the scheme must be wound up (see section 601NE).

**601FN ASC or scheme member may apply to Court for appointment of temporary responsible entity**

The ASC or a member of the registered scheme may apply to the Court for the appointment of a temporary responsible entity of the scheme under section 601FP if the scheme does not have a responsible entity that meets the requirements of section 601FA.

**601FP Appointment of temporary responsible entity by Court**

- (1) On application under section 601FL or 601FN, the Court may, by order, appoint a company as the temporary responsible entity of a registered scheme if the Court is satisfied that the appointment is in the interest of the members.
- (2) The Court may make any further orders that it considers necessary.
- (3) If the application was made by the current responsible entity, it must, as soon as practicable after the Court's order appointing the temporary responsible entity, lodge a notice with the ASC informing the ASC of the appointment made by the Court.
- (4) As soon as practicable after the appointment, the ASC must alter the record of the scheme's registration to name the appointed company as the scheme's temporary responsible entity.

**601FQ Temporary responsible entity to take steps for appointment of new responsible entity**

- (1) The temporary responsible entity of a registered scheme must call a members' meeting for the purpose of the members, by extraordinary resolution, choosing a company to be the new responsible entity. The temporary responsible entity must call the meeting as soon as practicable and, in any event, within 3 months of becoming the temporary responsible entity.
  - (2) Within that 3 months, the temporary responsible entity may call further members' meetings for the purpose of choosing a company
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to be the new responsible entity. Before the end of the 3 months, it may apply to the Court for an extension of that period. If the Court grants the extension, the temporary responsible entity may, within the extended period, call further members' meetings for the purpose of choosing a company to be the new responsible entity.

- (3) Provided it still meets the requirements in section 601FA, nothing prevents the company that is the temporary responsible entity from being chosen as the new responsible entity.
- (4) If the members choose a company to be the new responsible entity and that company has consented, in writing, to becoming the scheme's responsible entity, the temporary responsible entity must, as soon as practicable, lodge a notice with the ASC asking it to alter the record of the scheme's registration to name the chosen company as the scheme's responsible entity. The ASC must comply with the notice when it is lodged.
- (5) The temporary responsible entity must apply to the Court for an order directing it to wind up the scheme, and the Court may make the order, if:
  - (a) no meeting is called within the 3 months or extended period for the purpose of choosing a new company to be the responsible entity; or
  - (b) the meeting or meetings called within that period for that purpose have not resulted in the members choosing a company to be the new responsible entity that consents to becoming the scheme's responsible entity.

The ASC or a member of the scheme may apply for the order if the temporary responsible entity does not do so.

- (6) The temporary responsible entity must not lodge a notice under subsection (4) unless the consent referred to in that subsection has been given before the notice is lodged.

### **Division 3—Consequences of change of responsible entity**

#### **601FR Former responsible entity to hand over books and provide reasonable assistance**

If the responsible entity of a registered scheme changes, the former responsible entity must:

- (a) as soon as practicable give the new responsible entity any books in the former responsible entity's possession or control that this Law requires to be kept in relation to the scheme; and
- (b) give other reasonable assistance to the new responsible entity to facilitate the change of responsible entity.

#### **601FS Rights, obligations and liabilities of former responsible entity**

- (1) If the responsible entity of a registered scheme changes, the rights, obligations and liabilities of the former responsible entity in relation to the scheme become rights, obligations and liabilities of the new responsible entity.
- (2) Despite subsection (1), the following rights and liabilities remain rights and liabilities of the former responsible entity:
  - (a) any right of the former responsible entity to be paid fees for the performance of its functions before it ceased to be the responsible entity; and
  - (b) any right of the former responsible entity to be indemnified for expenses it incurred before it ceased to be the responsible entity; and
  - (c) any right, obligation or liability that the former responsible entity had as a member of the scheme; and
  - (d) any liability for which the former responsible entity could not have been indemnified out of the scheme property if it had remained the scheme's responsible entity.

**601FT Effect of change of responsible entity on documents etc. to which former responsible entity is party**

- (1) If the responsible entity of a registered scheme changes, a document:
  - (a) to which the former responsible entity is a party, in which a reference is made to the former responsible entity, or under which the former responsible entity has acquired or incurred a right, obligation or liability, or might have acquired or incurred a right, obligation or liability if it had remained the responsible entity; and
  - (b) that is capable of having effect after the change;has effect as if the new responsible entity (and not the former responsible entity) were a party to it, were referred to in it or had or might have acquired or incurred the right, obligation or liability under it.
- (2) Subsection (1) does not apply to a right, obligation or liability that remains a right, obligation or liability of the former responsible entity because of subsection 601FS(2).

## Part 5C.3—The constitution

### 601GA Contents of the constitution

- (1) The constitution of a registered scheme must make adequate provision for:
    - (a) the consideration that is to be paid to acquire an interest in the scheme; and
    - (b) the powers of the responsible entity in relation to making investments of, or otherwise dealing with, scheme property; and
    - (c) the method by which complaints made by members in relation to the scheme are to be dealt with; and
    - (d) winding up the scheme.
  - (2) If the responsible entity is to have any rights to be paid fees out of scheme property, or to be indemnified out of scheme property for liabilities or expenses incurred in relation to the performance of its duties, those rights:
    - (a) must be specified in the scheme's constitution; and
    - (b) must be available only in relation to the proper performance of those duties;and any other agreement or arrangement has no effect to the extent that it purports to confer such a right.
  - (3) If the responsible entity is to have any powers to borrow or raise money for the purposes of the scheme:
    - (a) those powers must be specified in the scheme's constitution; and
    - (b) any other agreement or arrangement has no effect to the extent that it purports to confer such a power.
  - (4) If members are to have a right to withdraw from the scheme, the scheme's constitution must:
    - (a) specify the right; and
    - (b) if the right may be exercised while the scheme is liquid (as defined in section 601KA)—set out adequate procedures for making and dealing with withdrawal requests; and
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- (c) if the right may be exercised while the scheme is not liquid (as defined in section 601KA)—provide for the right to be exercised in accordance with Part 5C.6 and set out any other adequate procedures (consistent with that Part) that are to apply to making and dealing with withdrawal requests.

The right to withdraw, and any provisions in the constitution setting out procedures for making and dealing with withdrawal requests, must be fair to all members.

### **601GB Constitution must be legally enforceable**

The constitution of a registered scheme must be contained in a document that is legally enforceable as between the members and the responsible entity.

### **601GC Changing the constitution**

- (1) The constitution of a registered scheme may be modified, or repealed and replaced with a new constitution:
  - (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.
- (2) The responsible entity must lodge with the ASC a copy of the modification or the new constitution. The modification, or repeal and replacement, cannot take effect until the copy has been lodged.
- (3) The responsible entity must lodge with the ASC a consolidated copy of the scheme's constitution if the ASC directs it to do so.
- (4) The responsible entity must send a copy of the scheme's constitution to a member of the scheme within 7 days if the member:
  - (a) asks the responsible entity, in writing, for the copy; and
  - (b) pays any fee (up to the prescribed amount) required by the responsible entity.

## Part 5C.4—The compliance plan

### 601HA Contents of the compliance plan

- (1) The compliance plan of a registered scheme must set out adequate measures that the responsible entity is to apply in operating the scheme to ensure compliance with this Law and the scheme's constitution, including the arrangements for:
  - (a) ensuring that all scheme property is clearly identified as scheme property and held separately from property of the responsible entity and property of any other scheme (see paragraph 601FC(1)(i)); and
  - (b) if the scheme is required to have a compliance committee (see section 601JA)—ensuring that the compliance committee functions properly, including adequate arrangements relating to:
    - (i) the membership of the committee; and
    - (ii) how often committee meetings are to be held; and
    - (iii) the committee's reports and recommendations to the responsible entity; and
    - (iv) the committee's access to the scheme's accounting records and to the auditor of the scheme's financial statements; and
    - (v) the committee's access to information that is relevant to the responsible entity's compliance with this Law; and
  - (c) ensuring that the scheme property is valued at regular intervals appropriate to the nature of the property; and
  - (d) ensuring that compliance with the plan is audited as required by section 601HG; and
  - (e) ensuring adequate records of the scheme's operations are kept; and
  - (f) any other matter prescribed by the regulations.
- (2) If:
  - (a) a registration application is made as a result of a resolution passed under subparagraph 1457(1)(a)(i); and

(b) the resolution included a direction under subsection 1457(1A);

the compliance plan lodged with the application must provide for scheme property to be held by a person other than the responsible entity, or a person that is not related to the responsible entity, as the responsible entity's agent.

**601HB Compliance plan may incorporate provisions from another scheme's plan**

- (1) The responsible entity of a registered scheme may lodge with the ASC a compliance plan for the scheme that is expressed to incorporate specified provisions, as in force at a specified time, of a compliance plan of another registered scheme of which it is also the responsible entity.
- (2) The specified provisions, as in force at the specified time, are taken to be included in the plan.

**601HC Directors must sign lodged copy of compliance plan**

The copy of a scheme's compliance plan that is lodged with the ASC must be signed by all the directors of the responsible entity.

**601HD ASC may require further information about compliance plan**

The ASC may direct the responsible entity of a registered scheme to give it information about the arrangements contained in the compliance plan. The direction is to be given by notice in writing to the responsible entity.

**601HE Changing the compliance plan**

*Responsible entity's powers*

- (1) The responsible entity of a registered scheme may modify the scheme's compliance plan or repeal it and replace it with a new compliance plan.

*ASC may require modifications*

- (2) The ASC may direct the responsible entity of a registered scheme to modify the scheme's compliance plan, as set out in the direction, to ensure that the plan is consistent with section 601HA. The direction is to be given by notice in writing to the responsible entity.

*Lodgment of modification or new plan*

- (3) The responsible entity must lodge with the ASC a copy of a modification of the scheme's compliance plan or of a new compliance plan within 14 days after the modification is made or the old plan is repealed. The copy must be signed by all the directors of the responsible entity.

**601HF ASC may require consolidation of compliance plan to be lodged**

- (1) The ASC may direct the responsible entity of a registered scheme to lodge a consolidated copy of the scheme's compliance plan.
- (2) The consolidation must set out:
  - (a) the plan as modified to the time of lodgment; and
  - (b) if required by the ASC's direction—the full text of provisions taken to be included in the plan by subsection 601HB(2).

**601HG Audit of compliance plan**

- (1) The responsible entity of a registered scheme must ensure that at all times a registered company auditor is engaged to audit compliance with the scheme's compliance plan in accordance with this section. This auditor is referred to as the *auditor of the compliance plan*.
- (2) A person is not eligible to act as the auditor of the compliance plan if the person is:
  - (a) an associate of the responsible entity; or
  - (b) an agent holding scheme property on behalf of the responsible entity or an associate of an agent of that kind; or
  - (c) the auditor of the responsible entity's financial statements.

The auditor of the compliance plan and the auditor of the responsible entity's financial statements may, however, work for the same firm of auditors.

- (3) Within 3 months after the end of a financial year of the scheme, the auditor of the compliance plan must:
- (a) examine the scheme's compliance plan; and
  - (b) carry out:
    - (i) if the scheme has only had one responsible entity during the financial year—an audit of the responsible entity's compliance with the compliance plan during the financial year; or
    - (ii) if the scheme has had more than one responsible entity during the financial year—an audit of each responsible entity's compliance with the compliance plan during that part of the financial year when it was the scheme's responsible entity; and
  - (c) give to the scheme's current responsible entity a report that states whether, in the auditor's opinion:
    - (i) the responsible entity, or each responsible entity, complied with the scheme's compliance plan during the financial year or that part of the financial year when it was the scheme's responsible entity; and
    - (ii) the plan continues to meet the requirements of this Part.
- (4) The auditor of the compliance plan must, as soon as possible, notify the ASC in writing if the auditor:
- (a) has reasonable grounds to suspect that a contravention of this Law has occurred; and
  - (b) believes that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report under subsection (3) or bringing it to the attention of the responsible entity.
- (5) The auditor of the compliance plan:
- (a) has a right of access at all reasonable times to the books of the scheme; and
  - (b) may require an officer of the responsible entity to give the auditor information and explanations for the purposes of the audit.
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- (6) An officer of the responsible entity must:
  - (a) allow the auditor of the compliance plan to have access to the books of the scheme; and
  - (b) give the auditor information or an explanation required under subsection (5); and
  - (c) otherwise assist the conduct of the audit.
- (7) The responsible entity must lodge the auditor's report under subsection (3) with the ASC at the same time as the financial statements and reports in respect of the scheme are to be lodged with the ASC (see sections 292 and 321).
- (8) The auditor of the compliance plan has qualified privilege in respect of:
  - (a) a statement made in a report under subsection (3); or
  - (b) a notification to the ASC under subsection (4).
- (9) This section does not prevent the responsible entity from arranging for the auditor of the compliance plan to carry out audits in addition to those required by this section.

#### **601HH Removal and resignation of auditors**

##### *Removal of auditor by responsible entity*

- (1) The responsible entity:
  - (a) must remove the auditor of the compliance plan if the auditor becomes ineligible under subsection 601HG(2) to act as auditor of the compliance plan; and
  - (b) may, with the ASC's consent, remove the auditor of the compliance plan.

##### *Resignation of auditor*

- (2) The auditor of the compliance plan may resign by written notice to the responsible entity if:
  - (a) the auditor:
    - (i) applies to the ASC in writing for its consent to the resignation; and

- (ii) gives the responsible entity written notice of the application at or about the same time as applying to the ASC; and
  - (b) the ASC consents to the resignation.
- (3) As soon as practicable after receiving the application, the ASC must notify the auditor and the responsible entity whether it consents to the resignation.
- (4) A statement by the auditor in the application or in answer to an inquiry by the ASC relating to the reasons for the application:
  - (a) is not admissible in evidence in any civil or criminal proceedings in a court of this jurisdiction against the auditor (other than proceedings for a contravention of section 1308); and
  - (b) may not be made the ground of a prosecution (other than a prosecution for a contravention of section 1308), action or suit against the auditor.

A certificate by the ASC that the statement was made in the application, or in answer to an inquiry by the ASC, is conclusive evidence that the statement was so made.
- (5) The auditor's resignation takes effect on the later of:
  - (a) the day (if any) specified in the notice of resignation; or
  - (b) the day the ASC consents to the resignation; or
  - (c) the day (if any) fixed by the ASC for the purpose.

#### **601HI Action on change of auditor of compliance plan**

If the auditor of the compliance plan of a registered scheme changes, the responsible entity must, as soon as practicable after the change and in writing, ask the ASC to alter the record of the scheme's registration to show the name of the new auditor as the auditor of the scheme's compliance plan. The ASC must comply with the request if the change complies with the Law.

## **Part 5C.5—The compliance committee**

### **601JA When is a compliance committee required?**

- (1) The responsible entity of a registered scheme must establish a compliance committee if less than half of the directors of the responsible entity are external directors.
- (2) A director of the responsible entity is an external director if they:
  - (a) are not, and have not been in the previous 2 years, an employee of the responsible entity or a related body corporate; and
  - (b) are not, and have not been in the previous 2 years, an executive officer of a related body corporate; and
  - (c) are not, and have not been in the previous 2 years, substantially involved in business dealings, or in a professional capacity, with the responsible entity or a related body corporate; and
  - (d) are not a member of a partnership that is, or has been in the previous 2 years, substantially involved in business dealings, or in a professional capacity, with the responsible entity or a related body corporate; and
  - (e) do not have a material interest in the responsible entity or a related body corporate; and
  - (f) are not a relative or de facto spouse of a person who has a material interest in the responsible entity or a related body corporate.
- (3) The responsible entity must establish the compliance committee within 14 days after it is required to do so by subsection (1) or within any longer period that the ASC has agreed to in writing.
- (4) In agreeing to a longer period under subsection (3), the ASC may impose conditions to be complied with and the responsible entity must comply with them.

### **601JB Membership of compliance committee**

- (1) A scheme's compliance committee must have at least 3 members, and a majority of them must be external members.
- (2) A member of the compliance committee is an external member if they:
  - (a) are not, and have not been in the previous 2 years, a non-external director, an executive officer or an employee of the responsible entity or a related body corporate; and
  - (b) are not, and have not been in the previous 2 years, substantially involved in business dealings, or in a professional capacity, with the responsible entity or a related body corporate; and
  - (c) are not a member of a partnership that is, or has been in the previous 2 years, substantially involved in business dealings, or in a professional capacity, with the responsible entity or a related body corporate; and
  - (d) do not have a material interest in the responsible entity or a related body corporate; and
  - (e) are not a relative or de facto spouse of a person who has a material interest in the responsible entity or a related body corporate.
- (3) For the purposes of paragraph (2)(a), a person who is a director of a related body corporate, but not of the responsible entity itself, is an external director of the related body corporate if they would have been an external director of the responsible entity under section 601JA(2) had they been a director of the responsible entity.
- (4) A person who is, or has been, either:
  - (a) an external director of the responsible entity; or
  - (b) a member of a compliance committee for the scheme or another registered managed investment scheme operated by the responsible entity;is not, merely because of that directorship or membership, taken to be, or to have been, substantially involved in business dealings, or in a professional capacity, with the responsible entity.
- (5) If the membership of the scheme's compliance committee ceases to satisfy subsection (1), the responsible entity must make

appointments to the committee to satisfy that subsection within 14 days or within any longer period that the ASC has agreed to in writing.

- (6) In agreeing to a longer period under subsection (5), the ASC may impose conditions to be complied with and the responsible entity must comply with them.

### **601JC Functions of compliance committee**

- (1) The functions of a scheme's compliance committee are:
- (a) to monitor to what extent the responsible entity complies with the scheme's compliance plan and to report on its findings to the responsible entity; and
  - (b) to report to the responsible entity:
    - (i) any breach of this Law involving the scheme; or
    - (ii) any breach of the provisions included in the scheme's constitution in accordance with section 601GA; of which the committee becomes aware or that it suspects; and
  - (c) to report to the ASC if the committee is of the view that the responsible entity has not taken, or does not propose to take, appropriate action to deal with a matter reported under paragraph (b); and
  - (d) to assess at regular intervals whether the compliance plan is adequate, to report to the responsible entity on the assessment and to make recommendations to the responsible entity about any changes that it considers should be made to the plan.
- (2) In carrying out its functions, the compliance committee may commission independent legal, accounting or other professional advice or assistance, at the reasonable expense of the responsible entity.

### **601JD Duties of members**

- (1) A member of a scheme's compliance committee must:
- (a) act honestly; and

- (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the member's position; and
- (c) not make use of information acquired through being a member of the committee in order to:
  - (i) gain an improper advantage for the member or another person; or
  - (ii) cause detriment to the members of the scheme; and
- (d) not make improper use of their position as a member of the committee to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme.

Note: Subsection (1) is a civil penalty provision as defined in section 1317DA and Part 9.4B provides for civil and criminal consequences of contravening it.

- (2) A member of the compliance committee is to take all reasonable steps to assist the ASC in carrying out a check under subsection 601FF(1).

#### **601JE Compliance committee members have qualified privilege in certain cases**

A member of a scheme's compliance committee has qualified privilege in respect of a statement concerning the operation of the scheme made by or on behalf of the committee, or a member of the committee, to the responsible entity or to the ASC.

#### **601JF When can responsible entity indemnify compliance committee members?**

- (1) A scheme's responsible entity or a related body corporate must not:
  - (a) indemnify a person who is or has been a member of the scheme's compliance committee against a liability incurred by the person as a member; or
  - (b) exempt the person from such a liability.
- (2) A provision of the scheme's constitution or a body corporate's constitution is void in so far as it provides for the responsible entity or a related body corporate to do something that subsection (1) prohibits.

- (3) Subsection (1) does not prevent a person from being indemnified against a liability to another person (other than the responsible entity or a related body corporate) unless the liability arises out of conduct involving a lack of good faith.
- (4) Subsection (1) does not prevent a person from being indemnified against a liability for costs and expenses incurred by them:
  - (a) in defending proceedings, whether civil or criminal, in which judgment is given in favour of them or in which they are acquitted; or
  - (b) in connection with an application, in relation to such proceedings, in which the Court grants relief to them under this Law.
- (5) In this section:  
*indemnify* includes indemnify indirectly through one or more interposed entities.

**601JG When can responsible entity pay insurance premiums for compliance committee members?**

- (1) A scheme's responsible entity or a related body corporate must not pay, or agree to pay, a premium in respect of a contract insuring a person who is or has been a member of the scheme's compliance committee against a liability:
  - (a) incurred by the person as a member; and
  - (b) arising out of conduct involving a wilful breach of a duty referred to in section 601JD.
- (2) If subsection (1) is contravened, the contract is void in so far as it insures the person against the liability.
- (3) Subsections (1) and (2) do not apply to a liability for costs and expenses incurred by a person in defending proceedings, whether civil or criminal and whatever their outcome.
- (4) In this section:  
*pay* includes pay indirectly through one or more interposed entities.

### **601JH Proceedings of compliance committee**

- (1) Subject to the requirements of the compliance plan, a scheme's compliance committee may regulate its proceedings as it thinks appropriate.
- (2) The committee must keep:
  - (a) minutes of its meetings; and
  - (b) records of its reports and recommendations.
- (3) A committee meeting may be held using any technology agreed to by all the members.

### **601JJ Disclosure of interests**

- (1) A member of a scheme's compliance committee must disclose to the committee a direct or indirect pecuniary interest that they have in a matter being considered, or about to be considered, by the committee if their interest could conflict with the proper performance of their duties in relation to the consideration of the matter.
- (2) A disclosure under subsection (1) must occur at the first meeting of the committee after the relevant facts have come to the member's knowledge and must be recorded in the minutes of the meeting.

## **Part 5C.6—Members’ rights to withdraw from a scheme**

### **601KA Members’ rights to withdraw**

#### *Withdrawal from schemes that are liquid*

- (1) The constitution of a registered scheme may make provision for members to withdraw from the scheme, wholly or partly, at any time while the scheme is liquid (see subsection 601GA(4)).

#### *Withdrawal from schemes that are not liquid*

- (2) The constitution of a registered scheme may make provision for members to withdraw from the scheme, wholly or partly, in accordance with this Part while the scheme is not liquid (see subsection 601GA(4)).

#### *Restrictions on withdrawal from schemes*

- (3) The responsible entity must not allow a member to withdraw from the scheme:
  - (a) if the scheme is liquid—otherwise than in accordance with the scheme’s constitution; or
  - (b) if the scheme is not liquid—otherwise than in accordance with the scheme’s constitution and sections 601KB to 601KE.

#### *Liquid schemes*

- (4) A registered scheme is liquid if liquid assets account for at least 80% of the value of scheme property.

#### *Liquid assets*

- (5) The following are liquid assets unless it is proved that the responsible entity cannot reasonably expect to realise them within the period specified in the constitution for satisfying withdrawal requests while the scheme is liquid:

- (a) money in an account or on deposit with a bank, building society or other financial institution
  - (b) bank accepted bills
  - (c) marketable securities (as defined in section 9)
  - (d) property of a prescribed kind.
- (6) Any other property is a liquid asset if the responsible entity reasonably expects that the property can be realised for its market value within the period specified in the constitution for satisfying withdrawal requests while the scheme is liquid.

**601KB Non-liquid schemes—offers**

- (1) The responsible entity of a registered scheme that is not liquid may offer members an opportunity to withdraw, wholly or partly, from the scheme to the extent that particular assets are available and able to be converted to money in time to satisfy withdrawal requests that members may make in response to the offer.
- (2) The withdrawal offer must be in writing and be made:
  - (a) if the constitution specifies procedures for making the offer—in accordance with those procedures; or
  - (b) otherwise—by giving a copy of the offer to all members of the scheme or to all members of a particular class.
- (3) The withdrawal offer must specify:
  - (a) the period during which the offer will remain open (this period must last for at least 21 days after the offer is made); and
  - (b) the assets that will be used to satisfy withdrawal requests; and
  - (c) the amount of money that is expected to be available when those assets are converted to money; and
  - (d) the method for dealing with withdrawal requests if the money available is insufficient to satisfy all requests.

The method specified under paragraph (d) must comply with section 601KD.
- (4) For joint members, a copy of the withdrawal offer need only be given to the joint member named first in the register of members.

- (5) As soon as practicable after making the withdrawal offer, the responsible entity must lodge a copy of the offer with the ASC.

**601KC Non-liquid schemes—only one withdrawal offer to be open at any time**

Only one withdrawal offer may be open at any time in relation to a particular interest in a registered scheme that is not liquid.

**601KD Non-liquid schemes—how payments are to be made**

The responsible entity of a registered scheme that is not liquid must ensure that withdrawal requests made in response to a withdrawal offer are satisfied within 21 days after the offer closes. No request made under the withdrawal offer may be satisfied while the offer is still open. If an insufficient amount of money is available from the assets specified in the offer to satisfy all requests, the requests are to be satisfied proportionately in accordance with the formula:

$$\text{Amount of money available} \times \frac{\text{Amount member requests to withdraw}}{\text{Total of all amounts members request to withdraw}}$$

**601KE Non-liquid schemes—responsible entity may cancel withdrawal offer**

- (1) The responsible entity of a registered scheme that is not liquid:
- (a) may cancel a withdrawal offer before it closes if the offer contains a material error; or
  - (b) must cancel a withdrawal offer before it closes if it is in the best interests of members to do so.
- (2) The cancellation must be made:
- (a) if the constitution specifies procedures for cancelling the withdrawal offer—in accordance with those procedures; or
  - (b) otherwise—by notice in writing to the members to whom the withdrawal offer was made.

- (3) The responsible entity must lodge written notice of the cancellation with the ASC.

## **Part 5C.7—Related party transactions**

### **601LA Part 3.2A applies with modifications**

Part 3.2A applies to a registered scheme with the modifications set out in sections 601LB to 601LE and as if:

- (a) references to a public company were instead references to the responsible entity of the scheme; and
- (b) references to a benefit being given to or received by a related party of a public company were instead references to a benefit being given to or received by the responsible entity or a related party; and
- (c) references to a resolution of a public company were instead references to a resolution of the members of the scheme; and
- (d) references to a general meeting were instead references to a members' meeting of the scheme; and
- (e) references to members of a public company were instead references to members of the scheme; and
- (f) references to the company's best interests were instead references to the best interests of the scheme's members.

### **601LB Replacement section 243A**

Part 3.2A applies as if section 243A were replaced by the following section:

#### **243A Object**

The object of this Part as it applies to a registered scheme is to protect the scheme property and the interests of members in the scheme property by requiring that, in general, financial benefits to the responsible entity or its related parties that could diminish or endanger the scheme property, or that could adversely affect the interests of members, must be disclosed, and approved by a members' meeting, before they are given.

### **601LC Replacement section 243H**

Part 3.2A applies as if section 243H were replaced by the following section:

#### **243H Prohibited financial benefits to responsible entity and related party**

- (1) The responsible entity of a registered scheme must not give a financial benefit to itself, or to a related party:
  - (a) out of the scheme property; or
  - (b) that could diminish or endanger the scheme property; unless Division 4 or 5 permits the benefit to be given.
- (2) A child entity of the responsible entity must not give a financial benefit:
  - (a) to itself, to the responsible entity, or to a related party of the responsible entity, out of the scheme property; or
  - (b) that could diminish or endanger the scheme property; unless Division 4 or 5 permits the benefit to be given.
- (3) Subsections (1) and (2) do not prevent the responsible entity from paying itself fees, and exercising rights to an indemnity, as provided for in the scheme's constitution under subsection 601GA(2).

### **601LD Omission of sections 243L, 243M and 243ZF**

Part 3.2A applies as if sections 243L, 243M and 243ZF were omitted.

Note: Instead of section 243ZF, the rule in section 253E will apply.

### **601LE Modification of section 243ZB**

Part 3.2A applies as if subsection 243ZB(1) were amended by omitting "subsection 243ZF(1)" and substituting "section 253E" and by omitting the note at the end.

## **Part 5C.8—Effect of contraventions (civil liability and voidable contracts)**

### **601MA Civil liability of responsible entity to members**

- (1) A member of a registered scheme who suffers loss or damage because of conduct of the scheme's responsible entity that contravenes a provision of this Chapter may recover the amount of the loss or damage by action against the responsible entity whether or not the responsible entity has been convicted of an offence, or has had a civil penalty order made against it, in respect of the contravention.
- (2) An action under subsection (1) must be begun within 6 years after the cause of action arises.
- (3) This section does not affect any liability that a person has under other provisions of this Law or under other laws.

### **601MB Voidable contracts where subscription offers and invitations contravene this Law**

- (1) If:
  - (a) a managed investment scheme is being operated in contravention of subsection 601ED(5) and a person (the *offeror*) offers an interest in the scheme for subscription, or issues an invitation to subscribe for an interest in the scheme; or
  - (b) a person (the *offeror*), in contravention of Part 7.12, offers an interest in a registered scheme for subscription, or issues an invitation to subscribe for an interest in a registered scheme;a contract entered into by a person (other than the offeror) to subscribe for the interest as a result of the person accepting the offer, or of the acceptance of an offer made by the person in response to the invitation, is voidable at the option of that person by notice in writing to the offeror.
- (2) If the person gives a notice under subsection (1), the obligations of the parties to the contract are suspended:

- (a) during the period of 21 days after the notice is given; and
  - (b) during the period beginning when an application is made under subsection (4) in relation to the notice and ending when the application, and any appeals arising out of it, have been finally determined or otherwise disposed of.
- (3) Subject to subsection (6), the notice takes effect to void the contract:
- (a) at the end of 21 days after the notice is given; or
  - (b) if, within that 21 days, the offeror applies under subsection (4)—at the end of the period when the obligations of the parties are suspended under paragraph (2)(b).
- (4) Within 21 days after the notice is given, the offeror may apply to the Court for an order declaring the notice to have had no effect.
- (5) The Court may extend the period within which the offeror may apply under subsection (4), even if the notice has taken effect.
- (6) On application under subsection (4), the Court may declare the notice to have had no effect if it is satisfied that, in all the circumstances, it is just and equitable to make the declaration.

## **Part 5C.9—Winding up**

### **601NA Winding up required by scheme’s constitution**

The constitution of a registered scheme may provide that the scheme is to be wound up:

- (a) at a specified time; or
- (b) in specified circumstances or on the happening of a specified event;

but a provision of the constitution that purports to provide that the scheme is to be wound up if a particular company ceases to be its responsible entity is of no effect (including for the purposes of paragraph 601NE(1)(a)).

### **601NB Winding up at direction of members**

If members of a registered scheme want the scheme to be wound up, they may take action under Division 1 of Part 2G.4 for the calling of a members’ meeting to consider and vote on an extraordinary resolution directing the responsible entity to wind up the scheme.

### **601NC Winding up if scheme’s purpose accomplished or cannot be accomplished**

- (1) If the responsible entity of a registered scheme considers that the purpose of the scheme:
  - (a) has been accomplished; or
  - (b) cannot be accomplished;it may, in accordance with this section, take steps to wind up the scheme.
- (2) The responsible entity must give to the members of the scheme and to the ASC a notice in writing:
  - (a) explaining the proposal to wind up the scheme, including explaining how the scheme’s purpose has been accomplished or why that purpose cannot be accomplished; and

- (b) informing the members of their rights to take action under Division 1 of Part 2G.4 for the calling of a members' meeting to consider the proposed winding up of the scheme and to vote on any extraordinary resolution members propose about the winding up of the scheme; and
  - (c) informing the members that the responsible entity is permitted to wind up the scheme unless a meeting is called to consider the proposed winding up of the scheme within 28 days of the responsible entity giving the notice to the members.
- (3) If no meeting is called within that 28 days to consider the proposed winding up, the responsible entity may wind up the scheme.

### **601ND Winding up ordered by Court**

- (1) The Court may, by order, direct the responsible entity of a registered scheme to wind up the scheme if:
- (a) the Court thinks it is just and equitable to make the order; or
  - (b) within 3 months before the application for the order was made, execution or other process was issued on a judgment, decree or order obtained in a court (whether an Australian court or not) in favour of a creditor of, and against, the responsible entity in its capacity as the scheme's responsible entity and the execution or process has been returned unsatisfied.
- (2) An order based on paragraph (1)(a) may be made on the application of:
- (a) the responsible entity; or
  - (b) a director of the responsible entity; or
  - (c) a member of the scheme; or
  - (d) the ASC.
- (3) An order based on paragraph (1)(b) may be made on the application of a creditor.

### **601NE The winding up of the scheme**

- (1) The responsible entity of a registered scheme must ensure that the scheme is wound up in accordance with its constitution and any orders under subsection 601NF(2) if:
  - (a) the scheme's constitution provides that the scheme is to be wound up at a specified time, in specified circumstances or on the happening of a specified event and that time is reached, those circumstances occur or that event occurs; or
  - (b) the members pass an extraordinary resolution directing the responsible entity to wind up the scheme; or
  - (c) the Court makes an order directing the responsible entity to wind up the scheme; or
  - (d) the members pass an extraordinary resolution to remove the responsible entity but do not, at the same meeting, pass an extraordinary resolution choosing a company to be the new responsible entity that consents to becoming the scheme's responsible entity.

Note: For the Court's power to order winding up, see subsection 601FQ(5) and section 601ND.

- (2) The responsible entity of a registered scheme may wind up the scheme in accordance with its constitution and any orders under subsection 601NF(2) if the responsible entity is permitted by subsection 601NC(3) to wind up the scheme.
- (3) Interests must not be issued in a registered scheme at a time after the responsible entity has become obliged to ensure the scheme is wound up, or after the scheme has started to be wound up.

### **601NF Other orders about winding up**

- (1) The Court may, by order, appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution and any orders under subsection (2) if the Court thinks it necessary to do so (including for the reason that the responsible entity has ceased to exist or is not properly discharging its obligations in relation to the winding up).
- (2) The Court may, by order, give directions about how a registered scheme is to be wound up if the Court thinks it necessary to do so

(including for the reason that the provisions in the scheme's constitution are inadequate or impracticable).

- (3) An order under subsection (1) or (2) may be made on the application of:
- (a) the responsible entity; or
  - (b) a director of the responsible entity; or
  - (c) a member of the scheme; or
  - (d) the ASC.

### **601NG Unclaimed money to be paid to ASC**

If, on completion of the winding up of a registered scheme, the person who has been winding up the scheme has in their possession or under their control any unclaimed or undistributed money or other property that was part of the scheme property, the person must, as soon as practicable, pay the money or transfer the property to the ASC to be dealt with under Part 9.7.

## Part 5C.10—Deregistration

### 601PA Deregistration—voluntary

*Responsible entity may apply for deregistration*

- (1) The responsible entity of a registered scheme may lodge an application for deregistration of the scheme with the ASC.
- (2) The responsible entity may only apply if:
  - (a) the scheme:
    - (i) has 20 or less members (calculated in accordance with subsection 601ED(4)) and all the members agree that the scheme should be deregistered; and
    - (ii) is not required to be registered by paragraph 601ED(1)(b) or (c); or
  - (b) because of subsection 601ED(2) (exemption based on excluded issues), the scheme is not required to be registered and all the members agree that the scheme should be deregistered; or
  - (c) the scheme is not a managed investment scheme.
- (3) If the ASC is satisfied that the application complies with subsections (1) and (2), it must give notice of the proposed deregistration:
  - (a) on the national database; and
  - (b) in the *Gazette*.When 2 months have passed since the *Gazette* notice, the ASC may deregister the scheme.
- (4) The ASC must give notice of the deregistration to the applicant.

### 601PB Deregistration by ASC

- (1) The ASC may decide to deregister a registered scheme if:
    - (a) the scheme does not have a responsible entity that meets the requirements of section 601FA; or
-

- (b) the scheme does not have a constitution that meets the requirements of sections 601GA and 601GB; or
- (c) the scheme does not have a compliance plan that meets the requirements of section 601HA; or
- (d) the scheme's property is not being:
  - (i) clearly identified as the scheme's property; and
  - (ii) held separately from property of the responsible entity and property of any other scheme;in accordance with the scheme's compliance plan; or
- (e) the following conditions are satisfied:
  - (i) the annual return for the scheme is at least 6 months late; and
  - (ii) no other documents have been lodged by or on behalf of the scheme in the last 18 months; and
  - (iii) the ASC has no reason to believe that the scheme is being operated; or
- (f) the scheme has been wound up.

*Deregistration procedure*

- (2) If the ASC decides to deregister a scheme under this section, it must give notice of the proposed deregistration:
  - (a) to the scheme's responsible entity; and
  - (b) to any other person who is winding up the scheme; and
  - (c) on the national database; and
  - (d) in the *Gazette*.

If the notice is given under paragraph (1)(a), (b), (c) or (d), the notice must specify the period at the end of which the ASC proposes to deregister the scheme.

- (3) The ASC may deregister the scheme:
  - (a) if paragraph (1)(a), (b), (c) or (d) applies—at the end of the period set out in the *Gazette* notice; or
  - (b) if paragraph (1)(e) or (f) applies—when 2 months have passed since the *Gazette* notice.
- (4) The ASC does not have to give a person notice under subsection (2) if the ASC does not have the necessary information about the person's address.

- (5) The ASC must give notice of the deregistration to everyone who was notified of the proposed deregistration under paragraph (2)(a) or (b).

### **601PC Reinstatement**

- (1) The ASC may reinstate the registration of a managed investment scheme if the ASC is satisfied that the scheme should not have been deregistered or if the defect that led to the scheme being deregistered has been remedied.
- (2) The Court may make an order that the ASC reinstate the registration of a managed investment scheme if:
  - (a) an application for reinstatement is made to the Court by:
    - (i) a person aggrieved by the deregistration; or
    - (ii) a person who was winding up the scheme; and
  - (b) the Court is satisfied that it is just that the scheme's registration be reinstated.
- (3) The Court may give any directions it thinks just for putting the scheme and other people in the same position, as far as possible, as if the scheme had not been deregistered.

#### *ASC to give notice of reinstatement*

- (4) The ASC must give notice of a reinstatement in the *Gazette*. If the ASC exercises its power under subsection (1) in response to an application by a person, the ASC must also give notice of the reinstatement to the applicant.

## Part 5C.11—Exemptions and modifications

### 601QA ASC's power to make exemption and modification orders

- (1) The ASC may:
  - (a) exempt a person from a provision of this Chapter; or
  - (b) declare that this Chapter applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

Without limiting this, the ASC may declare that this Chapter applies to a person as if section 601HA included a requirement for scheme property to be held by a person other than the responsible entity as the responsible entity's agent.

- (2) The exemption or declaration may:
  - (a) apply to all or specified provisions of this Chapter; or
  - (b) apply to all persons, specified persons, or a specified class of persons; and
  - (c) relate to all interests, specified interests or a specified class of interests in managed investment schemes; and
  - (d) relate to any other matter generally or as specified.
- (3) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only the ASC may apply to the Court for the order.
- (4) The exemption or declaration must be in writing and the ASC must publish notice of it in the *Gazette*.
- (5) For the purposes of this section, the *provisions of this Chapter* include:
  - (a) regulations made for the purposes of this Chapter; and
  - (b) definitions in this Law or the regulations as they apply to references in:
    - (i) this Chapter; or
    - (ii) regulations made for the purposes of this Chapter; and

(c) Division 11 of Part 11.2.

### **601QB Modification by regulations**

The regulations may modify the operation of this Chapter or any other provisions of this Law relating to securities in relation to:

- (a) a managed investment scheme; or
- (b) all managed investment schemes of a specified class.

## **2 After Division 10 of Part 11.2**

Insert:

### **Division 11—Changes resulting from the Managed Investments Act 1998**

#### **1451 Definitions**

In this Division:

*commencement* means the commencement of Chapter 5C of this Law.

*new Law* means this Law as in force after the commencement.

*old Law* means this law as in force immediately before the commencement.

*registered scheme* means a managed investment scheme that is registered under section 601EB of the new Law.

*registration application* means an application for registration of a managed investment scheme under section 601EB of the new Law.

*undertaking* includes scheme, enterprise, contract or arrangement.

#### **1452 Division applies to prescribed interests in existence immediately before commencement**

This Division applies to interests that, immediately before the commencement, were prescribed interests to which:

- (a) Division 5 of Part 7.12 of the old Law applied; or

(b) that Division would have applied but for the operation of subparagraph 7.12.04(c)(ii) of the Corporations Regulations; and that are interests in a managed investment scheme as defined in section 9 of the new Law. It also applies to the undertaking to which the interests relate and to the trustee or representative and the management company in relation to the interests.

#### **1453 Application of new Law to interests covered by approved deed immediately before commencement**

The new Law applies to prescribed interests covered by an approved deed immediately before commencement as if paragraph 601ED(1)(a) (requirement for 20 members) were omitted. This section ceases to apply to the prescribed interests covered by the deed if all the people who hold the interests agree that this section should cease to apply to the interests.

#### **1454 Old Law continues to apply for 2 years or until scheme registered**

- (1) The old Law continues to apply to the interests, the undertaking, the trustee or representative and the management company, for the period of 2 years starting on the commencement, unless, before then, the undertaking becomes a registered scheme.
- (2) The ASC may extend that period of 2 years if the undertaking is to be wound up at a fixed time after the 2 years and the ASC thinks it would be unreasonable to require the undertaking to become a registered scheme before being wound up.
- (3) Except for the purposes of applying to register the undertaking as a managed investment scheme under the new Law and dealing with the application, the new Law does not apply to the interests, the undertaking, the trustee or representative and the management company while the old Law continues to apply to them.
- (4) If the undertaking becomes a registered scheme within the period of 2 years referred to in subsection (1), section 601FC(4) of the new Law applies to the registered scheme for the remainder of that period as if prescribed interests that are still covered by an approved deed because of subsection (1) of this section were interests in a registered scheme.

**1455 Retirement from office of trustee or representative or management company**

- (1) This section provides for the bodies that hold the offices of trustee or representative and management company to retire from those offices. A retirement under this section takes effect if, and only if, the undertaking becomes a registered scheme.
- (2) One of the bodies may retire from the office it holds by giving written notice of its retirement to the other body. The body giving the notice must lodge a copy of it with the ASC.
- (3) Once one of the bodies has given a retirement notice to the other body, that other body cannot give a retirement notice. If both bodies give notices at the same time, the notice by the body that holds the office of management company is ineffective.
- (4) A retirement notice may only be given:
  - (a) while Division 5 of Part 7.12 of the old Law continues to apply to the prescribed interests; and
  - (b) during the first year after the commencement.
- (5) A retirement notice cannot be revoked.
- (6) Section 1456 sets out what happens when one of the bodies gives the other a retirement notice.
- (7) Section 1457 sets out what happens if neither of the bodies gives the other a retirement notice.
- (8) Sections 1458 to 1461 only confer rights and impose obligations on a body for so long as:
  - (a) if the body is the trustee or representative or the management company—the body continues to hold that office; and
  - (b) in any case—the undertaking is not a registered scheme.

**1456 What happens when one of the bodies receives a retirement notice**

- (1) If one of the bodies receives a retirement notice it must, within 2 months, decide either to:
  - (a) retire from the office it holds; or

- (b) lodge a registration application in relation to the undertaking naming itself as the proposed responsible entity.

The body must lodge a notice of its decision with the ASC.

Note: For the powers of the body if it decides to become the responsible entity, see section 1460.

- (2) If the body decides to retire:
  - (a) its retirement takes effect if, and only if, the undertaking becomes a registered scheme; and
  - (b) the body must, as soon as practicable after making its decision, convene a meeting of the holders of the prescribed interests to:
    - (i) choose a proposed responsible entity for the purpose of making a registration application; or
    - (ii) decide that the undertaking is to be wound up; and
  - (c) the body must lodge a notice with the ASC setting out the outcome of the meeting.

Note 1: For the powers of the proposed responsible entity, see section 1460.

Note 2: For the procedure at the meeting, see section 1460.

- (3) If, at the meeting held under paragraph (2)(b), the holders of the prescribed interests do not either choose a proposed responsible entity or decide that the undertaking is to be wound up, the management company may apply to the Court for an order directing it to wind up the scheme.

### **1457 What happens if neither of the bodies gives a retirement notice**

- (1) If neither of the bodies gives a retirement notice during the first year after the commencement, the management company must:
  - (a) as soon as practicable after the end of that year, convene a meeting of the holders of the prescribed interests to:
    - (i) choose a proposed responsible entity for the purpose of making a registration application; or
    - (ii) decide that the undertaking is to be wound up; and
  - (b) lodge a notice with the ASC setting out the outcome of the meeting.

Note 1: For the powers of the proposed responsible entity, see section 1460.

Note 2: For the procedure at the meeting, see section 1460.

- (1A) A resolution passed under subparagraph (1)(a)(i) may direct the proposed responsible entity to lodge with the registration application a compliance plan that provides for scheme property to be held by a person other than the responsible entity, or a person that is not related to the responsible entity, as the responsible entity's agent.
- (2) If, at the meeting, the holders of the prescribed interests do not either choose a proposed responsible entity or decide that the undertaking is to be wound up, the management company may apply to the Court for an order directing it to wind up the scheme.

### **1458 Winding up of the undertaking**

The trustee or representative for the purposes of the deed must ensure that the undertaking is wound up in accordance with the deed in relation to the prescribed interests and with any orders under subsection 1459(2) if:

- (a) the holders of the prescribed interests decide, at a meeting convened for the purpose of paragraph 1456(2)(b) or 1457(1)(a), that the undertaking is to be wound up; or
- (b) the Court makes an order directing the management company to wind up the undertaking pursuant to an application under subsection 1457(2).

### **1459 Other orders about winding up**

- (1) The Court may, by order, appoint a person to take responsibility for ensuring the undertaking is wound up in accordance with the deed and any orders under subsection (2) if the Court thinks it necessary to do so (including for the reason that the management company has ceased to exist or is not properly discharging its obligations in relation to the winding up).
- (2) The Court may, by order, give directions about how the undertaking is to be wound up if the court thinks it necessary to do so (including for the reason that the provisions in the deed are inadequate or impracticable).

- (3) An order under subsection (1) or (2) may be made on the application of:
  - (a) the management company or the trustee or representative; or
  - (b) a director of the management company or of the trustee or representative; or
  - (c) a holder of any of the prescribed interests; or
  - (d) the ASC.

### **1460 Powers of proposed responsible entity**

- (1) This section sets out the powers of:
  - (a) a body that decides under subsection 1456(1) to lodge a registration application in relation to the undertaking naming itself as the proposed responsible entity; or
  - (b) a body chosen by the holders of the prescribed interests as the proposed responsible entity at a meeting convened under paragraph 1456(2)(b) or 1457(1)(a).
- (2) The body has power to lodge a registration application in relation to the undertaking on behalf of the holders of the prescribed interests, and has power to do all things necessary for the purpose of the application.
- (3) The body has power to modify the deed in relation to the prescribed interests:
  - (a) if the purpose of the modification is to make the deed meet the requirements of section 601GA of the new Law for the constitution of a registered scheme; or
  - (b) the modification removes from the deed covenants that were included to satisfy the requirements of Division 5 of Part 7.12 of the old Law.

This is so despite any provision in the deed to the contrary.

- (4) Section 1069A of the old Law does not apply to the body's power to modify the deed (except as provided in section 1461).
- (5) The body must lodge a notice with the ASC setting out the modifications.
- (6) The body's power to modify the deed is subject to the following qualifications:

- (a) the modifications have effect if, and only if, the undertaking becomes a registered scheme; and
- (b) within 28 days of lodgment of the notice setting out the modifications, the ASC may require the management company to convene a meeting of the holders of the prescribed interests to ratify all or any of the modifications; and
- (c) if the ASC requires a modification to be ratified, it does not have effect under paragraph (a) unless it has been ratified and written notice of the ratification has been lodged with the ASC.

#### **1461 Meeting procedures**

Sections 1069A to 1069C of the old Law apply, with necessary modifications, for the purposes of convening, holding, and voting at meetings for the purpose of paragraph 1456(2)(b), 1457(1)(a) or 1460(6)(b).

#### **1462 Transfer of rights, obligations and liabilities**

If the undertaking becomes a registered scheme, Division 3 of Part 5C.2 of the new Law applies as if:

- (a) references to the new responsible entity were references to the responsible entity of the scheme on registration; and
- (b) references to the former responsible entity were references to either or both of the bodies that, immediately before the scheme's registration, held the offices of trustee or representative and management company (in their capacities as the holders of those offices).

#### **1463 Indemnification of trustee or representative for transfer of scheme property**

If the undertaking becomes a registered scheme but the trustee or representative does not become the responsible entity of the scheme, the trustee or representative is entitled to be indemnified out of the scheme property for reasonable expenses incurred in transferring the scheme property to the responsible entity.

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**1464 Application of paragraphs 601JA(2)(c) and 601JB(2)(b) of new Law to officers or employees of body that does not become scheme’s responsible entity**

If:

- (a) the undertaking becomes a registered scheme; and
- (b) on registration of the scheme, the scheme’s responsible entity is one of the bodies referred to in subsection 1455(1);

then, in applying paragraph 601JA(2)(c) or 601JB(2)(b) of the new Law to the scheme, a person who was an officer or employee of the other of those bodies is not, merely because of things they did before the scheme’s registration in the performance of their functions or duties as an officer or employee of that body, taken to have been substantially involved in business dealings, or in a professional capacity, with the responsible entity.

**1465 References to prescribed interests etc. in existing laws and documents**

A reference in any law of the Commonwealth or of a State or Territory, or in any document, to a term set out in the old term column of the table (within the meaning of this Law) is to be read after commencement as including a reference to the corresponding term set out in the new term column of the table (within the meaning of this Law) except so far as the contrary intention appears in the law or document.

<b>Conversion of references</b>		
<b>Item</b>	<b>Old term</b>	<b>New term</b>
1.	prescribed interest	managed investment
2.	management company	responsible entity
3.	trustee	responsible entity
4.	approved deed	constitution of registered scheme

## Schedule 2—Consequential amendments

### Part 1—Amendment of the Corporations Law set out in section 82 of the Corporations Act 1989

#### 1 After subparagraph 8(5)(c)(ix)

Insert:

(ixa) Chapter 5C; or

#### 2 Subparagraph 8(5)(c)(xiii)

Repeal the subparagraph.

#### 3 Section 9

Insert:

*ARSN* (short for “Australian Registered Scheme Number”) is the number given by the ASC to a registered scheme on registration (see section 601EB).

#### 4 Section 9 (definition of *buy-back arrangements*)

Repeal the definition.

#### 5 Section 9 (definition of *buy-back covenant*)

Repeal the definition.

#### 6 Section 9 (definition of *cash management trust interest*)

Repeal the definition, substitute:

*cash management trust interest* means an interest that:

- (a) is an interest in a registered scheme; and
- (b) relates to an undertaking of the kind commonly known as a cash management trust.

#### 7 Section 9 (definition of *class*)

Omit “prescribed interests”, substitute “interests in a managed investment scheme”.

**8 Section 9 (definition of *constitution*)**

Repeal the definition, substitute:

*constitution* means (depending on the context):

- (a) a company's constitution; or
- (b) a managed investment scheme's constitution; or
- (c) in relation to any other kind of body:
  - (i) the body's charter or memorandum; or
  - (ii) any instrument or law (other than this Law) constituting, or defining the constitution of, the body or governing the activities of the body or its members.

**9 Section 9 (definition of *deed*)**

Repeal the definition, substitute:

*deed* includes a document having the effect of a deed.

**10 Section 9 (paragraph (b) of the definition of *excluded security*)**

Omit "a prescribed interest", substitute "an interest in a managed investment scheme".

**11 Section 9**

Insert:

*exempt managed investment scheme interest* has the meaning given by section 68A.

**12 Section 9 (definition of *exempt prescribed interest*)**

Repeal the definition.

**13 Section 9**

Insert:

*franchise* means an arrangement under which a person earns profits or income by exploiting a right, conferred by the owner of the right, to use a trade mark or design or other intellectual property or the goodwill attached to it in connection with the supply of goods or services. An arrangement is not a franchise if

the person engages the owner of the right, or an associate of the owner, to exploit the right on the person's behalf.

#### 14 Section 9

Insert:

*interest* in a managed investment scheme means a right to benefits produced by the scheme (whether the right is actual, prospective or contingent and whether it is enforceable or not).

#### 15 Section 9 (paragraph (a) of the definition of *issue*)

Omit "prescribed interests", substitute "interests in a managed investment scheme".

#### 16 Section 9

Insert:

*managed investment scheme* means:

(a) a scheme that has the following features:

- (i) people contribute money or money's worth as consideration to acquire rights (*interests*) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not)
- (ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the *members*) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders)
- (iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions); or

(b) a time-sharing scheme;

but does not include the following:

- (c) a partnership covered by an application order made for the purposes of section 115
- (d) a body corporate (other than a body corporate that operates as a time sharing scheme)

- (e) a scheme in which all the members are bodies corporate that are related to each other and to the body corporate that promotes the scheme
- (f) a franchise
- (g) a statutory fund maintained under the *Life Insurance Act 1995*
- (h) a regulated superannuation fund, an approved deposit fund, a pooled superannuation trust, or a public sector superannuation scheme, within the meaning of the *Superannuation Industry (Supervision) Act 1993*
- (i) a scheme operated by an Australian bank in the ordinary course of its banking business
- (j) the issue of debentures or convertible notes by a body corporate
- (k) a barter scheme under which each participant may obtain goods or services from another participant for consideration that is wholly or substantially in kind rather than in cash
- (l) a retirement village scheme operating within or outside Australia:
  - (i) under which the participants, or a majority of them, are provided, or are to be provided, with residential accommodation within a retirement village (whether or not the entitlement of a participant to be provided with accommodation derives from a proprietary interest held by the participant in the premises where the accommodation is, or is to be, provided); and
  - (ii) which is not a time-sharing scheme
- (m) a scheme that is operated by a co-operative company registered under Part VI of the *Companies (Co-operative) Act 1943* of Western Australia or under a previous law of Western Australia that corresponds to that Part
- (n) a scheme of a kind declared by the regulations not to be a managed investment scheme.

Note: Paragraph (c)—A partnership with less than 20 members will usually not require registration because of paragraph 601ED(1)(a) and under section 115 a partnership with more than 20 members can only operate if covered by an application order.

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## **17 Section 9 (definition of *management company*)**

Repeal the definition.

**18 Section 9 (definition of *marketable security*)**

Omit “prescribed interest”, substitute “interest in a managed investment scheme”.

**19 Section 9 (definition of *member*)**

Insert before paragraph (a):

- (aa) in relation to a managed investment scheme—means a person who holds an interest in the scheme; or

**20 Section 9 (definition of *of*)**

Omit “prescribed interests”, substitute “interests in a managed investment scheme”.

**21 Section 9 (definition of *officer*)**

Repeal the definition, substitute:

*officer*:

- (a) in relation to the responsible entity of a registered scheme—means a person who is a director, secretary or executive officer of the responsible entity; or
- (b) in any other case—has the meaning given by section 82A.

**22 Section 9 (definition of *participation interest*)**

Repeal the definition.

**23 Section 9 (definition of *prescribed interest*)**

Repeal the definition.

**24 Section 9 (paragraph (a) of the definition of *public company*)**

Omit “in the definition of *public corporation* (in this section) and”.

**25 Section 9 (definition of *public corporation*)**

Repeal the definition.

**26 Section 9**

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Insert:

**registered scheme** means a managed investment scheme that is registered under section 601EB.

## 27 Section 9

Insert:

**responsible entity** of a registered scheme means the company named in the ASC's record of the scheme's registration as the responsible entity or temporary responsible entity of the scheme.

## 28 Section 9

Insert:

**scheme property** of a registered scheme means:

- (a) contributions of money or money's worth to the scheme; and
- (b) money that forms part of the scheme property under provisions of this Law or the ASC Law; and
- (c) money borrowed or raised by the responsible entity for the purposes of the scheme; and
- (d) property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in paragraph (a), (b) or (c); and
- (e) income and property derived, directly or indirectly, from contributions, money or property referred to in paragraph (a), (b), (c) or (d).

Note 1: Paragraph (a)—if what a member contributes to a scheme is rights over property, the rights in the property that the member retains do not form part of the scheme property.

Note 2: For provisions that are relevant to paragraph (b), see subsections 177(4), 1317HA(1A), 1317HB(3) and 1317HD(3) of this Law and subsection 93A(5) of the ASC Law.

## 29 Section 9 (definition of *securities law*)

After "Chapter" insert "5C,".

## 30 Section 9 (definition of *subscriber*)

Repeal the definition, substitute:

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*subscriber* for securities that are interests in a managed investment scheme means any person:

- (a) accepting an offer, or making an offer pursuant to an invitation, in respect of the interests; or
- (b) subscribing for or buying the interests.

**31 Section 9 (definition of *undertaking*)**

Repeal the definition, substitute:

*undertaking*, in relation to a managed investment scheme, means the undertaking, scheme, enterprise, contract or arrangement to which the scheme relates.

**32 Section 9 (definition of *unit*)**

Omit “(whether a prescribed interest or not)”.

**33 Paragraph 53(e)**

Omit “prescribed interests”, substitute “interests in a managed investment scheme”.

**34 Paragraph 53(h)**

Omit “prescribed interests”, substitute “interests in a managed investment scheme”.

**35 Paragraph 53(j)**

Omit “prescribed interests”, substitute “interests in a managed investment scheme”.

**36 Subsection 57(2)**

Omit “prescribed interests”, substitute “interests in a managed investment scheme”.

Note: The heading to section 57 of the Corporations Law is altered by omitting “**prescribed interests**” and substituting “**interests in managed investment schemes**”.

**37 Paragraph 66(2)(d)**

Omit “prescribed interests or units of prescribed interests”, substitute “interests in an unregistered managed investment scheme”.

**38 After paragraph 66(2)(d)**

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Insert:

- (da) the securities are interests in a managed investment scheme that is not registered under section 601EB and that is not required by section 601ED (disregarding subsection 601ED(2)) to be registered under section 601EB; or

### **39 Paragraph 66(2)(m)**

Repeal the paragraph, substitute:

- (m) in the case of an issue of interests (in this paragraph called *new interests*) in a registered scheme:
  - (i) the issue was made to existing holders of interests (in this paragraph called *existing interests*) in the scheme:
    - (A) in satisfaction in whole or in part of an amount payable to those holders in respect of their existing interests, whether the existing interests are of the same class as, or are of a different class from, the new interests; or
    - (B) in exchange for existing interests of a different class from the new interests; and
  - (ii) the existing interests were issued under a prospectus; or

### **40 Paragraph 66(3)(d)**

Omit “prescribed interests or units of prescribed interests”, substitute “interests in an unregistered managed investment scheme”.

### **41 After paragraph 66(3)(d)**

Insert:

- (da) the securities are interests in a managed investment scheme that is not registered under section 601EB and that is not required by section 601ED (disregarding subsection 601ED(2)) to be registered under section 601EB; or

### **42 At the end of subsection 66(4)**

Add:

- ; and (c) an interest in a managed investment scheme is of the same class of interests as any other interest in the scheme or any other scheme that is declared by the ASC to be a closely related scheme under subsection 601ED(3).

### 43 Section 68A

Repeal, substitute:

#### 68A Exempt interests in managed investment schemes in relation to a jurisdiction

- (1) Each of the following is an exempt interest in a managed investment scheme in relation to Western Australia:
  - (a) an interest in a registered scheme that a registered co-operative company has issued, or proposes to issue, to a member of the company
  - (b) an interest in a registered scheme in so far as a registered co-operative company
    - (i) offers the interest to a member of the company for subscription or purchase; or
    - (ii) invites such a member to subscribe for or buy the interest
  - (c) an interest in a registered scheme in so far as:
    - (i) a registered co-operative company:
      - (A) offers the interest to a person other than a member of the company; or
      - (B) invites a person other than a member to subscribe for or buy the interest; and
    - (ii) the terms or circumstances of the offer or invitation are such that, if the offer, or an offer that the person makes because of the invitation, is accepted, the acceptance will result in the person becoming a member of the company.
- (2) In subsection (1):

*registered co-operative company* means a body of the kind referred to in paragraph 66A(4)(c).

### 44 Paragraph 82(b)

Omit “prescribed interests”, substitute “interests in managed investment schemes”.

### 45 Section 85

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Repeal the section.

**46 Subsection 92(1) (paragraph (c) of the definition of securities)**

Repeal the paragraph, substitute:

- (c) interests in a managed investment scheme; or
- (ca) in Parts 7.3 to 7.6 (inclusive)—interests that would be interests in a managed investment scheme but for paragraph (h) of the definition of *managed investment scheme* in section 9; or

**47 Subsection 92(1) (paragraph (d) of the definition of securities)**

Omit “or of prescribed interests”.

**48 Paragraph 92(2)(c)**

Omit “prescribed interests”, substitute “interests in a managed investment scheme”.

**49 After paragraph 92(2)(c)**

Insert:

- (ca) in Parts 7.3 to 7.6 (inclusive)—interests made available by the body that would be interests in a managed investment scheme but for paragraph (h) of the definition of *managed investment scheme* in section 9;

**50 Paragraph 92(2)(d)**

Omit “or prescribed interests”.

**51 Paragraph 92(4)(a)**

Omit “prescribed interests”, substitute “interests in a managed investment scheme”.

**52 Paragraph 92(4)(b)**

Omit “prescribed”.

**53 Subsection 111AC(1)**

Omit “prescribed interests and units of prescribed interests”, substitute “interests in a managed investment scheme”.

**54 Subsection 111AC(2)**

Omit “prescribed interests or units of prescribed interests”, substitute “interests in a managed investment scheme”.

**55 Subsection 111AD(2)**

Repeal the subsection, substitute:

- (2) For the purposes of sections 111AE, 111AF, 111AG and 111AI, a class of shares or debentures is taken to include units of shares or debentures in that class.

**56 Paragraph 111AR(1)(e)**

Repeal the paragraph.

**57 Before section 168**

Insert in Chapter 2C:

**167A Who is covered by this Chapter**

- (1) This Chapter covers:
  - (a) all companies; and
  - (b) all registered schemes.
- (2) A registered scheme’s responsible entity:
  - (a) must perform the obligations imposed under this Chapter in respect of the scheme; and
  - (b) may exercise the powers given by this Chapter in respect of the scheme.

**58 Subsection 168(1)**

After “A company”, insert “or registered scheme”.

**59 Paragraph 168(1)(b)**

After “the company”, insert “or scheme”.

**60 Paragraph 168(1)(b)**

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After “shares”, insert “or interests”.

**61 Subsection 169(2)**

After “company” (wherever occurring), insert “or scheme”.

**62 After subsection 169(6)**

Insert:

*Registered schemes*

- (6A) The register of a registered scheme must also show:
- (a) the date on which every issue of interests takes place; and
  - (b) the number of interests in each issue; and
  - (c) the interests held by each member; and
  - (d) the class of interests; and
  - (e) the amount paid, or agreed to be considered as paid, on the interests.

**63 Paragraph 169(7)(a)**

After “the company”, insert “or scheme”.

**64 Subsection 169(7)**

After “The company”, insert “or scheme”.

**65 Subsection 169(8)**

Repeal the subsection, substitute:

*Joint holders*

- (8) For the purposes of this section, 2 or more persons who jointly hold shares in the company or interests in the scheme are taken to be a single member of the company or scheme in relation to those shares or interests. They may also be members of the company or scheme because of shares or interests that they hold in their own right or jointly with others.

**66 Subsection 170(1)**

After “unissued shares in the company”, insert “or unissued interests in the scheme”.

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**67 Paragraph 170(1)(d)**

After “shares”, insert “or interests”.

**68 Subsection 170(3)**

After “The company”, insert “or scheme”.

**69 Subsection 170(3)**

Omit “in the company”, substitute “or interests”.

**70 Subsection 170(4)**

Repeal the subsection, substitute:

- (4) The company or scheme must change the register to reflect the transfer of an option only if the person transferring the option gives the company or scheme written notice of the transfer.

**71 Subsection 170(5)**

Omit “company’s”.

**72 Subsection 172(1)**

After “this Part”, insert “that relates to a company”.

**73 After subsection 172(1)**

Insert:

- (1A) A register kept under this Part that relates to a registered scheme must be kept at:
- (a) the responsible entity’s registered office; or
  - (b) an office at the responsible entity’s principal place of business; or
  - (c) an office (whether of the responsible entity or of someone else) where the work involved in maintaining the register is done; or
  - (d) another office approved by the ASC.

The office must be in Australia.

**74 Subsection 172(2)**

After “The company”, insert “or scheme”.

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**75 Paragraph 172(2)(a)**

Repeal the paragraph, substitute:

- (a) established at an office that is neither the registered office, nor at the principal place of business, of the company or responsible entity; or

**76 Subsection 173(1)**

After “A company”, insert “or registered scheme”.

**77 Subsection 173(1)**

After “company”, insert “or the responsible entity”.

**78 Subsection 173(2)**

After “a company”, insert “or a registered scheme”.

**79 Subsection 173(2)**

After “the company”, insert “or scheme”.

**80 Subsection 173(3)**

After “The company”, insert “or scheme”.

**81 Paragraph 173(3)(a)**

Omit “the company”.

**82 Paragraph 173(3)(b)**

After “the company”, insert “or scheme”.

**83 Subsection 173(3)**

Omit “allow the company”, substitute “allow”.

**84 Subsection 173(3)**

Omit “the company must give”, substitute “the company or scheme must give”.

**85 Subsection 173(4)**

Omit “a company’s options”, substitute “the”.

**86 Section 174**

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After “company”, insert “or registered scheme”.

**87 Subsection 175(1)**

Repeal the subsection, substitute:

- (1) A company or registered scheme or a person aggrieved may apply to the Court to have a register kept by the company or scheme under this Part corrected.

**88 Subsection 175(2)**

After “the company” (wherever occurring), insert “or scheme”.

**89 Subsection 175(3)**

After “company” (wherever occurring), insert “or scheme”.

**90 Paragraph 177(1)(c)**

After “the shares,”, insert “interests,”.

**91 Paragraph 177(1)(d)**

After “the company”, insert “or scheme”.

**92 Subsection 177(3)**

After “the company”, insert “or the scheme”.

**93 At the end of section 177**

Add:

- (4) If a person owes a debt under subsection (3) to the scheme:
  - (a) the debt may be recovered by the responsible entity as a debt due to it; and
  - (b) any amount paid or recovered in respect of the debt forms part of the scheme property.

**94 Paragraph 235(1)(b)**

Omit “prescribed interests”, substitute “interests in a registered scheme”.

**95 Paragraph 235(1)(c)**

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Omit “prescribed interests”, substitute “interests in a registered scheme”.

**96 Paragraph 235(1)(d)**

Repeal the paragraph, substitute:

- (d) contracts to which the director is a party or under which the director is entitled to a benefit and that confer a right to call for or deliver:
  - (i) shares in; or
  - (ii) debentures of; or
  - (iii) interests in a registered scheme made available by; the company or a related body corporate.

**97 After subsection 235(1)**

Insert:

- (1A) If interests in a registered scheme are quoted on a stock market of a securities exchange, a director of the company that is the responsible entity must notify the securities exchange under subsections (3) and (4) of the following interests of the director:
  - (a) relevant interests in interests in the scheme
  - (b) rights or options over interests in the scheme
  - (c) contracts to which the director is a party or under which the director is entitled to a benefit and that confer a right to call for or deliver interests in the scheme.

**98 Subsection 235(2)**

After “or (b)”, insert “or (1A)(a)”.

**99 Subsection 235(3)**

After “the exchange”, insert “as required by subsection (1)”.

**100 Paragraph 235(3)(b)**

After “the company”, insert “or responsible entity”.

**101 After subsection 235(3)**

Insert:

- (3A) The director must notify the exchange as required by subsection (1A) within 14 days after each of the following occasions:
- (a) the commencement of this subsection
  - (b) the company becoming the responsible entity
  - (c) appointment as a director of the company after that commencement or after the company becomes the responsible entity
  - (d) the scheme becoming listed after that commencement or after the company becomes the responsible entity.

Paragraph (c) does not apply to a director who retires and is then re-appointed at the same meeting.

## **102 Heading to Division 1 of Part 3.7**

After “auditors” insert “(companies)”.

## **103 After section 331**

Insert:

## **Division 1A—Appointment and removal of auditors (registered schemes)**

### **331AA Qualifications of auditors**

- (1) Subject to this section, a person must not:
- (a) consent to be appointed as auditor of a registered scheme; or
  - (b) act as auditor of a registered scheme; or
  - (c) prepare a report required by this Law to be prepared by a registered company auditor or by an auditor of a registered scheme;
- if:
- (d) the person is not a registered company auditor; or
  - (e) the person, or a body corporate in which the person is a substantial shareholder for the purposes of Part 6.7, owes more than \$5,000 to the scheme’s responsible entity, to a related body corporate or to an entity that the responsible entity controls; or
  - (f) the person:
    - (i) is an officer of the responsible entity; or

- (ii) is a partner, employer or employee of an officer of the responsible entity; or
- (iii) is a partner or employee of an employee of an officer of the responsible entity.

(2) Subject to this section, a firm must not:

- (a) consent to be appointed as auditor of a registered scheme; or
- (b) act as auditor of a registered scheme; or
- (c) prepare a report required by this Law to be prepared by a registered company auditor or by an auditor of a registered scheme;

unless:

- (d) at least 1 member of the firm is a registered company auditor who is ordinarily resident in Australia; and
  - (e) the business name under which the firm is carrying on business is registered under a law of a State or Territory relating to the registration of business names or a return in the prescribed form has been lodged showing, in relation to each member of the firm, the member's full name and address as at the time when the firm so consents, acts or prepares a report; and
  - (f) no member of the firm, and no body corporate in which a member of the firm is a substantial shareholder for the purposes of Part 6.7, owes more than \$5,000 to the scheme's responsible entity or to an entity that the responsible entity controls; and
  - (g) no member of the firm is:
    - (i) an officer of the responsible entity; or
    - (ii) a partner, employer or employee of an officer of the responsible entity; or
    - (iii) a partner or employee of an employee of an officer of the responsible entity; and
  - (h) no officer of the responsible entity receives any remuneration from the firm for acting as a consultant to it on accounting or auditing matters.
- (3) Subsections 324(3), (4), (5) and (6) apply in relation to a registered scheme as if:
- (a) those subsections were part of this section; and

- (b) references in those subsections to a company were instead references to the registered scheme's responsible entity.
- (4) Subsections 324(7), (8), (9), (10), (11) and (16) apply in relation to a registered scheme as if:
  - (a) those subsections were part of this subsection; and
  - (b) references in those subsections to a company were instead references to the registered scheme.

### **331AB Appointment of auditors**

- (1) Within 1 month after the day on which a registered scheme is registered, the responsible entity must appoint a person or persons, a firm or firms, or a person or persons and a firm or firms, as auditor or auditors of the scheme.
- (2) Within 1 month after a vacancy occurs in the office of auditor of a registered scheme, if there is no surviving or continuing auditor of the scheme, the responsible entity must appoint a person or persons, a firm or firms, or a person or persons and a firm or firms, to fill the vacancy.
- (3) While a vacancy in the office of auditor of a registered scheme continues, the surviving or continuing auditor or auditors (if any) may act.
- (4) The responsible entity of a registered scheme must not appoint a person or firm as auditor of the scheme unless that person or firm has, before the appointment, consented to act as auditor by notice in writing given to the responsible entity and has not withdrawn that consent by notice in writing given to the responsible entity.
- (5) A notice given by a firm under subsection (4) is to be signed by a member of the firm who is a registered company auditor:
  - (a) in the firm's name; and
  - (b) in the member's name.
- (6) If the responsible entity of a registered scheme appoints a person or firm as auditor of the scheme in contravention of subsection (4), the purported appointment does not have any effect and the responsible entity, and any officer of the responsible entity who is in default, are each guilty of an offence.

- (7) If the responsible entity of a registered scheme does not appoint an auditor when required by this Law to do so, the ASC may, on application in writing by a member of the scheme, appoint as auditor or auditors of the scheme a person or persons, a firm or firms, or a person or persons and a firm or firms. An appointment can only be made with the consent of the person or firm concerned.
- (8) If a director of the responsible entity of a registered scheme fails to take all reasonable steps to secure compliance with subsection (1) or (2), the director is guilty of an offence.

### **331AC Removal and resignation of auditors**

- (1) The responsible entity of a registered scheme may, with the ASC's consent, remove the auditor of the scheme from office.
- (2) An auditor of a registered scheme may, by notice in writing given to the responsible entity, resign as auditor of the scheme if:
  - (a) the auditor:
    - (i) has, by notice in writing given to the ASC, applied for consent to the resignation and stated the reasons for the application; and
    - (ii) has, at or about the same time as giving the notice to the ASC, given the responsible entity notice in writing of the application to the ASC; and
  - (b) the ASC has given its consent.
- (3) As soon as practicable after the ASC receives a notice from an auditor under subsection (2), the ASC must notify the auditor, and the responsible entity of the registered scheme, whether it consents to the resignation.
- (4) A statement made by an auditor in an application to the ASC under subsection (2) or in answer to an inquiry by the ASC relating to the reasons for the application:
  - (a) is not admissible in evidence in any civil or criminal proceedings against the auditor; and
  - (b) must not be made the ground of a prosecution, action or suit against the auditor.

A certificate by the ASC that the statement was made in the application or in answer to the inquiry by the ASC is conclusive evidence that the statement was so made.

- (5) The resignation of an auditor takes effect:
- (a) on the day (if any) specified for the purpose in the notice of resignation; or
  - (b) on the day on which the ASC gives its consent to the resignation; or
  - (c) on the day (if any) fixed by the ASC for the purpose;
- whichever occurs last.
- (6) If, on the retirement or withdrawal of a member of a firm, the firm will no longer be capable of acting as auditor of a registered scheme because of paragraph 331AA(2)(d), the member is (if not disqualified from acting as auditor of the scheme) taken to be the auditor of the scheme until he or she obtains the consent of the ASC to his or her retirement or withdrawal.
- (7) Within 14 days after:
- (a) the removal from office of an auditor of a registered scheme; or
  - (b) the receipt of a notice of resignation from an auditor of a registered scheme;
- the responsible entity must lodge with the ASC a notice of the removal or resignation in the prescribed form.

### **331AD Effect of winding up an office of auditor**

An auditor of a registered scheme ceases to hold office if:

- (a) the scheme's constitution provides that the scheme is to be wound up at a specified time, in specified circumstances or on the happening of a specified event, and that time is reached, those circumstances occur or that event occurs; or
- (b) the members pass an extraordinary resolution directing the responsible entity to wind up the scheme; or
- (c) the Court makes an order directing the responsible entity to wind up the scheme; or
- (d) the members pass an extraordinary resolution to remove the responsible entity but do not, at the same meeting, pass an

extraordinary resolution choosing a company to be the new responsible entity that consents to becoming the scheme's responsible entity.

**331AE Fees and expenses of auditors**

The reasonable fees and expenses of an auditor of a registered scheme are payable by the responsible entity.

**104 Section 603 (paragraph (d) of the definition of *marketable security*)**

Omit "a prescribed interest", substitute "an interest in a managed investment scheme".

**105 Subsection 770A(1)**

Omit "management company", substitute "responsible entity".

**106 Subsection 770A(1)**

Omit "prescribed interests", substitute "interests in a registered scheme".

**107 Paragraph 770A(2)(a)**

Omit "management company's", substitute "responsible entity's".

**108 Paragraph 770A(2)(c)**

Omit "management company" (twice occurring), substitute "responsible entity".

**109 Paragraph 770A(2)(d)**

Omit "prescribed interests", substitute "interests in the scheme".

**110 Paragraph 770A(2)(d)**

Omit "facility; and", substitute "facility."

**111 Paragraph 770A(2)(e)**

Repeal the paragraph.

**112 Paragraph 770A(3)(b)**

Repeal the paragraph, substitute:

- (b) a condition that the responsible entity will comply with the requirements (if any) of the regulations for the lodging of documents containing information relating to the interests in the scheme; and

**113 Paragraph 770A(3)(c)**

Omit “management company’s”, substitute “responsible entity’s”.

**114 Paragraph 770A(3)(d)**

Omit “management company’s”, substitute “responsible entity’s”.

**115 Subsection 770A(5) (definition of *unquoted*)**

Omit “prescribed interests”, substitute “interests in a registered scheme”.

**116 Subsection 770B(1)**

Omit “prescribed interests”, substitute “interests in a registered scheme”.

**117 Paragraphs 770B(2)(a) and (b)**

Repeal the paragraphs, substitute:

- (a) unless paragraph (b) applies, the interests in a registered scheme constitute a kind of interest in the scheme; and
- (b) if a particular scheme relates to a number of different undertakings in relation to interests—the interests in the scheme are taken to be divided into a number of kinds, with each kind consisting of the interests to which a particular one of those undertakings relates.

**118 Subsection 777(3)**

Repeal the subsection, substitute:

- (3) For the purposes of subsection (1), if a disclosing entity that is an undertaking to which interests in a registered scheme relate is, with the responsible entity’s agreement, consent or acquiescence, included in the official list of a securities exchange, the responsible entity, or an associate of the responsible entity, is taken to be under an obligation to comply with the listing rules of that securities

exchange to the extent to which those rules apply to the responsible entity or associate.

### **119 Heading to Division 1 of Part 7.3**

Repeal the heading, substitute:

## **Division 1—Dealers, investment advisers and operators of managed investment schemes**

### **120 At the end of section 780**

Add:

- (2) A dealers licence may authorise a person to do either or both of the following:
- (a) to carry on a securities business
  - (b) to operate:
    - (i) a managed investment scheme; or
    - (ii) managed investment schemes of a particular kind.

Note: Only public companies that hold a dealers licence can be responsible entities for registered managed investment schemes (see section 601FA).

### **121 At the end of subsection 784(2)**

Add:

- ; and (e) if the licence applied for is a licence to operate a managed investment scheme or schemes, the applicant meets the requirements of subsection (2A), and any additional requirements determined by the ASIC under subsection (2B).

### **122 After subsection 784(2)**

Insert:

- (2A) For the purpose of paragraph (2)(e), the ASIC must be satisfied that the value of the net tangible assets of the applicant is and will be maintained at a minimum of \$50,000 or, where the value of all scheme property is greater than \$10,000,000, an amount equal to 0.5% of those assets shown in the latest accounts of the scheme lodged with the ASIC, up to a maximum of \$5,000,000.

(2B) The ASIC may determine additional requirements for the purpose of paragraph (2)(e), including, but not limited to, a requirement that scheme property be held by an agent in particular circumstances.

(2C) In this section:

*net tangible assets* means the total tangible assets of the applicant, including any guarantee approved by the ASIC, less any adjusted liabilities as shown in the latest accounts of the applicant lodged with the ASIC.

(2D) The ASIC, or a member of the ASIC, may exempt an applicant from the requirements of subsection (2A). This power may not be delegated. The ASIC is to provide details of any exemptions granted under this section in its annual report.

### **123 Subsection 788(1)**

After “carried on” insert “, or the managed investment scheme operated,”.

### **124 After section 825**

Insert:

### **825A Power to revoke responsible entity’s licence without a hearing**

The ASC may, by written order, revoke a licence held by the responsible entity of a registered scheme if it is satisfied that the members of the scheme have suffered, or are likely to suffer, loss or damage because the responsible entity has contravened this Law.

### **125 Paragraph 827(1)(a)**

Omit “or 825”, substitute “, 825 or 825A”.

### **126 Paragraph 837(1)(d)**

Omit “or 825”, substitute “, 825 or 825A”.

### **127 Paragraph 838(1)(a)**

Omit “or 825”, substitute “, 825 or 825A”.

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**128 Subsection 843(6)**

Repeal the subsection.

**129 Subsection 1001A(4)**

Omit “prescribed interests”, substitute “interests in a registered scheme”.

**130 Subsection 1001A(4)**

Omit “management company”, substitute “responsible entity”.

**131 Subsection 1001B(4)**

Omit “prescribed interests”, substitute “interests in a registered scheme”.

**132 Subsection 1001B(4)**

Omit “management company” (occurring 3 times), substitute “responsible entity”.

**133 Subsection 1002A(1) (paragraph (c) of the definition of securities)**

Omit “prescribed interests”, substitute “interests in a managed investment scheme”.

**134 Subsection 1002A(1) (paragraph (d) of the definition of securities)**

Repeal the paragraph, substitute:

(d) units of shares referred to in paragraph (a);

**135 Section 1002H**

Repeal the section, substitute:

**1002H Exception for withdrawal from registered scheme**

Subsection 1002G(2) does not apply in respect of a member’s withdrawal from a registered scheme if the amount paid to the member on withdrawal is calculated (so far as is reasonably practicable) by reference to the underlying value of the assets of the financial or business undertaking or scheme, common enterprise, investment contract or time-sharing scheme to which

the member's interest relates, less any reasonable charge for buying the member's interest.

**136 Subsection 1006(3)**

Repeal the subsection, substitute:

- (3) A person who is named in the prospectus as a trustee for holders of debentures of the corporation is not taken, for that reason alone, to have authorised or caused the issue of the prospectus.

**137 Subsection 1013(8)**

Repeal the subsection, substitute:

(8) If:

- (a) the responsible entity for a registered scheme; or  
(b) the Commission in the name of, and for the benefit of, the responsible entity for a registered scheme;

brings an action in accordance with subsection (2) in respect of a subscription for, or any agreement to subscribe for, any interests in the scheme, any amount recovered in the action:

- (c) is to be held by the responsible entity on behalf of the persons who, at the time of the subscription or agreement, had rights or interests in the relevant financial or business undertaking or scheme, common enterprise, investment contract or time-sharing scheme; and  
(d) is to be held on their behalf in the respective proportions that, at that time, their individual rights or interests bore to the total of all those rights or interests.

(8A) If:

- (a) the responsible entity for a registered scheme; or  
(b) the Commission in the name of, and for the benefit of, the responsible entity for a registered scheme;

brings an action in accordance with subsection (5) in respect of a purchase or sale of, or an agreement to purchase or sell, interests in the scheme, any amount recovered in the action:

- (c) is to be held by the responsible entity on behalf of the persons who, at the time of the sale, purchase or agreement, had rights or interests in the relevant financial or business

undertaking or scheme, common enterprise, investment contract or time-sharing scheme; and

- (d) is to be held on their behalf in the respective proportions that, at that time, their individual rights or interests bore to the total of all those rights or interests.

**138 Subsection 1017A (paragraph (b) of the definition of approved unlisted corporation)**

Repeal the paragraph, substitute:

- (b) in the case of interests in a managed investment scheme—the operations of the relevant undertaking to which the interests relate;

**139 Subsection 1017A(4)**

Omit “prescribed interests” (twice occurring), substitute “interests in managed investment schemes”.

**140 At the end of section 1018**

Add:

- Note: A contract resulting from an offer or invitation that contravenes this section and that relates to interests in a registered scheme may be voidable under section 601MB.

**141 After subsection 1043(1)**

Insert:

- (1A) Where a corporation offers interests in a registered scheme, the corporation must, in all prospectuses and other representations relating to the interests in the scheme, direct that all cheques and other payment orders in respect of applications for interests be drawn in favour of the responsible entity, or custodian or trustee where there is one, on account of the particular scheme and the applicant.

**142 Paragraph 1043D(2)(e)**

Repeal the paragraph, substitute:

- (e) if the securities concerned are interests in a registered scheme—the undertaking to which the interests relate and the responsible entity for the scheme.

**143 Divisions 5 and 5A of Part 7.12**

Repeal the Divisions.

**144 Subsection 1084(1)**

Omit “, 5”.

**145 Subsection 1089(1)**

Omit “prescribed interests” (first occurring), substitute “interests in a managed investment scheme”.

**146 Subsection 1089(1)**

Omit “prescribed” (second occurring).

**147 Paragraph 1089(3)(b)**

Omit “prescribed”.

**148 Paragraph 1089(4)(a)**

Omit “prescribed”.

**149 Section 1090 (definition of *interest*)**

Omit “a prescribed interest”, substitute “an interest in a managed investment scheme”.

**150 Subsection 1097(1) (definition of *prescribed security*)**

Repeal the definition, substitute:

*prescribed security* means an interest in a managed investment scheme that is prescribed for the purposes of this definition.

**151 Subsection 1109K(2)**

Repeal the subsection, substitute:

- (2) Subsection (1) has effect despite anything in:
- (a) the body’s constitution; or
  - (b) a deed relating to debentures; or
  - (c) the constitution of a registered scheme; or
  - (d) a deed relating to interests.

**152 At the end of section 1317DA**

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Add:

Subsection 601FC(1)

Subsection 601FD(1)

Subsection 601FE(1)

Section 601FG

Subsection 601JD(1)

**153 Subsection 1317EA(2)**

After “corporation”, insert “or registered scheme”.

**154 Heading to Division 5 of Part 9.4B**

Repeal the heading, substitute:

**Division 5—Compensation for loss suffered by corporation  
or registered scheme**

**155 Paragraph 1317HA(1)(b)**

Repeal the paragraph, substitute:

- (b) the act or omission constituting the contravention caused:
  - (i) loss or damage to the corporation in relation to which the contravention was committed; or
  - (ii) loss or damage to, or a diminution in the value of, the property of the scheme in relation to which the contravention was committed;

**156 Subsection 1317HA(1)**

Omit “pay to the corporation compensation of such an amount as the order specifies.”, substitute “compensate the corporation or scheme. The order must specify the amount of the compensation.”.

**157 After subsection 1317HA(1)**

Insert:

- (1A) If the responsible entity for a registered scheme is ordered to compensate the scheme, the responsible entity must transfer the amount of the compensation to scheme property. If anyone else is

ordered to compensate the scheme, the responsible entity may recover the compensation on behalf of the scheme.

**158 Subsection 1317HA(2)**

After “corporation”, insert “or a registered scheme’s responsible entity”.

**159 Subsection 1317HA(3)**

After “a corporation”, insert “or responsible entity”.

**160 Paragraph 1317HA(3)(a)**

Omit “that corporation”, substitute “the corporation or registered scheme”.

**161 Paragraph 1317HA(3)(b)**

Omit “pay compensation to the corporation”, substitute “compensate the corporation or scheme”.

**162 Paragraph 1317HB(1)(a)**

After “corporation”, insert “or registered scheme”.

**163 Paragraph 1317HB(1)(b)**

Repeal the paragraph, substitute:

- (b) the court is satisfied that the act or omission constituting the contravention caused:
  - (i) loss or damage to the corporation in relation to which the contravention was committed; or
  - (ii) loss or damage to, or a diminution in the value of, the property of the scheme in relation to which the contravention was committed;

**164 Subsection 1317HB(1)**

Omit “pay to the corporation compensation of such amount as the order specifies.”, substitute:

compensate the corporation or scheme. The order must specify the amount of the compensation.

**165 Paragraph 1317HB(2)(b)**

Repeal the paragraph, substitute:

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- (b) the court is satisfied that the act or omission constituting the contravention caused:
  - (i) loss or damage to the corporation in relation to which the contravention was committed; or
  - (ii) loss or damage to, or a diminution in the value of, the property of the scheme in relation to which the contravention was committed;

**166 Subsection 1317HB(2)**

Omit “pay to the corporation compensation of such amount as the order specifies.”, substitute:

compensate the corporation or scheme. The order must specify the amount of the compensation.

**167 At the end of section 1317HB**

Add:

- (3) If the responsible entity for a registered scheme is ordered to compensate the scheme, the responsible entity must transfer the amount of the compensation to scheme property. If anyone else is ordered to compensate the scheme, the responsible entity may recover the compensation on behalf of the scheme.

**168 Subsection 1317HD(1)**

Omit all the words from and including “Where” to and including “corporation:”, substitute:

If a person contravenes a civil penalty provision in relation to a corporation or a registered scheme, the person must account to the corporation or scheme for:

**169 Paragraph 1317HD(1)(b)**

After “corporation”, insert “or scheme”.

**170 After subsection 1317HD(1)**

Insert:

- (1A) The amount for which the person is liable under subsection (1) may be recovered as a debt.

**171 At the end of section 1317HD**

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Add:

- (3) If the responsible entity for a registered scheme is liable under subsection (1), it must transfer the amount for which it is liable to scheme property. If anyone else is liable, the responsible entity may recover the debt on behalf of the scheme.

**172 Paragraph 1317HE(a)**

After “corporation”, insert “or registered scheme”.

**173 Subparagraphs 1317HF(b)(i) and (ii)**

After “corporation”, insert “or registered scheme”.

**174 Paragraph 1317JA(2)(b)**

After “corporation”, insert “, of a registered scheme’s responsible entity”.

**175 After section 1343**

Insert in Part 9.7:

**1343A Disposal of interests in registered scheme if whereabouts of member unknown**

If, during a period of at least 6 years while a person has been shown in the register of members of a registered scheme as the holder of interests in the scheme:

- (a) the responsible entity has had reasonable grounds for believing that the person was not residing at the address shown in the register as their address; and
- (b) the responsible entity’s attempts to communicate with the person have been made using reasonable diligence but have all been unsuccessful;

the responsible entity may, by executing a transfer for and on behalf of the person, transfer the interests and any rights in respect of them to the ASC to be dealt with under this Part.

**176 Schedule 3 (after the penalty relating to section 600)**

Insert:

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**Subsection 601ED(5)**

Penalty: 200 penalty units or imprisonment for 5 years, or both.

**Subsection 601FF(2)**

Penalty: 200 penalty units or imprisonment for 5 years, or both.

**Subsection 601FL(4)**

Penalty: 100 penalty units or imprisonment for 2 years, or both.

**Subsection 601FM(3)**

Penalty: 100 penalty units or imprisonment for 2 years, or both.

**Subsection 601FQ(6)**

Penalty: 100 penalty units or imprisonment for 2 years, or both.

**Section 601HD**

Penalty: 25 penalty units or imprisonment for 6 months, or both.

**Subsection 601HG(6)**

Penalty: 25 penalty units or imprisonment for 6 months, or both.

**Subsection 601JA(1)**

Penalty: 100 penalty units or imprisonment for 2 years, or both.

**Section 601JA**

Penalty: 25 penalty units or imprisonment for 6 months, or both.

**Subsection 601JB(5)**

Penalty: 25 penalty units or imprisonment for 6 months, or both.

**Subsection 601KA(3)**

Penalty: 25 penalty units or imprisonment for 6 months, or both.

## **Part 2—Amendment of the Australian Securities and Investments Commission Act 1989**

### **177 Subparagraph 13(1)(b)(i)**

After “body corporate”, insert “or managed investment scheme”.

### **178 Subparagraph 13(1)(b)(ii)**

Omit “body corporate,”, substitute “body corporate or managed investment scheme or to”.

### **179 Section 28**

Omit “and 36”, substitute “, 36 and 39A”.

### **180 At the end of section 30**

Add:

(2) The Commission may give to:

- (a) the responsible entity of a registered scheme; or
- (b) an eligible person in relation to the responsible entity;

a written notice requiring the production to a specified member or staff member, at a specified place and time, of specified books relating to the operation of the scheme.

Note: The heading to section 30 is altered by inserting “**or registered scheme**” after “**body corporate**”.

### **181 After paragraph 33(a)**

Insert:

- (ab) affairs of a registered scheme; or

### **182 After section 39**

Insert in Division 3 of Part 3:

**39A Commission may give copy of book relating to registered scheme to another person**

- (1) The Commission may, subject to such conditions (if any) as it imposes, give to a person a copy of any book in its possession that relates to a registered scheme.
- (2) If a copy of a book is given to a person under subsection (1) subject to conditions, the person, and any other person who has possession, custody or control of the copy or a copy of it, must comply with the conditions.

Penalty: 10 penalty units or imprisonment for 3 months, or both.

**183 After Part 3**

Insert:

**Part 3A—Enforceable undertakings in relation to registered schemes**

**93A Undertakings by responsible entity**

- (1) The Commission may accept a written undertaking given by the responsible entity of a registered scheme in connection with a matter:
  - (a) concerning the registered scheme; and
  - (b) in relation to which the Commission has a power or function under a national scheme law of this jurisdiction.
- (2) The responsible entity may withdraw or vary the undertaking at any time, but only with the consent of the Commission.
- (3) If the Commission considers that the responsible entity has breached any of the terms of the undertaking, the Commission may apply to the Court for an order under subsection (4).
- (4) If the Court is satisfied that the responsible entity has breached a term of the undertaking, the Court may make all or any of the following orders:

- (a) an order directing the responsible entity to comply with that term of the undertaking;
  - (b) an order directing the responsible entity to transfer to scheme property an amount up to the amount of any financial benefit that the responsible entity has obtained directly or indirectly and that is reasonably attributable to the breach;
  - (c) any order that the Court considers appropriate directing the responsible entity to compensate any person who has suffered loss or damage as a result of the breach;
  - (d) any other order that the Court considers appropriate.
- (5) The Commission must keep a record of the full text of the undertaking.
- (6) The Commission must make available to a person who asks for it a copy of the text of the undertaking, but the Commission must delete from the copy information:
- (a) that the responsible entity has asked it not to release; and
  - (b) that the Commission is satisfied:
    - (i) is commercial in confidence; or
    - (ii) should not be disclosed because it would be against the public interest to do so; or
    - (iii) consists of personal details of an individual.
- (7) If the Commission makes available a copy that has information deleted from it, the copy must include a note stating that information has been deleted.

**Part 3—Amendment of the Pooled Development  
Funds Act 1992**

**184 Paragraph 30(1)(e)**

Repeal the paragraph, substitute:

- (e) issue or make available an interest in a managed investment scheme.



