



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 134

Managed investments: Constitutions

Chapter 5C Part 5C.3 — Managed investment schemes: The constitution

Issued 3/8/1998

Updated 4/11/1998, 2/6/1999, 11/9/2000

From 5 July 2007, this document may be referred to as Regulatory Guide 134 (RG 134) or Policy Statement 134 (PS 134). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 134.1) or their policy statement number (e.g. PS 134.1).

What this guide is about

In order to gain a full understanding of our policy in this area you should read all the parts of this guide, including the Underlying Principles and the Explanations.

RG 134.1 This guide provides guidance on how we will:

A assess a scheme's constitution; and

see RG 134.3–RG 134.17

B decide whether or not a scheme's constitution meets the content requirements of s601GA.

see RG 134.18–RG 134.56

RG 134.2 The guidance in this guide is designed to assist directors of responsible entities to prepare and lodge a scheme

constitution that complies with the Law and that enables the directors of the responsible entity to meet their obligations under s601EA(4)(c)(i).

Contents

What this guide is about	1
A Assessing a constitution.....	3
Our policy	3
Underlying principles	3
Explanations	3
B Content needed under s601GA	6
Our policy	6
Underlying principles	9
Explanations	10
Key terms.....	17
Related information	18

A Assessing a constitution

Our policy

Ordinary case

RG 134.3 We assess a constitution when it is lodged with a registration application for a managed investment scheme. To assist us assess your constitution, your application must state where your constitution covers the matters required by s601GA and 601GB. Ordinarily, we will only check the parts of your constitution that you identify.

RG 134.4 We will not ordinarily review amendments to a constitution or replacement constitutions lodged after registration.

Further review

RG 134.5 We may completely review a constitution or replacement or amended constitution at any time to see if it complies with the Law.

Underlying principles

RG 134.6 Our assessment of a scheme's constitution will take into account that the Law, after the Managed Investments Act commenced on 1 July 1998, allows constitutions to be more flexibly tailored to the nature of the scheme involved, so long as the outcomes under s601GA and 601GB are met. The responsible entity and its directors have a responsibility to ensure that the constitution meets these outcomes.

Explanations

What is a "constitution"?

RG 134.7 Each scheme must have a constitution that is lodged when applying for registration of the scheme.

RG 134.8 We cannot register a scheme if its constitution does not appear to meet s601GA and 601GB. However, unlike the prescribed interest statutory covenant provisions of the Law before the Managed Investments Act, the Law does not prescribe in detail what a

constitution must contain. Instead, under s601GA and 601GB a constitution must:

- (a) adequately cover some specified matters which are important to the relationship between the members and the responsible entity; and
- (b) be a document which is legally enforceable between the members and the responsible entity.

RG 134.9 Many of the obligations in the statutory covenants under the Law before 1 July 1998 became direct duties of a responsible entity under Pt 5C.2. The responsible entity only has a duty to comply with a constitution when the constitution is consistent with the Law: s601FC(1)(m).

RG 134.10 We are aware that constitutions will be different in length and form. Apart from the matters prescribed in s601GA, constitutions will also include different matters. For example, some constitutions may refer to other rules or regulations (which may or may not be legally enforceable between the members and the responsible entity).

RG 134.11 We are also aware that most constitutions will declare a trust in favour of the members over scheme property. This view is based on the obligation of a responsible entity under s601FC(2) to hold scheme property on trust for the members.

RG 134.12 Your rights and obligations and the rights and obligations of the members that are material to an investment decision must be disclosed in a scheme's prospectus. Those rights and obligations must be disclosed even if they are not included in the constitution. If the rights and obligations are listed in the prospectus they:

- (a) are enforceable by the members against you; and
- (b) may be the basis of a civil claim under the Law against you if the description of them is misleading and deceptive.

RG 134.13 We consider that a constitution needs to contain only those matters that Pt 5C.3 of the Law requires.

Assessing the constitution

RG 134.14 Under s601EB(1)(e), we have to assess a scheme's constitution. A constitution must deal adequately with key matters set out at s601GA and 601GB governing your rights and obligations as well as those of the members. These are:

- (a) the consideration to acquire interests in the scheme;

- (b) investment and borrowing powers of the responsible entity;
- (c) member complaints handling;
- (d) winding up the scheme;
- (e) your rights to be paid or indemnified from the scheme property;
and
- (f) the withdrawal rights of the members and the exit price for interests in the scheme.

Further review

RG 134.15 Although we will not usually review all of a constitution, we may do so at any time. This approach is consistent with the pre Managed Investments Act approach taken by us under Superseded Policy Statement 23 *Approval of deeds relating to prescribed interests* [SPS 23], and our practice when reviewing prospectuses lodged for registration.

RG 134.16 We may discover, for example, that a constitution has a provision that negates the effect of other provisions that we relied on in assessing the adequacy of the constitution. In this case we may do a thorough review of the constitution.

No compliance clause

RG 134.17 We do not consider that a constitution needs a provision to say that it is subject to the Law. This is because the Law imposes direct obligations to comply with the Law and the constitution.

RG 134.17A However, we do consider that the provisions of the constitution must not be inconsistent with the Law, in order that the constitution will be legally enforceable as required by s601GB. For example, we may refuse registration of a scheme where its constitution contains a clause purporting to limit or exclude the liability of the responsible entity for conduct which may contravene the Law. If such a clause is included in the constitution it may need to be qualified in the following manner:

- (a) the limitation of liability only operates to the extent permitted by the law; and
- (b) in no way does the limitation purport to exclude, or reduce liability under the Law.

This will also highlight the need for parties relying on the constitution to first examine the Law in order to understand the effect of such an exclusion clause.

[*Historical note:* RG 134.17A inserted 2/6/1999.]

B Content needed under s601GA

Our policy

RG 134.18 We are required by the Law to assess whether or not a constitution makes adequate provision about the matters specified in s601GA. We consider in order to make adequate provision about those matters, the content must be “certain and complete” in a contractual sense. That is, a person reading a constitution must be able to understand how matters will be resolved without having to rely on extrinsic material or on further agreement between the members and you. This policy gives guidance about what the Law requires to help you comply.

RG 134.18A We have given relief to allow a constitution to include a provision to the effect of Appendix 15A of the Listing Rules of the ASX: see [CO 98/1808]. The relief will mean that changes to the terms of the constitution as a result of the operation of Appendix 15A are not required to be made in accordance with s601GC(1) or 601GC(2).

[*Historical note:* RG 134.18A inserted 4/11/1998.]

Consideration to acquire

RG 134.19 Section 601GA(1)(a) provides that a constitution must make adequate provision for the consideration that is to be paid to acquire an interest in the scheme. We consider that adequate provision has been made when a constitution provides for an independently verifiable price. However, we have given relief from the effect of this section under [CO 98/52] in a number of situations when:

- (a) for commercial reasons, the consideration to acquire cannot be determined independently; and
- (b) investor protection will not be reduced.

RG 134.20 Relief is available under [CO 98/52] for:

- (a) placements of quoted interests;
- (b) when there is no pooling except of money pending its further investment;
- (c) proportionate issues to members and re-investment schemes;
- (d) forfeited interests;
- (e) options over interests;

- (f) fees for sophisticated and professional investors (that is, members who acquired their interests in a way to which s708(8) and s708(11) would apply, if the scheme were registered at the time of the offers concerned).

[*Historical note:* RG 134.20 amended 11/9/2000 by inserting para (f).]

RG 134.21 This means that you do not have to include a price or the consideration in a constitution if it fits one of the situations set out in [CO 98/52]. We will consider giving relief in other situations if the criteria in para (a) and (b) of RG 134.19 are met. Refer to Regulatory Guide 136 *Managed investments: Discretionary powers and closely related schemes* at RG 136.2 for our general policy on exemptions and modifications.

How to apply for relief

- Lodge an application with the prescribed fee at any ASIC Regional Office
- Ensure the application complies with Regulatory Guide 51 *Applications for relief* (RG 51)

You can also contact the ASIC Infoline on 1300 300 630 for information and assistance.

Powers to deal with scheme property

RG 134.22 Section 601GA(1)(b) provides that a constitution must have adequate provisions about what powers you have when dealing with scheme property, such as what investments can be made. We consider that adequate provision for your powers in dealing with scheme property has been made when the powers are set out in the constitution with certainty and completeness. For example, adequate provision has been made if the constitution gives the responsible entity all the powers of a natural person to invest and to borrow on security of the scheme property.

Complaints procedures

RG 134.23 Section 601GA(1)(c) provides that a constitution must have adequate provisions about the method by which complaints made by members in relation to the scheme will be dealt with. We consider that a constitution makes adequate provision about member complaints when it provides for a complaints handling procedure which will give an effective way for members to efficiently get redress if they suffer loss due to breaches. When assessing the method for dealing with members' complaints, we will refer to the Australian

Standard on Complaints Handling (AS 4269) as a guide, but it is not necessary for the constitution to set out provisions relating to every aspect of the standard. We expect a constitution to at least include provisions about:

- (a) acknowledging complaints;
- (b) properly considering complaints within reasonable timeframes;
- (c) communicating with the member;
- (d) outlining remedies available to the member; and
- (e) advising the member of any further avenue for complaint.

Winding-up

RG 134.24 Section 601GA(1)(d) provides that a constitution must have adequate provisions about winding-up the scheme. We consider that adequate provision for winding-up a scheme has been made if its constitution:

- (a) deals with all the circumstances under which a scheme may be wound-up; and
- (b) provides for an independent audit by a registered company auditor of the final accounts after winding-up.

The provisions about winding up need to be consistent with Part 5C.9.

Withdrawal rights of members

RG 134.25 Section 601GA(4) provides that if members have a right to withdraw, the constitution must specify the right and set out adequate procedures in a way that is fair to all members. We consider that if there are provisions for a right of withdrawal, the constitution complies if it sets out fair provisions about:

- (a) how members can withdraw; and
- (b) what exit price will apply.

If there is provision for withdrawal, the constitution must include a method for calculating the exit price in a way which is fair to all members and independently verifiable. Fairness will normally require that the price depend on appropriate, and reasonably current, valuations of scheme property.

Generally if the withdrawal provisions meet these requirements, we will treat them as complying with the Law unless they:

- (a) unreasonably disadvantage one group of members; or
- (b) are otherwise inconsistent with the Law.

Underlying principles

RG 134.26 We consider that a constitution must address the matters in s601GA in a way that enables members to know their rights. We believe these matters must be addressed in a way that is consistent with the Law.

Incorporation by reference

RG 134.26A A provision that allows provisions in another document to override the terms of the constitution prevents the provisions of the constitution that deal with the matters in s601GA and 601GB from being adequate because they are not certain and complete. That type of provision may require a reader to consider material which is extrinsic to the constitution itself and avoid the requirements for amendments of the constitution. The Law would not permit us to register a scheme if its constitution has this type of provision.

[Historical note: RG 134.26A inserted 4/11/1998.]

Appendix 15A ASX Listing Rules

RG 134.26B We believe that relief to permit inclusion of a provision to the effect of Appendix 15A of the ASX Listing Rules that incorporates by reference and gives overriding effect to the ASX Listing Rules is appropriate. This is because:

- (a) the listing rules are available to the public;
- (b) amendments to the listing rules are subject to regulatory oversight; and
- (c) amendments to the terms of the constitution are highly likely to be appropriate where the listing rules require those amendments in order to maintain listing.

[Historical note: RG 134.26B inserted 4/11/1998.]

Explanations

Consideration to acquire

Independently verifiable price

RG 134.27 We do not consider that “adequate provision” for “consideration to acquire”, in s601GA(1)(a), means there must be a “fair price”. We do not require this because the Law does not require any duty of fairness to applicants for interests. Applicants are protected, in relation to the consideration paid for interests, by the disclosure requirements of Div 2 of Pt 7.12.

RG 134.28 To meet s601GA(1)(a), the consideration for acquiring interests needs to be set out in the constitution so that it is independently verifiable. The Law requires provisions enabling calculation of the consideration to be set out in the constitution so members have rights about the consideration for an issue of interests. This is because the consideration for an issue of an interest to another may affect the value of a member’s interest.

RG 134.29 If the amount of consideration can be influenced by any party who has an interest in the scheme, it will not comply. This means that the consideration is not to be influenced by:

- (a) you;
- (b) any related party of yours;
- (c) any person acting in concert with you in setting the consideration;
and
- (d) any other person having an interest in the amount of consideration.

For there to be an independently verifiable price, the scheme’s auditor must be able to verify the amount of consideration by referring to the constitution and without referring to you. If the consideration is based on the value of scheme property, the constitution has to set out how the property will be valued.

RG 134.30 The concept of an “independently verifiable price” is consistent with the approach that we took dealing with the statutory covenant on issue and sale price, s1069(1)(b)(ii), in:

- (a) Superseded Policy Statement 55 *Covenants in deeds* at [SPS 55.24]; and
- (b) Superseded Policy Statement 23 *Approval of deeds relating to prescribed interests* at [SPS 23.30].

RG 134.31 We will not generally give relief so interests in a trust can be issued at your discretion at a discount or at an increased price as this would not be consistent with the policy of the Law. We do not accept that, because companies can issue shares at a discount or a premium, similar treatment should be applied to issuing interests in a scheme in the form of a trust. Unitholders in a trust have different rights from shareholders. Unitholders in a trust place their funds under your control to invest their funds. The scheme property is held for the benefit of the members. By contrast, shareholders supply capital for running a company. Shareholders are not beneficially or legally entitled to the assets of the company.

RG 134.32 We will give relief to facilitate flexibility for the responsible entity about the price of interests in a number of situations. Class Order [CO 98/52] is similar to the policy we applied to s1069(1)(b)(ii) of the Law before 1 July 1998 under [SPS 55.29].

Placements of quoted interests

RG 134.33 We have given conditional relief in [CO 98/52] allowing interests in a scheme to be issued at a price determined by the responsible entity. This relief facilitates off-market placements of quoted interests. The relief applies only if the interests are quoted on a securities exchange or an approved foreign exchange as defined in reg 1.2A.02(2).

RG 134.34 Relief means that interests can be issued at a discount to the market price. The price paid will normally be the result of commercial negotiations between you and the person taking up the issue.

RG 134.35 The market price may reflect only dealings by holders of small parcels of interests. In this situation you may not be able to find anyone willing to take a substantial placement at the market price.

RG 134.36 If interests in the scheme are quoted, the market is an independent pricing mechanism. The market regulates the depth of any discount, and establishes an appropriate reference point for measuring it. These mechanisms are not available when a scheme is not listed.

RG 134.37 We recognise that issuing interests at a discount to the market could dilute the value of members' interests. This is justifiable because of the substantial commercial benefit in enabling capital to be raised by a placement. There are conditions on our relief that limit the extent of any dilution of existing interests. Stricter conditions apply to issues that could involve large dilutions.

RG 134.38 A condition of relief for placements is that you and your associates are not issued any of the interests.

RG 134.39 Additional conditions apply if:

- (a) the proposed placement means that more than 10% of interests in any class had been placed in the last 12 months without members' approval (except if we have given relief for this); or
- (b) the discount to market is more than 10%.

The additional conditions require 75% by value of members to approve the issue and 25% by value to vote. If interests of members of a class are affected then members of the class must separately approve the issue. Those who are to be issued interests and their associates must be excluded in determining if approval is given.

Limited pooling

RG 134.40 Sometimes the only pooling or common use is of members' contributions before they are invested or otherwise disposed of. In this situation the price at which interests are issued to one member does not affect the interests of the others. In these schemes, we have given relief so you can decide the issue price.

Proportionate issues to members and re-investment

RG 134.41 We have given relief so issues can be made at a discount for some proportionate offers and re-investment schemes because there will be no unfair dilution. Relief is available when:

- (a) any price discount is less than or equal to the percentage stated in the constitution; and
- (b) the interests (whether renounceable or not) are offered to all the existing members proportionately to the value of their interests and not to anyone else. Foreign members may be excluded if:
 - (i) offering to them means complying with overseas regulations; and
 - (ii) they receive a payment reflecting any benefit they would have received.

We have given incidental relief from s601FC(1)(d) so foreign members can be excluded.

RG 134.42 We also have given relief so that you can decide the price under a re-investment scheme. In a re-investment scheme, you use money payable to a member as a distribution of capital or income

to pay for additional interests. If all members can participate in the re-investment scheme, our relief applies regardless of whether or not their participation is mandatory or optional. Foreign members may be excluded if:

- (a) offering to them means complying with overseas regulations; and
- (b) they receive a payment reflecting any benefit they would have received.

We have given incidental relief from s601FC(1)(d) so foreign members can be excluded.

RG 134.43 Relief for re-investment schemes is given on condition that:

- (a) the same price applies to all interests issued in a particular distribution; and
- (b) any price discount offered is not more than the percentage stated in the constitution.

RG 134.44 You have to consider the rights and interests of all members when deciding the price in these circumstances, particularly, the rights and interests of members who do not take up the offer. This is because you have duties under s601FC(1)(c) and 601FC(1)(d) and a fiduciary relationship with members.

Forfeited interests

RG 134.45 We have given relief so you can decide the price at which partly paid interests are resold. This relief applies if the interests:

- (a) are in a listed scheme; and
- (b) are forfeited to you as responsible entity because of a failure to pay a call.

This does not imply that in these circumstances we will also give relief from the prospectus or other provisions of the Law.

RG 134.46 The forfeited interests are to be sold at a public auction conducted, as far as practicable, under the Law about forfeited shares: s254Q.

Options over interests

RG 134.47 We have given relief so that options can be issued at a price decided by you and specified in the terms of issue of the options. This relief applies if the options are offered to all the existing

members in proportion to the value of their interests and at the same price. The relief also applies to the issue of interests under the terms of the options. Any price discount offered, as measured at the date of issue of the interests following exercise of the options, must not be more than the percentage stated in the constitution. Foreign members may be excluded if:

- (a) offering to them means complying with overseas regulations; and
- (b) they receive a payment reflecting any benefit they would have received.

We have given incidental relief from s601FC(1)(d) so foreign members can be excluded.

Fees

RG 134.47A We consider that some fees such as an entry fee are a part of the consideration payable to acquire an interest in a scheme. Without the relief available under [CO 98/52], these fees would have to be specified in an independently verifiable manner in the constitution.

RG 134.47B We recognise that fee arrangements involving negotiated rates for sophisticated and professional investors are a means by which responsible entities can attract those investors to a scheme. Such arrangements may assist in more efficient structuring of schemes by facilitating economies of scale.

RG 134.47C Under the conditions of [CO 98/52]:

- (a) fee arrangements must be disclosed to:
 - (i) existing members of the scheme; and
 - (ii) persons being offered interests in the scheme under a disclosure document; and
- (b) the fee arrangement agreed with any member must not adversely affect the fees that any other member will incur.

RG 134.47D In some circumstances discounted fee arrangements for related parties may be used to provide incentives for effective performance by officers and employees. We have given relief in relation to a scheme so that a differential fee arrangement could apply to employees of a related body corporate of the responsible entity of the scheme and their relatives where:

- (a) the number of employees as a proportion of all members in the scheme was insignificant (and therefore unlikely to materially affect other members in voting or takeover); and

- (b) the differential fee arrangement involving the waiver of entry and exit fees did not impact on the scheme to the disadvantage of other members of the scheme.

RG 134.47E We will consider applications for relief to allow differential fees for employees or officers on a case by case basis having regard to these matters. Applications should include proposals for disclosing such fee arrangements.

RG 134.47F This relief is consistent with the relief we have given from s601FC(1)(d) under [CO 01/50] to allow individually negotiated fees: see RG 136.11D.

[*Historical note:* RG 137.47A–RG 137.47F inserted 4/10/2000.]

Powers to deal with scheme property

RG 134.48 We do not consider that a scheme's investment policy must be set out in its constitution. This is because s601GA(1)(b) relates to powers of investment rather than how you intend to exercise your powers. We expect prospectuses will specify the investment policy for a scheme.

Complaints procedures

RG 134.49 A constitution must adequately deal with how members' complaints will be handled: s601GA(1)(c). This implies there must be a complaints handling system. The complaints handling system may also be seen as a measure to ensure compliance that will need to be addressed in the compliance plan. Further, because the complaints handling method will be in the constitution, the scheme's compliance plan is required by the Law to include adequate measures to ensure that the scheme's complaints handling method is complied with.

RG 134.50 The intention of the Law is that there must be an appropriate complaints handling system set out in the constitution so that it is a right of members.

RG 134.51 We will include licence conditions requiring:

- (a) use of an external complaints system that is satisfactory to us;
- (b) the responsible entity's complaints handling system to comply with AS 4269.

Regulatory Guide 130 *Managed investments: Licensing* at RG 130.64 onwards describes licence conditions about complaints resolution which will be put on licences. The requirements of RG 130 are broader than the requirements of s601GA(1)(c).

Winding-up

RG 134.52 The Law sets out the framework for winding-up of schemes. A constitution should set out members' rights in a winding-up process consistently with Pt 5C.9 of the Law.

RG 134.53 The appointment of the auditor is terminated when a winding-up commences: s331AD. The accounts of winding-up should be independently checked in order to ensure compliance with the Law. We consider that provision in a constitution for the independent sign off of the accounts of a winding-up is a part of adequately dealing with winding-up.

Withdrawal rights of members

RG 134.54 We do not prescribe how fairness is to be achieved. Because the constitution must provide for the withdrawal price, we consider that the basis for the price set out must be independently verifiable based on the terms of the constitution.

RG 134.55 The withdrawal provisions in a constitution must be consistent with Pt 5C.6 of the Law which restricts withdrawal from non-liquid schemes.

[Historical note: RG 134.56 deleted 4/11/1998. The paragraph formerly read:

"Further examples

RG 134.56 Provisions similar to Appendix 15A of the Listing Rules of the ASX prevent the provisions of the constitution that deal with the matters in s601GA and 601GB from being complete. That type of provision may require a reader to consider material which is extrinsic to the constitution itself. We cannot register a scheme if its constitution has this type of provision. We have discussed this with the ASX and will consider whether or not a modification of the Law should be made that may enable these provisions to be included in a constitution.".]

Key terms

RG 134.57 In this guide, a reference to:

“ASX” is to the Australian Stock Exchange Ltd;

“Managed Investments Act” is to the Managed Investments Act 1998;

“scheme” is to a managed investment scheme;

“s782” (for example) is to a section of the Law;

“reg 7.12.15(1)(g)” (for example) is to the Corporations Regulations;
and

“the Law” is to the Corporations Law.

Related information

RG 134.58

Headnotes

Managed investment schemes, constitution, assessing constitution, definition of constitution, adequate provision for content requirements under 601GA, consideration to acquire, powers to deal with scheme property, complaints procedures, winding-up, withdrawal rights of members, independently verifiable price, issue-price relief, Appendix 15A.

Class orders

[CO 98/52], [CO 00/1714]

Policy statements

Superseded Policy Statement 23 *Approval of deeds relating to prescribed interests* [SPS 23]

Superseded Policy Statement 55 *Covenants in deeds* [SPS 55]

Superseded Policy Statement 131 *Managed investments: Financial requirements* [SPS 131]

Regulatory guides

RG 130 *Managed investments: Licensing*

RG 132 *Managed investments: Compliance plans*

RG 133 *Managed investments: Scheme property arrangements*

RG 135 *Managed investments: Transitional issues*

RG 136 *Managed investments: Discretionary powers and closely related schemes*

Legislation

Chapter 5C, Parts 5C.2, 5C.3, 5C.6 and 5C.9, Div 2 of Part 7.12, s601GA, 601GB, 601GA(1)(a), (b), (c) and (d), 601GA(4), 601EA(4)(c)(i), 601FC(1)(c), (d), (m), 601FC(2), 1069(1)(b)(ii) and reg 1.2A.02(2).

Consultation papers

Licensing a responsible entity

Financial requirements of a responsible entity

Compliance plans for managed investment schemes

Scheme property arrangements

Constitutional issues

Transitional issues

Exemptions and modifications

Information releases

[IR 98/9], [IR 98/10], [IR 99/12]