

## Chapter 6 Scheme constitution

### Template for submissions

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#### 6.1 Rights and powers requiring inclusion in the constitution if they are to exist

**Question 6.1.1**

What rights and powers, if any, not currently requiring specification in a scheme constitution should be required to be so specified if they are to exist (for instance, an RE's power to grant security over scheme property)?

**Submission**

We do not see the need to be prescriptive of what must be in a Constitution.

## 6.2 Enforceability of the scheme constitution

### Question 6.2.1

How common is it for scheme constitutions to fail to provide that they are legally enforceable by all relevant parties against all other relevant parties?

### Submission

The fact that Constitutions are not executed by scheme members always gives rise to a concern that a scheme member will say it is not binding on them though Primary Securities has never encountered this argument).

It is preferable if the Corporations Act specifies that a registered Constitution is binding on scheme members.

### Question 6.2.2

Are there any instances of scheme members experiencing difficulties through being unable to enforce the scheme constitution against other members?

### Submission

No.

### Question 6.2.3

Are there any reasons why the approach to the enforceability of scheme constitutions should not be the same for schemes as for companies?

### Submission

It is not the function of a Constitution to be enforceable against other scheme members.

Managed investment schemes are not companies and members do not have limited liability.

Scheme Constitutions are like spokes to wheel. The agreement constituted by the Constitution is an agreement between each several scheme member and the RE only. They are “several ventures” as opposed to “joint ventures”.

Primary opposes the extension to render a Constitution an agreement between each member. There could be unwanted consequences in members contracting with each other. There are potentially so

many kinds of schemes that such a change could sometimes result in danger for scheme members.

Some schemes could become closer to being outsized partnerships if they constituted agreements between each scheme member.

### 6.3 Procedure for changing the scheme constitution

#### Question 6.3.1

What difficulties, if any, have been experienced as a result of the current procedure for amending scheme constitutions?

#### Submission

We appreciate the effect of the decision in the *360 Capital* case, and the doubt that now arises in relation to any amendments an RE might unilaterally make to a Constitution. However, the situation in the *360 Capital* case was extreme because as a result of the RE's unilateral amendment, convertible notes were to be issued at a discount of 23%, and the interests of scheme members were going to be severely adversely affected.

Primary continues to make unilateral amendments where it considers that the rights of members are not adversely affected and the fund continues to be essentially administered in accordance with the constitution of the scheme prior to the amendments.

#### Question 6.3.2

Is there any reason why the procedure for changing a scheme constitution should differ from that for amending a company's constitution?

#### Submission

A responsible entity is under a much higher duty than the board of directors of a company. This higher duty justifies permitting the RE to make amendments which will not adversely affect members' rights.

As a professional responsible entity, Primary Securities makes a lot of Constitutional amendments for administrative convenience which of course do not adversely affect members' rights or interests. Our procedure involves full consideration of the question and the receipt of a legal opinion on the matter. We do not wish this facility to be removed. It could considerably add to our costs if every amendment, no matter how innocent, required a meeting of scheme members.

We oppose removing that right.

**Question 6.3.3**

If the procedure for amending a scheme constitution should differ from that for amending a company's constitution, does the current procedure for schemes (in particular the ability of the RE to amend the constitution where the RE reasonably considers that the amendment would not adversely affect members' interests) need to be modified and, if so, how?

**Submission**

To remove the concerns that were present in the *360 Capital* case, the Corporations Act could be amended so that it provides that amendments can be made unilaterally provided the amendments do not adversely affect members' rights **or interests**.

**Other comments**

Please insert any other comments you may have on the matters covered in this chapter.

**Submission**

A recent ASIC Regulatory Guide 134 recommended that Constitutions be rejected which do not precisely specify the fees payable to a responsible entity or for the use of its staff but refer to the RE's usual rates. A maximum amount was permitted with the RE having the right to charge less.

Primary Securities believes that it is quite inappropriate to include in a Constitution a fee which is excessive (say 5% of the gross assets of a fund, or \$1,000 per hour for its staff) and say that the RE is permitted to charge less. This is meaningless to scheme members and dangerous. Primary Securities prefers to charge a fee for its staff which is published on our website and available for all to see. Scheme members can see whether or not the fee is reasonable or not. These inappropriate provisions of Regulatory Guide 134 need to be withdrawn.