

14. The regulator

Introduction

14.1 The regulator of collective investments schemes should be the Australian Securities Commission (ASC). This chapter considers the information gathering and enforcement powers that the ASC will need for this role. It first outlines the surveillance and investigative powers that should be available to the ASC. It then discusses criminal enforcement and civil preservative and recovery actions by the ASC. It concludes with proposals for suitable administrative powers for the ASC, including enforceable undertakings, calling or attending meetings of investors, revoking licences and issuing stop orders.

Single external regulator

Proposal and submissions

14.2 DP 53 argued the need for a single national regulator of all collective investment schemes including investment linked policies of life insurance companies and friendly societies to ensure consistency of regulation across different markets and to prevent operators choosing the regulatory regime most advantageous to themselves.¹ Submissions supported the proposal.² Some submissions, however, argued that investment-linked life policies should continue to be regulated solely by the ISC to prevent duplication of regulation and to take advantage of the expertise that a specialist regulator can provide.³ The Review acknowledges that consistency in regulation of different products does not necessarily require them to be subject to the same regulator. It also recommends that life insurance products and investment linked policies of friendly societies should continue to be regulated by their own regulators, subject to their regulation having at least comparable disclosure and other protections for investors.⁴

Recommendation

14.3 The Review recommends that collective investments schemes as defined in chapter 3 should be regulated by the ASC as part of the national corporations scheme laws, and thus subject to the same Federal-State arrangements that apply to other components of those laws. The ASC should be given adequate resources, particularly to evaluate and monitor the compliance measures of collective investment schemes. As a consequence of the recommendation that life insurance products should continue to be regulated separately, the current division of responsibilities between the ASC and the ISC will not be disturbed. The Review is concerned, however, to ensure as much consistency as possible in the treatment of

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1. Proposal 11.1.
 2. eg IFA *Submission* 1 December 1992; MLC Investments Ltd *Submission* 17 December 1992; ASCPA & ICAA *Submission* 15 February 1993; Attorney-General's Department, Business Law Division *Submission* 21 December 1992.
 3. See for instance Treasury *Submission* 24 December 1992.
 4. See para 3.15, 3.16.

functionally similar investment products by the different regulators. The Council of Financial Supervisors (comprising the RBA, the AFIC, the ASC and the ISC) is the appropriate body to co-ordinate and ensure consistency of regulation of investment products.

Self regulation

14.4 IP 10 asked whether there is a role for industry self regulatory organisations (ISROs). The majority of submissions on this issue favoured regulation being carried out by a government agency.⁵ DP 53 noted concerns expressed in the UK, where the financial system involves comprehensive use of ISROs, about the level of industry self-regulation and the role and effectiveness of ISROs.⁶ The Review recommends that the Commonwealth should retain primary responsibility for regulating the collective investments industry. No segment of the market should be substantially regulated by the industry itself.

The regulators' existing powers

ASC

14.5 The ASC has broad investigative and other information gathering powers which it may employ in relation to any person or structure regulated under the Corporations Law, including prescribed interest schemes.⁷ They include powers to inspect certain books,⁸ to require a securities dealer to provide specific information and, if directed, have that information audited,⁹ to require persons to give assistance to the ASC and to appear for examination,¹⁰ to require the production of books,¹¹ to require the disclosure of information relating to the acquisition or disposal of securities¹² and, where appropriate, to seize documents under a search warrant.¹³ The national scheme laws also confer on the ASC a range of enforcement powers applicable to prescribed interest schemes. These include civil preservative or recovery actions, the instigation of criminal proceedings and various administrative remedies including powers to

- revoke approval of a prescribed interest trust deed or of a trustee¹⁴
- refuse to register a prospectus¹⁵
- issue a stop order on the issue of securities¹⁶

5. eg Law Council of Australia *Submission* 21 February 1992; RW Arnold *Submission* 31 September 1991.
6. eg House of Commons Social Security Committee (UK) *Second Report: The Operation of Pension Funds* March 1992 para 243-244.
7. These are conferred by the ASC Act Pt 3.
8. ASC Act s 29.
9. Corporations Law s 788.
10. ASC Act s 19.
11. ASC Act s 30-33.
12. ASC Act s 41.
13. ASC Act s 35, 36; *Crimes Act 1914* (Cth) s 10.
14. Corporations Law s 1067(5).
15. Corporations Law s 1020A(2).
16. Corporations Law s 1033.

- revoke a fund manager's dealers licence¹⁷
- suspend a dealers licence¹⁸
- issue a licensee banning order.¹⁹

In some instances the ASC must provide the opportunity for a hearing prior to the exercise of its administrative powers.²⁰

ISC

14.6 The ISC regulates superannuation schemes and the activities of insurance companies. In regard to life insurance companies the ISC has power to

- cancel a company's licence to act as a life insurance company²¹
- require the provision of information²²
- require the production of books and other documents²³
- gain access to a company's premises to search for documents and to inspect and copy them²⁴
- undertake an investigation of a company²⁵
- obtain information pursuant to an investigation of a company²⁶
- apply to the court for an order to place a company or part of the business of a company under judicial management²⁷
- apply to the court for an order that a company be wound up²⁸
- transfer any or all of the business of a company to another life insurance company.²⁹

Information gathering by the regulator

Application of existing powers

14.7 To promote investor confidence and provide adequate investor protection, the regulator must have effective information gathering powers. It must be able to monitor compliance with the laws governing collective investment schemes by conducting surveillance programs, requiring the production of documents and disclosure of the whereabouts of information not supplied, examining persons capable of providing relevant information and, ultimately, gaining access to premises where documents may be located. Investigative powers must be carefully

17. Corporations Law s 824-826
 18. Corporations Law s 827.
 19. Corporations Law s 828.
 20. Corporations Law s 837, 1033(3).
 21. LIA s 23A.
 22. LIA s 54.
 23. LIA s 54A.
 24. LIA s 54B.
 25. LIA s 55.
 26. LIA s 56.
 27. LIA s 59(1)(a).
 28. LIA s 59(1)(b).
 29. LIA s 65, 73-6.

drafted to ensure a balance between powers needed for effective enforcement by the regulator and the protection of personal rights. The Review recommends that, in regulating collective investment schemes, the ASC should have available all its existing information gathering powers under the Corporations Law and the *Australian Securities Commission Act 1989* (Cth) (ASC Act). It should also have additional powers, some of which are presently possessed by the ISC but not by the ASC.

Information gathering powers

14.8 Introduction. The ASC may become aware in a number of ways of a possible breach of the law. Documents lodged with it under statutory reporting obligations, including auditors' reports, may give rise to some issue that requires investigation. It may receive a complaint from an investor in a collective investment scheme or obtain information in the course of its surveillance program. It requires comprehensive information gathering powers to ensure that it can adequately and effectively respond to instances of suspected breach.

14.9 Enhanced surveillance powers. The ASC should play a strong and active role in the regulation of collective investment schemes. This can be achieved through a concerted program of periodic and continuing surveillance. The ASC currently undertakes a surveillance program for licensees, including field inspections to monitor compliance with licence conditions.³⁰ Where necessary, the Commission can require the production of documents and explanations as to their contents.³¹ A system of random audits is also used by the Australian Taxation Office to enforce compliance with tax legislation. DP 53 considered that a vigorous surveillance program by the regulator would significantly enhance the level of compliance by scheme operators with the law and schemes' constitutions. Submissions generally supported this.³² The credibility of such a program may, however, be severely damaged if sufficient resources are not provided. The ASC should be given adequate funds to enable it to carry out a thorough surveillance program on a continuing basis. An ASC surveillance program for collective investments should include a review of the quality and functioning of a scheme's compliance measures, the means of ensuring correct identification of scheme assets, and adherence to the terms of the scheme and any issued prospectuses. Where appropriate, the ASC could impose additional terms and conditions on the licence,³³ either after giving the scheme operator an opportunity to be heard³⁴ or having the scheme operator enter into an enforceable undertaking.³⁵ The Review recommends that, to enhance its existing surveillance powers, the ASC should have further powers, exercisable whether or not a contravention is suspected, to:

30. ASC Act s 28(b).

31. Corporations Law s 788; ASC Act 37(9). However, except by initiating a formal investigation, the ASC cannot otherwise compel persons to answer questions.

32. eg MLC Investments Ltd *Submission* 17 December 1992; TCA *Submission* 17 December 1992.

33. See Corporations Law s 786.

34. See Corporations Law s 837(1)(b), (c).

35. See para 14.24.

- gain access to, and within, premises to search for and examine relevant books³⁶
- bring devices upon premises to assist in such search or examination
- check and operate computers or other devices already upon the premises to obtain relevant information
- secure relevant books found during a surveillance visit
- require persons to assist its surveillance audit.

14.10 *Production and explanation of documents held overseas.* The ASC Act gives the ASC powers to require the production of books, to inspect, copy or retain them and to require an explanation of their contents.³⁷ These powers may be exercised whether or not the ASC has any suspicion of a breach of the law.³⁸ Powers of this nature are essential to the supervision of the collective investments industry. The ASC should not be hindered in exercising its lawful powers to obtain books. A problem arises where relevant books of persons within Australia are held on their behalf by a party outside the jurisdiction, for instance by an overseas bank. The Review **recommends** that the ASC should have an additional power to require a person within Australia to authorise the Commission to obtain documents or any other record of information directly from overseas parties.

14.11 *Search warrants.* The ASC, through the Australian Federal Police, has power under both the ASC Act³⁹ and the *Crimes Act 1914 (Cth)*⁴⁰ to seek the issue and execution of search warrants. Exercise of this power may be the only means of ensuring the security of documents. Statutory prerequisites to the use of search warrants and the role of the courts in ensuring their proper execution provide suitable and adequate protections against possible abuse. The Review **recommends** that the existing search warrant provisions should be amended to permit warrants to be obtained by facsimile and telephone if it is impractical to apply for a warrant in person. This would expedite their issue and execution, which is particularly necessary where urgent action is required to secure documents. The Review also **recommends** that a person executing a warrant should be permitted to leave the premises temporarily without the warrant thereby being discharged.

14.12 *Examination of persons.* To ensure effective investigations, the ASC must have appropriate powers to require persons to answer questions under compulsion. The ASC may act where it suspects or believes, on reasonable grounds, that a

36. The ISC has power of access to the premises of life insurance companies to search for and take possession of documents: LIA s 54B. The ATO also has powers to enter premises to inspect and take extracts from or copies of documents: ITAA s 263. The ASC has no such powers in relation to operators of prescribed interest schemes and, short of entering under a search warrant, must rely on common law licensee principles to enter premises. At common law persons have an implied licence to enter private land for lawful purposes. This right of entry and inquiry may be withdrawn by an unequivocal direction from the owner or occupier to leave the premises. Failure to leave, within a reasonable time, constitutes a trespass.

37. ASC Act s 29-33; 37(9).

38. ASC Act s 28, 29. The ASC Act Pt 3 Div 3 powers may be used against any relevant person, including an external auditor, whether or not that person is suspected of having committed a contravention.

39. s 35, 36.

40. s 10.

person can give information relevant to an investigation.⁴¹ DP 53 proposed that the regulator of collective investments schemes should have the same power for collective investment schemes.⁴² Submissions generally supported this proposal.⁴³ The ASC's examination powers will be available in the regulation of collective investment schemes. The ASC has no statutory power to restrain an examinee from discussing his or her evidence with another person,⁴⁴ although it may have implied powers to make limited non-disclosure orders.⁴⁵ The issue of restraining powers should be considered in a review of the ASC's investigation powers, rather than in the limited context of collective investments.

14.13 Power to arrest. The ASC may apply to a court for the arrest of a person who is either absconding from Australia, or improperly dealing with books, to avoid his or her obligations in connection with the winding up of a company.⁴⁶ The Review recommends that the ASC should have similar powers where a collective investment scheme is being wound up.

14.14 Protection of examinees. Investigative and other information gathering powers require persons to provide oral or written information under direction. The Parliament has recognised the need for statutory coercive powers of this nature to accommodate longstanding common law privilege and 'right to silence' principles. For instance, legal practitioners at ASC examinations may lawfully claim legal professional privilege,⁴⁷ and other examinees are granted an evidential immunity regarding self-incriminating or otherwise legally privileged information.⁴⁸ DP 53 noted that these privileges were not absolute and that any evidential immunity consequent upon giving information may be restricted.⁴⁹ It proposed that the approach adopted in the ASC Act, which currently applies to investigations concerning prescribed interest schemes, be applied to collective investments. Submissions generally supported the proposal.⁵⁰ One submission agreed in principle that there should be consistency under the national scheme laws

41. ASC Act s 19.

42. Proposal 11.3.

43. eg Macquarie Investment Management Ltd *Submission* 24 November 1992; MLC Investments Ltd *Submission* 17 December 1992.

44. Contrast ASC Act s 55: the Commission may restrict publication of certain material given at Commission hearings under Pt 3 Div 5.

45. An ASC examination must take place in private: ASC Act s 22. The ASC, by implication, may be entitled to take all reasonable steps necessary to maintain this privacy. The ASC might, by 'non-disclosure' directions, seek to prevent or restrict the premature disclosure of evidence given at an examination, provided the directions do not go beyond what is reasonably necessary to ensure the secrecy of the examination, as would, for instance, directions prohibiting disclosure indefinitely.

46. Corporations Law s 486B.

47. ASC Act s 69. A claim of legal professional privilege at the examination is available only to legal representatives: *CAC (NSW) v Yuill* (1991) 4 ACSR 624; *ASC v Dallegles Pty Ltd* (1992) 8 ACSR 109.

48. ASC Act s 68, 76.

49. For instance, the self-incrimination evidential immunity in the ASC Act s 68 protects only the examinee in criminal proceedings, other than for perjury, but not in any civil proceedings other than for the imposition of a civil penalty against the examinee. The evidential immunity is not available to bodies corporate: ASC Act s 68(2); Corporations Law s 1316A.

50. Macquarie Investment Management Ltd *Submission* 24 November 1992; MLC Investments Ltd *Submission* 17 December 1992; St George Funds Manager Limited *Submission* 18 December 1992; TCA *Submission* 17 December 1992.

but without wishing to be taken as saying that it regards the current state of the law on privilege and immunity as being satisfactory.⁵¹

The Review supports the principle of consistency regarding privileges from disclosure and evidential immunities under the national scheme laws. The privileges from disclosure, the immunities from use in evidence and the liabilities for non-compliance under the ASC Act will apply to collective investment schemes.

14.15 *Protection of informants.* Persons who provide information in compliance with a direction or purported direction of the ASC are protected from consequential civil liability.⁵² Persons who are obliged to report certain matters to the ASC are similarly protected.⁵³ However, other persons who volunteer information to the ASC do not have this statutory protection but must rely on the common law.⁵⁴ The Review **recommends** that the directors and other officers of scheme operators and any other persons involved in the compliance activities of collective investment schemes should be given statutory qualified privilege in respect of any information volunteered to the ASC .

Enforcement by the regulator

Criminal prosecutions

14.16 Criminal proceedings are one of the central means of enforcing the laws regulating collective investment schemes. For schemes currently defined as prescribed interests, the ASC undertakes such proceedings in conjunction with the Director of Public Prosecutions (Cth).⁵⁵ Submissions supported the proposal in DP 53⁵⁶ that similar powers should apply in respect of collective investment schemes. The ASC will be able to institute proceedings for an offence against a collective investment scheme law in the same manner as any other charge under the Corporations Law.

Civil enforcement

14.17 DP 53 described adequate civil as well as criminal enforcement powers as essential deterrents against contraventions of the law and the scheme constitution and as means to protect the assets and lawful interests of investors. The ASC should be able to undertake a range of civil proceedings to ensure an effective enforcement strategy, including

51. Law Council of Australia *Submission* 16 December 1992.

52. ASC Act s 92.

53. eg Corporations Law s 1289 in relation to auditors. Qualified privilege protects a person from any consequential civil liability for breach of confidentiality (express or implied), defamation or otherwise, except for any disclosure motivated by malice. See also Corporations Law s 89.

54. At common law, informants who seek to expose iniquities are generally protected from legal redress, though some doubt remains whether, and to what extent, informants must have had reasonable grounds for their belief of misconduct.

55. Corporations Law s 1315; ASC Act s 49.

56. Proposal 11.5.

- preservative actions
- civil recovery
- representative proceedings.

Preservative actions

14.18 **General powers.** Preservative actions are designed to prevent or contain loss caused by contraventions of relevant laws. The ASC should be permitted to take civil proceedings to seek to preserve scheme assets at risk from illegal activity. DP 53 proposed that the preservation powers currently available to the ASC in respect of prescribed interest schemes, including those dealing with breaches of the scheme constitution,⁵⁷ should also apply to collective investment schemes.⁵⁸ Under these powers, the ASC may, by court order, obtain

- Mareva injunctions
- statutory injunctions and related orders⁵⁹
- asset freezing, receivership and related remedies⁶⁰
- orders restraining dealings in accounts held by licensees⁶¹
- provisional liquidations.⁶²

Submissions fully supported the Review's proposal. These powers will be available to the ASC in regulating collective investment schemes. The interests of investors would be further enhanced by empowering the ASC to seek two further preservative remedies:

- an order for compliance
- a court appointed temporary scheme operator.

14.19 **Order for compliance.** In some instances an apparent refusal or failure of the scheme operator to comply with the Corporations Law or the scheme constitution may be best dealt with by a direction to comply. The Review **recommends** that the court should have a compliance directions power, exercisable upon the application of the ASC, a director of the scheme operator or an investor.⁶³

14.20 **Court appointed temporary scheme operator.** DP 53 proposed that, as an additional preservative remedy, the regulator should be able to apply to the court for the appointment of a person to act as a temporary scheme operator.⁶⁴ This would ensure continuity of a scheme where the scheme operator had failed to fulfil

57. Corporations Law s 1073(1A).

58. Proposal 11.9.

59. Corporations Law s 1324.

60. Corporations Law s 1323. A court may appoint a receiver under s 1323(1)(h), but will do so only where the circumstances are serious and no lesser remedy is suitable. There is no direct power in s 1323 for the court to order who shall pay the fees of the receiver or the receiver and manager. In the context of collective investments, the court should be empowered to direct such payments from the assets of the operator, the scheme or both.

61. Corporations Law s 874-878.

62. Corporations Law s 464, 472.

63. cf Corporations Law s 777.

64. Proposal 11.10.

its obligations, or was unable or unwilling to continue as operator. It would be similar to the power of the Insurance and Superannuation Commissioner to apply for a court order to place a life insurance company under judicial management.⁶⁵ An investor in a scheme, or the scheme operator itself, should also have standing to apply to have a person appointed as a temporary scheme operator. Submissions generally supported the right to seek a court appointed scheme operator.⁶⁶ One submission argued that the investors' rights should be confined to approaching the regulator or calling a meeting to remove a scheme operator.⁶⁷ The Review considers, on balance, that individual investors should be given standing to approach the court, which could discipline vexatious or unmeritorious applicants through costs orders. Another submission questioned the need for any specific judicial management power, given that under the Corporations Law s 1323 the court may appoint a receiver or receiver and manager.⁶⁸ The Review recognises the width of the s 1323 powers, but notes the limiting prerequisites of the section, namely, that there be an ASC investigation or civil or criminal litigation on foot. There are various other instances where a temporary scheme operator may be required, for instance, where the scheme operator goes into receivership or provisional liquidation, or is otherwise unable or unwilling to continue, and a replacement scheme operator has not yet been approved. These matters are not covered by s 1323. The Review recommends that the court should have power, upon an application by the ASC, an investor or the scheme operator, or any of its directors, to appoint a person to act as the temporary scheme operator. A liquidator or administrator of a scheme operator or a receiver of property of a scheme operator should be required to apply immediately to the court to appoint a temporary scheme operator in respect of each of the operator's schemes. A scheme operator that is unable to pay its debts should be obliged to make a similar application. A scheme operator should not be entitled to retire until either a replacement scheme operator has been approved by investors or the court has appointed a temporary scheme operator.⁶⁹ A court appointee need not hold a scheme operators licence or be incorporated. The court order should specify the terms and conditions of the appointment, including the powers and reporting obligations of the temporary scheme operator.⁷⁰

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65. LIA s 59(1)(a). The LIA obliges the judicial manager, as soon as possible following his or her appointment, to prepare a report to the court on the course of action which, in his or her opinion, will be most advantageous to the company's policyholders. The report may recommend a range of actions including transfer of a company's business, merger of that business with another company or the winding up of the business. The court may then make such orders as it considers appropriate in the circumstances.
66. eg Macquarie Investment Management Ltd *Submission* 24 November 1992; National Mutual *Submission* 6 November 1992; County NatWest Australia Investment Management Limited *Submission* 18 December 1992; TCA *Submission* 17 December 1992; MLC Investments Ltd *Submission* 17 December 1992; FPAA *Submission* 7 December 1992.
67. St George Funds Manager Limited *Submission* 18 December 1992.
68. M Starr *Submission* 12 November 1992.
69. See para 11.15.
70. For instance, the court appointee might be required to prepare a report to the court as soon as possible, stating the course of action considered most advantageous to the interests of investors. This might include the continuation, merging or winding up of the scheme. The court could then make such further orders as it considers appropriate in the circumstances.

Civil recovery and representative proceedings

14.21 *Introduction.* The ASC currently may institute a range of civil recovery proceedings against persons involved in prescribed interest schemes, including

- orders for restitution⁷¹
- oppression remedies⁷²
- liquidations⁷³
- insider trading orders⁷⁴
- representative public interest actions.⁷⁵

To better regulate collective investment schemes, the ASC should also have powers to

- undertake representative actions against scheme operators
- enforce the deed or instrument constituting the scheme
- take action against hired investment managers.

14.22 *ASC power to act on behalf of investors.* DP 53 proposed that the ASC should be able to stand in the shoes of an investor to enforce the general law and the scheme constitution.⁷⁶ The ASC currently has this power where it is investigating possible breaches of prescribed interest scheme covenants.⁷⁷ In addition, DP 53 proposed that the ASC should be able to take proceedings against the scheme operator as the representative party under the enhanced representative procedure provided for in the *Federal Court of Australia Act 1976* (Cth) Part IVA.⁷⁸ Submissions supported the regulator having this representative power.⁷⁹ However one submission proposed that the regulator should take a representative action only at the request of a quorum of investors.⁸⁰ Another submission doubted whether

71. Corporations Law s 1325.

72. Corporations Law s 260.

73. Corporations Law s 461, 462, 464.

74. Corporations Law s 1013(6).

75. ASC Act s 50.

76. Proposal 11.11, 11.14.

77. Corporations Law s 1073(1A) deems any breach of a covenant to be a contravention. The ASC may commence an investigation pursuant to ASC Act s 13 where it has reason to suspect any such contravention. The ASC Act s 50 empowers the ASC, in consequence of an investigation, to undertake civil recovery proceedings in the name of consenting investors. Consent is not required where the ASC acts in the name of a company. Where an action is taken by the ASC without the consent of particular investors, it should not prevent those persons from exercising their rights, nor impose on them any liability for costs, particularly if the action fails.

78. This would enable the regulator to recover damages on behalf of investors without the need to obtain the consent of all the investors being represented. However, if fewer than seven investors were involved, the Federal Court could order that the proceedings not continue as an enhanced representative proceeding. In that case, the regulator would still be able to act as the representative of any investor who consented.

79. eg TCA *Submission* 17 December 1992; Macquarie Investment Management Ltd *Submission* 24 November 1992.

80. IFA *Submission* 1 December 1992.

representative actions would be preferable to facilitating private enforcement.⁸¹ The Review does not support an investor quorum requirement. It recommends that the ASC should be entitled to act as a representative party pursuant to the Federal Court class action rules.⁸² Currently it may intervene in any civil proceeding involving a prescribed interest.⁸³ This power is an appropriate one for collective investments. Representative actions are not a substitute for private civil enforcement. Indeed private litigation is an additional enforcement mechanism. The ASC currently can assist private litigants by providing them with copies of relevant records of formal examinations.⁸⁴ The Review recommends that, in addition, the ASC should have a specific power to provide these persons with any relevant books it has in its possession, in addition to those related to an oral examination.⁸⁵

14.23 Proceedings against a hired investment manager. A scheme operator may choose to contract out the investment function of a scheme. The operator will have the right to take proceedings in contract and tort against a hired investment manager for some breaches. Some scheme operators may find their resources insufficient to commence or continue such an action or may otherwise decline to act. The ASC could protect investors' interests by undertaking this litigation. DP 53 proposed that the regulator should have the power to litigate on behalf of the scheme operator. Most submissions supported the proposal.⁸⁶ However, one submission argued that it should remain the sole duty of the scheme operator to enforce these legal rights.⁸⁷ Another submission expressed doubts about the principle of giving the regulator power to intervene in these private arrangements.⁸⁸ A third submission expressed reservations about investors not having to consent.⁸⁹ The Review does not envisage the ASC having power to block private civil enforcement. Rather, the concern relates to a scheme operator that is unwilling or unable to act, despite an apparently good cause of action. In such circumstances

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81. Law Council of Australia *Submission* 16 December 1992 doubted that 'simply vesting investors' rights in the regulator is a strategy preferable to facilitating the enforcement by the investors of their own rights, either by diminishing the cost barrier or by promoting more efficient means of access on a representative or other basis to the courts'.
82. Pursuant to FCR O 73 and its powers under ASC Act s 50, the ASC could seek to consolidate proceedings against various parties (FCR O 29 r 5) or join separate causes of action (FCR O 6).
83. Corporations Law s 1330. Refer ASC Policy Statement 4.
84. See ASC Act s 25, 26.
85. ASC Act s 25 permits the ASC to provide private litigants with books 'related' to a record of examination. The ASC has given a wide interpretation to the term 'related books' as being 'not only documents formally identified and incorporated in the record of examination, but also documents referred to directly or indirectly in the record and which would assist the comprehension of the records': ASC Policy Statement 17 para 10. However even on this wide interpretation, a nexus between the record of the oral examination and the books is required. The ASC may permit private litigants to inspect other books held by it pursuant to ASC Act s 37(7). These books may be used for the purpose of any proceedings: ASC Act s 37(4). The ASC may also agree, pursuant to the Corporations Law s 1330, but subject to ASC Act s 127, to provide information to or exchange information with another litigant in any case in which it has intervened: ASC Policy Statement 4. The Review's recommendation is intended to resolve any doubt over the ambit of these powers.
86. eg Credit Union Services Corporation (Australia) Ltd *Submission* 27 November 1992; FPAA *Submission* 7 December 1992; ISC *Submission* 12 November 1992; St George Funds Manager Limited *Submission* 18 December 1992.
87. Macquarie Investment Management Ltd *Submission* 24 November 1992.
88. IFA *Submission* 1 December 1992.
89. TCA *Submission* 17 December 1992.

the ASC could act to protect scheme assets by enforcing those rights on behalf of the scheme operator. To permit the regulator to act only with the consent of the operator or the investors would limit the effectiveness of this remedy. The Review supports the ASC being able to undertake any proceeding for relief against an investment manager on behalf of the scheme operator, with or without its consent.⁹⁰ Relief includes damages and compensation, recoverable as scheme assets. Any such proceedings will not relieve the scheme operator of any liability for breach of duty in failing to act.

Administrative remedies

Enforceable undertakings

14.24 The *Trade Practices Act 1974* (Cth) (TPA) was recently amended to provide that the Trade Practices Commission (TPC) may accept undertakings from companies in connection with any matter in relation to which it has a power or function.⁹¹ The amendment gives legislative recognition to a practice that had been adopted by the TPC in a number of its investigations. It is expected that, for the most part, an undertaking will be sought by the TPC when, after an investigation of a suspected contravention of the TPA, the TPC judges that an undertaking will better serve to promote compliance with the TPA than legal proceedings in respect of the contravention. An undertaking might also be used to settle such proceedings. Under the TPA, the undertakings will be 'enforceable' in their own right. The Federal Court may, if an undertaking is breached, make appropriate orders. These could include orders directing the other party to the undertaking

- to comply with it
- to pay to the Commonwealth any financial benefit that it has obtained directly or indirectly and that is reasonably attributable to the breach
- to pay compensation to anyone who has suffered loss because of the breach.⁹²

The ALRC will be reviewing the effectiveness, and other aspects of these undertakings in the course of its work on enforcement of the TPA.⁹³ However, it is clear that the facility to accept undertakings of this type is a valuable and useful addition to the enforcement options available to regulators, particularly in commercial or business areas of regulation. The Review recommends that the ASC should have such a power. There should be no compulsion to enter into an undertaking; to emphasise that, and to guard against the possibility that the use of undertakings may be oppressive, the Law should expressly provide that the obligations imposed on a scheme operator by such an undertaking should be of no effect so far as they are inconsistent with a national scheme law. In other respects, the TPA provisions should be adopted, and any modifications resulting from the ALRC's review, when completed, should be incorporated.

90. ASC Act s 50.

91. See *Trade Practices Legislation Amendment Act 1992* (Cth) s 13 which adds s 87B to the TPA.

92. TPA s 87B(4).

93. Referred to the ALRC by the federal Attorney-General on 17 December 1992.

Calling meetings

14.25 Proposal and submissions. Presently the ASC has no power unilaterally to call a meeting of investors in a prescribed interest scheme.⁹⁴ DP 53 proposed that it should have such a power in respect of collective investment schemes. It may facilitate rapid action to resolve matters without resort to any, or further, civil litigation. It would be particularly useful where several schemes with the one operator were experiencing similar problems. Submissions favoured the ASC having this power, although some expressed reservations about the width of the proposed power to propose resolutions.⁹⁵ One submission argued that this power should be available only where the ASC has commenced a formal investigation and the scheme operator has refused its request to convene a meeting.⁹⁶ Another submission doubted the practical benefit of the power, as the ASC may not be in a position to identify issues, formulate proposals, and prescribe the information to be sent to investors without prior use of its investigation powers.⁹⁷

14.26 Recommendation. The Review recognises that the ASC would call a meeting only where it held sufficient information to warrant it and where it believed a meeting would be beneficial to investors. The ASC should be able to propose resolutions only on matters on which investors can lawfully vote.⁹⁸ An ASC power, in appropriate circumstances, to so act may assist investors to control their own schemes, especially where various courses of action are possible, for example, to continue with the scheme, wind it up or replace the scheme operator. The ASC should ensure that investors are properly informed and that the meeting is properly conducted. The Review recommends that the ASC should have power to call investors' meetings and propose resolutions.

Attending meetings

14.27 The ASC may wish to participate in meetings called by the scheme operator or requisitioned by investors. The ASC's presence may considerably assist investors in their deliberations. The Review therefore recommends that the ASC should be able to attend and speak at any meeting of the investors in a collective investment scheme.

Revocation of a scheme operator's licence

14.28 Introduction. The Review has recommended that a scheme operator must be licensed.⁹⁹ An operator's licence will be subject to such conditions or restrictions as are prescribed or imposed by the ASC.¹⁰⁰ Licensed dealers are required to notify

94. The ASC could unilaterally call a meeting only by acquiring sufficient units in a prescribed interest scheme to requisition the meeting.

95. TCA *Submission* 17 December 1992.

96. IFA *Submission* 1 December 1992.

97. Law Council of Australia *Submission* 16 December 1992.

98. See para 11.13-11.23.

99. See para 10.35.

100. Corporations Law s 786. The ASC cannot impose further conditions on a licence, or vary the conditions of a licence, without first providing the opportunity for a hearing: Corporations Law s 837(1)(b),(c).

the ASC promptly of any breach of a licence condition.¹⁰¹ The Review recommends that the same obligation should apply to holders of a scheme operators licence. The ASC may, where appropriate, suspend or revoke a licence or issue a banning order.¹⁰² These administrative powers, other than licence suspension,¹⁰³ are appropriate complements to civil preservation and recovery remedies.

14.29 *Revoking a licence without providing an opportunity for a hearing.* The present licensing regime empowers the ASC to revoke a dealers licence, without providing an opportunity for a hearing, in limited circumstances.¹⁰⁴ The ASC should have comparable powers in respect of scheme operators licences. The Review recommends that the ASC should have power, without a hearing, to revoke the licence of a scheme operator if it

- becomes an externally administered body corporate¹⁰⁵
- ceases to carry on business
- requests the ASC to revoke its licence.

Each of these matters is an objectively ascertainable fact and a hearing would serve no useful purpose.

14.30 *Revoking a licence after providing an opportunity for a hearing.* In certain circumstances, the ASC may revoke a licence and make a banning order against a licensee or an unlicensed person acting as a representative of a licensee, subject to providing an opportunity for a hearing.¹⁰⁶ DP 53 proposed that the regulator should have power to revoke a scheme operators licence outright, or in respect of one or more schemes, without providing an opportunity for a hearing, if, in its opinion

- there is a risk of non-compliance by the scheme operator with the relevant law
- there has been or is likely to be a breach of any of the conditions or restrictions of the operator's licence
- the scheme operator is unable, or has failed, to fulfil its duties.¹⁰⁷

101. Corporations Law s 787.

102. Corporations Law Pt 7.3 Div 5.

103. Licence suspension powers are not appropriate for scheme operators given the need for a scheme to have an operator at all times during its life. Where a scheme operator's licence is revoked, a temporary or replacement scheme operator must be appointed to ensure continuity. By contrast a securities dealer could be suspended from conducting that business for a limited period because there is no need to ensure continuity.

104. Corporations Law s 825.

105. Defined in Corporations Law s 9.

106. Corporations Law s 826-829, 837.

107. Proposal 11.15. In ALRC 59 the Review recommended that the regulator of superannuation schemes should have the power, without a hearing, to suspend or remove a superannuation scheme operator, or a member or director of an incorporated scheme operator, having regard to the risk of non-compliance with the law or inability to perform the duties of the position: recommendation 13.12. This power was needed because no licensing regime was recommended for superannuation scheme operators.

Several submissions opposed the ASC having power to revoke a licence without a hearing.¹⁰⁸ They pointed to the possibly irreversible commercial damage that could result to an operator through loss of its licence, even temporarily. The ASC will have adequate powers under the Review's other recommendations to act quickly and decisively to preserve assets at risk, ensure the continued administration of a collective investment scheme and protect the interests of existing and potential investors. Consequently, there is no overriding public interest in denying a scheme operator an opportunity for a hearing prior to any decision by the ASC to revoke its licence outright, or in respect of one or more schemes. The Review recommends that the ASC should have power to revoke a scheme operators licence, outright or in respect of one or more schemes, subject to providing the opportunity for a hearing, if it is satisfied that there is a significant risk that the operator will contravene or fail to comply with the Corporations Law, so far as it relates to the scheme, in relation to a substantial matter. In determining this, the Commission shall have regard to any submission made by or on behalf of the scheme operator about the matter. In addition, the Commission may have regard to whether

- information given in connection with an application was false or misleading in a material particular
- whether what the operator is doing by way of compliance measures is adequate to detect in advance and prevent relevant contraventions in relation to the scheme
- the scheme operator is unable to fulfil, or has failed to fulfil, the duties or functions of the position under the law or under the scheme constitution
- the scheme operator has contravened the Corporations Law in relation to any scheme
- the number of non-executive directors of the scheme operator has at any time, without reasonable excuse, been less than half the total number of board members for any period exceeding 14 days
- there has been, or there is likely to be, a breach of any of the conditions or restrictions of the licence by the scheme operator
- the scheme operator has failed to maintain the necessary capital requirement for any period exceeding 14 days
- the scheme operator, or any of its directors or other executive officers, has been convicted of serious fraud
- a civil penalty has been imposed on the scheme operator or any of its directors or other executive officers.

If its licence is revoked, the former scheme operator must, without delay, surrender the relevant licence certificate to the ASC.

14.31 Temporary operator. To ensure continuity of a scheme the Review also recommends that on giving a notice revoking a scheme operators licence, the ASC should have to apply to the court for the appointment of a temporary scheme operator, unless an eligible replacement scheme operator has already been properly appointed or the scheme has been terminated.

108. eg IFA *Submission* 1 December 1992; St George Funds Manager Limited *Submission* 18 December 1992.

14.32 Review and appeal rights. A scheme operator whose licence has been revoked will have a right of appeal on the merits, or in law, in the same manner as all other licensees regulated under the Corporations Law.¹⁰⁹ The Review also recommends that any written notice to a scheme operator, or any other affected person, of a decision or determination by the ASC should be required to include a statement of any rights to apply for a review by the Administrative Appeals Tribunal.

14.33 Record of banned scheme operators. The ASC is required to keep a register of disqualified company directors and officers, which may be inspected and copied by the public.¹¹⁰ The Review has considered whether there should also be a public register of corporations disqualified from acting as a scheme operator.¹¹¹ Little purpose would be served by such a register. Scheme operators must be licensed and information about licensees can be obtained by search at the ASC. There is little point in maintaining a separate register in addition to this. The Review therefore does not recommend that a register of banned scheme operators be kept.

Suspension or revocation of licence of a hired investment manager

14.34 DP 53 discussed whether the regulator should have the power, with or without a hearing, to suspend the securities dealers licence of a hired investment manager if, in its opinion, this was necessary having regard to the risk of non-compliance with the relevant law, a breach or anticipated breach of any of the conditions or restrictions of the licence or the apparent inability of the investment manager to fulfil its duties and functions.¹¹² The Review considers that adequate powers exist under its other recommendations to protect the legitimate interests of all relevant parties, without providing the ASC with an additional power to suspend or revoke this licence without a hearing. Hired investment managers should remain subject to the same disciplinary procedures as other licensees.

Suspension or revocation of licence of an intermediary

14.35 Many investors make investment decisions on the basis of recommendations by dealers and investment advisers. The regulator has an important role in controlling the operations of these intermediaries. The ASC may revoke, without a hearing, a dealers or advisers licence if an individual holder is insolvent or is convicted of serious fraud or if a corporate holder becomes externally administered.¹¹³ In certain circumstances the ASC may revoke a licence, subject to providing an opportunity for a hearing.¹¹⁴ These circumstances include where the ASC has reason to believe that the licensee has not performed his or her duties efficiently, honestly and fairly and it has reason to believe that the licensee is not of

109. Corporations Law Pt 9.4A provides for rights of review of various decisions of the ASC, on the merits, by the Administrative Appeals Tribunal. The Federal Court has jurisdiction to review ASC decisions pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth); *Corporations Act 1989* (Cth) Pt 8 Div 2A; *Corporations (State) Act* Pt 8 Div 3.

110. Corporations Law s 243.

111. DP 53 para 11.31.

112. Para 11.32.

113. Corporations Law s 824, 825.

114. Corporations Law s 826, 837.

good fame and character.¹¹⁵ The ASC may also make a banning order to prohibit a person from acting as a representative of a dealer or investment adviser.¹¹⁶ These powers will apply to collective investments intermediaries. The Review considers them sufficient.

Stop orders to prevent further issue of interests

14.36 The ASC can prevent the issue of further securities where, in its opinion, any information issued pursuant to a prospectus is false, misleading or deceptive.¹¹⁷ This stop order power will apply to collective investment schemes because interests in schemes are securities. Thus the ASC will have power to prevent the issue of further units or interests in a collective investment scheme, either to new or existing investors. This power will complement the other powers available to the ASC to protect the interests of investors and potential investors.

115. Corporations Law s 826.

116. Corporations Law s 829.

117. Corporations Law s 1033.