MinterEllison.

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Director
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Dear Sir/Madam

Review of the regulatory framework for managed investment schemes – Consultation Paper

We appreciate the opportunity to make a submission in relation to the review of the regulatory framework for managed investment schemes consultation paper released on 4 August 2023 (**Consultation Paper**).

MinterEllison is a leading Australian law firm. We advise major financial institutions, including banks, specialist fund managers, platforms operators, financial advice firms, stockbrokers, and other financial intermediaries in Australia and overseas.

The views expressed in our submission are ours alone and do not necessarily reflect the views of our clients.

We are supportive of the review of the regulatory framework for managed investment schemes and are particularly supportive of the board look at regulatory cost savings as proposed in Chapter 8 of Consultation Paper. This submission sets out the areas that, in our view, present opportunities to streamline the regulatory framework for managed investment schemes.

Item	Issue	Current position	Recommendation
a) ASIC public register	Currently, the name and details of Responsible Entities (**RE**) for Managed Investment Schemes (**MIS**) are not freely publicly available.	The Australian Securities and Investment Commission (**ASIC**) provides a free search function via the ASIC Register which provides the user with the basic details of a MIS. An organisational search of this kind provides details such as the: a) name of the MIS; b) Australian Registered Scheme Number (**ARSN**); c) registration date; d) next review date; e) former names; f) registration status; g) type of organisation; h) date of deregistration (if applicable); i) regulator; and j) general details of documents lodged with ASIC.	To increase transparency, we suggest, the ASIC Register should contain information in relation to the RE of each MIS so this information is accessible without a paid search. Additionally, as opposed to using the general 'organisation and names' search function, a separate standalone search function for registered MISs could be introduced to assist with navigation and ease of use for users.
b) Unit pricing guidance	Unit pricing guidance currently only exists in ASIC guidance and instruments and is not codified in the *Corporations Act 2001* (Cth) (**Act**). MIS issuers would benefit from the certainty of codifying current ASIC guidance and instruments into primary law.	Part 5C.3 of the Act sets out the constitutional requirements of an MIS. Section 601GA(1)(a) provides that the constitution of an MIS must make 'adequate' provision for the consideration that is to be paid to acquire an interest in the MIS. Further, subsection 601GA(4) requires the constitution of an MIS to specify the right (if applicable) to withdraw from the MIS, as well as set out 'adequate procedures' for making and dealing with withdrawal requests. CO 13/655 and CO 13/657 were created to mitigate uncertainty that arises from the operative terms 'adequate provision' and 'adequate procedures' by providing a prescribed means to satisfy the requirements. On 8 September 2023, the *ASIC Corporation (Amendment and Repeal) Instrument 2023/694* repealed CO 13/655 and CO13/657, remaking the class orders into a consolidated legislative instrument, *ASIC Corporations (Discretions for Setting the Issue Price and Withdrawal Price for Interests in Managed Investment Schemes) Instrument 2023/693* (**Instrument 2023/693**). Instrument 2023/693 is set to be repealed at the start of 1 October 2028. Whilst ASIC did seek feedback on the proposal to remake the MIS unit pricing class orders,[1] it ultimately considered that the orders were operating effectively and	We note that earlier this year the government released exposure draft legislation to move matters in legislative instruments made by ASIC into primary law and regulations. Tranche 2 of the *Treasury Laws Amendment (Measures for Consultation) Bill 2023: Rationalisation of ending Instruments* proposed to incorporate, *inter alia,* CO 13/655 and CO 13/657 into the Act.[2] Whilst CO 13/655 and CO13/657 have been subsequently repealed, we nonetheless submit that Instrument 2023/693 should be incorporated in the Act given that these matters relate to key constitutional content requirements.

[1] 23-154MR ASIC consults on remaking 'sunsetting' class orders on unit pricing discretions for managed investment schemes | ASIC
[2] Explanatory materials: Treasury Laws Amendment (Measures for Consultation) Bill 2023: Rationalisation of ending ASIC instruments (Tranche 2)

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		efficiently, continuing to form a necessary and useful part of the legislative framework. Accordingly, Instrument 2023/693 contains substantially similar terms as the repealed class orders. Instrument 2023/693 inserts notional section 601GAD into the Act which exempts the constitution from making adequate provisions for price to acquire an interest, if provisions are included that enable the RE to set the acquisition price in accordance with requirements of Instrument 2023/693. Notional sections 601GAE(1) and 601GAF(1) are also inserted into the Act which allow a MIS to satisfy its obligations under subsection 601GA(1)(a) and section 601GA(4) outlining, in its constitution, a formula or method to determine the amount of consideration to acquire interests in the MIS or the amount to be paid on a withdrawal from a MIS. The MIS can exercise discretion in relation to determining certain matters that affect the formula, however discretion must not be exercised on the basis that it will result in a particular amount being set as the amount of the consideration to acquire an interest in the MIS. Instrument 2023/693 does not allow for types of adjustments that ASIC considers will distort the unit pricing, discretions affecting the timing for the provision of consideration, and certain discretions about the form of consideration. Broadly, Instrument 2023/693 also provides that the formula or method set out in the constitution must be based on the value of MIS property, less any liability, divided by the number of interests, when used to determine: a) the acquisition price for interests that are not traded on a financial market (under notional subsection 601GAE(2); or b) the acquisition price for interests that are able to be traded on the ASX or Cboe but the scheme satisfies all of the following requirements: i. it is not listed on those markets; ii. on any day those interests are able to be traded, the responsibly entity can issue those interests and allows for applications for and redemptions of those interests; or c) the price or value of anything the scheme invests in is continuously disclosed or can be immediately ascertained (notional subsection 601GAE(2). The above relief, that allows a MIS to rely upon a formula or method to satisfy its constitutional obligations is only allowable where the MIS publishes and maintains, on its website, a notice that it will do so.	

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		Finally, Instrument 2023/693 inserts subsection 601FC(1A) that requires a RE to ensure that a discretion that affects the acquisition or withdrawal price is exercised, as far as practicable, consistently with ordinary commercial practice and with producing a reasonably current price. It also inserts section 601FC(1B) that prescribes the requirement to exercise discretion only if it is reasonable to do so and mandates the preparation of a written explanation of how the discretion was exercised and why it was reasonable (unless the discretion is exercised in accordance with current written policy). Section 1013DAA is inserted into the Act such that Product Disclosure Statements (**PDS**) must include statements to the effect that copies of documents relating to discretions about pricing of interests are available from the RE at no charge.	

c) Uniform electronic disclosure	ASIC's approach to electronic disclosure under *ASIC Corporations (Facilitating Electronic Delivery of Financial Services Disclosure) Instrument 2015/647*,[3] (**Instrument 2015/647**) and *Regulatory Guide 221*,[4] (**RG221**) has effectively modernised and facilitated electronic delivery of financial services disclosure documents. This includes ongoing disclosure documents such as PDS updates. However, these efficiencies currently only exist in class orders and regulatory guides.
	
	Parts 7.6 – 7.9 of the Act permit the digital delivery of financial services disclosures, however there has been uncertainty about what specific practices the law
		RG 221.12 provides that, the following disclosures, *inter alia,* may be notified or given to a client in 'electronic' form or may be sent 'electronically':
		
		a) ongoing disclosures (section 1017B(3)(b));
		
		b) periodic statements (section 1017D(6)(b)) ;and
		
		c) confirmations of transactions (section 1017F(6)(a)(ii)).
		
		The following disclosures, *inter alia,* may alternatively be 'made available in any way agreed' by a client or their agent:
		
		a) PDSs (regulation 7.9.02A);
		
		b) ongoing disclosures (regulation 7.975A(1));
		
		c) periodic statements (regulation 7.9.75A(2)); and
		
		d) additional information on request (section 1017A(4)(b)).
		
		The above disclosures can be sent to an electronic address as text in an email or as an attachment to an email, but in most cases delivery by sending a link or reference to the disclosure can only be with the agreement of the client (RG 221.18). ASIC have addressed this inefficiency via Instrument 2015/647, which facilitates the delivery of disclosures by notifying the client and making the disclosure available digitally.
		
		Instrument 2015/647 enables providers to make many disclosures available digitally, and notify the client that the disclosure is available, without the need for client agreement to receive the disclosures in that manner ('publish and notify' method).
			Due to the growing prevalence of electronic disclosure and electronic disclosure being the main disclosure adopted by MIS issuers, MIS issuers would benefit from codifying Instrument 2015/647 into the Act. This will modernise disclosure consistently across the board and apply the same electronic disclosure requirements to all types of disclosure.

[3] ASIC Corporations (Facilitating Electronic Delivery of Financial Services Disclosure) Instrument 2015/647 (legislation.gov.au)
[4] Regulatory Guide RG 221 Facilitating online financial services disclosures (asic.gov.au)

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	allows. The provisions that enable disclosures to be delivered digitally differ depending on the type of disclosure.	To use this method, the provider must first give the client the opportunity to opt out of this method within 7 days. The publish and notify delivery method is available for the following disclosures: a) Financial Service Guides and Statements of Advice; b) PDSs: c) ongoing disclosure of material changes and significant events; d) periodic statements; and e) information statements for Commonwealth government security depository interests.	
d) Continuous disclosure obligations for MISs with more or less than 100 members	As the obligations under the two continuous disclosure regimes differ, this creates a compliance burden for issuers of several MISs which fall on either side of the member threshold. For example: • a Chapter 6CA registered scheme must prepare physical documents (which may be sent via email); and • the threshold for determining what information requires disclosure differs between the regimes, with s 1017B being broader in application.	Continuous disclosure obligations for a MIS are set out in either section 1017B or Chapter 6CA of the Act depending on whether the MIS has more or less than 100 members. The continuous disclosure obligations in Chapter 6CA apply to an MIS that is a 'disclosing entity'. Pursuant to section 111AC, a disclosing entity is a body, whose securities are 'ED Securities'. Managed investment products will be 'ED Securities' if, for example, 100 or more people hold the product as a result of offers that gave rise to obligations to give a Product Disclosure Statement (section 111AFA of the Act). Where a MIS is an unlisted disclosing entity, it will be required to provide continuous disclosure as soon as practicable, if it becomes aware of information: a) which is not generally available; b) which a reasonable person, if it were generally available, would expect to have a material effect on the price or value of ED securities of the entity; c) that has not been included in a Product Disclosure Statement, a Supplementary Product Disclosure Statement, or a Replacement Product Disclosure Statement; and d) regulations do not exclude disclosure under this section in the circumstances. Section 1017B establishes continuous disclosure obligations for managed investment products that are not 'ED Securities'. Accordingly, the obligations set	There is no clear reason for the distinction between a MIS with more or less than 100 members. In order to alleviate the compliance burden, the necessity of this distinction should be considered. Additionally, for the purposes of clarity and certainty, website disclosure as provided by RG 198 should be codified in the Act as a lawful means of continuous disclosure for unlisted disclosing entities.

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		out in section 1017B will not apply to MISs with 100 or more members. Section 1017(B)(1A) specifies that the changes and events that must be notified are: a) any material change to a matter, or significant event that affects a matter, being a matter that would have been required to be specified in a Product Disclosure Statement for the financial product prepared on the day before the change or event occurs; and b) any other change, event or other matter of a kind specified in regulations made for the purposes of this paragraph.	
e) CCIV requirements for majority external directors	The governance structure for Collective Corporate Investment Vehicles (**CCIVs**) to require a majority of external directors with no option for a compliance committee may be suitable for a CCIV but may not be appropriate for the REs of all MISs. While the corporate director of a CCIV has a specific role, we are aware that the RE in some funds management businesses have other roles in addition to being a responsible entity. For example, the RE may act as an investment manager, asset manager or development manager. Due to these multiple roles, we understand it is difficult to engage independent directors with suitable experience and time commitment to attend to the business of the company.	The CCIV framework is largely contained in Chapter 8B of the Act. Under section 1222, a CCIV must fulfil the following requirements to be registered: a) the company is a company limited by shares; b) the company has a constitution; c) the sole proposed director of the company is a public company that holds an Australian financial services (**AFS**) licence authorising it to operate the business and conduct the affairs of a CCIV; d) the company will, upon registration, have at least one sub-fund; e) each sub-fund of the company will, upon registration, have at least one member; f) a notice under section 1222A(4) (about whether a CCIV is to be a retail or a wholesale CCIV) has been lodged with the application; and g) if the company will on registration, be a retail CCIV, the company has a compliance plan. A CCIV will be a retail CCIV if it satisfies one of the following tests: a) at least one member of the CCIV is a protected retail client; b) at least one person is a protected client under a custodial arrangement; or c) at least one member is a protected member of a passport fund. A CCIV that does not fulfil any of the above tests is a wholesale CCIV. A CCIV may only have one director under section 1224(1), and that director must be a corporate director. Under section 1224F, a corporate director is a public company that holds an AFS Licence authorising it to operate the business and conduct the affairs of the CCIV (but not a Chapter 5 body corporate).	The Treasury should consider this matter in light of all the different operating models for responsible entities and the impact on different operating models to ensure it is appropriate for all funds management businesses.

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	Additionally, if independent directors were mandatory there would need to be a sufficient supply of appropriate independent directors, with relevant experience for each RE in the market.	There are additional rules about who can be a director that only apply to Retail CCIVs. Importantly, section 1224G requires that at least half of the directors of the corporate director of a retail CCIV must be external directors. Under section 1224G(2), a director is an external director if they: a) are not and have not been in the previous 2 years, an employee of the corporate director or a related body corporate; and b) are not, and have not been in the previous 2 years, a senior manager of the corporate director or 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 corporate director 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 corporate director or a related body corporate; and e) do not have a material interest in the corporate director or a related body corporate and f) are not a relative of a person who has a material interest in the corporate director or a related body corporate.	
f) ETF relief	Currently, there are no class orders commensurate to CO 13/721 relating to Exchange Traded Funds (**ETFs**), that grant relief to quoted managed funds. Accordingly, quoted managed funds must seek bespoke and individual relief.	CO 13/721 provides a suite of declaratory and exemptive relief for ETFs. The relief is targeted to allow 'authorised participants' to create and redeem shares of an ETF, enabling the ETF securities to closely track the underlying assets. ETF issuers allow ongoing application for and redemption of ETF units at a price based on the Net Asset Value (**NAV**) by authorised participants who have entered an arrangement with the issuer. This process seeks to ensure that the market price will generally reflect the current NAV of the fund through arbitrage. Retail investors are not allowed to be issued or redeem units directly (except in exceptional circumstances), but can trade ETF units on the secondary market. When there is a shortage or excess supply of ETF units on the secondary market, leading to a dislocation between the NAV and the ETF value, the authorised participant will reduce or increase the supply of ETF units in circulation so that its price closely matches the NAV. Accordingly, the class order grants relief in that an ETF does not have to comply with paragraph 601FC(1)(d) of the Act, that requires the RE to treat members who hold interests of the same class equally and members who hold interests of different classes fairly, to the extent that it would prevent the RE from permitting only authorised participants to withdraw from the fund. The exemption only applies	Noting that bespoke, individual relief in the same or similar form to CO 13/721 is typically applied for and granted to quoted managed funds, CO 13/721 should also provide relief for quoted managed funds. This will reduce the administrative and compliance cost of seeking bespoke relief for each individual quoted managed fund. Given the growing prevalence of quoted products, this relief could also be incorporated into the Act.

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		where a number of requirements are satisfied, for example, a PDS that contains statements to inform holders is published. The RE also does not need to comply with subsection 601FC(1)(d) of the Act to the extent that it would prevent the RE from providing information to authorised participants before other members about the index the fund aims to track as its investment strategy and MIS property.	
g) Voting relief in relation to the change of RE	Due to high thresholds imposed by the Act to pass an extraordinary resolution, in culmination with the fact that IDPS platform operators and custodians often have a policy to abstain from voting, applications to have the threshold requirements in the Act modified are common place.	In accordance with section 601QA of the Act, ASIC has discretionary powers to grant relief by way of an exemption or declaration to omit, vary or modify the application of Chapter 5C. Regulatory Guide 51 (RG 51) specifies three types of applications for relief: a) standard applications: seeking relief in accordance with published ASIC policy and pro forma instruments; b) minor and technical applications: involving the application of existing policy to new situations; and c) new policy applications: requiring the formulation of new policy. Broadly, when considering an application for relief, in particular minor and technical and new policy applications, ASIC will attempt to achieve two objectives: consistency and definite principles (RG 51.12). Minor and technical applications are, in effect, the application of existing policy to new situations, either legislative or administrative. They do not raise issues of such significance as to require ASIC's extensive consideration (RG 51.21 to RG 51.22). Often, ASIC would have granted materially similar relief to a prior applicant by way of an ASIC Instrument. An example of where applicants frequently make an application to ASIC to exercise its power under section 601QA would be where the requirements of section 601FL(1) of the Act cannot be satisfied. Section 601FL(1) provides that where the RE of a MIS 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 a resolution to choose the new RE. If the MIS is not listed, the resolution must be an extraordinary resolution. The Act provides that an extraordinary resolution in relation to a MIS is a resolution that has been passed by at least 50% of the total votes that may be cast by members entitled to vote on the resolution (including members who are not present in person or by proxy). Often, where there is a registered unitholder who is unable	As this relief is standard relief sought by REs going through a change of RE process, and as platforms and custodians generally have a policy of not voting, our recommendation is that an ASIC Instrument, granting voting relief consistent with the form of relief that is generally applied for and granted on a bespoke, individual basis, be issued or alternatively that this relief be included in the Act.

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		to vote, (for example, where a large registered holder is a custodian for underlying IDPS platforms) the requirements of section 601FL(1) can become insurmountable. Therefore, where the relief is consistent with ASIC policy and facilitates the retirement and appointment of a RE in accordance with section 601FL(1) of the Act and the relief sought is not contrary and does not derogate from the purpose of section 601FL(1), ASIC will issue a declaration that the Act be amended or modified to facilitate the passage of an extraordinary resolution.	
h) **Application of a liquid assets test in the context of a short form PDS test**	In the event where the liquidity circumstances of a MIS falls below the threshold stipulated in regulation 1.01.02 of the Corporations Regulations, the issuer is required to provide a long form PDS. As it stands, there is no provision allowing for a transition period for the MIS to convert the offering to a long form PDS.	If a MIS satisfies the definition of 'simple managed investment scheme', found in regulation 1.0.02 of the Corporation Regulations, a short form PDS is required. A 'simple managed investment scheme' means a registered scheme (other than a passport fund) which is or was offered because it meets one of the following requirements: a) the scheme invests at least 80% of its assets in money in an account with a bank on the basis that the money is available for withdrawal: i) immediately during the bank's normal business hours; or ii) at the end of a fixed-term period that does not exceed 3 months; b) the scheme invests at least 80% of its assets in money on deposit with a bank and on the basis that the money is available for withdrawal: i) immediately during the bank's normal business hours; or ii) at the end of a fixed-term period that does not exceed 3 months; c) the scheme invests at least 80% of its assets under one or more arrangements by which the responsible entity of the scheme can reasonably expect to realise the investment, at the market value of the assets within 10 days. Subsection (c) confirms that short form PDSs are intended to apply to MISs with high levels of liquidity.	The liquidity regime should consider and build in a transition period catering for an event where a MIS's liquidity circumstances change quickly due to market or other changes outside of the control of the RE.
i) **Process of approval of compliance plan**	Requiring every director on the board of a RE to sign a compliance plan lodged with ASIC is an unnecessary compliance burden and can be difficult in certain	Pursuant to section 601HC of the Act, a copy of a MIS's compliance plan that is lodged with ASIC must be signed by all the directors of the RE.	Section 601HC of the Act should be amended to allow RE to approve (but not require each director to sign) a compliance plan.

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	circumstances (for example, during COVID-19 lockdowns).		
j) Periodic statements for listed and quoted funds	For listed and quoted MISs, the information required to be included in a periodic statement by section 1017D of the Act is already known by the holder by virtue of the holder purchasing and selling the financial product on market. Accordingly, this is an unnecessary compliance burden.	Pursuant to section 1017D of the Act, an issuer of a financial product to a retail client, where the product is a managed investment product, must provide the holder of the financial product with a periodic statement. The periodic statement period lasts no more than one year. The obligation to provide a holder with a periodic statement begins when the holder acquires the product and ceases when the holder ceases to hold the product. Pursuant to section 1017D(5), a periodic statement must include: a) the opening and closing balances for the reporting period; b) the termination value of the investment at the end of the reporting period; c) the details of transactions in relation to the product during the reporting period as required by relevant Corporations Regulations; d) any increases in contributions in relation to the financial product by the holder or another person during the reporting period; e) return on investment during the reporting period; and f) details of any change in circumstances affecting the investment that has not been notified since the previous periodic statement. More generally, section 1017D(4) requires the periodic statement to give the holder the information that the issuer reasonably believes the holder needs to understand his or her investment in the financial product. Additional requirements about the disclosures are included in the Corporations Regulations (for example, see regulation 7.9.60B). CO 13/1200 temporarily exempts issuers of interest in a listed and quoted MISs from the obligation under section 1017D of the Act. It also modifies the obligation permanently to: a) allow issuers to exclude transaction values and investment return information from the periodic statements where the issuer does not know the price of the transactions, although, issuers may still use either net asset value or last market price in preparation of the statement if it is not misleading to investors;	We suggest an amendment to section 1017D to include more appropriate disclosure that is relevant to an investor in a listed or quoted MIS may be required. Alternatively, the requirements under section 1017D could be removed. Consultation Paper 196, published in December 2012, first proposed relief to allow issuers of interests in registered MISs that are able to be traded on a licenced financial market to report the balances and values required under section 1017D on a modified basis. The paper identified the practical reality that certain information is not available to issuers of listed and quoted products. For example, issuers generally do not have access to the price at which investors trade on the ASX, or the volume of each trade. Section 1017D(5)(c) requires the details of transactions in relation to the product during the reporting period. This information requires the issuer to obtain information on the number of interests bought or sold, and the transaction price. In light of these identified practical difficulties that issuers have in obtaining certain information essential to the statement required by section 1017D, ASIC implemented CO 13/1200. CO 13/1200 sunsets on 1 April 2024 and ASIC has timetabled the publication of a

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		CO 13/1200 temporarily exempts issuers of interest in a listed and quoted MISs from the obligation under section 1017D of the Act. It also modifies the obligation permanently to: a) allow issuers to exclude transaction values and investment return information from the periodic statements where the issuer does not know the price of the transactions, although, issuers may still use either net asset value or last market price in preparation of the statement if it is not misleading to investors; b) require issuers to provide a clear and prominent explanation of the price used to determine the dollar values on the statement; c) require issuers to report on the statement whether the scheme has met its investment objective over the last one-year and five-year periods; and d) allow issuers to not include the termination value of investors' interest in the scheme.	certain information essential to the statement required by section 1017D, ASIC implemented CO 13/1200. CO 13/1200 sunsets on 1 April 2024 and ASIC has timetabled the publication of a consultation paper for October – December 2023.

Please contact us if you have any questions about any of our submissions. We would welcome any discussions on proposals or recommendations to modernise the managed investment scheme regulatory framework and ensure that it is fit for purpose.

Yours faithfully
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