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27 September 2023

By Email: misreview@treasury.gov.au

Director
Investment Funds Unit
Retirement, Advice and Investment Division
The Treasury
Langton Crescent
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Dear Director

Submission to Review of the regulatory framework for managed investment scheme

I thank you for the opportunity to make a submission on issues raised in your Consultation Paper.

Background

By way of background, I have been operating as a lawyer in the managed investment scheme ('**MIS**') industry for over 26 years including prior to the *Managed Investments Act 1998* with the former prescribed interest scheme dual structure.

I am also the author of the book '*Managed Investment Schemes'* © Federation Press 2012.

I am currently carrying out research in relation to the managed investment scheme industry. The topic of my thesis is:

> Killing Bambi – Improving the efficacy and efficiency of the legal and regulatory framework for protection of retail investors investing in collective investment schemes (CIS).

I therefore bring a great deal of experience in this area of law. My thesis research indicates that improvements can be made to improve the legal and regulatory framework for the protection of retail investors investing in MIS.

Results of previous inquiries

As can be seen from the Consultation Paper in Box 2, there have been many previous inquiries into the MIS industry. Some of these inquiries made good and valid recommendations to no avail.

The following statement by the Senate Economics Reference Committee ('**SERC**') aptly describes and captures the phenomenon we have seen with the MIS industry over the years when it said:

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> The long history of failed management investment schemes in Australia and the associated destruction of consumer wealth demonstrates that this problem goes beyond what occurred with the Sterling Income Trust (SIT) and Sterling Group of companies. Clearly, there is a broader systemic issue related to the regulation of financial products to retail investors in Australia…………… Many recommendations arising from previous inquiries on similar issues have yet to be implemented and high-risk managed investment schemes continue to be ruthlessly marketed and then suddenly fail, taking retail investors financial hopes and dreams with them.[1]

In March 2022, the Board of the International Organisation of Securities Commission observed that fraud and the threat of fraudulent behaviour affecting retail investors, was a 'continuing persistent problem'.[2]

The industry is still adversely impacting retail investors despite all of the previous inquiries and recommendations made. This is even though one of the purposes of the current legal and regulatory framework of MIS was 'to improve corporate governance in relation to responsible entities'.[3] In particular the Corporations and Markets Advisory Committee ('**CAMAC**') in 2012 issued a comprehensive report of the MIS with many recommendations for reform.[4] Here we are 11 years later with nothing to show for all of these inquiries. This is despite the recommendation of SERC that

> the government use CAMAC's report on managed investment schemes as the platform for further discussion and consultation with the industry with a view to introducing legislative reforms that would remedy the identified shortcomings in managing an MIS in financial difficulties and the winding-up of collapsed schemes.[5]

Regulatory model – Warning – Don't Over-Regulate

It is important not to over-regulate. The Hon. Michael Kirby, former judge of the High Court, said that the 'law can facilitate economic development and not simply coerce, regulate and control.[6] The ideal state of affairs is one where the legal and regulatory framework of the MIS is sufficiently robust to engender confidence in the retail investor investing in MIS through risk reduction from loss (other than normal investment risk). The aim would be to do this without over-regulation which would discourage the provision by MIS operators of managed fund products to the retail investor due to increased compliance costs. In other words, 'effective regulation should be efficient'.[7]

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1 Senate Economics Reference Committee '*Sterling Income Trust*' (Commonwealth of Australia 2022) ('**SIT Report**'), [4.100].

2 OICU-IOSCO '*Retail Market Conduct Task Force Consultation Report'* (International Organization of Securities Commissions 2022), [1.4]: Note this was not MIS specific but still relevant to retail investors who invest through pooled structures.

3 Explanatory Memorandum to the Managed Investments Bill, 1997, [2.6(c)].

4 CAMAC '*Managed Investment Schemes – Report July 2012*' (CAMAC 2012) ('**CAMAC Report'**).

5 Senate Economics Reference Committee '*Agribusiness managed investment schemes Bitter harvest'* (Commonwealth of Australia, 2016) ('**Bitter Harvest**').

6 The Hon. Michael Kirby, 'The company director: past, present, and future' *Speech delivered at the Australian Institute of Company Directors, Tasmanian Division, Hobart, 1998.*

7 Shyam S. Bhati, 'An analysis of the financial services regulations of Australia' (2008) 4(2) *International Review of Business Research Papers*, 13, 22.

It is suggested that the best approach would be 'responsive regulation theory'.[8] The basic concept of this school of thought is that regulation will be more likely to be effective if it is responsive to the regulatory environment and the activities of the entity which is being regulated.[9] Kolieb (2015) argues that 'rule compliance' is an 'impoverished view of regulation'.[10] He further argues that if regulation is appropriately conceived, then it is not limited to compliance mechanisms or enforcement of rules but also includes methods and mechanisms to encourage regulatees to go beyond compliance with legal rules in order to satisfy the goals of the regulation.[11] Therefore, while rule compliance may be an end goal, compliance with legal standards is not an endpoint but rather a waypoint to improve the behaviour of the regulatee.[12]

Regulation needs to work if the retail investor is to be protected against improper behaviour by intermediaries. On the one hand regulation should not be so inadequate that it has no effect in protecting the retail investor or is so heavily regulated that suitable retail investor financial products are withdrawn from the market for retail investors. Buttigieg, Consigio and Sapiano (2020) summarise the position well when they say:

> good financial regulation and supervision occurs, always and anywhere, where those responsible fulfil this role professionally with the primary aim of achieving the common good. If the financial regulatory/supervisor is constantly guided by the high-level principle that the vulnerable in society should never be allowed to suffer the consequences which may result from regulatory capture or market malpractice, then financial regulation and supervision will be really working for the greater good and the interest of society in general.[13]

It is submitted that the current gatekeeper model of governance represented by the following diagram is an appropriate model for regulation and should not be disbanded.

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8 Ian Ayres and John Braithwaite J, '*Responsive Regulation: Transcending the Deregulation Debate*' (Oxford University Press, 1992).

9 Jasper Hedges et al 'The Policy and Practice of Enforcement of Directors' Duties by Statutory Agencies in Australia: An Empirical Analysis' (2017) 40(3) *Melbourne University Law Review* 13.

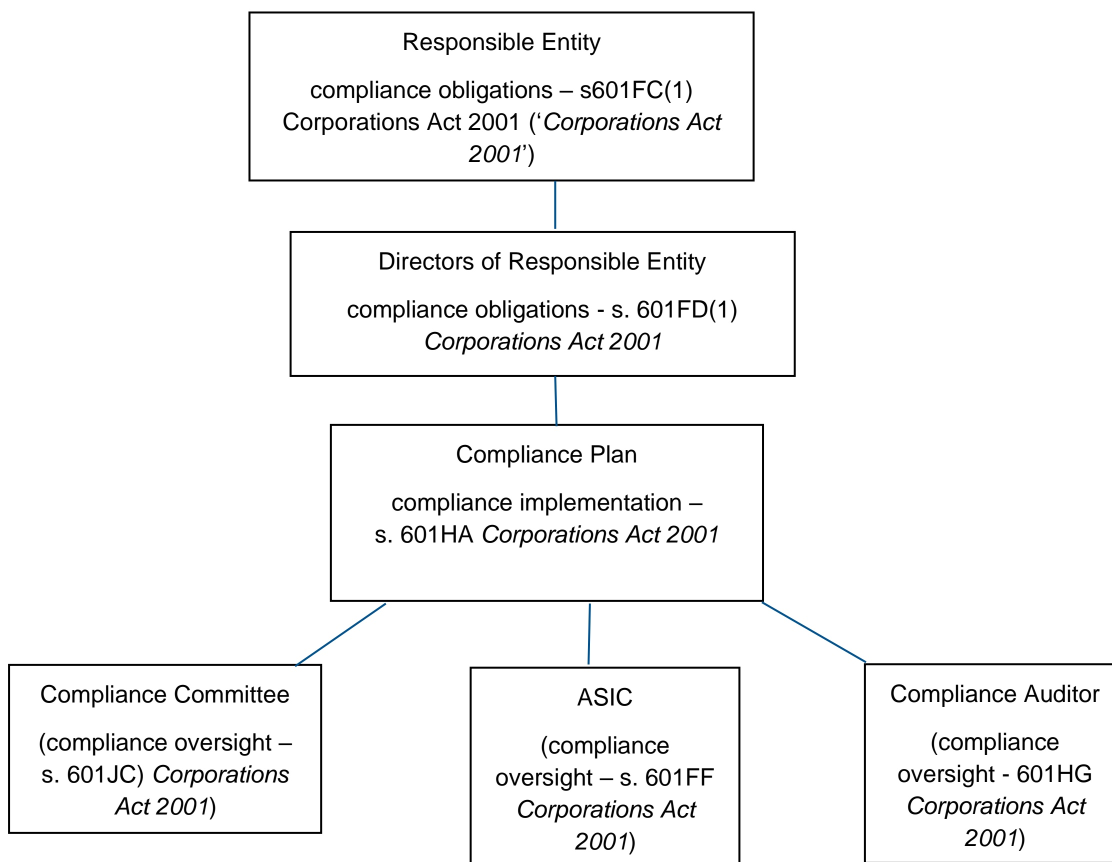
10 Jonathan Kolieb, 'When to Punish, When to Persuade and When to Reward: Strengthening Responsive Regulation with the Regulatory Diamond' (2015) 41(1) *Monash University Law Review* 136,137.

11 Ibid citing Jonathan C Borck and Cary Coglianese '*Beyond Compliance: Explaining Business Participation in Voluntary Environmental Programs*' Christine Parker and Vabeke Lehmann Nielsen (eds), '*Explaining Compliance: Business Responses to Regulation*' (Edward Elgar, 2011), 139.

12 Ibid 138.

13 Christopher P. Buttigieg, John A. Consiglio and Gerd Sapiano 'A Critical Analysis of the Rationale for Financial Regulation Part II: Objectives of Financial Regulation' (2020) *European Company and Financial Law Review* 437, 477.

MIS Gatekeeper Model [14]



The theory behind the gatekeeper model is that the reputational and litigation risk involved will cause the gatekeeper to be less willing than their principal to violate the law.[15] The litigation risk to a gatekeeper is now considerable with the evolution of the class action and litigation funding. Rather the model needs only 'light touch tweaking' to strengthen the existing framework.

Chapter 1. Wholesale client thresholds

1. Should the financial threshold for the product value test be increased? If so, increased to what value and why?

There is a moral question involved. Should financial resources be put into protection of what would be wealthy people if they can afford to invest $500,000 in one financial product? It is submitted that finite resources should be put to better use in protecting non-wealthy investors rather than increasing the number of investors who are required to be protected.

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[14] Alan Jessup, '*Managed Investment Schemes*' (Federation Press, 2012), 49.

[15] John C Coffee (jr), '*Gatekeepers: The Professions and Corporate Governance*' (Oxford University Press, 2006) 5.

Therefore, there should be no change.

2. Should the financial thresholds for the net assets and/or gross income in the individual wealth test be increased? If so, increased to what value and why?

As with question 1, there is a moral question involved. Should financial resources be put towards protection of what would be wealthy people whose gross income is $250,000 or more in the last 2 income years or holding net assets of $2.5m. It is submitted that finite resources should be used in protecting non-wealthy investors rather than increasing the number of investors required to be protected.

However, there is perhaps a reasonable argument that persons living in Sydney in particular have homes that would push them over the net asset threshold but really are not wealthy people. This issue could be resolved by excluding the investor's main or principal place of residence from the net assets test. A person with net assets of $2.5m excluding the family home is wealth compared with most retail clients. With respect, they should be able to look after themselves without finite resources being applied for their protection.

3. Should certain assets be excluded when determining an individual's net assets for the purposes of the individual wealth test? If so, which assets and why?

As suggested above, the main or principal place of residence should be excluded from the net assets test because owning your own home does not necessarily make you wealthy. The wealth it tied up in a family home which in reality cannot be sold without buying an equivalent property.

4. If consent requirements were to be introduced:

(a) How could these be designed to ensure investors understand the consequences of being considered a wholesale client?

A certificate similar to that provided in s 761GA of the *Corporations Act 2001* (Cth) is probably the best that can be done.

(b) Should the same consent requirements be introduced for each wholesale client test (or revised in the case of the sophisticated investor test) in Chapter 7 of the Corporations Act? If not, why not?

Yes for consistency with all financial products including securities.

Chapter 2. Suitability of scheme investments

5. Should conditions be imposed on certain scheme arrangements when offered to retail clients? If so, what conditions and why?

No. Such restrictions will stifle innovation and hence the economy given that:

- in 2022, the value of assets held in MIS in Australia was approximately $2.7 trillion with $1.8 trillion invested in registered MIS ([16]) whereas in 1992 the FUM was only $38 billion,[17]
- the funds management sector exceeds Australia's GDP,[18]
- Australians had the highest per capita investment in managed funds in the world.[19]

In addition, the Board of Taxation has observed 'Australia's managed funds industry is an important and dynamic part of Australia's economy and one of the largest in the world.'[20]

The combined operation of the current disclosure rules and more recently the target market determination ('**TMD**') requirement should be sufficient to protect investors, particularly the latter. The new TMD requirement should be given time to work.

Arguably, the Hayne Royal Commission[21] occurred too soon after the FOFA rules were introduced. As a result, we have heavy regulation of financial services as a result of politicians running for cover with knee jerk reactions. Prior to Parliament being prorogued in 2022, there were five amending statutes and nine amending regulations as a result.[22]

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16 Treasury 'Review of the regulatory framework for managed investment schemes' Consultation paper August 2023, 8.

17 Australian Law Reform Commission and the Companies and Securities Advisory Committee '*Collective Investments: Other People's Money*' (Commonwealth of Australia 1993) (**ALRC Report 65**),

18 ASIC Market Study Consultancy Funds Management Industry Terms of Reference Review of Competition in the Australian Funds Management Industry, 1 <https://asic.gov.au/regulatory-resources/funds-management/review-of-competition-in-the-australian-funds-management-industry/>.

19 Ibisworld.

20 Board of Taxation '*Review of the Tax Arrangements Applying to Managed Investment Trusts*' Discussion Paper (October 2008), [vi].

21 Hayne '*Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry' Final Report* (Commonwealth of Australia 2019) ('**HRC Report**').

22 *Financial Sector Reform (Hayne Royal Commission Response) Act 2020;Financial Sector Reform (Hayne Royal Commission Response--Protecting Consumers (2019 Measures)) Act 2020; Financial Sector Reform (Hayne Royal Commission Response--Stronger Regulators (2019 Measures)) Act 2020; Financial Sector Reform (Hayne Royal Commission Response No. 2) Act 2021; Financial Sector Reform (Hayne Royal Commission Response-Better Advice) Act 2021; Financial Sector Reform (Hayne Royal Commission Response) (2021 Measures No. 1) Regulations 2021; Financial Sector Reform (Hayne Royal Commission Response) (Regulation of Superannuation) Regulations 2020; Financial Sector Reform (Hayne Royal Commission Response-Protecting Consumers) (Mortgage Brokers) Regulations 2020; Financial Sector Reform (Hayne Royal Commission Response-Breach Reporting and Remediation) Regulations 2021; Financial Sector Reform (Hayne Royal Commission Response-Advice Fees) Regulations 2021; Financial Sector Reform (Hayne Royal Commission Response) (Claimant Intermediaries) Regulations 2021; Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021; Financial Sector Reform (Hayne Royal Commission*

6. Are any changes warranted to the procedure for scheme registration? If so, what changes and why?

There is no reason to change this. In fact, this is one of the best aspects of the regulation because ASIC must register the scheme within 14 days of lodgement unless it does not meet the requirements referred to in s 601EB(1)(c) to (h). ASIC is getting slower and slower in other areas of regulation such as varying the AFSL of the responsible entity ('**RE**') to add schemes where under their 'service' (or perhaps 'non-service' charter, ASIC says they aim to get 70% of applications varied within 150 days and 90% within 240 days. This is completely uncommercial. This information is now hard to find as you now have to trawl through annual reports of ASIC to find it out whereas previously they had a list of each year's performance target.

The issue of obtaining registration of a scheme has been considered by CAMAC in its Stage 2 Discussion Paper[23]. CAMAC acknowledged that obtaining registration of a company is much easier than obtaining registration of a scheme.[24] CAMAC has therefore suggested that it may be possible to bring the scheme registration procedure more closely into line with the corporate procedure (thereby giving ASIC more administrative flexibility), while retaining the investor protection purpose of scheme registration, by:

(a) permitting registration of a scheme upon lodgement of an application for registration, without the need for detailed consideration of the registration criteria;

(b) ensuring that ASIC has the power to make a stop order, on an interim as well as on a final basis, to prevent any issue of interests in a materially non-compliant scheme.

CAMAC suggested that this procedure would remove the need for ASIC to give active consideration in every case to whether the relevant registration criteria have been satisfied.[25]

7. What grounds, if any, should ASIC be permitted to refuse to register a scheme?

The only grounds should be those set out in s 601EB(1)((c) to (h). This works well so why change it?

Response-Breach Reporting and Remediation) Regulations 2021; Financial Sector Reform Amendment (Hayne Royal Commission Response-Better Advice) Regulations 2021.

[23] Corporations and Markets Advisory Committee '*The establishment and operation of managed investment schemes Discussion paper March 2014*' (Corporations and Markets Advisory Committee 2014) ('**CAMAC 2014 Discussion Paper**'), [4.2].

[24] Ibid, 43.

[25] Ibid.

Chapter 3. Scheme Governance and the role of the responsible entity

8. Are any changes required to the obligations of responsible entities to enhance scheme governance and compliance? If so, what changes and why?

There are two major areas where reforms can be made that would improve the protection of retail investors. These are in relation to duties of the officers of the RE to the members and the combined role of the compliance plan, compliance committee (if one is required) and the compliance plan auditor.

8.1 Officers of the RE – Improving their role as gatekeepers

While the duties of the RE and its officers to the members of the schemes is a strength of the MIS framework, this has not always been observed by officers of the RE in their role as gatekeepers. [26] Bad behaviour has often repeated itself. Although a fit and proper person has been introduced, in reality this is administratively operated by ASIC as a tick the box procedure and does not achieve much. At best it may be preventing with criminal records or bankrupts being appointed.

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[26] *Australian Securities and Investments Commission v Heydon Park Ltd* [2005] FCA 1583; *Australian Securities and Investments Commission v Beekink* [2006] FCA 388 (on appeal *Australian Securities and Investments Commission v Beekink* ([2007] FCAFC 7 where penalties increased); *Australian Securities and Investments Commission v Healey* [2011] FCA 717 (liability); *Australian Securities and Investments Commission v Healey (No 2)* [2011] FCA 1003 (penalties); *Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited (Receivers and Managers appointed) (in liquidation) (Controllers appointed) (No 3)* [2013] FCA 1342; *Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited (Receivers and Managers appointed) (in liquidation) (Controllers appointed)* [2014] FCA 1308 (penalties) (upheld on appeal to the High Court in *Australian Securities and Investments Commission v Lewski; Australian Securities and Investments Commission v Wooldridge; Australian Securities and Investments Commission v Butler; Australian Securities and Investments Commission v Jaques; Australian Securities and Investments Commission v Clarke* [2018] HCA 63); *Agricultural Land Management Ltd v Jackson [No 2]* [2014] WASC 102; *Trilogy Funds Management Limited v Sullivan (No 2)* [2015] FCA 1452 (on appeal *Sullivan v Trilogy Funds Management Limited* [2017] FCAFC 153 where appeal dismissed); *Australian Securities and Investments Commission v Managed Investments Ltd (No. 9)* [2016] QSC 109 (contravention declarations), *Australian Securities and Investments Commission v Managed Investments Ltd (No 10)* [2017] QSC 96 (penalties); *King v Australian Securities and Investments Commission* [2018] QCA 352 (on appeal *King v Australian Securities and Investments Commission* [2019] QCA 121; on further appeal *Australian Securities and Investments Commission v King* [2020] HCA 4); *Australian Securities and Investments Commission v Avestra Asset Management Limited (In Liquidation)* [2017] FCA 497; *Australian Securities and Investments Commission v Project Management (Aust) Pty Ltd* [2019] FCA 47; *Australian Securities and Investments Commission v Theta Asset Management Limited* [2020] FCA 1894; *Australian Securities and Investments Commission v Daly (Liability Hearing)* [2023] FCA 29; While these are the only reported cases, officers have been subject to banning or disqualification orders by ASIC for breaches of these duties e.g., ASIC media release 20-122MR 'ASIC bans three directors of Linchpin and Endeavour'; ASIC media release 11-133MR 'Former directors of Trio prevented from working in financial services industry'.

There is no requirement for officers, who are the guiding mind of the RE, to have any educational or experience qualifications unless the officer is also a responsible manager or is licensed to provide personal advice. Basically, any person who is 18 years of age, is not a banned person or disqualified from being an officer, does not have a criminal record and is not bankrupt can be a director of a RE. They need no prior experience. While ASIC could use the fit and proper person test to require educational and experience qualification under the 'any other matter ASIC considers relevant' limb of the fit and proper person test, ASIC does not do so.

As a result, the officers may be ignorant of their duties and responsibilities as an officer of a RE in handling other peoples' money. Even so called intelligent people have been found to have breached their duties.[27]

It is submitted that the following changes or reforms to the law are made to the existing legal and regulatory framework of the MIS in relation to the gatekeeper role of the officer of the RE with respect to their duties, this will strengthen the efficacy and efficiency of that framework and thereby protect retail investors.

(a) Reform 1

The entry level required for a person to qualify to hold the position of an officer of a RE should be lifted by requiring an officer of a RE to hold industry specific educational qualifications. These qualifications should include studies in the legal and regulatory framework of the MIS (including the statutory duties of the RE and its officers), the principles of corporate governance, virtue ethics and professional responsibility of officers of a RE.

The professionalisation of the financial services industry following the Hayne Royal Commission illustrates how this reform can work to the advantage of the retail investor.

Treasury in March 2022 published an Issues Paper for comment noting that the professional standards reforms for financial advisors had created a higher bar and potential barrier for new entrants [28]. The Joint Associations Working Group ('**JAWG**') comprising representatives that represented more than 90% of advisers on the Financial Advisers Register in its submission to Treasury, argued that the recognition of professionalism was important for the enhancement of the reputation and health of the financial advice profession.[29] JAWG said that this professionalism had increased consumer confidence and trust in the profession. This professionalism was underpinned by education standards and continuous CPD obligations.[30]

Therefore, this should have a similar effect if similar standards were imposed on officers of the RE.

The result of the proposed reform should be to cause officers of the RE to adhere to their statutory duties to members as a matter of habit thereby strengthening the efficacy

27 *Healey* (n 26).

28 Treasury '*Quality of Advice Review Issues Paper*' (Commonwealth of Australia, 2022) <https://treasury.gov.au/consultation/c2022-259464>, 6.

29 Joint Associations Working Group, Submission to Treasury, 'Quality of Advice Review Issues Paper' <Joint Association Working Group - Submission in response to: Quality of Advice Review - Issues Paper (treasury.gov.au)>.

30 Ibid.

and efficiency of this aspect of the legal and regulatory framework for the MIS in protecting retail investors for the reasons set out below.

(b) Reform 2

The second reform, linked to the first reform, is that every officer of a RE should be required to undertake compulsory annual Continuing Professional Development ('**CPD**') in MIS law, corporate governance, virtue ethics and professional responsibility of officers of a RE. This would be consistent with the professional status of the position as a result of the first reform and ensure that officers are kept up to date with the legal requirements and remind them of the ethical issues involved in their decision-making. This requirement is regarded as important with numerous professions as financial advisers,[31] lawyers, [32] tax agents[33] and registered health practitioners.[34]

8.2 Compliance Plan, Compliance Committee and Compliance Plan Auditor

Another important gatekeeper in the framework for the MIS is the combined operation of the compliance plan,[35] the compliance committee[36] (if one is required),[37] and the compliance plan auditor[38]. This is because the compliance plan and the compliance committee in particular are designed to address institutional risk.[39]

However there have been many failures of this combined gatekeeper role.[40]

It is therefore submitted that the following reforms, some of which have been recommended by earlier inquiries, should be made to this aspect of the MIS framework if these failures are to be prevented.

Reform 1

Similar to officers of the RE no qualifications or experience are required for a person to be an external member of a compliance committee. While it is true that ASIC in its regulatory guide has tried to impose entry level requirements,[41] this is not supported by appropriate legislation. Therefore it cannot be enforced. Under the present legislative regime, anyone over the age of 18 who is not subject to any disqualification or banning

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31 *Corporations Act 2001*, s 921D.

32 *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015* (NSW).

33 *Tax Agent Services Act 2009*, s 20.5.

34 *Health Practitioner Regulation National Law 2009* (NSW)

35 *Corporations Act 2001* (Cth), Part 5C.4.

36 *Corporations Act 2001* (Cth), Part 5C.5.

37 A compliance committee is not required if the RE has an equal number of external directors: *Corporations Act 2001*, s 601JA.

38 *Corporations Act 2001* (Cth), s 601HG.

39 *Woodcroft-Brown v Timbercorp Securities Limited (in liq)* [2011] VSC 427, [266].

40 Parliamentary Joint Committee on Corporations and Financial Services '*Inquiry into the collapse of Trio Capital*' (Commonwealth of Australia 2012) ('**Trio Report**'); *Australian Securities and Investments Commission v Avestra Asset Management Limited (In Liquidation)* [2017] FCA 497; *City Pacific Income Fund, in the matter of City Pacific Income Fund* [2010] FCA 437; *Australian Securities and Investments Commission v Theta Asset Management Limited* [2020] FCA 1894.

41 ASIC Regulatory Guide RG 132, [132.179] - [132.180].

order can be appointed to a compliance committee. They do not have to have any prior education or skills.

Compliance committee members should be armed with the required knowledge, monitoring abilities and skills necessary to do their job properly. They should be required to meet suitable education standards before being appointed. It is suggested that these educational standards should include not only training and development of what is required by such members to achieve a high level of compliance by REs but also studies in historical fraud and professional scepticism skills to assist them to identify potential issues with a scheme and critically test what they are told rather than acting as a 'box ticker'. [42]

This would be consistent with the research I have undertaken for my thesis, the literature and the recommendations of the Turnbull Review,[43] the Turnbull Review Report [44] and the Trio Report [45]. It is surprising we are still talking about it after all these inquiries and reports.

Reform 2

The RE should be required to notify ASIC of the appointment, removal, or resignation of compliance committee members similar to the requirement to inform ASIC in relation to the resignation and appointment of directors and secretaries of a company.

If there was such a register, the removal or resignation of a compliance committee member, would be publicly available information. Frequent changes of compliance committee members would raise 'red flags' both to ASIC and proposed investors that there may be an issue or problem within the management of the RE in the operation of its scheme. This would then enable regulatory action to be taken earlier than might otherwise have been the case.

This reform is also supported by the research I have undertaken for my thesis, the Turnbull Review[46] and the Turnbull Review Report[47].

Reform 3

There is no requirement to have a compliance committee where there are an equal number of external directors on the board of the RE. However, although it may be implied, it is not clear that external directors are meant to take the role of compliance

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42 Inez GF Verwey and Stephen K Asare 'The Joint Effect of Ethical Idealism and Trait Skepticism on Auditors' Fraud Detection' (2022) 176 *Journal of Business Ethics* 381.

43 Malcolm Turnbull '*Review of the Managed Investments Act 1998*' 3 December 2001 ('**Turnbull Review**').

44 Parliamentary Joint Committee on Corporations and Financial Services '*Report on the Review of the Managed Investments Act, 1998*' (Commonwealth of Australia 2002) ('**Turnbull Review Report**').

45 Trio Report (n 40).

46 Turnbull Review (n 43), 62, recommendation 11.

47 Turnbull Review Report (n 44), [4.38], recommendation 2

similar to the compliance committee. This should be made clear in the legislation. This reform is also supported by the Turnbull Review,[48] and the Turnbull Review Report. [49]

Reform 4

As a result of the repeal of subsection (4) of section 601FC of the Corporations Act 2001, it is now difficult for REs and other gatekeepers of the MIS to spot issues with offshore investments as the Trio Capital disaster revealed. There should be specific requirements for the compliance plan where the RE holds offshore investments through unregistered schemes.

Reform 5

Unless qualitative standards are improved for compliance plan audits, the requirement to have a compliance plan auditor should be scrapped. As a result of the current Guidance Statement GS 013 – *'Special Considerations in the Audit of Compliance Plans of MISs'* (Auditing and Assurance Standards Board, 2009), the compliance plan audit provides no protection for the retail investor at great cost to the investors (via inclusion of the audit cost within the REs fees to the members of the scheme). Further it is received long after events of non-compliance, even if detected by the compliance plan auditor (which generally it is not to which see the Trio Report.)

9. Should ASIC be able to direct a responsible entity to amend a scheme's constitution to meet the minimum content requirements, similar to the CCIV regime?

ASIC already has the power to decline to register the scheme if the constitution does not comply with the requirements set out in section 601EB(1)(c) to (h). In over 25 years of practice, this does not appear to have been an issue in MIS. In fact, ASIC has always taken an interest in the content of the constitution and compliance plan.

10. Are changes required to the compliance plan provisions to ensure compliance plans are more tailored to individual schemes? If so, what changes and why?

No.

Despite criticism of compliance plans, compliance Plans have been robust enough to enable the courts to find REs and their officers to be in breach of their respective

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48 Turnbull Review (n 43), 62, recommendation 11.

49 Turnbull Review Report (n 44), [4.54].

legislative duties in failing to adhere to the compliance plan of the registered scheme.[50] AFCA also has had no difficulty in making similar findings.[51]

11. Should auditors be legislatively required to meet minimum qualitative standards when conducting compliance plan audits? If so, what should these standards be and why?

Yes.

At present, compliance plan audits are useless because of the effect of Guidance Statement GS 013, '*Special Considerations in the Audit of Compliance Plans of MISs'* Auditing and Assurance Standards Board, 2009 ('**GS 013**'). This is apparent from the Trio Report[52] and case law.[53] Retail investors suffer twice. They contribute to the cost of the compliance plan audit in the RE's fees but get no benefit from it. Every compliance plan I have seen since GS 013 was issued states:

> Because of the inherent limitations of an assurance engagement, together with the inherent limitations of a compliance plan and the compliance measures contained therein, there is an unavoidable risk that fraud, error and some deficiencies in the compliance plan, or noncompliance by [name of RE] with the compliance plan may not be detected. A reasonable assurance engagement as at [last day of relevant year] does not provide assurance on whether compliance with the compliance plan, or the adequacy of the compliance plan will continue in the future.

Therefore, the report is meaningless. In any event the report will be long after the breaches have occurred so what is the point of the expenditure on a useless document? Money for jam for the audit industry but of no value to the retail investor.

12. Should responsible entities be required to have a majority of external board members, similar to the CCIV regime?

This should only be a requirement if there is no compliance committee. At present only an equal number of external board members is required to avoid the appointment of a compliance committee. This does not make a lot of sense and there should either be a majority requirement or a compliance committee will be required.

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50 *Agricultural Land Management Ltd v Jackson (No. 2)* [2014] WASC 102; *Australian Securities and Investments Commission v Beekink* [2006] FCA 388 (on appeal the penalty was amended but not the breach findings); *Australian Securities and Investments Commission v Theta Asset Management Limited* [2020] FCA 1894; *Australian Securities and Investments Commission v Linchpin Capital Group Ltd* [2018] FCA 1104; *Australian Securities and Investments Commission v Linchpin Capital Group Ltd (No 2)* [2019] FCA 398; *Australian Securities and Investments Commission v Daly (Liability Hearing)* [2023] FCA 29; *Trilogy* n 26 upheld on appeal in *Sullivan* (n 26).

51 *Investors Exchange Limited v Australian Financial Complaints Authority Limited* [2020] QSC 74.

52 (n 40), recommendation 7, [4.50], [5.19].

53 (n 50).

Chapter 4. Right to replace the responsible entity

13. Are any changes required to the voting requirements or meeting provisions that allow members to replace the responsible entity of a listed scheme? If so, what changes and why?

No.

14. Are any changes required to the voting requirements or meeting provisions that allow members to replace the responsible entity of an unlisted scheme? If so, what changes and why?

Yes.

An extraordinary resolution is difficult to achieve because scheme members often could not be bothered participating making it difficult to get 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). I am aware of one case where gift cards had to be offered to members to get them to send in a proxy to enable the RE to be replaced where the former RE wished to retire.

For section 601FL of the *Corporations Act 2001*, where there is a retirement of the current RE, because of the consequences of not obtaining an extraordinary resolution at the meeting which may either result in a court application to appoint a temporary RE ('**TRE**') or ultimately resulting in a winding up of the scheme, the requirement should only be an ordinary resolution. This would be particularly useful where a RE that is in external administration making it easier to replace the insolvent RE with a solvent one.

However, for section 601FM of the *Corporations Act 2001*, where removal of the existing RE and replacement with a new RE it is likely to be contested, if is suggested that the requirement remain as an extraordinary resolution but if the meeting has to be adjourned because the number of members who attend the meeting in person or by proxy do not hold at least 50% of the total votes that may be cast by members entitled to vote on the resolution, at the adjourned meeting should only require an ordinary resolution to be passed. The fact that the meeting had to be adjourned indicates an apathy with the members so why should the commercial operations be disrupted?

15. In what circumstances should an existing responsible entity be required to assist a prospective responsible entity conduct due diligence? What might this assistance look like?

This should be compulsory obligation where the current RE is in external administration. External administrators are not always cooperative when they are appointed as administrators to the existing insolvent RE.[54]

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[54] e.g. see *Huntley Management Limited v Timbercorp Securities Limited* [2010] FCA 576 as an example.

However, where there is a contested replacement RE appointment proposed, it is more problematic due to confidentiality and costs issues. CAMAC has already done valuable work on this issue.[55] The recommendations made would provide information to any proposed replacement RE but also make it easier where the current RE is insolvent. Treasury does not have to look further than the valuable work already done by CAMAC over 10 years ago to no avail.

A practical problem and arguably the major reason for the lack of appointment of a TRE or replacement RE when the existing RE is in external administration are the '*statutory novation*' provisions[56] which have been described as a 'poison pill'. [57] The problem is illustrated in one case where the proposed replacement REs were reticent to replace the existing insolvent RE.[58] One should therefore not be surprised that 'the automatic vesting of the non-viable combination of liabilities and inadequate rights of recoupment must mean that in the real world there will never be a new responsible entity'.[59]

CAMAC noted that the statutory novation provisions had assumed that it is possible to identify the relevant documentation for each scheme [60] when in practice this is simply not the case. The lack of ability for possible replacement REs to access this information makes it difficult to know what risks are assumed by a proposed new RE if it were to take on the role of RE. This has led to the natural reluctance on their part to offer themselves as a suitable replacement to an insolvent RE. REs need to be able to carry out due diligence before accepting a role as replacement RE so they can ascertain the risks. At present there is no data room for this purpose.

CAMAC therefore made three recommendations which were designed to assist a prospective RE in carrying out due diligence before its appointment as RE or TRE.

(a) The first recommendation was that the RE should be subject to an obligation to maintain a register of agreements for each scheme that it operates.[61] This would include a continuing agreements section (i.e., agreements where any rights, obligations or liabilities under the agreement are still on foot) and a 'completed agreements' section (i.e., agreements where all rights, obligations and liabilities under the agreement have been discharged). The register would be required to be maintained throughout the life of a scheme. It would not be permissible for any agreement to be deleted from the register whether or not still on foot (except

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55 CAMAC Report (n 4).

56 *Corporations Act, 2001,* ss 601FS and 601FT; *Huntley Management Limited v Timbercorp Securities Limited* [2010] FCA 576, [4], [12], [44] - [50] per Rares J followed in *Saker, in the matter of Great Southern Managers Australia Ltd (Receivers and Managers Appointed) (in liquidation)* [2010] FCA 1080; *Primary RE Limited v Great Southern Property Holdings Limited (recs & mgrs apptd) (in liq)* [2011] VSC 242, [169]; *Perpetual Nominees Limited v Rytelle Pty Ltd (recs & mgrs apptd)* [2012] VSC 209, [3].

57 Jessup (n 14), 104-115.

58 *Bosi Security Services Limited v Australian and New Zealand Banking Group Ltd* [2011] VSC 255; *Re Willmott Forests Limited (No 2)* [2012] VSC 125.

59 The Hon. Reginald I, Barrett 'Insolvency of Registered Managed Investment Schemes' (2008) *Banking and Financial Services Law Association, Queenstown, New Zealand* 2, 12.

60 CAMAC Report (n 4), 62.

61 Ibid, [4.3.4].

where recorded by mistake). CAMAC also recommended that the requirement to keep the register should be a compulsory provision of the Constitution.

To ensure compliance with these new provisions, CAMAC recommended that there be legislative sanctions against a RE for any material breach of its obligation to maintain the register, subject to an exemption from liability for failure to register an agreement that did not involve the payment of a material amount in the context of the scheme. CAMAC also recommended that as a penalty the RE would also lose its right of indemnity against scheme property until a breach of this obligation was rectified.

To enable due diligence of the scheme to be carried out by a prospective RE, CAMAC recommended that prospective REs should have access to the register (subject to specified conditions, including confidentiality and, for instance, either consent of the current RE or prior approval to that access by a special resolution of the scheme members actually voting) and any person approved by the court on the conditions of the order by the court. These conditions could operate to delay an appointment of a prospective RE. Therefore, CAMAC recommended that there should be an automatic right of inspection by a prospective RE subject only to confidentiality obligations. An incoming RE would not have to obtain consent of the current RE, members or the court to have access.

The register would be definitive This would mean that a prospective RE would be entitled to rely upon the register as a complete statement of the agreements involved in the scheme to which the prospective RE will be bound if it is appointed (including pursuant to the statutory novation provisions in s 601FS and s 601FT). Therefore, a prospective RE will be protected from assuming unknown rights, obligations or liabilities provisions to the extent that the register is defective. However, there would be an option for a TRE or replacement RE to include a missing agreement in the register, so this is effectively an 'opt in' measure for application of the statutory novation provisions to such missing agreements. This will give flexibility to the incoming TRE or replacement RE.

An objection to these provisions could be that this would have an effect on counterparties to an agreement where the RE failed to register the agreement. However, it is suggested that this should not be a problem. Firstly, counterparties can ensure that their agreements are included in the register contractually and by requiring proof of entry on the register of the agreement as a condition precedent to the commencement of the agreement.[62] Secondly if counterparties were also given access to the register, they can check that their agreement is recorded on that register. This would mean that the counterparty can protect itself from harm by making its own check.[63] If there was concern over confidentiality, a redacted version or an extract showing that the counterparty's agreement was on the register would be sufficient.[64] There should also be a statutory remedy for a counterparty to claim for loss and damage against the former RE and its directors if the agreement is not recorded on the register.[65]

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[62] Alan Jessup Submission to CAMAC, [1.3(a)].

[63] Ibid.

[64] Freehills Submission to ASIC, [3.1].

[65] Ibid.

However, it is to be noted that ASIC had concerns about this proposal based on the view that this would involve additional compliance and administrative costs.[66] This seems odd, particularly because ASIC consider the REs obligation under section 286 of the *Corporations Act 2001* would require them to keep records of such agreements anyway.[67] The maintenance of such a register would not be that hard or costly. The costs would be outweighed by the benefits in providing better protection for investors when a RE goes into external administration. This does not seem to be a fair criticism by ASIC. In any event it is the right of access that is a key feature of the recommendation.

(b) The second recommendation was that there a RE should be required to establish and maintain a register of scheme property for each scheme that it operates[68] which would have comparable obligations and rights as the agreements register referred to in (a) above.

(c) The third recommendation was that there should be an obligation imposed on the existing RE to provide reasonable assistance to a prospective TRE or new RE:

(1) upon request from at least 5% of scheme members; or

(2) when directed by court order (for instance, a court may give directions to assist the due diligence exercise of a prospective TRE).[69]

There is already a statutory requirement on the outgoing RE to give the new RE any books in the former RE's possession or control that are required to be kept in relation to the scheme pursuant to the provisions of the *Corporations Act, 2001* and to give other reasonable assistance to the new RE to facilitate the change of RE. [70] In addition, at least where the MIS is a trust, the former RE will be under a fiduciary duty to hand over the trust documents and records in its possession, custody or control to the new RE.[71] This is the case whether or not they are books which it was required to keep in relation to the scheme ([72]). A retiring trustee is under a duty to cooperate fully and actively in the transfer by making all relevant documents and correspondence available promptly to the incoming trustee.[73] The documents which must made available promptly to the incoming trustee includes legal advice received by the former trustee in relation to the trust at least where the advice has been paid for from trust property.[74]

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66 ASIC Submission to CAMAC, [32].

67 Ibid, [33].

68 Ibid, [4.4.3].

69 Ibid, [5.2.3].

70 *Corporations Act, 2001*, s 601FR.

71 It may be that this applies to all registered schemes because section 601FC(2) of the *Corporations Act, 2001* creates a layer of fiduciary protection for members of the scheme in addition to the statutory protections contained in the *Corporations Act, 2001*: *Wellington Capital Limited v ASIC* [2014] HCA 43, [14].

72 *Stacks* (n), [56].

73 *Hancock v Rinehart* [2015] NSWSC 646 at [358]; *Tiger v Barclays Bank Ltd* [1952] 1 All ER 85; *Ogier Trustee (Jersey) Limited-v-CI Law Trustees Limited* [2006] JRC 158.

74 *In The Matter of The Bird Charitable Trust and The Bird Purpose Trust* [2012] JRC 1006.

This recommendation would bring this obligation forward to where there is a proposal to appoint a TRE or new RE rather than after appointment. This is not unreasonable where the existing RE is in external administration as an incoming TRE or RE will need to act quickly armed with full knowledge for what it will be liable under the statutory novation provisions.

It is submitted that CAMAC recommendations should be mandatory requirements. While there were varied views on this issue in the submissions to ASIC, these recommendations do not appear to be that onerous particularly when arguably in the case of the first and second recommendations, the RE should be maintaining these records anyway.[75]

These CAMAC recommended amendments to the legal and regulatory regime of the MIS would be a major improvement to the current system. This is because prospective REs would be able to ascertain the risks of appointment through a structured due diligence process. They would be able to assess the rights, obligations and liabilities that will be novated to them before taking on the role.

These recommendations, if enacted, would facilitate the ability of a prospective RE to be appointed as a TRE or replacement RE in the event of insolvency of the RE. This should improve the availability of candidates for replacement REs notwithstanding the statutory novation provisions because the RE will be able to assess what rights and obligations will be novated to it upon appointment.

These recommendations could have made a difference in *BOSI* (supra).[76] This is because the proposed candidates for TRE or replacement RE would not have been so reticent had they known the extent of the rights, obligations and liabilities that were to be novated to them upon appointment. The evidence was by one proposed RE at the hearing was that it was prepared to be appointed subject to confirmation of the liabilities that were to be statutorily novated to it.[77]

16. Should there be restrictions on agreements that the responsible entity enters into or clauses in scheme constitutions that disincentivise scheme members from replacing a responsible entity? If so, what restrictions may be appropriate?

Yes. Such restrictions are a fetter on members' rights. The members are at a disadvantage with little control over the RE so are totally dependent on the honesty and expertise of the RE, its officers and employees once they hand over their money to the RE for investment. Nothing should be put in their way to using what little power they have to bring a RE into line.

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75 *Corporations Act, 2001*, ss 286 & 253M.
76 *Bosi*, (n 58).
77 Ibid, [112].

Chapter 5. Right to withdraw from a scheme

17. Is the definition of liquid assets appropriate? If not, how should liquid assets be defined?

Yes, the definition is appropriate. This is a prudential requirement[78] and therefore the strict definition should remain.

18. Are any changes required to the procedure for withdrawal from a scheme? If so, what changes and why?

No. The current provisions are well balanced and appropriate.[79]

19. Is there a potential mismatch between member expectations of being able to withdraw from a scheme and their actual rights to withdraw? If so, how might this be addressed?

Possibly but this should not be the case if the members have read the PDS and TMD.

Chapter 6. Winding up insolvent schemes

20. Are any changes required to the winding up provisions for registered schemes? If so, what changes and why?

There does not appear to be a need to make changes to this regime. The courts have been able to deal with issues involving the winding up of schemes without the need for a detailed code such as exists with companies. The power given to the Court in relation to the winding up of a scheme in sections 601ND, 601NE and 601NF of the *Corporations Act 2001* is broad and ambulatory in character and confers a very wide discretionary power on the court. The remedy is therefore available to the court both in established and novel contexts.[80] Changes to the existing regime may have unintended consequences. Submissions to CAMAC on this issue questioned the need for a specific insolvency ground on the basis that the courts have been willing to apply the general ‘just and equitable’ ground to wind up an ‘insolvent’ scheme.[81]

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78 *Corporations Act 2001,* s 912AA(8) as inserted by Legislative Instrument *ASIC Corporations (Financial Requirements for Responsible Entities, IDPS Operators and Corporate Directors of Retail CCIVs) Instrument 2023/647.*

79 See also RG 134 Funds management: Constitutions, Section G.

80 *Capelli v Shepard* [2010] VSCA 2, [102] citing House of Lords' decision in *Re Westbourne Galleries Ltd* [1973] AC 360 in support.

81 CAMAC (n 4), 176.

21. Would a tailored insolvency regime for schemes improve outcomes for scheme operators, scheme members and creditors? Are there certain aspects of the existing company and CCIV insolvency regimes that should be adopted?

No. See paragraph 20 above.

22. Should statutory limited liability be introduced to protect personal assets of scheme members in certain circumstances? If not, why not?

The weight of authority is in favour of the view that that the right of indemnity against a member of the scheme may be excluded by contract[82] although it has been suggested that in certain circumstances the exclusionary provision may be capable of being attacked by the scheme creditors.[83] It has also been suggested that an exclusion clause might not be given force for reasons of public policy where it was used as a cloak for fraud[84] and that perhaps this right of exclusion only applies as between the trustee and unit holders [85] which may leave it open for a creditor to still claim.

Although it is standard practice to include a limitation of liability clause in the constitution for schemes, the position in law is therefore not clear. In 2000 CAMAC made recommendation on this issue.[86] In particular one of its recommendations was:

> members of all registered managed investment schemes and ASIC-exempt schemes (eligible schemes) have limited liability for scheme debts that remain outstanding on the winding up of the scheme, in the same manner as shareholders of a company limited by shares, except to the extent that the inherent nature of the scheme or any scheme provision imposes any form of liability on members of the scheme beyond their initial contribution.[87]

although this was qualified by the following requirement:

> eligible schemes that limit the liability of their members in whole or in part on liquidation should be noted through some appropriate identifier to be stipulated by the Corporations Law.[88]

In 2012, CAMAC went further and recommended that ‘scheme members be given statutory limited liability (which should not be subject to any contrary provision in a

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[82] *RWG Management Ltd v Commissioner for Corporate Affairs (Vic)* [1985] VR 385; *McLean v Burns Philp Trustee Co Pty Limited* (1985) 2 NSWLR 623.

[83] *RWG Management Ltd* Ibid referring to an article by Professor Ford at [1981] MelbULawRw 1; 13 MULR 1, at pp. 14 and 17-18 although His Honour did not go into this question and left it open.

[84] *McLean v Burns Philp Trustee Co Pty Limited* (1985) 2 NSWLR 623.

[85] *Tindon Pty Ltd v Adams* [2006] VSC 172 at [37].

[86] Corporations and Markets Advisory Committee ‘*Report to the Minister for Financial Services and Regulation on Liability of Members of Managed Investment Schemes*’ March 2000.

[87] Ibid, 10.

[88] Ibid.

scheme constitution)'. CAMAC's 2012 recommendations on this issue should be adopted.[89]

It is noted that despite the above previous recommendations of long standing, all the previous work on this and other issues remains unfinished.

Chapter 7 Commonwealth and state regulation of real property investments

23. Do issues arise for investors because of the dual jurisdictional responsibility when regulating schemes with real property? If so, how could they be addressed?

This might be difficult to achieve without the assistance of State and Territory Governments. State and Territory Governments should be persuaded to refer the power to regulate REITs to the Commonwealth similar to what was done with corporations.

Chapter 8 – Regulatory cost savings

24. What opportunities are there to modernise and streamline the regulatory framework for managed investment schemes to reduce regulatory burdens without detracting from outcomes for investors?

Currently one of the biggest regulatory burdens lies with ASIC dilatory behaviour in relation to licensing. It is difficult to get an authorisation for a 'kind' scheme [90] and therefore, generally variations are needed for each named scheme that a RE wishes to operate. ASIC under its 'service' (or perhaps 'non-service' would be a more appropriate description) charter currently will take up to 150 days of receiving an application to vary an AFSL to add a named scheme for 70% of cases and up to 240 days for 90% of cases. This compares with the position in 2006/2007 when ASIC only took 28 days to approve a variation of an AFSL for 71% of cases. In one case, evidence was given that the proposed RE had lodged an application to vary its AFSL to include a named scheme on 24 January 2018, but the approval was not given until 7 June 2018. This means that it took ASIC 134 days to complete the process which is only slightly better than the service charter period of 150 days. [91] It beggars belief that the process would take so long.

These periods are unreasonable and outside the requirements for ordinary commercial operations. It has been made worse by movements of staff. Once the same person dealt with the one RE's applications. This is no longer the case so each new analyst has to be taken through the same material over and over again delaying the process.

Time is of the essence once a RE is in external administration if the MIS is to be saved and the retail investor protected.

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89 CAMAC (n 4), 19 and [8.4.3].

90 *One Re Services Limited and ASIC* [2012] AATA 294.

91 *Sandalwood Properties Ltd (Subject to a Deed of Company Arrangement) v Huntley Management Ltd* [2018] FCA 1502, [65].

Therefore the requirement for REs to continuously ask for variations for named schemes should be removed and all REs be given a 'kind' scheme authorisation for the "kind' of schemes that they operate.

This would remove a significant regulatory burden on REs as well as freeing up staff within licensing in ASIC to do other more important tasks.

If this is not done then there will remain a significant problem for retail investors where a RE is insolvent. Although section 601FA of the *Corporations Act, 2001* refers to '**a**' MIS, this requirement is not satisfied by the proposed RE or TRE holding an AFSL to operate **any** registered MIS. The proposed RE of TRE must hold an AFSL that specifically authorises the appointee to operate the MIS of the type in question.[92] This may be met by the AFSL of the proposed RE or TRE holding an AFSL that authorises it to operate the named scheme or a scheme that holds the particular asset kind of that scheme.[93] For example, if the registered MIS is 'XYZ Property Trust' which is a scheme that holds direct real property, the AFSL of the proposed RE or TRE would need to either authorise the appointee to operate the 'XYZ Property Trust' or to operate schemes which only hold direct real property.

It is not sufficient for the proposed RE or TRE to hold an AFSL containing an authorisation to 'operate the following kinds of registered managed investment scheme (including the holding of any incidental property) in its capacity as a responsible entity' followed by a list of named schemes if the specific scheme is not one of the named schemes.[94]

This poses a problem if the AFSL of the proposed RE or TRE is not sufficient for it to immediately step into the shoes of the current RE due to the administrative practices of ASIC. These administrative practices reduce the availability of candidates to replace an insolvent RE.

In order to overcome this problem, the PJC agreed with a submission that it should be sufficient for an entity to be appointed by the Court as a TRE that the entity only need hold an AFSL which authorised it to operate a MIS of any kind.[95] This would give ASIC sufficient time to issue a variation to the AFSL of the appointee thereby enabling the interests of the members to be protected through the management of the scheme by the TRE rather than the insolvent RE. However, this recommendation has not been adopted.

Further, following the issue of a discussion paper,[96] CAMAC recommended that where a scheme was viable but the RE is insolvent, the most suitable course would be to appoint a TRE or a new RE, thereby removing the scheme from the external

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92 *Australian Olives Limited v Stout* [2007] FCA 1958, [41]; *Sandalwood Properties Ltd (Subject to a Deed of Company Arrangement) v Huntley Management Ltd* [2018] FCA 1502, [58] (*'Sandalwood Properties'*).

93 *Sandalwood Properties* Ibid, [41] - [47]].

94 Ibid, [26].

95 Parliamentary Joint Committee on Corporations and Financial Services ('**PJC**') *'Inquiry into aspects of agribusiness managed investment schemes'* – September 2009*'* (Commonwealth of Australia, 2009), [3.108].

96 CAMAC *'Managed Investment Schemes – Discussion Paper June 2011'* (Corporations and Markets Advisory Committee 2011) (*'***CAMAC 2011***'*).

administration of its former RE.[97] CAMAC said that this would mean that the disruption to the operation of the viable scheme as a result of the RE going into external administration would be minimal.[98] No consideration has been given to taking up recommendations made by CAMAC that would overcome the problem of an insolvent RE in charge of a solvent scheme.

Despite the recommendations of the PJC and CAMAC, the problem remains. The current circumstances are a far cry from the original recommendation in the ALRC Report 65 compelling the appointment of a TRE in the case of insolvency of the scheme operator.[99]

These provisions have proven to be a failure at protecting retail investors of solvent schemes where the RE is insolvent. As CAMAC has noted, the appointment of a TRE is 'very rare'.[100] As at September 2021, there is only one reported case where a TRE has been appointed to a registered MIS in 23 years of operation of the *Managed Investment Act, 1998.*[101]

ASIC fixing up its appalling regulatory approval process within licensing would go a long way to improving the administration of MIS where a RE is in external administration by allowing immediate replacement of the insolvent RE with a replacement RE or at the very least a TRE.

The second area of regulatory burden is where there is a replacement RE and it is required by ASIC to continue with the auditors for the previous RE. Often there is a dispute between the incoming RE and the auditors because the auditors have not been paid. In some instances they are uncooperative or seek to charge higher fees. It would reduce the regulatory burden for REs if they could replace the current auditors of such schemes to the auditors who carry out the audits for other schemes managed by the incoming RE without the consent of ASIC.

This would avoid the inevitable delays that occur when there is a change in the RE and the existing auditors tend to be dilatory because they have not been paid.

Yours faithfully
Piper Alderman

Per:

Alan Jessup
Partner

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97 CAMAC Report (n 4), 133.

98 Ibid.

99 ALRC Report 65 (n 17), [8.14].

100 CAMAC 2011 (n 96), [4.3].

101 *Gordon, in the matter of Heydon Park Ltd (ACN 082 041076) (In Liquidation)* [2005] FCA 950.