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FOI 3586
Document 1



Australian Government
The Treasury



Ministerial Submission

MS22-000942

FOR ACTION - Financial Services Royal Commission – ongoing implementation and next steps

TO: Assistant Treasurer and Minister for Financial Services - The Hon Stephen Jones MP

CC: Treasurer - The Hon Dr Jim Chalmers MP

TIMING

Your response and signature by 29 June 2022 is required to support finalisation of the Bills ahead of introduction in the 2022 Spring sittings (MS22-000095 refers).

Recommendations

That you **agree** to finalise the response to the Financial Services Royal Commission (FSRC) by:

s 22

- Tasking Treasury to review the regulatory framework of Managed Investment Schemes, subject to a further brief on the scope, timing and nature of such a review, including resourcing required;

Agreed / Not agreed

s 22

- Failures of Managed Investment Schemes (MISs) have and will continue to be a significant category of unpaid claims. However, including MISs in the CSLR raises risks and broader design issues, and would not address broader issues regarding the regulatory framework for MISs.
- Accordingly, we recommend against including MISs within scope of the CSLR at this time and instead undertaking a review of the regulatory regime applying to MISs with a view to testing options to strengthen investor protections. Our reasons are set out at [Attachment C](#).
 - If you are agreeable to such a review, we will brief you further, including scope, timing, consultation plans and resourcing requirements.

s 22



- If you decide to include MISs within the scope of the CSLR, we will provide you with further briefing by 8 July 2022 seeking your decision on related design specifications as part of finalising the overall design of the scheme. Your decision by 15 July 2022 will be required to ensure legislation can be drafted for introduction as a 2022 Spring T measure.

s 22



s 22



Clearance Officer
James Kelly
First Assistant Secretary
Financial System Division
22/06/2022

Contact Officer
s 22 (CSLR)
Director
Ph: s 22

s 22 (MIS assessment)
Director
Ph: s 22

Mohita Zaheed s 22
Assistant Secretary
Mob: s 22

s 22
Director
Ph: s 22

s 22
Director
Ph: s 22

CONSULTATION

Law Division, Department of the Prime Minister and Cabinet, and Department of Finance

ATTACHMENTS

s 22



C: Compensation Scheme of Last Resort: Managed Investment Schemes

s 22



ATTACHMENT C – COMPENSATION SCHEME OF LAST RESORT: MANAGED INVESTMENT SCHEMES

- Retail clients hold approximately \$130 billion in managed fund investments in Australia, the majority of which is held through products that are managed investment schemes (MISs).
- A MIS is a legal structure rather than a specific product. A MIS is any product where members contribute money that is pooled to make investments. In practice, MISs are generally structured as a trust and the trustee (known as a Responsible Entity (RE)) manages the funds for the benefit of the members.
 - There are a wide range of different kinds of investments that are MISs, which range from conservative funds (such as passive equity index funds) to high-risk funds (such as emerging market funds or complex property funds) or products such as timeshares.
- The RE is required to have an Australian Financial Services Licence (AFSL) and there are currently 450 REs in Australia, of which 402 deal with retail clients and are thus required to be members of AFCA and therefore would be subject to a CSLR levy.
- There have been a number of significant MIS failures where investors have lost their investments. Although these failures are sporadic, they are high profile and often involve significant amounts of money. While there is a lack of comprehensive data, we estimate that investments lost as part of MIS failures since 2009 are approximately \$3.5 billion.
- As at 1 June 2022, the Australian Financial Complaints Authority (AFCA) had 334 complaints which relate to failed MISs. The total value of these complaints is estimated to be \$34.5 million. If the scope of the CSLR was extended to include MISs (with a claims cap of \$150,000), the expected compensation payments and associated AFCA fees for these complaints would be \$29.0 million, and this amount (and ongoing claims) would need to be funded by the MIS sector and potentially other financial institutions.
 - The current design of the CSLR includes a levy on the top-10 financial firms to pay compensation costs and associated AFCA fees for unpaid claims accumulated between 1 November 2018 and the date the legislation is introduced. Including MISs would increase the costs to be funded by the top-10 firms from \$35.6 million to \$66.7 million.
 - We also expect that including MISs within scope of the scheme will result in more MIS-related complaints being lodged with AFCA, further increasing the costs for the scheme.

Managed Investment Schemes and the Compensation Scheme of Last Resort

- Under the proposed design of the CSLR, MIS investors would not be eligible to make a claim for compensation in relation to a failed MIS investment.
- The Ramsay Review recommended that the CSLR should be established and be limited and carefully targeted at the areas of the financial sector with the greatest evidence of need. The Review recommended that the CSLR should initially be restricted to financial advice failures

but should also be designed to be scalable to cover other types of financial services, should significant problems with unpaid compensation arise in the future.

- The Ramsay Review was also clear that effective regulatory settings must exist to ensure that, to the maximum extent possible, financial firms can comply with a requirement to pay compensation owed to consumers.
 - In recommending that the CSLR initially be restricted to financial advice failures, the Ramsay Review noted that the inclusion of such failures within the CSLR was appropriate given the significant regulatory reform that had improved the quality of advice concerning more complex products.
- The subsectors proposed to be within scope of the CSLR (personal financial advice, credit provision, credit intermediation and securities dealing) have been subject to a number of reforms over the past decade which have significantly reduced the risk of misconduct and failure. In our view, there is a need to review the regulatory framework applying to MISs before the same can be said for the adequacy of regulatory settings for MISs.
 - For example, the UK banned issuers and distributors from marketing fund products with similar features to high risk MISs to retail investors from 2020.
 - In Australia, the design and distribution obligations (DDOs), which commenced on October 2021, was a key reform affecting the distribution of MISs. DDO requires MIS issuers to design products to meet the needs of investors and to distribute the products in a more targeted manner. If the DDO regime works as expected, high risk MISs should not be offered to retail investors. However, it is still too early to assess whether DDO is sufficient.

s 47E(d)

s 22

s 47E(d)

s 47E(d)

s 22

s 47E(d)

s 22

Sustainability of the Compensation Scheme of Last Resort

- Historic data for failed MISs indicate a high degree of volatility in claims for failed MISs. Where large MIS failures have occurred they have been associated with a significant number of consumers that have suffered large losses.

s 47E(d)

s 47E(d)

Review of regulatory framework for MISs

- Taking these issues into account, we recommend deferring a decision about whether the scope of the CSLR should be extended to include MISs. s 47E(d)

s 47E(d)

Sterling Group collapse

- A total of 566 people entered into investments with the Sterling Group. Some of these investments related to the Sterling Group MIS, while other investors invested in preference shares issued by two Sterling Group companies.
- 101 of these investors also entered into a ‘Sterling New Life Lease Arrangement’. When the Sterling Group collapsed these retiree investors lost their investment and the house that they were living in under long-term leases connected with the Lease Arrangement.


s 47E(d)

**ATTACHMENT E – COMPENSATION SCHEME OF LAST RESORT: DESIGN SPECIFICATIONS
DEPARTING FROM RAMSAY REVIEW RECOMMENDATIONS**

s 22



s 47E(d)



s 22





Australian Government
The Treasury

Ministerial Submission

MS22-002280

FOR ACTION - Review of the regulatory framework for managed investment schemes

TO: Assistant Treasurer and Minister for Financial Services - The Hon Stephen Jones MP
CC: Treasurer - The Hon Jim Chalmers MP

TIMING: Your response by 25 October 2022 so that the media release can be published after the 2022 Budget.

Recommendation

- That you **note** the scope of the review of the regulatory framework for managed investment schemes (MIS) which will now be delivered within existing resources ([Attachment A](#)).

Noted / Please discuss

- That you **note** the proposed timing of the review ([Attachment B](#)).

Noted / Please discuss

- That you agree to publish a media release after Budget which outlines the scope and timing of the review ([Attachment C](#)).

Agreed / Not agreed

Signature	Date: / /2022
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~~PROTECTED - CABINET~~

KEY POINTS

- s 34(2), s 34(3) 34(2)
[Redacted]
- We have previously briefed you on the review (refer to s 22 [Redacted] MS22-000942).
- We will establish a dedicated team to prepare a public consultation paper, conduct stakeholder consultations and report findings to you by December 2023.

s 47E(d)

- This will allow us to commence work in January 2023, consult on all of the issues outlined in the previous briefings and report findings to you in December 2023.

s 47E(d)

s 22

s 22

Scope of the review

- A list of issues that will be considered by the review, and those outside of the scope are set out at Attachment A.

Timing of the review

- The review will commence in January 2023, with Treasury to report findings to you in December 2023.
- We propose to release a public consultation paper in the first quarter of next year, undertake a six-week consultation period (including roundtables and bilateral meetings) and then test our draft recommendations in further targeted meetings during the second half of 2023. We will report findings to you in December 2023.
- The proposed timing is set out at Attachment B.

Draft media release

- We recommend that you agree to publish a media release after Budget which outlines the scope and timing of the review (Attachment C).

s 47E(d)

Clearance Officer
Melissa Bray
Assistant Secretary
Advice and Investment Branch
Retirement, Advice and Investment Division

Contact Officer
s 22
Director
Ph: s 22

CONSULTATION

Financial Services Division, ASIC, Law Division

ATTACHMENTS

- A: Scope of the review
- B: Proposed timing of the review
- C: Draft media release

ATTACHMENT A – SCOPE OF THE REVIEW

s 47E(d)

Issues to be considered in the review		
Item No.	Item for review	Nature of the issue
1	Whether the governance, compliance and risk management frameworks for MIS remain appropriate	Some concerns have been raised whether the existing settings for governance, compliance and risk management of MIS remain appropriate.
2	Roles and responsibilities of responsible entities (REs) to ensure that conflicts of interest are appropriately managed	MIS are generally structured as a trust and the trustee (known as a Responsible Entity (RE)) manages the MIS. This will consider whether it is necessary to clarify the functions and duties of REs to ensure that conflicts of interest are appropriately managed.
3	Insolvency regime	There is currently no tailored insolvency regime for MIS and MIS failures normally result in court proceedings. This increases the complexity and expense of the winding up procedures for insolvent MIS and potentially reduces the proceeds that can be obtained from the insolvency (if any).
4	Liquidity requirements	Consider whether the limited liquidity requirements for MIS mean that investors are not able to redeem their investments quickly.

s 47E(d)

Issues to be considered in the review		
Item No.	Item for review	Nature of the issue
5	Whether certain MIS investments are too complex and not suitable for retail investors	<p>Some countries specify that retail investors cannot invest in certain types of complex managed funds.</p> <p>Evidence to the Senate Standing Committee on Economics inquiry into the Sterling Income Trust suggests that investors did not fully understand the complexity and risk of their investments in the Sterling MIS.</p>
6	Whether the classification of investors as wholesale or retail clients remains appropriate	<p>The thresholds in the Corporations Act that determine whether an investor is a retail or wholesale client have not changed in over twenty years.</p> <p>This will consider whether the thresholds are still appropriate.</p>
7	MIS investments in real estate and interactions between Commonwealth and State laws	<p>The failure of the Sterling Income Trust highlighted a range of complex issues that arise when a MIS invests in real estate, particularly, residential real estate.</p> <p>The Senate Standing Committee on Economics report into the Sterling Income Trust raised concerns about the interactions between Commonwealth and State regulation of MIS that invest in real property.</p>

s 47E(d)

Issues excluded from the review		
Item No.	Item for review	Nature of the issue
1	Litigation funding	Whether a litigation funding scheme is appropriately classified as a MIS and whether improvements to the licensing and consumer protection settings for litigation funding schemes are required.
2	Taxation issues	The Financial Services Council (FSC) and other industry stakeholders regularly argue for changes to the tax settings for MIS to encourage international competitiveness.
3	Enhancements to Corporate Collective Investment Vehicle (CCIVs)	The CCIV regime commenced on 1 July 2022. The FSC have suggested amendments to the CCIVs framework.
4	Timeshare	ASIC and consumer groups have advised that timeshare investors require more robust protection features given the inappropriate sales practices and product features which are common in this sector.
5	Rights and obligations of custodians	Custodians are not subject to comprehensive licensing or statutory obligations.

ATTACHMENT B – PROPOSED TIMING OF THE REVIEW

We propose the following indicative timeframe for the review:

Review Timeline	
October 2022	Announce scope of review
January 2023	Review commences
March 2023	Consultation paper released
March 2023 – May 2023	Consultation period, including roundtables and bilateral meetings with stakeholders
June 2023	We will brief you about the outcome of consultation and submissions and draft proposals
August 2023	Targeted consultation to test draft proposals
November 2023	We will brief you about our findings
December 2023	We will provide advice to you about our findings



**The Hon Stephen Jones MP
Assistant Treasurer and Minister for Financial Services**

MEDIA RELEASE

[Insert date] 2022

**REVIEW OF THE REGULATORY FRAMEWORK FOR MANAGED
INVESTMENT SCHEMES**

The government has tasked Treasury to review the regulatory framework for managed investment schemes (MIS) to strengthen investor protections.

The regulatory framework for managed investment schemes was introduced more than twenty years ago and there have been a number of significant scheme failures, including the recent failure of the Sterling Income Trust.

It is now timely to consider whether the regulatory framework is still appropriate and what enhancements can be made to reduce financial risk and losses for investors.

The review will identify gaps in the current regulatory framework and potential reform options.

Treasury will focus on the following issues:

- whether certain investments are too complex and not suitable for retail investors
- whether the thresholds that determine whether an investor is a retail or wholesale client remain appropriate
- the various roles and obligations of responsible entities and whether conflicts of interest can be appropriately managed, and
- interactions between Commonwealth and State laws when regulating real estate investments by MIS (including issues arising in relation to the failure of the Sterling Income Trust).

Treasury will also consider the following issues:

- liquidity requirements for managed investment schemes

- whether an insolvency regime is required for managed investment schemes
- whether the governance, compliance and risk management frameworks for managed investment schemes are appropriate, and
- whether ‘investor rights’ for people who invest in managed investment schemes are appropriate.

The review will not consider the compensation scheme of last resort (CSLR) and whether managed investment schemes should be brought within the scope of the scheme. Any consideration of the inclusion of managed investment schemes within the scope of the CSLR would be informed by the review and any reforms that may follow.

In addition, the review will not consider the following issues:

- litigation funding schemes
- issues relating to the tax treatment of managed investment schemes and investors
- any changes to the corporate collective investment vehicle (CCIV) regime
- timeshare investments, and
- the rights and obligations of custodians.

Treasury is due to release a public consultation paper in the first quarter of 2023 and will report findings to Government by early 2024. Treasury will consult with industry stakeholders and investor and consumer groups.

The Government acknowledges the previous work and recommendations by various bodies, including the former Corporations and Markets Advisory Committee and the Parliamentary Joint Committee on Corporations and Financial Services and this will inform Treasury’s consideration of these issues.

The government encourages interested stakeholders to engage with the consultation process to ensure Australia’s regulatory framework for managed investment schemes remains fit for purpose.

Ends



Australian Government
The Treasury

FOI 3586
Document 3

Ministerial Submission
MS22-002712

FOR ACTION - 2023 Rationalisation of Ending of ASIC Instrument Measures - exposure draft legislation for public consultation

TO: Assistant Treasurer and Minister for Financial Services - The Hon Stephen Jones MP
CC:

TIMING

By **Tuesday 7 February 2023** to allow for four weeks for public consultation on the exposure draft legislation and associated explanatory materials.

Recommendation

- That you agree to release for public consultation the attached draft Bill, Regulations and explanatory materials that comprise the 2023 Winter Rationalisation of Ending ASIC Instruments Measures package (**Attachments A-D**).

Agreed / Not agreed

- That you agree that, when moved into the *Corporations Act 2001*, the breach of obligations currently included in ASIC Class Order [CO 13/657] be subject to the civil penalty regime set out in that Act, which will significantly increase the maximum penalties that apply.

Agreed / Not agreed

- That you agree that, subject to the outcomes of consultation, the documentation requirements in ASIC Class Order [CO 13/657] will not be incorporated into the *Corporations Act 2001*.

Signature	Date: / /2023
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KEY POINTS

- Treasury is developing the second tranche of amendments to make general improvements to portfolio legislation, which is proposed for introduction in the Winter 2023 sitting period.
- This submission seeks your agreement to release exposure draft legislation for amendments incorporating longstanding matters currently in ASIC legislative instruments into the primary law and regulations (the Rationalisation of Ending ASIC Instrument Measures). The draft legislation moves matters currently in ASIC legislative instruments into the *Corporations Act 2001*, *National Consumer Credit Protection Act 2009* and *National Consumer Credit Protection Regulations 2010*.
- Moving these matters from the instruments to primary law and regulations will improve the clarity of the law, provide certainty and make it simpler for regulated entities and consumers to understand their rights and obligations.
- The exposure draft legislation includes matters from five longstanding ASIC instruments and generally does not change the broad regulatory settings that currently apply to affected entities. A sixth instrument may be repealed entirely subject to feedback received during consultation. Further details about the amendments are below and in **Attachment E**.

ASIC Class Order [CO 13/657]

Increase in maximum penalties

- Your approval is required to consult on increasing the penalties that will apply to breaches of obligations currently in ASIC Class Order [CO 13/657] by making them civil penalty provisions when they are moved into the *Corporations Act 2001*.

s 47E(d)

- ASIC Class Order [CO 13/657] allows the constitution of a registered scheme to grant a responsible entity a discretion that could affect the acquisition or withdrawal price of interests in the scheme and requires that a responsible entity comply with certain obligations when exercising such a discretion. Under the draft legislation, a breach of these obligations would be a breach of a civil penalty provision.
- When there is a breach of a *Corporations Act 2001* civil penalty provision, a court may make a pecuniary penalty order in relation to the breach. The maximum penalty that can be imposed for individuals is 5,000 penalty units or, if the Court can determine the benefit derived, three times the benefit. The maximum penalty for a body corporate is 50,000 penalty units or, if the court can determine the benefit derived, an amount based on the turnover of the body corporate or benefit derived, capped at 2.5 million penalty units.

s 47E(d)

s 47E(d)

Change in documentation requirements

- The requirement to prepare and keep documentation relating to the exercise of a discretion that is set out in the instrument is not included in the amendments and would be repealed. This is because it does not provide meaningful benefits to consumers so imposes an unnecessary burden on responsible entities. However, the repeal of this provision is subject to feedback received during consultation.

ASIC Corporations (Managed investment product consideration) Instrument 2015/847

- During consultation we will seek feedback as to whether the ASIC Corporations (Managed investment product consideration) Instrument 2015/847 is still in use or should be repealed. ASIC would need to repeal the instrument if it is no longer required.
 - This instrument provides legacy arrangements for registered schemes that were registered before 1 October 2013 and provides a very similar framework to ASIC Class Order [CO 13/655] and ASIC Class Order [CO 13/657], which are being incorporated into the *Corporations Act 2001* in this package. Once a registered scheme has moved to the framework in the 2013 instruments it cannot revert to the previous arrangements.

Public consultation

- We recommend four weeks consultation from early February to early March 2023, which would allow for introduction in the Winter 2023 sittings. We note that the Corporations Agreement 2002 requires four weeks consultation for some of the amendments.
 - We note that ASIC has also consulted on the matters in [CO 13/520] as that instrument is part of a package of instruments that sunset on 1 October 2023, most of which need to be remade by ASIC. It may be appropriate to make changes to the bill amendments to incorporate feedback received during that consultation. We will brief you about any such changes after consultation.]
- The draft legislation and explanatory documents are undergoing final editorial checking and quality assurance by Treasury and the Office of Parliamentary Counsel and minor editorial changes may occur to the package ahead of its release for public consultation.


State and Territory Consultation

- Parts of the package will amend law that the States have referred to the Commonwealth under the Corporations Agreement 2002. The Agreement requires you to notify the States and Territories of your intention to make the amendments prior to their introduction to Parliament.

- We will brief you separately about this process.

Financial and Regulatory Impacts

s 47E(d)



Clearance Officer

s 22

Assistant Secretary (a/g)

Law Division

24 January 2023

Contact Officer

s 22

Director

Ph: s 22

CONSULTATION

The Department of the Prime Minister and Cabinet, Office of Parliamentary Counsel, ASIC

ATTACHMENTS

- A: Exposure Draft Bill
- B: Exposure Draft Explanatory Memorandum
- C: Exposure Draft Regulations
- D: Exposure Draft Explanatory Statement
- E: Details of instruments

Summary of ASIC instruments and proposed amendments

Proposed amendments to the *Corporations Act 2001*

ASIC-made legislative instrument	Provisions of the Corporations Act affected	Operation of the Corporations Act without instrument	Effect of the instrument	Proposed amendment
ASIC Class Order [CO 13/520] Relevant interests, voting power and exceptions to the general prohibition	Chapter 6, specifically sections 609, 610, 611, 615 and 671B.	<p>Chapter 6 of the Act relates to takeovers. It regulates the acquisition of substantial interests in listed companies and bodies, listed registered managed investment schemes and unlisted companies with more than 50 members.</p> <p>This includes imposing a general prohibition relating to the acquisition of interests by, or on behalf of a person, resulting in an increase of a persons voting power in a regulated entity to, or from, a point above 20 per cent (section 606).</p>	The instrument makes a number of modifications to Chapter 6 of the Act in relation to situations that will not give rise to a relevant interest under section 609 of the Act and exceptions to the general prohibition.	The amendments would transfer the modifications in the instrument directly into Chapter 6 of the Act.
ASIC Class Order [CO 13/655]	Section 601GA	<p>Part 5C.3 of the Act sets out the constitutional requirements of a managed investment scheme that is registered with ASIC and subject to the legal requirements of a registered scheme (a 'registered scheme').</p> <p>Paragraph 601GA(1)(a) requires the constitution of a registered scheme to make adequate provision for the consideration to be paid in order to acquire an interest in the scheme.</p> <p>Subsection 601GA(4) requires the constitution of a registered scheme to specify the right (if there is a right) to withdraw from the scheme, as well as set out adequate procedures for</p>	<p>The instrument inserts notional sections 601GAD, 601GAE, and 601GAF.</p> <p>Section 601GAD allows the constitution to include provisions that allow the responsible entity to set the acquisition price of interests under certain circumstances.</p> <p>Sections 601GAE and 601GAF allow a constitution to provide a formula or method to determine the amount of consideration to acquire interests or the amount to be paid on a withdrawal. The constitution can provide responsible entities with the discretion to decide certain matters</p>	<p>The amendments would transfer the modifications included in sections 601GAE and 601GAF to Chapter 5C of the Act.</p> <p>Notional section 601GAD will not be transferred and will remain in ASIC Class Order [CO 13/655].</p>

ASIC-made legislative instrument	Provisions of the Corporations Act affected	Operation of the Corporations Act without instrument	Effect of the instrument	Proposed amendment
		making and dealing with withdrawal requests.	relating to the formula or method, however the formula or method must be based on market price or net asset value (depending on the class of interests).	
ASIC Class Order [CO 13/657]	Section 601FC	<p>Division 1 of Part 5C.2 of the Act sets out the responsibilities and powers of the responsible entity of a managed investment scheme. Section 601FC sets out the duties of a responsible entity.</p> <p>Part 5C.3 of the Act sets out the constitutional requirements of a registered scheme.</p> <p>Paragraph 601GA(1)(a) requires the constitution of a registered scheme to make adequate provision for the consideration to be paid in order to acquire an interest in the scheme.</p> <p>Subsection 601GA(4) requires the constitution of a registered scheme to specify the right (if there is a right) to withdraw from the scheme, as well as set out adequate procedures for making and dealing with withdrawal requests.</p>	<p>The instrument inserts notional subsections into section 601FC to require that a responsible entity that is exercising their discretion under [CO 13/655] has a duty to exercise that discretion consistent with ordinary commercial practice and consistent with producing a reasonably current value.</p> <p>Notional subsections 601FC(1C) to 601FC(1E) also require the responsible entity to prepare and keep documentation relating to the exercise of discretion.</p> <p>The instrument also inserts notional section 1013DAA which requires the PDS to include the statement that those documents are available at no charge.</p>	<p>The amendments would transfer most of the modifications directly into Chapter 5C of the Act. Namely, a responsible entity's duties to exercise their discretion consistent with ordinary commercial practice and consistent with producing a reasonably current value.</p> <p>However, contravention of the duties would become a contravention of a civil penalty provision (as outlined by existing sections 1317E-1317H of the Act).</p> <p>This change is consistent with the civil penalty applicable to similar duties of responsible entities already in the Act, ensures the integrity of the registered scheme, and protect members interests relating to acquisition price and withdrawal payments.</p>

ASIC-made legislative instrument	Provisions of the Corporations Act affected	Operation of the Corporations Act without instrument	Effect of the instrument	Proposed amendment
				Further, the requirement to prepare and keep documentation relating to the exercise of discretions would be repealed and not moved into the Act. It is no longer required, is burdensome for responsible entities and does not provide meaningful benefits to consumers. The repeal of this provision is subject to feedback received during consultation.
ASIC Corporations (Managed investment product consideration) Instrument 2015/847	N/A	N/A	<p>This instrument can only be used by registered schemes that were registered by 1 October 2013 and provides a very similar framework to ASIC Class Order [CO 13/655] and ASIC Class Order [CO 13/657] with slight differences.</p> <p>Registered schemes that were registered prior to 1 October 2013 may rely upon ASIC Corporations (Managed investment product consideration) Instrument 2015/847 or ASIC Class Order [CO 13/655] and ASIC Class Order [CO 13/657]. If such schemes have chosen to move to the framework in the 2013 instruments, they cannot return to the previous framework.</p>	<p>Consultation question only: In the exposure draft of the explanatory memorandum we will seek feedback in consultation whether ASIC Corporations (Managed investment product consideration) Instrument 2015/847 is still relied upon or should be repealed.</p> <p>If it is repealed then only the framework currently set out in ASIC Class Order [CO 13/655] and ASIC Class Order [CO 13/657] (as moved into the Act) will be available to registered schemes (see above).</p>

ASIC-made legislative instrument	Provisions of the Corporations Act affected	Operation of the Corporations Act without instrument	Effect of the instrument	Proposed amendment
				If the instrument is no longer required then ASIC would need to repeal it.
<p>Section 6 of ASIC Corporations (Superannuation and Schemes: Underlying Investments) Instrument 2016/378</p>	<p>Section 941C</p>	<p>Section 941A of the Act requires AFSL licensees to provide Financial Service Guides (FSG) to retail clients for their financial products.</p> <p>Section 941C provides exemptions to the requirement to provide an FSG for dealing by a trustee in fund interests and dealing by a responsible entity in scheme interests.</p>	<p>Section 6 of the instrument includes two exemptions.</p> <p>The first exempts the trustee of a superannuation entity from the requirement to provide a Financial Services Guide for dealing in financial products in the ordinary course of operation of the entity.</p> <p>The second exemptions provides a similar relief to the responsible entity of a registered scheme for dealing in the ordinary course of operation.</p>	<p>The amendments would transfer the effect of section 6 of the instrument into the Act by introducing new exemptions to cover the underlying dealing of responsible entities and trustees.</p> <p>These amendments only move matters in section 6 of the instrument. The remainder of the instrument will continue to apply.</p>

Proposed amendments to the *National Consumer Credit Protection Act 2009* and *National Consumer Credit Protection Regulations 2010*

ASIC-made legislative instrument	Provisions affected	Operation of the primary law without instrument	Effect of the instrument	Proposed amendment
<p>ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835</p>	<p>Section 16 of Schedule 1 to the <i>National Consumer Credit Protection Act 2009</i> (the National Credit Code) and the <i>National Consumer Credit Protection Regulations 2010</i></p>	<p>Section 16 of the National Credit Code requires a credit provider to give a prospective debtor a precontractual statement and an information statement, prior to entering into a contract.</p> <p>The standard arrangements for the provision of documents electronically in regulation 28L do not apply to section 16 of the National Credit Code.</p> <p>Regulation 28L of the <i>National Consumer Credit Protection Regulations 2010</i> provides for the giving of certain prescribed documents by electronic means, including via an electronic document retrieval system, with the consent of the consumer.</p> <p>Regulation 28L also sets out a range of administrative matters relating to consent and the form of the documents and matters that the licensee must be satisfied of.</p>	<p>The instrument applies the equivalent of regulation 28L to credit providers and debtors in relation to precontractual statements and information statements required to be given under section 16 of the National Credit Code.</p>	<p>The amendments would insert a regulation making power into the <i>National Consumer Credit Protection Act 2009</i>, and make regulations in reliance on that power, to allow documents that must be provided under section 16 of the National Credit Code to be provided electronically, consistent with the existing arrangements in regulation 28L.</p>



Ministerial Submission
MS23-001158

FOR ACTION – Consultation paper - Review of the regulatory framework for managed investment schemes (MIS)

TO: Assistant Treasurer and Minister for Financial Services - The Hon Stephen Jones MP
CC: Treasurer - The Hon Jim Chalmers MP

TIMING

By 26 July 2023 - to allow publication of the consultation paper before the end of July 2023.

Recommendation

- That you agree to publish the attached consultation paper (**Attachment A**) on the regulatory framework for managed investment schemes before the end of July 2023 (date to be agreed with your office).

Agreed / Not agreed

- That you agree to publish the attached draft media release (**Attachment B**) to announce the consultation.

Agreed / Not agreed

- That you note the proposed consultation strategy (**Attachment C**).

Noted / Please Discuss

Signature	Date: / /2023
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KEY POINTS

- On 8 March 2023, you announced a review of the regulatory framework for managed investment schemes (MIS review). The announcement included a commitment for Treasury to release a consultation paper by mid-2023 and report findings to Government by early 2024.
- A draft consultation paper has been prepared at **Attachment A**. The paper reflects the scope of the review you agreed to in October 2022 (MS22-002280 refers). The paper also seeks stakeholder views on opportunities to streamline the regulatory framework.
 - An overview of the content of the consultation paper is included in **Additional Information**. Prior to the release of the paper, minor formatting and technical amendments may be incorporated to ensure accuracy and readability.
- A draft media release announcing the consultation is at **Attachment B**. We recommend publishing the consultation paper before the end of July to allow consultation to commence by mid-2023, reflecting your announcement.
- Our proposed consultation strategy is at **Attachment C**. We recommend an 8 week consultation due to the breadth and complexity of the issues being considered by the review and the broad stakeholder interest. In addition to seeking formal submissions, we propose directly engaging stakeholders on the issues covered in the paper via roundtables and bilateral meetings.

Next steps

- Subject to your agreement, we propose releasing the consultation paper on the Treasury website before the end of July 2023 on a date to be agreed with your office.
- After consultation closes we will analyse stakeholder feedback and brief you on the outcomes.

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Clearance Officer
Andre Moore
Assistant Secretary
RAID, Advice and Investment Branch
14/07/2023

Contact Officer
s 22
A/g Director, Investment Funds Unit
Ph: s 22

CONSULTATION

Law Division, Financial System Division, Market Conduct Digital Division, Australian Securities and Investments Commission (consultation paper).

ATTACHMENTS

- A: Consultation Paper
- B: Media Release
- C: Proposed consultation strategy

ADDITIONAL INFORMATION

- The purpose of the consultation paper is to identify the potential gaps and vulnerabilities in the MIS regulatory framework. The issues presented are consistent with the scope announced and have primarily been informed by the findings and recommendations from previous reviews and inquiries.
 - A summary of the relevant reviews and inquiries is provided in Box 1 and Box 2 of the consultation paper. A list of consultation questions is provided in Appendix B of the consultation paper

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- The consultation paper addresses the following matters:
 - The wholesale client thresholds. The paper discusses the importance of the retail client and wholesale client distinction and the adequacy of the financial thresholds in today's environment. The wholesale client consent arrangements proposed by the Quality of Advice Review is also examined.
 - Suitability of scheme investments for retail clients. The paper discusses the existing regulatory settings that support retail clients invest in suitable MIS products. The paper explores if further enhancements are required. This includes an examination of the MIS registration process and the expectation of investors.
 - Governance and compliance frameworks for scheme operators. The paper explores the effectiveness of the existing governance and compliance frameworks for MIS. The paper discusses potential vulnerabilities that may contribute to poor scheme governance and seeks views on what enhancements could be made.
 - The rights of investors. The paper examines the definition of scheme liquidity and how this impacts an investor's right to withdraw. The paper also considers whether there is a mismatch in investor expectations regarding withdrawal rights. The ability for investors to exercise their right to replace the responsible entity of a scheme is also discussed with consideration as to how barriers could be removed.
 - Winding up insolvent schemes. The paper discusses the lack of statutory wind up provisions for insolvent schemes and explores the need to introduce a tailored insolvency regime. Introducing statutory limited liability for investors is also examined.
 - Commonwealth/state regulation of real property investments. The paper presents the dual jurisdictional responsibility for financial products involving real property investments. The paper seeks to understand what issues arise for investors and how these could be addressed.
 - Streamlining the regulatory framework. The paper invites views on opportunities to modernise and streamline the framework without detracting from investor outcomes.

ATTACHMENT C – PROPOSED CONSULTATION STRATEGY

Summary

- Our proposed 8 week consultation process has three components. Key consultation objectives have been outlined in the table below.
 - Public release of the consultation paper on the Treasury website inviting written submissions from interested parties.
 - Stakeholder roundtables consisting of both general and targeted policy discussions. For example, we propose targeted roundtables to examine the wholesale client financial thresholds.
 - Bilateral meetings with key stakeholders.
- We propose to engage with the following stakeholders:
 - Investment funds and platform providers such as Blackrock, Vanguard, Macquarie, State Street, Hub24, Westpac, and Commsec.
 - Legal firms that advise funds such as Allens, Clayton Utz, Norton Rose Fulbright, Mills Oakley and Herbert Smith Freehills.
 - Industry associations and consumer bodies such as the Financial Services Council, CHOICE, Australian Investors Association, Association of Superannuation Funds of Australia, Financial Advice Association Australia, Financial Rights Legal Centre and the Sterling First Action Group.
 - Regulators and Government-related bodies such as the WA Department of Mines, Industry Regulation and Safety, Australian Financial Complaints Authority and ASIC.
 - Academics who have been active in policy debates about the regulation of MIS.

Consultation objectives

Consultation paper chapter	High-level summary
Wholesale client thresholds	<ul style="list-style-type: none"> • Whether the existing wholesale client thresholds are still adequate and if not, how should they be revised. • How wholesale client consent arrangements should be designed to ensure investors understand the consequences of being considered a wholesale client.
Suitability of scheme investments	<ul style="list-style-type: none"> • Whether there should be changes to the scheme registration process and/or conditions applied to certain schemes offered to retail clients.

Scheme governance and the role of the responsible entity	<ul style="list-style-type: none"> Whether the governance and compliance requirements for schemes effectively protect and promote investor interests through good scheme governance.
Right to replace the responsible entity	<ul style="list-style-type: none"> Whether there are barriers that restrict scheme members from exercising their right to remove or replace the responsible entity.
Right to withdraw from a scheme	<ul style="list-style-type: none"> Whether the current definition of liquidity and how this informs withdrawal rights for scheme members is fair and equitable.
Winding up insolvent schemes	<ul style="list-style-type: none"> Whether there are opportunities to modify wind up provisions for insolvent scheme to improve outcomes for scheme operators, members and creditors.
Commonwealth and state regulation of real property investments	<ul style="list-style-type: none"> Whether the duality of jurisdictional responsibility between Commonwealth and state laws when regulating schemes that involve real property investments gives rise to consumer harm.
Regulatory cost savings	<ul style="list-style-type: none"> Whether there are opportunities to streamline and modernise the regulatory framework for managed investment schemes.

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The Hon Stephen Jones MP
Assistant Treasurer and Minister for Financial Services

MEDIA RELEASE

XXXX2023

CONSULTATION OPENS FOR THE REVIEW OF THE REGULATORY FRAMEWORK FOR MANAGED INVESTMENT SCHEMES

The Albanese Government is continuing its work to modernise and strengthen regulatory settings in the financial services sector.

Today the Government has released a consultation paper examining the regulatory framework for managed investment schemes to ensure it remains fit-for-purpose and effectively protects investors from undue financial risk.

The paper seeks stakeholder views on a range of issues, including whether the wholesale client thresholds remain appropriate, whether the governance and compliance frameworks promote the effective operation of schemes, and whether the rights of investors are adequate. The Government is also seeking views on opportunities to reduce regulatory burdens without detracting from outcomes for consumers.

Further information about the consultation process is available on the Treasury consultation website at www.treasury.gov.au/consultation.

Submissions close on **[date month 2023]**.

The Government welcomes submissions from all interested parties.

Ends