28 August 2023

Director
Investment Funds Unit
Retirement, Advice and Investment Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email only: misreview@treasury.gov.au

Dear Director.

SUBMISSION ON THE REVIEW OF THE REGULATORY FRAMEWORK FOR MANAGED INVESTMENT SCHEMES

I am pleased to provide my feedback to Treasury on the material provided in its Consultation paper dated August 2023 about the subject identified above. I trust some of my comments are helpful in the work you are undertaking to better regulate this area of the capital market.

My views and perception have been developed from various sources.

1. Direct experience as a licensee dealing in securities and other financial products from 1987 until 1993;
2. Experience as a senior investigator for ASIC from 1993 until 2002;
3. Experience as a head of compliance function at 2 Australian banks and 2 financial planning entities between 2002 until 2006 (followed by 10 years experience as head of compliance and audit for a major oil and gas enterprise which included a financial services licence to trade financial derivatives.)

Whilst an enforcement officer with ASIC, I was involved in the national team set up to implement the managed investment scheme regulatory process and was very closely involved in many investigations and surveillance operations involving poor behaviour within the finance sector.

Some of the matters I dealt with involved unsophisticated retail investors being duped out of very significant portions of their wealth by dishonest advisers dishonestly fitting them into a "wholesale investor" category so that there was no need for the adviser to provide Good Advice and deliver honest, efficient and fair financial advice to vulnerable investors.

Briefly, I am of the opinion that:

1. the current s761A definition of "wholesale investor" ought to be deleted from the Corporations Act;
2. Scheme responsible entities should be prohibited from selling their managed investment scheme **(scheme)** investments directly to retail investors;
3. All schemes should be registered with ASIC;
4. ASIC must be adequately resourced to proactively conduct broad ranging surveillance activity involving all facets of the financial services regime to prevent illegal and damaging behaviour before financial damage is done to retail investors or at least severely limit the extent of such behaviour; and
5. Ensure that the capacity to limit the definition of retail investor is curtailed as much as possible.

I have offered comment where I think I have something to say. In others I have said nothing because I don't feel I know enough to give any worthwhile comment.

I trust my comments set oy below in tabular form are acceptable and provide some value to you.

Sincerely

Gavin Harrington
Mobile: 0429 075 866

CONSULTATION QUESTIONS	
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?	Currently the threshold is $500,000 which the investor must be able to pay over to acquire a single interest in a scheme or other investment offer. This amount must be the minimum amount accepted by the issuer for its offer. This amount is probably still sufficient however the application of this limit requires urgent surveillance by ASIC to ensure its appropriate application.
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?	Yes. In both instances. Current wage levels in many industries are significantly higher than in the 1990's. Specific value increases are not something I feel competent to ascertain however if the category is to be retained, indexation to the national rate of inflation starting from inception of the income and asset tests should provide a more meaningful level of wealth. I am convinced however that the Wholesale Investor category set out in s761A of the Corporations Act is fundamentally flawed and allows many inappropriate investors to be fitted into a category where they are being denied proper disclosure and legal protection, both of which they in fact require and are due. In my opinion, the entire Wholesale Investor regime should be removed from the Law. I can see no real connection between a person's wealth and their financial or investment sophistication or capacity to adequately assess the risks or potential benefits of investment proposals.

	Whilst I recognise that the original concept of the "Wholesale Investor" considered that they were investors who are "better informed and better able to assess the risks involved in financial transactions" therefore allowing them to participate in wholesale markets under a lighter touch regulatory regime because they are wealthy, I am certain that this assumption is wrong. However, that goal can be achieved with the current definitions of sophisticated and professional investor. The disconnect between implying the capacity to assess and analyse investment products is present because of some arbitrary wealth determination is fundamentally wrong and unnecessary. The best example I can imagine to support my view, is to consider the circumstances of a specialist medical surgeon and/or a non-finance based academic. In both circumstances, these example investors are very likely to earn in excess of the minimum amount to be categorised as a "wholesale investor" most likely will own in excess of the minimum net assets required and may also hold liquid assets in savings that allow a minimum initial investment of $500,000 as required. However, because their lives have been consumed in the learning of medicine or in attaining academic expertise in a chosen field, it is very possible that they have not acquired expertise in critically assessing an investment proposal. Obviously these type of investors must not be left to deal with investment decisions as if the principle of *caveat emptor* applied to them. They must be treated as retail investors due to their lack of investment sophistication. I have also often experienced managers of medium sized businesses who are not capable of analysing or assessing necessary parameters of investment offers despite their high level incomes and general business

	expertise. The wholesale investor category does not work and allows many investment offers to be made without proper disclosure and care as is required when dealing with vulnerable investors. Investors may proactively refuse to accept any advice about their investment intentions and rely solely on their own capabilities. They will however be unlikely to interact with any financial adviser when making their decisions.
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?	It seems preferable to have primary residence and superannuation savings exempted from the asset test. These family based assets should not be considered as available to advance legal process to gain redress for bad advice.
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?**	I have a very real concern with the idea of a consent regime based on the investor making the consent. Invariably retail investors rely fully on the honesty and reasonableness of the financial services adviser involved. It is my experience that investor consent is only sought where the adviser is aware that the investor is not capable of fitting the criteria for wholesale investor status and attempts to avoid the statutory obligations by passing the responsibility to the investor. There is a need for a "reasonable grounds" duty to be applied against the adviser such that it is totally transparent that the investor does in fact have sufficient skill and knowledge to independently and sufficiently assess the suitability of the financial product being offered apart from meeting the requisite wealth limits. It would be helpful for the Corporations Act (or the Regulations) to include a clear and plain English definition of "reasonable grounds" and how that is satisfied.

(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. However, in the case of an investor who is to be considered a sophisticated investor pursuant to s761GA(d) of the Corporations Act, there is already an obligation for the financial services licensee offering the financial product to have "reasonable grounds" for assessing that the investor has previous experience and skill to independently assess the financial product and its suitability for the investor's circumstances. Obviously, if the "reasonable grounds" cannot be demonstrated, the investor should be considered by the offering financial services licensee to be "retail" and treated as such.
Chapter 2. Suitability of Scheme Assets	
General Comment	It is necessary to allow MIS to invest in any legal venture in order to provide the widest possible choice of investment opportunity to the investing population. To better protect retail investors, it would be preferable to amend the regulatory landscape so that Responsible Entities are prevented from offering interests in their schemes directly to retail investors. This activity ought to be the sole province of the financial services advisers (licensees and representatives) who provide "Good Advice" to their clients. Responsible Entities have an insurmountable conflict of interest when dealing in their own schemes. They are systemically unable to provide comparative assessment of competing schemes that allows a retail investor to make an informed choice of investment. The financial services adviser dealing with the investor should do this. The financial services adviser has the obligation of giving Good Advice to the retail investor. This should ensure that the various investments within the MIS are properly researched and understood by the adviser so that the

	suitability of the prospects of the scheme are matched directly to the circumstances of the investor. The sole determinant of what is an allowable investment for an MIS is the pure legality of the asset/s. The Good Advice providers will determine who might have the capacity to take the risk of investment into such assets. Section 2.2 of the Consultation Paper discusses the regulatory landscape that is expected to ensure retail investors are only offered scheme investments that suit the "target market" to which the retail investor belongs. It implies that the obligation to determine the suitability of the investment sits with the retail investor. That is simply not appropriate. Retail investors, by definition, do not have the skill or resources to make such a decision. In my opinion, that does not provide the protection that the Corporations Act offers retail investors. Retail investors should always be provided properly qualified personal financial advice from an appropriate financial adviser before any investment decision is finalised. Simply relying on a PDS being provided by the Responsible Entity or ASIC's reactive product intervention powers, does nothing to prevent the at times tragic loss of retirement savings and the loss of investment capital better utilised in suitable investments.
5. Should conditions be imposed on certain scheme arrangements when offered to retail clients? If so, what conditions and why.	The "target market" requirement in designing MIS is of questionable benefit. The Good Advice" providers are the appropriate entities to determine whether any particular MIS is suitable to a particular investor. They are obligated to determine in respect of each unique investor whether it is appropriate for that specific investor and whether or not it aligns with the investor's particular risk tolerance. As set out above, it is not appropriate that Responsible Entities deal directly with retail investors in any case. The target market is of no real assistance to the Good Advice provider.
6. Are any changes warranted to the procedure for scheme registration? If so,	The idea that ASIC is obligated to provide a registration decision within 14 days of receiving an application for registration seems to be a recipe for forcing ASIC to approve all registration applications regardless of merit.

what changes and why	There is simply no way that ASIC is sufficiently resourced with registration officers for that to be a realistic obligation. It seems a much better position to require that any MIS that is to be available to retail investors must be registered. Sufficient resourcing of ASIC for this task is imperative. The current timing restriction is not helpful. Properly proofed applications should be considered in a timely manner but applications that are not constructed adequately will obviously lead to longer registration timeframes.
7. What grounds, if any, should ASIC be permitted to refuse to register a scheme	Obviously, ASIC must be permitted to refuse registration of a scheme if reasonable enquiries are not sufficiently responded to. This is especially true where the scheme is intended to hold any form of exotic type of asset which is difficult to value or analyse. In these cases, it could be expected that retail investors are subject to particularly high risk of financial loss. Given appropriate resourcing with sufficient and adequately skilled surveillance and enforcement officers, ASIC will be well able to maintain proactive supervision of the schemes to ensure compliance with their obligations.
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?	Responsible entities that manage multiple schemes should be more effectively and robustly surveyed by ASIC due to a heightened risk of member's rights not being sufficiently protected at all times due to the complexity of managing schemes with different assets, scheme constitutions and compliance plans. Arguably the main governance documents involved with the operation of a scheme are the scheme constitution

	and the scheme compliance plan. Where a scheme is subject to a generic form of constitution or compliance plan, it is very difficult to expect the responsible entity to manage the scheme solely for the benefit of the members of a particular scheme. These documents that drive the core of scheme governance should be developed and executed for a single scheme only. A statutory requirement that a responsible entity is restricted to managing one scheme only is likely to improve scheme management through better concentration on scheme matters and potentially better outcomes for members. Multiple schemes managed by the one responsible entity with non-specific governance documents is not in the spirit of the law, in my opinion.
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	Yes. Whilst this should be a part of the registration process, there could be occasion where the scheme's structure or purpose may change therefore acceptable changes to all or any governance documents must be within ASIC's powers.
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	All scheme governance documents, including the compliance plan, must be scheme specific and unique to the scheme.
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?	I have no useful comment to make about this matter however from past experience, it would improve the outcome of compliance plan audits if the auditor was legally bound to provide ASIC with a copy of the audit report at the same time as the report is issued to the responsible entity. Serious problems could be dealt with in a more timely manner and potentially prevent financial loss for members.

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 issue should be dealt with in the scheme constitution and management plan. It requires a management system that provides members with certainty that any jurisdictional complexity is able to be appropriately handled as a business as usual matter. When financial advisers are considering recommending such a scheme to a retail investor, they have the obligation to appropriately research the scheme's capacity to handle these type of issues for the best benefit of the member. If the responsible entity cannot demonstrate such skills to ASIC during registration, the scheme should be rejected until the right skill set is available.

27 October 2023

Committee Secretariat
Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear Sir/Madam,

SUBMISSION BY Rxxx XXXX AND Txxx XXXX (Variously referred to as I, We, Us, Our as relevant)

We are making this submission to the Senate Standing Committees on Economics **(Committee)** to assist the **Committee** understand the effect that substandard and misinformed regulatory actions have on the wealth and welfare of unsophisticated and inexperienced retail investors.

Considering the Terms of Reference for the **Committee**, we believe that a detailed explanatory submission setting out our experience with two regulated financial services licensees and their agents could inform the **Committee** of the systemic nature of bad advice being provided to unsophisticated and therefore quite vulnerable retail investors.

Further, it is very likely that our disappointing and frustrating engagement with the Australian Securities and Investments Commission **(ASIC)** will provide valuable feedback about some of the aims of the **Committee's** inquiry as set out in the Terms of Reference.

We have been the victims of deception, dishonesty, misleading and deceptive statements and misleading and deceptive conduct from the two Australian financial services licensees and their representatives that we dealt with from August 2011 until 2017 leading to us losing our total savings of $199,000. This was the full proceeds of the sale of our small business. We now face an eventual retirement far more restrained than we had hoped and planned for.

Due to the complex nature of financial services and products, we have asked Mr Gavin Harrington to act as our advocate in this matter. We authorise Mr Harrington to speak on our behalf for this matter in respect to any future correspondence or enquiry about our situation. Mr Harrington's assistance to produce this submission is greatly

appreciated and has allowed us to obtain significant insight to the difficulties when attempting to present evidence of how we were treated.

The core issue that enabled the **ASIC** regulated licensees to divert our savings into a worthless and possibly non-existent "investment" was the dishonest manner in which we were improperly fitted into the definition of wholesale and sophisticated investors. We are not and could never be truthfully considered anything but retail investors. By being so comprehensively misled and deceived we were denied the lawful protection of the Corporations Act 2001 that should properly have protected us from this outcome.

We have reported our situation to Australian Financial Complaints Authority **(AFCA)**, **(ASIC)**, Financial Ombudsman Service **(FOS)** and Pearce Callahan and Associates Pty Ltd **(PCA)**. **PCA** is one of the two financial services licensees who arranged our investment and certified that we met the necessary criteria to make the investment.

The other financial services licensee initially involved with encouraging our investment and then arranging it, was a company called Viridian Equity Group Pty Ltd **(Viridian)**. Viridian representatives were the first to assess our capacity to meet the various necessary criteria to make this investment.

AFCA refused to deal with our submission due to the two relevant financial services licensees not being members of **AFCA**.

Following the rejection by **AFCA** we lodged a submission of our situation with **ASIC.** This was dealt with under the **ASIC** complaints mechanism and has been very difficult to deal with. Principally the **ASIC** complaints officers have taken a deflective non-engagement attitude towards the facts of our situation and caused us severe stress.

Submission Detail

Complaints Resolution Submission

On 5 October 2021, we submitted a formal complaint to **AFCA** setting out full details of our financial loss and the circumstances that caused it. This is provided as **Attachment 1**.

No response was provided until I telephoned and was told that **AFCA** could not assist due to the financial services licensees who dealt with us not holding current **AFCA** membership.

On 8 December 2021 we formally responded to the **AFCA** denial of our claim which is provided as **Attachment 2**.

AFCA responded by email 24 January 2022 when they again advised that due to the financial services licensees that dealt with us not currently or previously holding

membership of **AFCA** or **FOS,** they could offer us no assistance and that our "options remain external to **AFCA**". The email is provided as **Attachment 3.**

ASIC Submission

On 8 December 2021 we sent a submission to **ASIC** setting out the circumstances of our financial loss and how it came about as set out in **Attachment 4**.

As clearly advised to **ASIC**, it was, and still is, our firm opinion that the reason for our loss is the deception by the financial services licensees who arranged and offered us the investment into the Newman Estate Project. Had these licensees acted honestly, efficiently and fairly, they would have refused to encourage us to undertake this investment.

We did not then and could never meet the status of wholesale investors as defined in section 761G of the Corporations Act as required under the terms of the investment.

As **ASIC** must be aware, **Viridian** at all times was only permitted to deal with and advise wholesale investors. They do not and did not possess a licence to deal with us and were legally obliged to refuse to deal with us.

Likewise, **PCA** had no capacity to deal with us as sophisticated investors as defined in section 761GA of the Corporations Act. It is impossible for them to be satisfied on any grounds, let alone reasonable ones, of our previous experience in using financial services and investing in financial products nor our capacity to assess the merits of the financial product offered, the value of the product, the risks associated with holding the product, our own information needs or the adequacy of the information given by **PCA**.

An honest licensee would have refused to deal with us.

These are the sole issues we dealt with in our submission to **ASIC** but they ignored this.

Their responses nonsensically concentrate on the role played by Macro Realty Pty Ltd **(Macro)** and the various media releases made by **ASIC** about the actions of Veronica Macpherson and **Macro**. At no time during our dealings with **ASIC** did they seriously consider the facts of our submission or attempt to provide any assistance that could help us recover our losses.

ASIC's initial response to our 8 December submission is set out in an email dated 18 February 2022 **(ASIC email)** which is provided as **Attachment 5**.

Our response to the **ASIC email** is provided as **Attachment 6**. It comprises a letter dated 20 April 2022 addressed to Tim Homel, the author of the **ASIC email.**

By email dated 30 May 2022, **ASIC** responded to the 20 April letter **(Second ASIC email).** It is provided as **Attachment 7**. It provides irrelevant and in some cases erroneous material that does not assist us.

Our response to the **Second ASIC email** is set out in a letter dated 26 July 2022 addressed to Isaac Chien and is provided as **Attachment 8.** In the 26 July letter we set out our concerns with what **ASIC** is telling us and clarify why we consider that they are not taking our situation seriously.

In a letter dated 17 October 2022 **ASIC** provided a response from their Escalated Matters and Government department. The contents are very concerning in that several of the assertions made in the letter are simply untrue. Nothing in the material supplied relates to our submission. The 17 October letter is provided as **Attachment 9.**

We have never responded to the 17 October letter. We have instead spent valuable time engaging with our Federal member for Swan.

Summary of issues

Attachment 10 is a summary document that sets out the process we went through with both **AFCA** and **ASIC**. Whist this summary provides a convenient overview of the situation we face and the difficulties we have had to contend with, the greater detail held in the original submission and response documents provide a much more complete discussion of the matter. The **Committee** is encouraged to read the detailed submissions so as to get a clear view of the core of our situation.

Relevant Enforcement Outcome

Following advice from Mr Harrington, we never expected **ASIC** to provide any financial remedy for our losses. There are however we believe, other outcomes that would assist us to recover all or most of our money.

Because we are demonstrably retail investors, we ought to have been provided the full protection of the Corporations Act by **Viridian** and **PCA**. Accordingly, we should have been provided with a Statement of Advice, Financial Services Guide and full disclosure of the investment details. We never were provided with this.

Further, due to **Viridian** not holding the requisite financial services licence, we ought to have been turned away from participating in this scheme.

The result of **ASIC's** inexplicable response to our submission has prevented them from undertaking any enforcement or investigative activity that may have assisted us to recover our funds.

Surely it is reasonable for **ASIC** to have approached **Viridian** and **PCA** through an Enforceable Undertaking and demanded that they each retrospectively provide full personal advice to us in respect to the Newman Estate Project investment and therefore allow us to properly consider the circumstances and risks of this investment. In the event that we rejected the advice to invest, each of **PCA** and **Viridian** would then be liable to put us back into the financial position we were in prior to dealing with them and their representatives.

ASIC at that stage would have ample opportunity to enforce the Law against these licensees and to help send a timely message to the industry at large of the consequences of misleading and deceiving retail investors. This outcome would assist in providing practical deterrence of poor behaviour.

Mapping issues to Terms of Reference

In order to further assist the **Committee**, we have provided a summary that maps our issues and concerns to the issues raised in the **Committee's** Terms of Reference. This was originally developed to accompany a submission to the Joint Committee on Corporations and Financial Services. We have since been advised that the Joint Committee will probably not consider the matter due to the Economics Committee considering same issues and being much further advanced. The mapping table is provided as **Attachment 11**.

We are very disappointed with the manner in which **ASIC** treated our matter. We continue to feel that we have never been heard and that **ASIC's** focus upon their internal policies and procedures rather than their regulatory obligations has denied us any form of justice.

We hope that the Committee sees fit to consider our submission and that the details set out in the attachments are able to provide clarity about what we sought from **ASIC**.

Sincerely

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Mobile:

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