Allens
Deutsche Bank Place
Corner Hunter and Phillip Streets
Sydney NSW 2000 Australia
T +61 2 9230 4000
F +61 2 9230 5333
www.allens.com.au

GPO Box 50
Sydney NSW 2001 Australia

ABN 47 702 595 758

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

By email: misreview@treasury.gov.au

Dear Director

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

Allens welcomes the opportunity to comment on the Treasury's consultation paper titled *Review of the regulatory framework for managed investment schemes* and issued in August 2023 (***Consultation Paper***). Attached as Schedule 1 to this letter are our submissions on each question for consideration set out in the Consultation Paper.

We support this long-awaited review (the ***MIS Review***) of Chapter 5C and related provisions of the *Corporations Act 2001* (Cth) (***Corporations Act***). We hope that this review, together with related efforts to reframe and restructure the parts of the Corporations Act – most notably, the Australian Law Reform Commission's (the ***ALRC***) ongoing review of Australian Financial Services Law – will result in enhancements to the regulatory framework governing managed investment schemes for both operators of managed investment schemes and investors.

Please let us know if you would like to discuss any aspect of our submissions.

Yours sincerely

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Allens contacts:

Penny Nikoloudis, Partner	Penny.Nikoloudis@allens.com.au
Marc Kemp, Partner	Marc.Kemp@allens.com.au
James Kanabar, Partner	James.Kanabar@allens.com.au
Derek Heath, Consultant	Derek.Heath@allens.com.au
Mai Go, Senior Associate	Mai.Go@allens.com.au
Virosh Poologasundram, Senior Associate	Virosh.Poologasundram@allens.com.au
Marc Privitelli, Associate	Marc.Privitelli@allens.com.au

Introductory Remarks

As noted in the Consultation Paper, since the commencement of the managed investment scheme (***MIS***) regime in 1998, there have been a number of reviews and inquiries regarding the regulation of MISs. Many of these reviews and inquiries have examined issues that arose from large-scale collapses of investment schemes, including registered MISs, over the past two decades, and other significant events that caused losses to investors in registered MISs during this period, as summarised in the table below:

Year	Collapse	Review/Inquiry	Relevant issues of concern
2008	**Storm Financial**	PJC Inquiry into financial products and services in Australia (2009)	• Quality of financial advice to clients/investors ('one size fits all' advice) • Insufficient client understanding of product, risk and protection • Conflicts of interest for financial advisers (eg, commissions, ownership conflicts) • Competency of licensees and individual advisers under the licensing system
2008	**Opes Prime**	PJC Inquiry into financial products and services in Australia (2009)	• Inappropriate provision of a sophisticated product to retail investors • Quality of financial advice to investors • Conflicts of interest for financial advisers (eg, commissions, ownership conflicts) • Competency of licensees and individual advisers under the licensing system • Ineffective disclosure
2008 – 2010	**Frozen funds during Global Financial Crisis** (e.g unlisted direct property funds and mortgage funds)	PJC report on *Statutory oversight of ASIC* (No. 4, 2012) CAMAC Discussion Paper on *The establishment and operation of MISs* (2014) Financial System Inquiry (2014)	• Definition of 'liquid scheme' in the Corporations Act, which relies on a subjective assessment by the responsible entity and permits instability by enabling an MIS to be classified as 'liquid' or 'non-liquid' depending on whether the responsible entity reasonably expects that the asset can be released in the timeframe specified in the scheme's constitution • Potential for mismatch between marketing of fund as a 'liquid scheme' and the underlying illiquidity of the scheme's assets
2009	**Trio Capital**	PJC Inquiry into the collapse of Trio Capital (2012)	• Possible need for more detailed scrutiny of new owner where there is a change of ownership or control of an Australian Financial Services Licensee • Need for greater oversight and operation of compliance plans and compliance committees • Concerns about the length of time it took for fraudulent activity to be detected

Year	Collapse	Review/Inquiry	Relevant issues of concern
			• Expectation gaps between what is expected of auditors, custodians and research houses and what they are actually responsible for doing
2009 - 2012	**Agribusiness / Forestry MIS collapses**, including: • Environinvest • Timbercorp • Great Southern • Willmott Forests • Gunns Plantation	PJC Inquiry into aspects of agribusiness managed investment schemes (2009) CAMAC Report on Managed Investment Schemes (2012) Senate Economics References Committee inquiry into forestry managed investment schemes (Final Report: *Agribusiness managed investment schemes: Bitter harvest)* (2016)	• Quality of financial advice to consumers, including the role of accountants in promoting the schemes • Commission-based remuneration models for financial planners • Disclosure of projected returns and use of independent expert opinions in PDSs • Products too complex and high-risk for retail investors • Financial literacy • Investors' reliance on ATO product rulings • Shortcomings in managing an MIS in financial difficulties and the winding-up or restructuring of collapsed schemes, particularly with respect to contract-based schemes
2019	**Sterling Income Trust**	Senate Economics References Committee: Sterling Income Trust (2022)	• Complex, high-risk scheme offered to retail investors • Quality of financial advice (including at seminars) • Financial literacy • Gap in community expectations around the regulation of investment products – eg, misconception that ASIC registration of an MIS is an endorsement of the product

The Consultation Paper invites submissions on many of the topics that were canvassed by these earlier reviews and inquiries. As set out in our submissions that follow, there have been significant legislative and regulatory reforms over the past decade that are intended to address the issues of concern that arose from the historical MIS collapses, and which had been recommended in the earlier reviews and inquiries. In particular:

- (**FOFA reforms in 2012**) The *Future of Financial Advice* reforms introduced amendments to the Corporations Act that were intended to improve the delivery and quality of financial advice to retail clients, including a new duty for financial advisers to act in the best interests of their clients, a ban of conflicted remuneration and enhanced fee disclosure obligations.
- (**Enhanced PDS disclosure in 2012**) In 2012, ASIC issued (or in some cases revised) a series of regulatory guides that set out enhanced PDS disclosure requirements, by way of new disclosure benchmarks and principles, for high risk investments in mortgage schemes (RG 45), unlisted property schemes (RG 46), infrastructure entities (RG 231), contracts for difference (RG 227) and agribusiness MISs (RG 232).

- (**Repeal of AFSL exemption for accountants in 2016**) In 2016, an Australian financial services licence (***AFSL***) exemption that applied to accountants in certain circumstances was repealed and a new 'limited AFSL' regime was introduced that was intended to capture financial services provided by accountants.
- (**ASIC RG 259 in 2017**) First issued in 2017, ASIC Regulatory Guide 259 (*Risk management systems of fund operators*) sets out guidance to responsible entities on ASIC's expectations for compliance with their obligation under the Corporations Act to maintain adequate risk management systems. For example, there is detailed guidance as to ASIC's expectations of responsible entities in relation to scheme liquidity and withdrawals.
- (**ASIC PIP in 2019**) Since April 2019, ASIC has had a product intervention power, allowing it to make orders in relation to financial or credit products (or a class of products) when it is satisfied the product has resulted in, or will or is likely to result in, significant detriment to retail clients. The power is broad and can be used by ASIC to make an order even where there is no actual or suspected breach of the law. ASIC can use this power to make a range of interventions, including order that a product only be offered to specific classes of consumers, order that a product only be offered in specified circumstances (eg, through personal advice), order the amendment, restriction or banning of promotional or disclosure material relating to the order, order that a product not be distributed without prescribed improvements to the information provided to consumers, or order the banning of the issue of a product.
- (**Increased penalties for financial sector misconduct from 2019**) Following the recommendations in the final report of Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, significant changes were made to the penalty regime for breaches of financial services laws, including laws relating to MISs. The key changes resulted in increases in the severity of penalties for criminal offences and civil breaches, and an increase in the scope of the civil penalty regime.
- (**New standards for financial advisers from 2019**) From 2019, new education and training standards have applied to financial advisers. The new professional standards require financial advisers to have an approved qualification, pass the financial adviser exam, participate in 40 hours of CPD each year and comply with the Financial Planners and Advisers Code of Ethics (a set of principles and core values in the areas of ethical behaviour, client care, quality process and professional commitment).
- (**Fit and proper requirements for AFSL holders since 2020**) Since 2020, all AFSL holders and applicants are required to satisfy a 'fit and proper person' in respect of a range of people related to the AFSL holder (including officers and controllers of the AFSL holder).
- (**DDO in 2021**) The product design and distribution obligations impose obligations on product issuers and distributors to design financial products that meet the needs of consumers and to distribute such products in a more targeted manner. A new objects clause was also added to Chapter 7 of the Corporations Act - that is, the 'provision of suitable financial products to consumers of financial products' (s760A(aa)).

In light of these and other developments over the past decade, in our view many of the issues of concern that were highlighted by the historical MIS collapses have been directly addressed, such as the quality of financial advice (eg, through FOFA) and the suitability of high-risk MISs for retail investors (eg, through DDO). Furthermore, developments such as ASIC's PIP and increased penalties have strengthened ASIC's 'regulatory toolkit' in the event that similar incidents were to occur in the future. That said, as our submissions describe in more detail, there may still be other discrete areas of the MIS regulatory framework canvassed in the Consultation Paper, which could be further refined and improved.

Schedule 1

No.	Question	Allens submissions
Chapter 1: Wholesale client thresholds		
N/A	General comments	Before commenting on the specifics of the retail-wholesale client distinction, it is worth reprising the policy basis that underpins that distinction. Chapter 6 of the Final Report of the 1997 Financial System Inquiry (the ***Wallis Inquiry***) described that policy basis as one of consumer protection, driven by the need to safeguard users of financial services that lack sufficient knowledge, experience or judgement to determine what information they require (***retail clients***), as distinct from financially sophisticated market participants who can be reasonably expected to attend to their own informational needs (***wholesale clients***).[1] The Wallis Inquiry also acknowledged that the distinction between retail and wholesale is an imprecise one and, accordingly, in determining the bounds of that distinction, there is a need to weigh up the relative importance of its protective function against the practical need for certainty in the tests regulating when an investor may be properly classified as retail or wholesale.[2] On one view, the financial thresholds introduced by the product value test and the individual wealth test are an outgrowth of these two key considerations canvassed by the Wallis Inquiry. As the Explanatory Memorandum for the Financial Services Reform Bill 2001 (Cth) explained, the financial thresholds are premised on the assumption that investors who meet those thresholds have either: (a) the knowledge and experience to understand and to accept the additional risks (or, better, the fewer protections) that result from wholesale classification; or (b) the means to acquire professional advice in relation to those risks and weakened protections.[3] Although there may be reasons to doubt the correctness of these assumptions (in particular, the use of wealth as a proxy for financial literacy),[4] financial thresholds do have the distinct advantage of simplicity and objectivity. On this view, the product value test and the individual wealth test each embody the inherent tension between precisely fixing the metes of the retail-wholesale client distinction so as to accord appropriate protections to retail investors, and achieving certainty in the definition of each of those terms. Accordingly, short of reform to the policy underpinnings of the retail-wholesale client distinction, this balancing act between consumer protection and certainty necessarily informs our views in relation to the questions for consideration in Chapter 1 of the Consultation Paper. It is, however, worth noting that, although consumer protection and certainty may, at

[1] Wallis Inquiry at 238.
[2] Wallis Inquiry at 238 (see, in particular, footnote 3).
[3] Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) at [6.19]-[6.24].
[4] For example, the sudden acquisition of amounts as a result of an inheritance, the sale of a home, or a lump-sum superannuation withdrawal has no bearing on the knowledge, experience or judgement of the individual with respect to their use of financial services.

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		times, exist in tension, this should not be taken to imply that the two are mutually exclusive. Insofar as objective standards may allow market participants to more reliably determine who is entitled to the protections afforded to retail clients, they too can be seen to further the existing policy basis for the retail-wholesale client distinction. In this regard, the complexity of the current tests – including the exceptions and modifications to those tests set out in Division 2 (*Retail clients and wholesale clients*) of Part 7.1 of Chapter 7 (*Financial services and markets*) of the *Corporations Regulations 2001* (Cth) (***Corporations Regulations***) – is an example of where a failure to have proper regard to certainty may ultimately erode the goal of consumer protection. As such, we consider that, in addition to the rebalancing of the consumer protection / certainty equilibrium, a key objective of Chapter 1 of the MIS Review should be the overall simplification of the retail-wholesale client distinction.
1	Should the financial threshold for the product value test be increased? If so, increased to what value and why?	Although an assessment of the merits of any proposed dollar figure for the product value test raises non-legal consideration on which we are not in a position to comment, we note that: • at least anecdotally, the investment of $500,000 in a financial product (the ***Product Value Threshold***) remains a relatively high bar to qualify for wholesale status;[5] • despite this, the passage of time since the introduction of the Product Value Threshold may provide a justification for revisiting that threshold to determine whether it remains an appropriate line beyond which the policy basis for preserving the protections afforded to retail investors generally falls away.[6] In the event that Treasury does determine to alter the Product Value Threshold, we consider that it would be necessary to have regard to the following matters: • first, any revision to the Product Value Threshold must, as a matter of practicality, be prospective only, and the status of persons whose wholesale client status was, at the time of their investment in a particular financial product, determined on the basis of the existing Product Value Threshold should be preserved for the life of their investment in the relevant financial product;[7]

[5] Noting, in particular, that the $500,000 threshold is approximately three times the income threshold under the individual wealth test (assessed based on net income, post-taxation).
[6] We say 'generally' because of the inherent shortcomings of wealth as a proxy for financial literacy. These shortcomings mean that there can never be a bright line beyond which it can be definitively said that persons no longer require the protections associated with classification as a retail client under the Corporations Act and the Corporations Regulations. Additionally, our support for revisiting the Product Value Threshold should not be taken to imply that the threshold must, as a matter of course, be adjusted – it is possible that revisiting the Product Value Threshold will result in a conclusion that the existing dollar figure remains appropriate having regard to the dual policy considerations of consumer protection and certainty.
[7] We note that Regulation 7.1.27 of the Corporations Regulations may already have that effect (depending on how any changes to the Product Value Threshold are to be drafted).

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		• second, consideration should be given to any potential unintended consequences of the current drafting of the product value test, most notably the uncertainty around the amounts that may be considered in determining the 'price for the provision' or the 'value' of a financial product;[8] and • third, recognising that the number of Australians that may qualify as wholesale clients on the basis of the Product Value Threshold will, as has historically been the case, increase over time, consideration should also be given to building variability into that threshold. In our view, variability would be best achieved by way of a review mechanism allowing for changes to the Product Value Threshold at fixed intervals (for example, every five years).[9] Subject to Treasury having proper regard to the above qualifications, in our view, the product value test should continue to strike an appropriate balance between the protective function of the retail-wholesale client distinction, and the need for certainty and objectivity in setting the bounds of that distinction.
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?	Although, as above, we cannot comment on the merits of any proposed dollar figure for the financial thresholds under the individual wealth test (the ***Individual Wealth Thresholds***), we do consider that it is worth restating the observations set out in the Consultation Paper and in the Final Report of the Commonwealth Government's *Quality of Advice Review* published in December 2022 (***Quality of Advice Review***) that: (a) the current Individual Wealth Thresholds have not been adjusted, or even indexed, since they were first introduced in 2002; and (b) accordingly, the number of Australians that may qualify as wholesale clients on the basis of the individual wealth test has significantly increased since that time.[10] In our view, both of these considerations point to the need to revisit the Individual Wealth Thresholds to determine where a line may now be drawn beyond which the policy basis for preserving the protections afforded to retail investors generally falls away.[11]

[8] See Corporations Act, s 761G(7)(a). By way of example, the current drafting would appear to *exclude* amounts committed by an investor to the extent that those amounts have not yet been drawn down on by the responsible entity or trustee of the MIS (on the basis that undrawn amounts do not contribute towards calculation of the price for the provision of units in that scheme), but *include* the paid-up value of partly-paid units, even when amounts on those units remain unpaid. In our view, there is no reasonable basis for this distinction between commitments to subscribe for additional units and partly-paid units.
[9] This, in our view, would be simpler to administer than an indexation mechanism (whether tied to CPI, or by way of fixed percentage increases) as it would allow for simpler monetary thresholds and would also avoid the risks arising from financial services licensees miscalculating the relevant threshold.
[10] See Consultation Paper at p. 18 and Quality of Advice Review at section 8.5.3.
[11] We say 'generally' because of the inherent shortcomings of wealth as a proxy for financial literacy. These shortcomings mean that there can never be a bright line beyond which it can be definitively said that persons no longer require the protections of classification as a retail investor under the Corporations Act and the Corporations Regulations.

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		That being said, we would again qualify our support by reference to the following considerations (which largely mirror our comments with respect to the product value test):
		• first, there is a practical need for any changes to the Individual Wealth Thresholds to have prospective effect only such that the status of persons whose wholesale client status was, at the time of their investment in a particular financial product, determined on the basis of one of the existing thresholds is preserved for the life of their investment in the relevant financial product;
		• second, we would restate our support for variability in the Individual Wealth Thresholds (preferably, by way of a review mechanism allowing for revisions at fixed intervals). Not only would this accommodate changes in the wealth of Australians over time, it would also reduce the risk that, with such changes, persons in need of retail protections may be classified as wholesale clients; and
		• third, consideration should be given to extending the operation of regulation 7.1.27 of the Corporations Regulations to capture the other tests for wholesale classification, including the individual wealth test. This, in our view, would:
		  ◦ first, clarify that the retail-wholesale client distinction is principally concerned with the client's status, with respect to a particular financial product, at the 'point of entry'; and
		  ◦ second, avoid practical concerns for product issuers around the frequency with which they are required to reassess the wholesale client status of holders of financial products.[12]
		As above, subject to Treasury having proper regard to each of these considerations, in our view, the individual wealth test should continue to strike an appropriate balance between consumer protection, on the one hand, and certainty, on the other.

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?	The term 'net assets' is not defined for the purposes of the individual wealth test, or under the Corporations Act more broadly, and, as such, it takes on its ordinary meaning. The corollary of this is that a qualified accountant's certification of an investor's net assets (and whether the quantum of those assets reaches the prescribed threshold under the Corporations Regulations)[13] is a matter of the certifying accountant's professional judgement and is therefore a decidedly non-legal inquiry. That being said, we do consider that, at the very least, an accountant's assessment of a client's net assets should be consistent with the policy basis for the retail-wholesale client distinction and, in particular, with the assumptions underlying

[12] Other than holders in respect of whom, because such holders have satisfied the product value test, the issuer may rely on r 7.1.27.
[13] See Corporations Regulations, r 7.1.28.

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		the individual wealth test. As noted above, the individual wealth test assumes that, ordinarily, there will be a positive correlation between an investor's wealth and their financial literacy. Logically, that correlation will be strongest where the investor's wealth is derived from previous dealings in financial products.[14] It follows that 'wealth' that is: (a) tied up in the investor's primary place of residence, and is therefore illiquid; and (b) derived from the investor's superannuation balance, being superannuation-sourced money;[15] is unlikely to reflect the investor's conversance with financial products and, accordingly, should be ring-fenced for the purposes of an investor's dealings in financial products. Assuming this is correct, an assessment of net assets that specifically excludes these assets will, in our view, more closely accord with the protective function of the retail-wholesale client distinction.[16]
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? (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?	Although we strongly agree with the views expressed in the Quality of Advice Review that: (a) it is undesirable to build into the regulatory regime discrepancies in the disclosure given to different 'types' of wholesale clients;[17] and (b) in all cases, the policy goal of consumer protection demands that investors understand the consequences of their classification as a wholesale client,[18] particularly in the absence of a defined, bilateral relationship between product issuers and prospective investors,[19] we query whether: (c) consent requirements can ever be framed in a manner that meaningfully addresses the considerations canvassed in the Quality of Advice Review; and (d) as such, it is artificial to impute informed consent – including an understanding of the consequences of such classification – on the relevant client.[20]

[14] As distinct from wealth derived from an inheritance, the sale of a home, or a lump-sum superannuation withdrawal.
[15] In this regard, noting the important role of superannuation in providing retirement benefits for individuals, we consider that there are strong policy considerations militating against any interpretation of the net assets test that could be seen to encourage investors to rely on superannuation-sourced money to achieve wholesale status.
[16] We note, for completeness, that excluding superannuation-sourced money from the assessment of an individual's net assets would achieve greater consistency across the financial thresholds for wholesale clients. Specifically, under the current product value test, regulation 7.1.26 of the Corporations Regulations requires that superannuation-sourced money be disregarded in determining whether the Product Value Threshold has been met.
[17] Quality of Advice Review at 8.5.4. We note that our reference to different 'types' of wholesale client is a reference to the basis on which that person has been classified as wholesale.
[18] Quality of Advice Review at 8.5.5.
[19] As distinct from the clear, client-advisor relationship that characterised the provision of personal financial product advice.
[20] This is particularly true where an investor has proactively sought wholesale classification (for instance, where the investor procures an accountant's certification for the purposes of the individual wealth test).

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		In the context of MISs, additional complexity arises by reason of the fact that the consequences of wholesale classification are not uniform, but vary on a scheme-by-scheme basis. By way of example, a responsible entity may choose to provide a product disclosure statement, or allow access to a dispute resolution process, to all scheme members in a pooled fund, regardless of their status as retail or wholesale clients. That being said, recognising the fundamental protective function of the retail-wholesale client distinction, and the importance of clients understanding the implications of wholesale client classification, we consider that an intermediate position, which would apply universally to wholesale clients, would be to require that financial services licensees (being, in the context of MISs, the issuer of interests in the relevant scheme) provide such clients with a clear, written warning stating that the client's classification as wholesale may involve the loss of certain protections under the Corporations Act and the Corporations Regulations. While this may itself be imperfect (as it does not guarantee that wholesale clients will understand the consequences of that status), we consider that such a warning provides an appropriate intermediate position on the basis that it: • avoids concerns around the artificiality of imputing informed consent, particularly on those clients who have proactively sought out wholesale client status; • with respect to MISs, overcomes the complexity arising from the variable consequences of classification as a wholesale client; and accords with the assumption underlying financial thresholds that persons who meet the relevant thresholds have the means to acquire, and may therefore be reasonably expected to obtain, professional financial and legal advice in relation to the risks associated with wholesale client status.
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?	We do not think additional conditions need to be imposed on scheme arrangements when offered to retail clients. Recent legislative reforms have been introduced with the objective of addressing concerns regarding the suitability of certain products for retail investors. Although these reforms are still relatively new, we are already seeing their impact in the market. *Design and Distribution Obligations (**DDO**) and Target Market Determination (**TMD**)* Given the DDO regime and ASIC's Product Intervention Powers (***PIPs***), we think there are sufficient safeguards in place for retail clients who are offered interests in MISs. The DDO includes the determination of an appropriate client base for

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		an MIS through the preparation of a TMD.[21] The content of the TMD defines the target market for the particular MIS, taking into account factors such as: • investor objectives (eg, capital growth and/or income generation or preservation of capital with access to liquidity);[22] • financial situation (eg, income level, savings level, employment status);[23] and • needs of a retail client.[24] The TMD includes other information such as an explanation as to why the key attributes of the financial product align with the objectives, financial situation and needs of clients in the proposed target market,[25] which arguably provides more protection for a retail client than the more rigid approaches adopted in the United Kingdom and the United States which impose restrictions on retail investors in respect of diversification of assets and liquidity without considering the bespoke circumstances of individual investors (eg, financial situation, age, occupation, etc).[26] The DDO also requires the issuer of interests in the relevant MIS to take reasonable steps to ensure that MIS interests are issued to people within the target market, which is another important safeguard for retail clients. ASIC's targeted and risk-based review of TMDs across a variety of sectors has been effective, with ASIC issuing a total of 80 interim stop orders with 44 remaining in place.[27] *Product Intervention Powers* The objective of the Financial System Inquiry for the introduction of PIPs afforded to ASIC was to provide ASIC with powers to deal with unsuitable financial products, distribution and recommendations made by financial advisers to retail clients.[28]

[21] ASIC Regulatory Guide 274 at [274.59].
[22] ASIC Regulatory Guide 274 at [274.72].
[23] ASIC Regulatory Guide 274 at [274.74].
[24] Corporations Act, s 994B(8)(b); ASIC Regulatory Guide 274 at [274.68(a)].
[25] ASIC Regulatory Guide 274 at [274.68(c).
[26] 17 Code of Federal Regulations s 270.22e-4; U.S. *Investment Company Act of 1940*, ss 5(b)(1), 8(b)(1), 18(f); FCA (2023), 'Collective Investment Schemes', section 5.1.4, pp. 95-96, accessed August 2023.
[27] ASIC (2023) 23-174MR ASIC issues 38 DDO stop orders for pet insurance products | ASIC [media release], 29 June 2023, accessed 25 August 2023.
[28] Kingsford-Smith, D & Nehme, M, 'Product Intervention Powers: a Legal, Comparative & Policy Analysis, *Centre for Law Markets and Regulation, Australian Securities and Investments Commission* (2015) p 11.

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		Section 1023D provides ASIC with the power to make an individual product intervention order with respect to a specified person or persons[29] or a market wide product intervention order which applies to a person in relation to a class of financial products[30] and ASIC can issue such orders to do a number of things, such as: • amend, restrict or ban the marketing of a product;[31] • require improvement to the information provided to retail clients in respect of a product;[32] • ban the feature of a product;[33] and/or • amend or ban the remuneration arrangements in connection with a product (we note this list is not exhaustive).[34] Given these broad PIPs, we think ASIC would have the appropriate tools to intervene if it considered interests in certain MISs to be unsuitable for retail clients (or a sub-set of retail clients). Although a shortcoming of the PIPs is that they are a reactionary measure rather than proactive, we think this is mitigated by the application of the DDO regime.
6	Are any changes warranted to the procedure for scheme registration? If so, what changes and why?	In our experience, the 14-day ASIC review period for registering a scheme constitution works well and gives scheme operators certainty for transaction timetable purposes. The limited circumstances in which ASIC may refuse to register an MIS (under s601EB(1)) also provide consistency and certainty. However, we think there are two potential improvements that could be made to the scheme registration process. First, while we would not expect ASIC to undertake a merits review of a scheme that seeks registration (that is, ASIC cannot and should not express views about whether a particular investment is good or bad), we think that ASIC's review of the scheme's constitution and compliance plan (as required by s601EA(2)) should be undertaken in a more holistic manner. In order for ASIC to determine whether the constitution and compliance plan comply with the requirements of the Corporations Act (as required by s601EB(1)), we think it is important for ASIC to be provided with some key information that explains how the MIS is intended to operate and how the fundamental MIS concepts under the Corporations Act apply to the scheme. This is particularly important for MISs that are not structured as trusts, or that involve broader

[29] s1023D(1) of the *Corporations Act 2001* (Cth).
[30] s1023D(3) of the *Corporations Act 2001* (Cth).
[31] ASIC Regulatory Guide 272 at [272.26(c)].
[32] ASIC Regulatory Guide 272 at [272.26(d)].
[33] ASIC Regulatory Guide 272 at [272.26(f)].
[34] ASIC Regulatory Guide 272 at [272.26(e)].

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		arrangements (outside the MIS itself) with investors. In our experience, the ambiguity in relation to such matters was one of the challenges in winding up the agribusiness MISs following their collapses. To that end, we think a scheme operator should be required to submit to ASIC, along with the other documents referred to in section 601EA, a short summary of the MIS' key attributes, such as: • a brief description of how the MIS is intended to operate by reference to the definition of 'managed investment scheme' in section 9 of the Corporations Act, including identifying the 'interests' that are to be acquired by the members, whether contributions are to be pooled and/or used in a common enterprise and which entity is to have day-to-day control over the operation of the MIS; • an explanation of the 'scheme property' of the MIS that will be held on trust by the responsible entity in accordance with s601FC(2); • a description of the proposed management arrangements for the MIS; • a description of any related party transactions between the responsible entity and its related parties; • a description of the proposed investments of the MIS; • a description of the proposed liquidity or withdrawal rights for scheme members; and • any other contractual arrangements with the scheme members. In addition, to address the concern that retail investors may incorrectly assume that ASIC's registration of an MIS represents ASIC's endorsement of the MIS, we would support the introduction of a legislative requirement that the product disclosure statement for the MIS must include a prominent statement that the registration of the MIS by ASIC does not represent the endorsement of the MIS by ASIC.
7	What grounds, if any, should ASIC be permitted to refuse to register a scheme?	As noted above, in our view, the limited circumstances in which ASIC may refuse to register an MIS (under s601EB(1)) provide consistency and certainty and, on that basis, should not be expanded. That said, we would support expanding the ground for refusing to register a scheme in s601EB(1)(b), which currently allows ASIC to refuse to register a scheme if the proposed responsible entity does not meet the requirements of s601FA. Section 601FA requires the responsible entity to be a public company that holds an AFSL authorising it to operate a managed investment scheme. In our view, ASIC should also be able to refuse to register a scheme if ASIC has reason to believe that the responsible entity: • has not complied with, or is likely to contravene, its obligations under section 912A or section 601FC, or • does not satisfy the fit and proper test under section 913BA.

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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 change and why?	In our view, the current obligations that apply to a responsible entity appear to sufficiently promote scheme governance and compliance, and do not require changes. At present, a responsible entity is subject to broad duties under Chapter 5C of the Corporations Act, duties as an Australian financial services licensee under Chapter 7 of the Corporations Act (which includes a requirement to have adequate risk management systems), duties at general law (eg, fiduciary duties), duties relating to the scheme's constitution and compliance plan and, if the scheme is listed, requirements under the listing rules of the relevant exchange. We also note that officers and employees of a responsible entity also have direct duties under Chapter 5C that are owed to the members of the scheme. Unless there is evidence to the contrary, on balance, we consider that the matrix of existing obligations appears to be achieving its intended purpose and does not require to be supplemented with further obligations on responsible entities.

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?	We do not support the introduction of an absolute power for ASIC to direct amendments to a scheme constitution for the following reasons:
		
		• (**CCIV and MIS constitution content requirements are not the same**) Section 1223C of the Corporations Act provides that ASIC may direct a retail CCIV to modify its constitution, as set out in the direction, to ensure that the constitution deals in adequate detail with the content requirements in the Corporations Act. If such a direction is given, the CCIV must comply with the direction within 14 days of receiving it. While we acknowledge that the CCIV regime has been designed to ensure, for the most part, regulatory parity with the MIS regime, we have concerns with introducing a similar power for ASIC to direct the responsible entity to amend the constitution of a registered scheme on the basis that the content requirements for a retail CCIV and a registered scheme are not comparable. Sections 1223G and 1223H of the Corporations Act provides that a retail CCIV constitution must:
		  • make provision for the establishment of sub-funds and classes of shares referable to the sub-funds;
		  • make provision for the method by which complaints made by members in relation to the CCIV are to be dealt with;
		  • state that the CCIV has the power to borrow or raise money and if there are to be any limits on the CCIV's exercise of such power, set out those limits;
		  • if applicable, make provision for the ability of one sub-fund of the CCIV to acquire shares in another sub-fund of the CCIV; and

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		• if all of some of the shares in the CCIV are redeemable shares, make provision for the shares to be redeemed (including the matters referred to in s1223H). Section 601GA, on the other hand, requires a constitution for a registered scheme to: • make adequate provision for the consideration that is to be paid to acquire an interest in a MIS; • make adequate provision for the powers of the responsible entity in relation to making investments of, or otherwise dealing with, the scheme property; • make adequate provision for the method by which complaints made by members in relation to the scheme are to be dealt with; • make adequate provision for winding up of the MIS; • if the responsible entity is to have any rights to be paid fees out of scheme property, or to be indemnified out of scheme property for liabilities or expenses incurred in relation to the performance of its duties, specify those rights in the constitution and ensure that those rights are available only in relation to the proper performance of those duties; • if the responsible entity is to have any powers to borrow or raise money for the purposes of the MIS, specify those powers; and • if members are to have a right to withdraw from the MIS, specify that right and address the matters referred to in s601GA(4)). We consider that the registered scheme requirements are expressed more broadly and conceptually than the content requirements for a constitution of a retail CCIV (which are expressed as specific provisions that need to be included in the constitution). This is also reflected in the guidance in ASIC Regulatory Guide 134: *Funds management: Constitutions* (***RG 134***) which incorporates detailed guidance on how a constitution for a registered scheme will make adequate provisions for a content requirement, but provides much more limited guidance on the basic content requirements for retail CCIVs.[35] The more contained and straightforward minimum content requirements for retail CCIVs means that it will be easier to identify when a retail CCIV constitution fails to satisfy a minimum content requirement (with less need for a subjective assessment) and therefore, a direction from ASIC to amend the retail CCIV constitution would be easier to implement.

[35] See, for example, RG 134 at [134.133] – [134. 318] which sets out ASIC's guidance on the requirement to include a provision to establish sub-funds of a CCIV and the provision to allow cross-investments between sub-funds in a retail CCIV constitution. The guidance provided is very high level when compared to ASIC's guidance on a minimum content requirement of a registered scheme (see, for example, section B which sets out ASIC's guidance on what is an adequate provision for consideration that is to be paid to acquire an interest in a scheme).

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		We do not consider it appropriate for ASIC to have a similar absolute power to direct a responsible entity to amend a constitution because the broad nature of the registered scheme constitution content requirements means that it is not always clear whether or not a provision in the constitution fails to meet a minimum content requirement, and there is a greater need for subjective assessment. Indeed, this often occurs as part of the scheme registration process where ASIC identifies a provision which it believes does not meet the relevant content requirement but the responsible entity is able to make submissions as to why it believes the content requirement is still satisfied. If Treasury is minded to adopt this proposal, we submit that the power should not be absolute and the responsible entity should be granted an opportunity to make submissions to ASIC on the matter so that ASIC has an understanding of why the provision was included in the first instance or expressed in a particular way, or why the proposed change may have an unintended adverse consequence (eg, an unintended and adverse tax consequence – see below). We also consider, for consistency with the CCIV regime, that the power should not extend to registered MISs that only have wholesale clients as members. • (**ASIC has other means for ensuring constitution meets content requirements**) We also note that ASIC has existing means and powers that could assist with addressing any issues that may arise from having a constitution that fails to satisfy the content requirements under the Corporation Act. For example, as part of the scheme registration process, and in contrast to the CCIV registration process, ASIC has a 14 day period to review the constitution to confirm that it satisfies the content requirements. Where issues are identified, they are raised by ASIC though requisitions during the registration process and addressed as required. To the extent subsequent amendments are made to a constitution of a registered scheme that cause the constitution to no longer comply with the content requirements, ASIC could address this through its existing power to issue notices to the responsible entity and ASIC's PIPs. Alternatively, ASIC could consider reviewing draft amendments to scheme constitutions. This could be offered by ASIC on a request basis (similar to the review of provisions for scheme constitutions as described in RG 134.35 to RG134.44), although we note this may not be practical from a resourcing perspective. • (**A power to direct a responsible entity to amend a constitution could have adverse commercial or tax consequences for members**) We would also caution against introducing a power for ASIC to direct the responsible entity to amend a constitution because any such amendment may result in adverse consequences for scheme members. For example, for MISs that are trusts, amendments to relevant clauses in the constitution may give rise to adverse tax consequences (eg, resettlement risks, risks to tax status of the MIS), or may result in the validity and effectiveness of prior transactions (eg, issues or redemptions of units) being uncertain.

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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?	We would support the following observations that were made by ASIC in relation to compliance plans and cited in the PJC on Corporations and Financial Services' report titled *Inquiry into the collapse of Trio Capital* published in May 2012:[36] • The requirements in s601HA of the Corporations Act relating to the content of compliance plans are set at a high level rather than requiring detail on specific matters. (We would add that there is additional detail as to the content requirements for compliance plans provided by ASIC in Regulatory Guide 132 *Managed investments: Compliance Plans*, but this is regulatory guidance only.) • The liability for the responsible entity and its directors attaches to any contravention of the compliance plan, rather than material contraventions, which can result in generic compliance plans with low standards, while still meeting the requirements of section 601HA. (We would add that this has been exacerbated in more recent times because any breach of a compliance plan is now automatically reportable to ASIC under the current AFSL reportable situations regime). • The Corporations Act requires a compliance audit to be done, but does not impose any qualitative standards by which a compliance plan auditor must conduct their audits. These concerns with the efficacy of compliance plans were also acknowledged in CAMAC's 2014 discussion paper on 'The establishment and the operation of managed investment schemes' (***2014 CAMAC Discussion Paper***).[37] In our view, compliance plans provide limited benefits and are no longer fit for purpose. Since the commencement of the MIS regime, compliance and risk management frameworks have become more tailored and sophisticated. In the 2014 CAMAC Discussion Paper, CAMAC considered three reform options relating to compliance plans: • Option 1 – retain the current framework (there would continue to be a requirement for schemes to have a compliance plan (with steps taken to improve the quality of compliance plans), and risk management would remain a general licensee obligation of the responsible entity). • Option 2 – strengthened risk management alongside compliance (retention of the requirement for a compliance plan (with steps taken to improve the quality of compliance plans), together with the introduction of legislative risk management requirements for schemes that would link in with the current licensing obligation for a scheme's responsible entity to have adequate risk management systems). • Option 3 – subsume compliance into risk management (no requirement for a compliance plan; a scheme's compliance risk would no longer be subject to a discrete set of requirements, but would be one of the risks covered by a risk management framework for schemes, which would link in with the responsible entity's risk

[36] At [4.50] ('Improving compliance plans and the role of auditors').
[37] At section 5.5.2 ('Compliance').

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		management obligation. A responsible entity would in practice be able to have a single risk management system that deals with risks separately at the responsible entity level and at the scheme level). In 2017, ASIC issued *Regulatory Guide 259: Risk management systems of fund operators* (***RG 259***), which sets out ASIC's expectations for compliance by fund operators (including responsible entities of registered schemes) with s912A(1)(h) of the Corporations Act as well as ASIC's good practice guidance for establishing adequate risk management systems. RG 259 addresses both scheme-level and responsible entity-level risks, and requires the material risks faced by the fund operator and the funds its operates to be identified, analysed and treated in a comprehensive and systematic way. We would support adopting Option 3 proposed in the 2014 CAMAC Discussion Paper for the following reasons (which were included in the discussion paper):[38] • the compliance plan requirement only covers compliance risk (the risk that the responsible entity will fail to comply with the applicable laws in its operation of the scheme), but this is not the only risk a scheme faces and may not be the most important risk; • a greater emphasis on risk management for schemes may help focus the attention of responsible entities on the key strategic, enterprise and other business risks facing each of the schemes they operate, as commercial entities, rather than merely compliance risk; and • it would be more sensible to deal with compliance and other types of risk in a single integrated document, rather than requiring responsible entities to develop two separate sets of procedures for related concepts.
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?	If Option 3 (above) is to be adopted, the current requirement for an audit of the compliance plan could be replaced with a requirement for an auditor of the scheme's risk management arrangements.[39] Moreover, we make the following observations: • A compliance plan audit will only be as good as the compliance plan itself. If the compliance plan is expressed in generic terms, or where key functions are outsourced by the responsible entity to third party service providers, carrying out an audit of the responsible entity's compliance against such a compliance plan may not necessarily bring to light any deficiencies in the compliance framework for the registered scheme.

[38] At pages 75 – 76.
[39] CAMAC 2014 discussion paper at p77.

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		• The compliance plan audit is limited to an audit of the responsible entity's compliance with the compliance plan and whether the compliance plan continues to meet the requirements of the Corporations Act. It does not currently extend to an audit of any other risks that are applicable to a registered scheme.
12	Should responsible entities be required to have a majority of external board members, similar to a CCIV regime?[40]	Under the Corporations Act, a responsible entity is required to have a compliance committee if less than half of its director are 'external directors'(s601JA). We consider there are reasonable arguments for requiring a responsible entity to have 'external directors' comprising at least half of its board. These include the following: • A director of a responsible entity has stricter duties than those that apply to a member of a compliance committee. Duties of individual compliance committee members are limited to those set out in s601JD of the Corporations Act. The duties of a director of the responsible entity, on the other hand, mirror each of these duties and in addition, require the officer to act in the best interests of members of the scheme and to take all steps that a reasonable person would take, if they were in the officer's position, to ensure that the responsible entity complies with the Corporations Act, the responsible entity's AFSL, the scheme's constitution and the compliance plan (s601FD). The directors are also subject to general director duties that apply under the Corporations Act. • There is a fundamental difference between the role of a compliance committee (set out in s601JC) and the role of a board. A compliance committee generally meets only a few times a year and is responsible for monitoring the extent to which the responsible entity complies with the scheme's compliance plan and to report to the responsible entity (and in some cases to ASIC) any breaches of the Corporations Act or of the scheme's constitution or compliance plan of which it becomes aware. The focus of the compliance committee is therefore to review the performance of the responsible entity on a 'look-back' basis. A board, on the other hand, has more than a monitoring / reporting function; it is required to make decisions affecting the scheme in real-time, acting in the best interests of the scheme members, and is in a better position to detect any issues of concern through its interactions with management. That said, we also recognise that there may be circumstances where a compliance committee may be more appropriate than at least half of the directors being external directors. For example: • If a responsible entity operates multiple registered schemes, having scheme-specific compliance committees may result in better compliance where the committee members have the relevant expertise to identify and monitor compliance risks that are unique to their relevant scheme.

[40] We note that, under s1224G(1) of the Corporations Act, at least half (rather than a majority) of the directors of a retail CCIV must be external directors. This is consistent with the current requirement that applies to responsible entities under s601JA: The responsible entity must establish a compliance committee if less than half of the directors of the responsible entity are external directors.

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		• There may also be circumstances where the costs saved by the registered scheme (and therefore, the members) by having a compliance committee outweigh any benefit, or perceived benefit, of appointing independent directors (eg, for simple schemes). It is also arguable that given all directors of a responsible entity are subject to the director duties discussed above (including non-external directors), mandating at least half of the board being external directors may be of little practical benefit while potentially subjecting the members of the registered scheme to greater costs. If the proposal to encourage better scheme governance and enhance compliance monitoring is to require the board of a responsible entity to comprise at least half external directors, we consider a more balanced solution may be to impose an 'if not, why not' disclosure benchmark, whereby a responsible entity is required to disclose in the relevant PDS whether it meets the benchmark of having at least half of the board comprising external directors, and if not, why not. This will give the responsible entity the opportunity to explain the rationale for having a compliance committee instead of at least half of the board comprising external directors, and, if applicable, enables members of the registered scheme to assess whether there is any risk associated with not having at least half of the board comprising external directors. This approach would be similar to the ASX Corporate Governance Council Principles and Recommendations which includes as Recommendation 2.1, that a board of a listed entity should have a majority of independent directors who can challenge management and hold them to account. If a listed entity chooses not to adopt that recommendation, it must explain why it has not adopted the recommendation.
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?	In the context of listed schemes, the critical issue to be addressed is the existence of two, parallel processes for the calling of meetings to remove the responsible entity by way of ordinary resolution, namely: (a) Part 2G.4 of the Corporations Act,[41] read together with the decision in *MTM Funds Management Ltd v Cavalane Holdings Pty Ltd* [2000] NSWSC 922 (***Cavalane***) where the court confirmed that 'the statutory right of removal and replacement in s601FM(1), even when read together with s252B, requires only an ordinary resolution';[42] or (b) Section 601FM of the Corporations Act as modified by ASIC Class Order [CO 13/519] *Changing the responsible entity* (***CO 13/519***), which inserts into s601FM(1) a new subsection (1A) clarifying the meeting procedure for a vote on the statutory right of removal and replacement.[43]

[41] Specifically, pursuant to section 252B(1) or section 252D(1) of the Corporations Act.
[42] See Cavalene at [58], as confirmed in *Brisconnections Management Co Ltd (as RE for the Brisconnections Investment Trust and the Brisconnections Holding Trust) v Australian Style Investments Pty Ltd; Re Australian Style Pty Ltd* [2009] VSC 128 at [196]. That being said, despite its accepted status, the reasoning in Cavalane is imperfect, and fails to specifically engage with the apparent conflict between its conclusion that an ordinary resolution is sufficient to replace the responsible entity of a listed scheme and the express wording of ss 252B and 252D which refer only to special and extraordinary resolutions.
[43] We note that, although ASIC has opted for an amendment to section 601FM on the basis that it does not have power to modify Chapter 2G (and is therefore limited in its ability to clarify the application of the meeting provisions contained in Part 2G.4), it has done so without reference to the decision in Cavalane, which has created some confusion around the status of the parallel regimes.

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		Other than the obvious critique that, in the interests of promoting legislative coherence, overlapping provisions should be avoided where it is feasible to do so,[44] the existence of these parallel regimes has also given rise to certain legislative anomalies. For example, for meetings called under sections 252C, 252D or 252E, members must elect a chair of the meeting,[45] a requirement that has no parallel under the process contemplated by CO 13/519 (meaning that it is unclear, under s601FM(1A), who is entitled to appoint the chair). Practically, the solution to this has been to be call or requisition a meeting under both the relevant section of Part 2G.4 and under CO 13/519. In the interests of rationalising these parallel processes and minimising legislative overlap, we consider that the simplest approach would be to amend the relevant provisions of Part 2G.4 of the Corporations Act to enshrine the position in Cavalane (i.e. that, in the context of listed schemes, a vote on the removal of the responsible entity is by way of ordinary resolution). Not only will this remove the need for CO 13/519 and avoid the existence of parallel regimes, it would also avoid the risk of any legislative anomalies arising as a result of those parallel regimes.
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?	Section 601FM(1) of the Corporations Act makes it clear that the removal of a responsible entity of an unlisted scheme is by way of extraordinary resolution. As such, unlisted schemes do not suffer from the same mischief of parallel regimes as in the listed context. Instead, the key issues with respect to the voting requirements or meeting provisions that allow members to replace the responsible entity of an unlisted scheme are: (a) first, whether there are legitimate policy reasons for imposing a higher threshold for the removal of the responsible entity in the unlisted context; and (b) second, and in light of the response in paragraph (a), whether changes to the extraordinary resolution threshold may be justified. With respect to paragraph (a), we consider that the choice of Parliament to impose a higher removal threshold in the context of unlisted schemes was a deliberate one,[46] recognising, among other matters: • the economic and commercial effort required of responsible entities in the establishment and ongoing operation of a scheme (and, as a corollary, the need to incentivise entities to assume this role by ensuring that they cannot be too easily removed); and

[44] See, in particular, our responses in relation to Question 24.
[45] Corporations Act, s 252S(3).
[46] This is consistent with the view expressed by Dowsett J in *City Pacific Ltd v Bacon (No 2)* [2009] FCA 772 at [42].

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		• the restriction in s253E of the Corporations Act on the responsible entity and its associates from voting their interests on a resolution to remove the responsible entity of an unlisted scheme (the ***Voting Restriction***), which restriction falls away in the context of listed schemes. Practically, the Voting Restriction has at least two important consequences: (a) first, it reduces the number of votes required to pass an extraordinary resolution in contexts where the responsible entity and / or its associates hold interests in the scheme, meaning that the threshold is not, in fact, as high as it would otherwise seem; (b) second, it avoids a scenario where the responsible entity could seek to entrench itself by issuing interests in the scheme to itself or to its associates. Our view is that, collectively, these considerations militate against the need to align the voting thresholds for listed and unlisted schemes. That being said, if Treasury was minded to alter the removal threshold for unlisted schemes,[47] we consider that it would also be sensible to consider whether consequential amendments to remove the Voting Restriction may also be required. For completeness, we acknowledge that members of a CCIV may remove and replace a corporate director by way of special resolution. However, we do not think this means the same threshold should also apply to a registered scheme. The replacement of a corporate director of a CCIV applies to the CCIV as a whole, and not to individual sub-funds of the CCIV. Unlike the members of a registered scheme, the members of a sub-fund are unable to change the corporate director of their sub-fund only. This structural difference means that the voting thresholds for changing a responsible entity and a corporate director do not necessarily need to be aligned.
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?	In considering the circumstances in which an existing responsible entity should be made to assist a prospective responsible entity in conducting due diligence, it is necessary to first point to the competing objectives that underpin that process, namely: (a) the need to incentivise prospective responsible entities to assume the risks associated with that position, specifically by providing sufficient information to facilitate a proper assessment of such risks; and (b) the importance of maintaining confidentiality of information pertaining to the scheme, including to avoid the making of spurious investigations into the scheme by outsiders and / or competitors. In our view, at least in the period prior to a vote on its replacement, the weight of the latter consideration outweighs the benefits of imposing an obligation on existing responsible entities to provide reasonable assistance to facilitate due

[47] For example, the threshold recommended by the 2012 CAMAC Report required only a simple majority of the votes of scheme members cast at the meeting (in person or otherwise), provided that the total of the votes cast (for and against) on each of the resolutions constitutes at least 25% of the total votes of scheme members.

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		diligence inquiries. That being said, recognising the shortcomings of the existing approach,[48] we consider that an appropriate intermediate approach would be to amend sections 601FL(2) and 601FM(2) so that the resolutions effecting the change of responsible entity can be conditional on specific matters, for example, on the incoming responsible entity undertaking a due diligence review of the scheme, with consequential amendments to the assistance provisions in section 601FR to support this approach. This would mean that the 'outgoing' responsible entity would be required to provide assistance to the 'incoming' responsible entity in conducting due diligence, but only after the members have passed the relevant resolutions approving the appointment of the 'incoming' responsible entity. Of course, if this approach is adopted, further consideration would need to be given to the specifics of the conditional appointment, including, among other matters: • appropriate limits on the period during which due diligence could be conducted before the conditional appointment was deemed to be unconditional; • appropriate limits on the extent of assistance required to be provided to the incoming responsible entity, including the types of documents and information that would need to be provided; and • clarifying that the assisting responsible entity would have a right of indemnity out of the scheme assets in respect of its reasonable efforts. Additionally, it is worth noting that the above is intended to be a compromise position, and is therefore not a perfect solution from the perspective of confidentiality. That being said, we consider that concerns around confidentiality could be separately addressed, for example, via a statutory duty of confidence or through carve-outs from the assistance obligations of the outgoing responsible entity.
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?	As was recognised in the 2012 CAMAC Report on *Managed Investment Schemes*, in many contexts, there will be legitimate commercial reasons for the inclusion of provisions that may incidentally disincentivise scheme members from replacing a responsible entity (for example, requirements relating to the continuation of a particular party as the responsible entity of a scheme, or for the prior approval of a replacement responsible entity). In our view, these provisions, which typically reflect the legitimate commercial expectations of counterparties, or of the responsible entity itself, should not be the focus regulation. Instead, the concern should be with arrangements, whether arising in scheme constitutions or in private agreements, that create and undue or disproportionate disincentive around the replacement of, and therefore may illegitimately entrench, the responsible entity.

[48] Whereby a former responsible entity is required to provide reasonable assistance to facilitate the change of responsible entity only after a new responsible entity is appointed: see Corporations Act, s 601FR.

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		In such contexts, our view is that the primary levers employed to restrict such arrangements should be: (a) first, the statutory duties of the responsible entity,[49] in particular, the duties to exercise the degree of care and diligence of a reasonable person in the responsible entity's position and to act in the best interests, and to give priority to the interests, of the members; and (b) second, the requirement for adequate disclosure of arrangements liable to disincentivise scheme members from replacing a responsible entity, particularly in the context of listed schemes.[50] Relying on these levers allows for proper consideration to be given to, among other matters, the commercial rationale for the arrangement in question, allowing any such commercial rationale to be balanced against the nature of the disincentive that the arrangement might create in relation to the replacement of the responsible entity. Such an approach is, we think, most consistent with the open textured nature of the duties of the responsible entity, and the balancing act that needs to be undertaken in complying with those duties. We note, for completeness, that the 2012 CAMAC Report proposed an intermediate solution whereby such arrangements would be enforceable only insofar as they did not unreasonably inhibit the right of scheme members to replace the responsible entity. Although, in principle, we have no specific objection to this approach, we do query whether it alters or has any substantive effect on the existing approach under the Corporations Act. In particular, it is unclear to us how a provision that unreasonably inhibits the right of scheme members to replace the responsible entity would be permissible given that such a provision would invariably be at odds with the responsible entity's duty to act in the best interests of scheme members. We also note that, to the extent that a responsible entity seeks to 'entrench' its position by including in the scheme constitution a clause under which the responsible entity will be entitled to a 'termination fee' payable out of the scheme property in the event of its removal, ASIC has historically taken the view that such a clause is not enforceable because it is inconsistent with s601GA(2). That section provides that if the responsible entity has a right to be paid fees or to be indemnified out of scheme property, such a right must be available only in relation to the proper performance of the responsible entity's duties. See also RG 134.146-147.
Chapter 5: Right to withdraw from a scheme		
17	Is the definition of liquid assets appropriate? If not, how should liquid assets be defined?	Our view is that the definition of 'liquid assets' in ss601KA(5) and (6) is appropriate. As noted in the Consultation Paper, some other jurisdictions limit the types of assets that may be held by open-ended funds that offer redemptions, such that only certain prescribed highly liquid investments may be held by those funds.

[49] As set out in section 601FC of the Corporations Act.
[50] See, in particular, the decision in *AMP Shopping Centre Trust (No 1)* [2003] ATP 21 at [46]-[51].

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		By contrast, and consistent with the principles-based framework under the Corporations Act, the definition of 'liquid assets' gives the responsible entity flexibility to establish open-ended registered schemes (offering redemption facilities to members) that may hold a variety of assets. Importantly, however, in order for the scheme to be considered 'liquid', the responsible entity must reasonably expect that the relevant assets can be realised for market value within the period specified in the scheme's constitution for satisfying withdrawal requests. In other words, a scheme will be 'liquid', even if it does not hold highly liquid assets, provided that the period for satisfying withdrawal requests under the constitution is sufficient to enable the relevant assets to be realised for their market value. This means that the terms of the redemption facility offered to members must 'match' the liquidity characteristics of the underlying investments of the scheme. This has enabled registered schemes that hold real property, private credit, infrastructure and other assets to be established with redemption facilities for members, allowing for greater diversification and choice for retail investors. The redemption facilities offered by these types of schemes are typically limited (eg, redemptions can be made quarterly, rather than daily; there may be a maximum limit on the dollar amount that may be redeemed; and/or the responsible entity may have the right to satisfy requests on a partial or staggered basis). The current definition also provides the flexibility to allow the responsible entity to form the view that a scheme that has been 'liquid' is no longer liquid, if market circumstances change such that the responsible entity no longer reasonably expects that the relevant assets can be realised for market value within the period specified in the scheme's constitution for satisfying withdrawal requests. The Consultation Paper notes that the 'period specified in the scheme's constitution' for satisfying redemption requests is not prescribed and is at the discretion of the responsible entity, subject to its overarching duties including the obligation that withdrawal provisions be fair to all members. In RG 134, ASIC has acknowledged that the timeframe between acceptance of a withdrawal request and the date for payment of the withdrawal amount to a member whose interests have been redeemed 'will vary depending on the characteristics of the registered scheme and the operational practices of the responsible entity' (RG 134.223). The Consultation Paper also refers to the 2014 CAMAC Discussion Paper, which described this discretionary process to determining liquid assets as imprecise, difficult to verify independently and a possible source of instability by enabling a responsible entity to specify any realisation period in the constitution, without limit. CAMAC suggested it may be useful to introduce a clearer or more objective test for liquidity (such as an asset that can reasonably be expected to be realised for its book value within 7 business days). Our concern with this approach is that it would significantly limit the types of registered schemes that could offer redemption facilities of any kind. The concerns raised in the 2014 CAMAC Discussion Paper are addressed in the following ways: • (**Duties of responsible entity**) Section 601KA(6) requires the responsible entity to 'reasonably expect' that the relevant property can be realised for its market value within the period specified in the constitution for satisfying withdrawal requests while the scheme is liquid. This imposes on the responsible entity an objective standard for determining whether an asset should be classified as a 'liquid asset', having regard to the period specified in the

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		constitution for satisfying withdrawal requests. The decision to classify an asset as a 'liquid asset' is also subject to additional duties including the duty to ensure that the right to withdraw, and any provisions in the constitution setting out procedures for making and dealing with withdrawal requests, must be fair to all members (s601GA(4)), as well as the responsible entity's duty under s601FC(1)(b) to exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity's position. • (**RG 259**) In RG 259, ASIC has issued detailed guidance on its expectations of responsible entities in relation to scheme liquidity and withdrawals (paras [46] – [48], [91] – [98]). ASIC expects risk management systems of fund operators to include a liquidity risk management process, designed to ensure that there are adequate financial resources to meet the financial obligations and needs of the fund operator and the funds operated: *'At the fund level, we expect this will include stress testing or scenario analysis [i.e. a 'what if' exercise that examines what may happen if certain risks materialise ([RG 259.94])]… We also expect it will include fund operators assessing available liquidity management tools and considering whether these are appropriate to use. For example, redemption fees, suspension of withdrawal requests, redemption gates (a limit on the amount of redemptions), in specie transfers (transferring assets of an equivalent amount instead of providing cash proceeds), swing pricing (applying higher transaction costs adjustments on redemptions, reflecting the lack of an offsetting issue of fund interests or shares), minimum or maximum limits on withdrawals, or satisfying withdrawals on a partial or staggered basis.'* (RG 259.48) RG 259 also provides examples of measures that responsible entities may consider in managing liquidity risk (paras [152] – [155]). For example, fund operators are encouraged to establish appropriate internal thresholds for liquidity, which are proportionate to the redemption obligations and ongoing commitment of the funds, as well as tools to identify an emerging liquidity shortage before it occurs and ongoing assessments of the liquidity profile of the assets and liabilities of the funds. RG 259 also recommends appropriate disclosure in PDSs for the fund investor redemption rights, liquidity risks, the liquidity management process and if the fund operator has the power to use any liquidity risk management tools. Responsible entities should also implement processes that ensure that the frequency of dealing in units in the fund and investor redemption rights are compatible with the fund's liquidity profile, investment strategy and portfolio composition. • (**Enhanced disclosure requirements for certain types of registered schemes**) ASIC has issued specific guidance for disclosure to retail investors in unlisted property schemes (RG 46) and mortgage schemes (RG 45). There are disclosure principles and benchmarks set out in RG 46 and RG 45 relating to withdrawal arrangements. RG 46 requires PDS disclosure relating to the circumstances in which investors can withdraw, the maximum withdrawal period allowed under the constitution for the scheme (with a requirement that this disclosure should be at least as prominent as any shorter withdrawal period promoted to investors) and any

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		significant risk factors or limitations that may affect the ability of investors to withdraw from the scheme (including risk factors that may affect the ability of the responsible entity to meet a promoted withdrawal period) (RG 46.104 – RG 46.107). RG 45 also requires similar PDS disclosures (RG 45.104 – RG 45.114), and there is also benchmark disclosure (on an if not/why not basis) relating to withdrawals, which is intended to address the transparency of the responsible entity's approach to withdrawals of investments when the scheme is liquid and when the scheme is non-liquid (RG 45.64 – RG 45.71). For example, there are benchmarks that the maximum period allowed for in the constitution for the payment of withdrawal requests is 90 days or less, and that the responsible entity will pay withdrawal requests within the period allowed for in the constitution. More broadly, in addition to the benchmarks and disclosure principles under RG 46 and RG 45, there are prohibitions under the Corporations Act for misleading and deceptive statements in PDSs and marketing documents (s1041E and s1041H). If a responsible entity represents, expressly or impliedly, that it expects to be able to satisfy withdrawal requests within a particular period, it must have reasonable grounds to make that representation (particularly if a longer period is specified in the scheme's constitution). • (**DDO**) The DDO reforms require investors' liquidity needs to be taken into account, and disclosed in a TMD, in determining the target market for a financial product.
18	Are any changes required to the procedure for withdrawal from a scheme? If so, what changes and why?	No comments.
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?	Please refer to our responses to Question 17 above regarding the ways in which the concerns raised in the 2014 CAMAC Discussion Paper are addressed. In addition, we note that ASIC has recently undertaken targeted surveillances of responsible entities and registered schemes in relation to liquidity risk management processes, including during the COVID-19 period and has found that: • Generally, the redemption features offered by the funds reviewed in the fixed-income and property sectors were satisfactorily matched to the liquidity of the underlying assets. In 3 (out of 37) funds, there was a significant mis-match between redemption features and asset liquidity (i.e. the liquidity of underlying assets did not support the short redemption terms offered to consumers) (ASIC MR 20-218, ASIC tells fund managers to be 'true to label' (22 September 2020)); and • During the COVID-19 period (June – November 2020), the liquidity frameworks of the responsible entities reviewed were generally adequate; all funds had multiple ways available to manage investor liquidity, such as the right to suspend or stagger redemptions, to charge and adjust redemption fees and to borrow money to pay

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		redemptions. Also, overall, liquidity risks and redemption rights were appropriately disclosed to investors (ASIC MR 21-091 ASIC review finds retail managed funds responded well to COVID-19 challenges in 2020 (30 April 2021)). Despite the protections and regulatory guidance that are already available to investors, the regulatory regime may benefit from some enhancements to address some of the specific concerns that have been made in relation to the 'mismatch' between member expectations of being able to withdraw from a scheme and their actual rights to withdraw. For example: • The Corporations Act uses the terminology of 'liquid' to capture assets that may not be 'inherently' or 'highly' liquid, but can nevertheless be treated as 'liquid' for Corporations Act purposes because the responsible entity reasonably expects that those assets can be realised for market value within the period specific in the scheme's constitution for satisfying withdrawal requests. To clarify this distinction and avoid confusion by consumers, it may be preferable for the Corporations Act to use terminology other than 'liquid', because consumers may assume that a 'liquid scheme' only holds assets that are generally understood to be 'inherently' or 'highly' liquid (such as cash or listed securities). • It may also be helpful for the Corporations Act to be amended to incorporate some of the key principles relating to scheme liquidity, which are currently contained in RG 259. This will mean those principles would be legally binding, rather than reflected only in regulatory policy. For example, some of the principles and good practice guidance relating to the management of fund-level liquidity risks could potentially be incorporated into the legislation. Also, and by analogy, we note that section 1223H of the Corporations Act requires the constitution of a retail CCIV with redeemable shares to specify a period within which a redemption must ordinarily be satisfied while the sub-fund is liquid, and must contain provisions relating to the redeemable shares that are fair and reasonable to the members of the sub-fund to which the shares are referable. There is currently no directly equivalent requirement in the Corporations Act for registered schemes. • IOSCO's final report on the 'Thematic Review on Liquidity Risk Management Recommendations' (November 2022) may also highlight specific liquidity risk management measures that could be incorporated into the Corporations Act. Because of the principles-based approach taken in Chapter 5C and related ASIC policy, Australia was rated in that report as 'broadly consistent' or 'partly consistent' (rather than 'fully consistent') in relation to some of the recommendations that had been made in IOSCO's 2018 Recommendations for Liquidity Risk Management for Collective Investment Schemes. For example, it was noted in the report (p13) that there is no direct obligation in Australia for responsible entities to manage their assets consistently with members' redemption rights or other liabilities of the scheme. Similarly, the report noted (p18) that the Australian regulatory framework does not mandate that a fund set a dealing frequency for redemptions with appropriate consistency

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		tests at the design stage. Such obligations could be introduced into the legislation as direct legal duties imposed on responsible entities.
Chapter 6: Winding up insolvent schemes		
N/A	General comments	As an overarching comment in relation to Chapter 6 of the Consultation Paper, we refer to the recent report of the PJC on Corporations and Financial Services titled *Corporate insolvency in Australia* (published in July 2023), and draw particular attention to the recommendation of the committee (at [3.104]) that: *…as soon as practicable the government commission a comprehensive and independent review of Australia's insolvency law, encompassing both corporate and personal insolvency…* The same report included a recommendation that the government progress several other near-term actions, which included the treatment of trusts in insolvency. Having regard to these comments, we consider that, if Treasury is to consider an insolvency regime for MISs, then such a regime should ideally be considered as part of this broader review by government and, at the very least, should not be inconsistent, or overlap, with any planned trust insolvency reforms. *Overview* A key theme that underpins our responses to the questions in this Chapter of the Consultation Paper is the distinction between 'pooled schemes' (that are typically established as trust-based investment arrangements) and 'common enterprise schemes' (that are typically established as contract-based arrangements between scheme members, on the one hand, and the responsible entity and its related entities, on the other). In our view, this distinction is at the heart of the dilemma caused by the agribusiness MIS collapses following the GFC period. A regulatory or legislative response that overlooks this distinction, and that instead seeks to impose a set of rules uniformly to both trust-based and contract-based MISs, would be flawed. Indeed, in our view, this would be likely to increase, rather than reduce, the complexity and uncertainty that existed during the period of the agribusiness MIS collapses. The 2012 CAMAC Report made the following comments regarding contract-based schemes: *… common enterprise schemes are often structured as a series of bilateral or multilateral executory agreements between the member, the [responsible entity] and various external parties. The 'scheme' in that case is not a pool of assets under management, but rather the common enterprise carried out over time in accordance with those agreements… In that type of common enterprise scheme, complex problems can arise in determining the nature*

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		of the rights of scheme members, and clearly distinguishing between… the property of the scheme and the property of scheme members used in the enterprise.[51] These problems are compounded by the Corporations Act framework which, despite not mandating a particular legal structure for the broad concept of an MIS, relies on concepts such as 'scheme property', which are predicated on a trust-based structure, and goes so far as to impose a statutory trust over all scheme property (s601FC(2)). This means that, when a contract-based MIS collapses, the statutory tools that are intended to facilitate winding up, or otherwise rehabilitating, the MIS, are not as readily available to those MISs as they are to trust-based MISs. For example: • the uncertainty surrounding statutory novation of liabilities on a change of responsible entity of a contract-based MIS, where the capacity in which the responsible entity incurs liabilities is often blurred, limiting the attractiveness of the responsible entity role to prospective replacement responsible entities; • the difficulty in identifying the 'scheme property' of contract-based MIS, compounded by the statutory trust over 'scheme property' imposed by s 601FC(2), creates uncertainty in ascertaining the (often competing) rights and interests of members and other stakeholders, such as secured creditors, over property connected to the scheme, and reconciling these rights and interests when they are in competition with one another; and • the mechanisms available to wind up an MIS proved to be very limited in the context of agribusiness MISs, to which traditional trust-based tests of 'solvency' (ie, the availability of assets to indemnify the trustee for liabilities incurred) were not suitable. Moreover, there is not a 'one size fits all' structure or business model for contract-based MISs, and therefore any legislative regime that is introduced would need to be flexible enough to accommodate all forms of such MISs. In our view, while some of these discrete issues could be addressed by way of legislative reform (for example, see our responses to Question 6 above relating to the scheme registration process), we do not think that any changes to the statutory regime for winding up MISs is required, particularly in an environment where contract-based MISs represent a dwindling proportion of MIS overall. The proposal to introduce in the Corporations Act a procedure for winding up an MIS when the scheme becomes 'insolvent' or 'unviable' would, in our view, only give rise to further complexity. This is because, for a contract-based MIS in particular, whether a scheme is 'insolvent' or 'unviable' will vary greatly depending on the particular characteristics of the scheme. As the agribusiness MIS collapses demonstrated, the Courts are best placed to deal with complex arrangements and unforeseen circumstances in contract-based MISs, and during the agribusiness MIS collapses, the Courts facilitated the development of a 'de facto' winding up procedure for these arrangements.

[51] At section 2.2.1, pages 27 – 29.

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		Similarly, the proposal to introduce a tailored insolvency regime for MISs is, in our view, likely to be unworkable in the context of contract-based MISs and unnecessary in the context of trust-based MISs. We would support the introduction of statutory limited liability for members of trust-based MISs.
20	Are any changes required to the winding up provisions for registered schemes? If so, what changes and why?	We do not think any changes need to be made to the winding up provisions for registered schemes. Although the procedures for winding up registered schemes in Part 5C.9 of the Corporations Act do not expressly include provisions for when a scheme becomes unviable, we think there is sufficient flexibility under the existing Part 5C.9 provisions to enable steps to be taken to wind up an unviable scheme. In our experience, the constitution of a trust-based MIS will typically give the responsible entity the power to wind up the scheme at any time (subject to the responsible entity complying with its duties, including the duty to act in the best interests of the scheme members). As such, if the scheme were to become unviable, and the responsible entity formed the view that it was in the best interests of the members to wind up the scheme, the responsible entity could exercise its power under the constitution and take steps, in accordance with the constitution, to wind up the scheme (sections 601GA(1)(d), 601NA and 601NE(1)(a) of the Corporations Act). There is also a mechanism in section 601NC of the Corporations Act for the responsible entity to propose to members that the scheme be wound up if the purpose of the scheme cannot be accomplished. By way of contrast, constitutions for contract-based MISs (particularly the agribusiness MISs that were the subject of large scale insolvencies in the period following the GFC) are, in our experience, less likely to give the responsible entity the power to terminate the MIS. Such a power would be inconsistent with the commercial rationale of such schemes, being a business enterprise being carried on by the members (or 'growers'). Nor is there typically a procedure in the constitution setting out how the winding up is to be effected. However, if such schemes become unviable, there are existing mechanisms under the Part 5C.9 regime available to the responsible entity and other stakeholders (including insolvency administrators appointed to the responsible entity,[52] ASIC or a scheme member) to take steps to wind up the scheme: • (**winding up on just and equitable grounds**) First, as discussed in the 2012 CAMAC Report,[53] under section 601ND(1)(a) of the Corporations Act, the responsible entity, a director of the responsible entity, ASIC or a scheme member may apply to the court to have the scheme wound up on the basis that the court 'thinks it is just and equitable' to make the winding up order. The Courts have held that, generally, it is just and equitable to order the winding up of a registered scheme on just and equitable grounds under section 601ND(1)(a) if the scheme is

[52] In *Shepard and Mentha in their capacity as receivers and managers of Environinvest Ltd (in liq) v Downey in his capacity as liquidator of Environinvest Ltd (in liq)* [2009] VSC 33, it was held that a receiver appointed over all of the property and undertaking of a responsible entity had standing to bring an application under section 601ND(1)(a) on behalf of the responsible entity.
[53] At paragraph 7.4.1, page 175.

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		'insolvent' or unviable. As noted in the 2012 CAMAC Report, the general approach of the Courts has been to consider the overall financial position of the scheme, its assets and its future prospects.[54]
		• (**de facto winding up**) Secondly, in several of the agribusiness MIS insolvencies, a 'de facto' winding up process was implemented to facilitate a sale of assets used in connection with the scheme and the distribution of the proceeds of sale, in the absence of a formal winding up order. The primary reason for the development of the de facto winding up process was the uncertainty surrounding the procedure and outcomes of a winding up of an agribusiness MIS. The uncertainty about the respective rights of stakeholders in the winding up, including creditors and members (growers), caused external administrators, growers and the Courts to be reluctant to seek a formal scheme winding up order.[55] The other important element that led to the development of the 'de facto' winding up process was the 'wasting' nature of the assets associated with agribusiness MISs, such as trees and crops, in circumstances where the responsible entity has limited ability to fund ongoing maintenance. Generally speaking, the 'de facto' winding up process involves a three-step process:
		  • first, a unilateral amendment to the scheme constitution by the responsible entity, which gives the responsible entity the power to terminate or surrender the growers' rights under leases or licences which encumber the relevant land – judicial advice is typically sought from the court confirming that the responsible entity is justified, in the circumstances, in making this amendment;
		  • second, the marketing of the assets by the responsible entity (and any other entities in the group that owns the assets) leading to the execution of a sale contract which is conditional upon the termination of the growers' rights to permit an 'unencumbered' sale; and
		  • third, Court approval of the exercise of the power to terminate the growers' rights and permit completion of the sale contract based on:
		    • a consideration by the Court of the robustness of the sale process; and
		    • approval by the Court of the distribution of the net sale proceeds as between the growers and other stakeholders.
		As each contract-based MIS is likely to have its own unique features, business model and surrounding circumstances, in our view, any amendments to Part 5C.9 that are intended to facilitate the process of winding up an unviable scheme are

[54] For example: *Cumulus Wines Pty Ltd as manager of Central Highlands Wine Grape Projects Nos 2 and 3 v Huntley Management Ltd as trustee of Central Highlands Wine Grape Project Nos 2 and 3* [2004] NSWSC 609, *Re Orchard Aginvest Ltd (as responsible entity for the Primary Agribusiness Fund)* [2008] QSC 002, *Ex part PWL Ltd (formerly Palandri Wines Ltd) (admins appointed) (No 2)* [2008] WASC 232, *Environinvest Ltd (in liq) v Downey in his capacity as liquidator of Environinvest Ltd (in liq)* [2009] VSC 33, *Re Rubicon Asset Management Ltd (admins apptd) and others* [2009] VSC 33, *Capelli v Shepard and others* [2010] VSCA 2.

[55] See the Parliamentary Joint Committee on Corporations and Financial Services' Report on the 'Inquiry into aspects of agribusiness managed investment schemes' which noted at [3.111] that 'there was particular concern about the potential for leases to be terminated and the land to be sold free from the lease encumbrance if rent is not paid on time, due to the responsible entity's financial difficulties'.

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		unlikely to adequately address unforeseen circumstances or novel structures. A Court process, whether it be an application under section 601ND(1)(a) or a de facto winding up process, is likely to be preferred. Similarly, we do not think it is necessary to introduce a specific ground for winding up an MIS based on insolvency / viability considerations (however they are defined to accommodate both trust-based and contract-based schemes), particularly given the Courts already have the power to take insolvency considerations into account under section 601DN(1)(a). As the agribusiness MIS examples demonstrated, there may be reasons why a winding up process would not produce the optimal outcome for members and other stakeholders, and a tailored process (such as a de facto winding up overseen by the Court) may be preferred.
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?	We do not think that a tailored insolvency regime for schemes would improve outcomes for scheme operators, scheme members or creditors. While we acknowledge that sub-funds of CCIVs have their own insolvency regime under Part 8B.6 of the Corporations Act, the structure of MISs means that the insolvency concepts that apply to companies (or sub-funds of CCIVs) do not readily apply to MISs. Also, we note that the voluntary administration regime that applies to other companies is not available to CCIVs or sub-funds of CCIVs. Again, we think it is important to distinguish between pooled (or trust-based) schemes and 'common enterprise' (or contract-based) schemes. In our view, the proposal to introduce a tailored insolvency regime for registered schemes is likely to be unworkable in the context of contract-based MISs and unnecessary in the context of trust-based MISs. In relation to trust-based MISs, we think the existing insolvency regime that applies to trusts more broadly should apply to trust-based MISs. There is no need for a separate regime that applies only to trust-based MISs (and that differs from the regime that applies generally to other trusts). In our experience, the complexities with winding up 'insolvent' schemes have arisen in the context of contract-based MISs, rather than trust-based MISs. Any reforms and improvements to the insolvency regime relating to trusts and corporate trustees, including those that are registered schemes and responsible entities, should, in our view, be considered as part of Treasury's consultation on *Clarifying the treatment of trusts under insolvency law* (consultation paper dated 15 October 2021) and the Government's broader review of the Australian insolvency regime (most recently the final report of the PJC on Corporations and Financial Services' inquiry into corporate insolvency in Australia (July 2023)). We do not think it is necessary for trust-based MISs and responsible entities to be subject to a tailored insolvency regime that does not apply to other trusts or trustees. Similarly, we would not support introducing a tailored insolvency regime for contract-based MISs. Contract-based MISs take various forms, involve a variety of parties and stakeholders and involve bespoke contractual arrangements. The

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		Court processes that are available to wind up unviable schemes are able to respond to the unique features of these schemes and facilitate tailored and flexible winding up processes, such as the de facto winding up process described above. The difficulty in identifying with certainty the ambit of a contract-based MIS and the competing rights and interests of the relevant parties poses a dilemma that, in our view, would make a tailored insolvency regime for contract-based MISs impractical and unworkable. The 2012 CAMAC Report supported the introduction of a voluntary administration regime for MISs, on the basis that this could provide an orderly means for their administration prior to their winding up. However, CAMAC preferred voluntary administrations for schemes being introduced within the context of the 'SLE Proposal', which CAMAC also endorsed. Under the SLE Proposal, each registered scheme, whether a pooled or common enterprise scheme, would be given the status of a separate legal entity. We do not support the SLE Proposal (or, in turn, the proposal to introduce a voluntary administration regime for registered schemes) because we are concerned that there are risks and a range of potential unintended consequences (including tax and other laws) when treating a 'scheme' (whether it be a trust or a matrix of contracts) as a separate legal entity.
22	Should statutory limited liability be introduced to protect personal assets of scheme members in certain circumstances? If not, why not?	We are supportive of the introduction of a statutory limitation of liability for members of trust-based MISs, such that the liability of members of an MIS would be limited to the unpaid portion of the amount they have contributed to the scheme. This would have the same effect as section 516 of the Corporations Act in relation to shareholders of a company. A statutory limitation of liability will remove the need to rely on general trust law principles, which require a limitation clause to be included in the scheme's constitution: under general trust law principles, a beneficiary of a trust may be personally and proportionately liable to the trustee of the trust for liabilities incurred in the proper administration of a trust.[56] It is settled law, however, that where that liability does exist, it may be excluded or limited by an express provision contained in the trust instrument (subject to certain exceptions, such as where the use of the clause is contrary to public policy and where the beneficiary has authorised the trustee to enter into a transaction not within the scope of the trust, or has ratified such a transaction). However, our view is subject to two qualifications: • We do not believe that members of *all* registered schemes should have the benefit of the statutory limitation of liability. As the limitation of liability will codify general trust law principles, it should extend only to those schemes structured as trusts. This was recognised in the 2012 CAMAC Report, which recommended that a statutory limitation of liability clause should not apply where the scheme members enter into agreements on their own behalf or through the responsible entity acting as their agent – members who are parties or principals to agreements should be personally liable according to the terms of those agreements.[57] Contract-based

[56] *Hardoon v Belilios* [1901] AC 118 at 124-5.
[57] At paragraph 8.4.3.

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		agribusiness MISs, for example, required investors to pay fees and other expenses for the cultivation of the relevant crop or trees, in respect of which those investors were typically entitled to a tax deduction. A statutory limitation of liability would seem contrary to that business model and investment objective. • We generally agree with the recommendation in the 2012 CAMAC Report that statutory limitation of liability should not be overridden by contrary provisions in a scheme's constitution, as the benefit of statutory limitation of liability would be undermined if the position could be reversed in the scheme's constitution. However, it is fairly standard in our experience for a scheme constitution to include a clause that entitles the responsible entity to be indemnified by a member to the extent that the responsible entity (or the scheme) incurs any liability for tax or other costs as a result of the member's action or inaction or as a result of an act or omission by the member. We think this concept does not circumvent the principles of a statutory limitation of liability and should continue to apply so that the responsible entity, and the other members of the scheme, are not required to bear any liability for taxes that is caused by a particular member.
Chapter 7: Commonwealth and state regulation of real property investments		
24	Do issues arise for investors because of the dual jurisdictional responsibility when regulating schemes with real property? If so, how could they be addressed?	In our experience, the issues that arose in the case of the Sterling Income Trust from the dual jurisdictional responsibility (Corporations Act / State and Territory laws relating to real property rights, including leases and tenancy rights) were unique to the bespoke structure of that investment scheme. The issues arose because the investors in the Sterling Income Trust were also tenants under 'rent-for-life' leases. This structure is highly unusual.
Chapter 8: Regulatory cost savings		
25	What opportunities are there to modernise and streamline the regulatory framework for MISs to reduce regulatory burdens without detracting from outcomes for investors?	*ALRC Financial Services Review* In parallel with Treasury's MIS Review, the ALRC is separately undertaking its own inquiry into the simplification of the legislative framework for corporations and financial services regulation (the ***Financial Services Review***). Interim Report B and Interim Report C of the Financial Services Review focus respectively on: • the coherence of the regulatory design and hierarchy of laws, covering primary law provisions, regulations, class orders, and standards (i.e. the vertical hierarchy of regulation); and • the reframing and restricting of provisions contained in Chapter 7 of the Corporations Act and the Corporations Regulations to improve the legislative framework for financial services licensing and regulation (i.e. the horizontal, or internal, structure of regulation). Although the focus of the Financial Services Review is primarily on Chapter 7 of the Corporations Act and the Corporations Regulations, the principles articulated by the ALRC with respect to the streamlining of both the vertical and

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		horizontal planes of the regulatory frameworks are of general application. Accordingly, Treasury should, in our view, assess and, as relevant, adopt the learnings of the ALRC in seeking to modernise the regulatory framework for MISs. As a general observation, and to paraphrase the comments of Dr William Isdale and Christopher Ash with respect to the Financial Services Review,[58] regulatory design, structure and framing are important tools in avoiding undue complexity in regulation. Such complexity must, in turn, be avoided because it is antithetical to the rule of law; complexity makes it more difficult for consumers and their advocates to understand their rights and to exercise them, for professionals to advise their clients, for regulated persons to comply with, and for regulators to enforce, the law. Practically, complexity also translates into real world costs, reflected in the price of financial products and services (including interests in MISs), and in increased expenditure in funding regulators and courts tasked with navigating the regulatory warren. Against this backdrop, with respect to the establishment of a coherent legislative hierarchy, Interim Report B makes the following observations: (a) the function of primary legislation is to expound the core policy of the regulatory regime, establishing the broad parameters and key objectives of regulation and, in the interests of maintaining transparency and democratic legitimacy, containing all significant criminal offences and penalties. By restricting itself to matters of core policy and principle, primary legislation should be sufficiently flexible to meet the needs of novel situations; and (b) the function of delegated legislation is, accordingly, residual, housing exclusions and exemptions that modify the scope of the primary legislation, and setting out any prescriptive detail that clarifies the meaning of the primary legislation. Insofar as is possible, delegated legislation should also be thematically consolidated to reduce the number of places that users need to look to find the law. With respect to the horizontal, or internal, structure of the law, Interim Report C advocates for the following approach to the structure and framing of legislation: (a) from a theoretical perspective, legislation should be drafted as succinctly as possible, it should be structured in a way that flows intuitively and reflects the information needs of its primary users, and it should be presented in a manner that is both thematically and conceptually coherent; and (b) in fashioning a legislative regime that reflects the principles of succinctness, intuitive flow and coherence, duplicative and overlapping provisions should be consolidated, provisions of general application should precede more specific provisions containing technical detail, and related provisions should be proximate within the structure of that regime. Unlike the Financial Services Review, which was concerned with the overall architecture of the legislative framework for corporations and financial services regulation, the MIS Review has a far stronger policy focus, and so any broader structural changes to Chapter 5C of the Corporations Act (and associated delegated legislation) may, practically, need to

[58] William Isdale and Christopher Ash, 'Undue complexity in Australia's corporations and financial services legislation' (ALRC News, 30 November 2021) <https://www.alrc.gov.au/news/undue-complexity/>.

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		be to be addressed separately from the present review. That being said, the scope of Chapter 5C is far narrower than the focus of the Financial Services Review and, accordingly, our view is that it would not be too significant a task to ensure that the various aspects of the regulatory framework for MISs sit appropriately across the layers of the legislative hierarchy, and that each such layer is framed and structured in a manner that is internally sound. *Other opportunities to modernise and streamline the regulatory framework for MISs* Below we have listed some additional aspects of the regulatory framework for MISs that we think could be modernised or streamlined to ease compliance burdens without compromising the intent of any regulation or protections: • (**internally managed stapled groups**) These structures include a registered MIS and are therefore subject to the MIS regulatory framework, but in our view this has given rise to complexity, discrepancies in the regulation of the components of the stapled group and additional cost (borne by securityholders), without offering meaningful consumer protections. We refer to the submissions of the Property Council of Australia on this issue, which we support. • (**wholesale registered MISs**) Registered schemes are not typically used as investment vehicles for funds that are marketed exclusively to wholesale clients because of their rigid, inflexible structural requirements. By contrast, the CCIV regime introduced a 'wholesale CCIV' structure, to which many of the regulatory requirements that are more relevant for retail consumers do not apply (eg, restrictions on redemptions based on liquidity, content requirements for constitutions, requirement for at least half of the board of the corporate director to be external directors, need for a compliance plan, related party transaction rules, etc). We would support the introduction of an equivalent 'wholesale registered scheme' vehicle for use by fund operators and wholesale clients that would prefer the regulatory oversight of a registered scheme but without many of the consumer protections that are designed for retail investors. • (**product rationalisation and legacy products**) We would support the introduction of a comprehensive product rationalisation regime to enable fund operators to consolidate, wind up, merge or otherwise rationalise multiple products with the same investment strategy or legacy products that are no longer viable. In 2017, Treasury released a very thorough options paper covering product rationalisation in the managed funds sector. In 2014, the Financial System Inquiry recommended that the Government facilitate rationalisation of legacy MIS products. • (**related party transactions**) The related party transaction rules that apply to registered schemes are contained in Part 5C.7 of the Corporations Act. Part 5C.7 does not set out a 'standalone' complete set of rules for registered schemes but, rather, it applies Chapter 2E (which applies to public companies), with modifications, to registered schemes. The 2014 CAMAC Discussion Paper (section 7.5) identified some potential concerns with this approach, and with the broad scope of the related party transaction provisions for registered schemes (eg, agents of, and persons engaged by, a responsible entity are treated as related parties of the responsible entity).

No.	Question	Allens submissions
		We would support a review of these provisions to ensure that they operate as intended and that the current drafting method (i.e. adopting Chapter 2E with modifications) is appropriate.