Law Council
OF AUSTRALIA

5 March 2026

Mr Andre Moore
Assistant Secretary
Advice, Insurance and Capital Markets
The Treasury
Langton Crescent
PARKES ACT 2600

By Email: MISregulation@treasury.gov.au

Dear Mr Moore

Enhancing oversight and governance of managed investment schemes

1. The Law Council of Australia welcomes the opportunity to make a submission to Treasury in response to the consultation paper issued on 10 February 2026 (the **Consultation Paper**) relating to proposals to enhance the regulatory framework for managed investment schemes (**MIS** or **scheme**) to provide, if possible, greater consumer protection for investors in MIS following the costly collapse of the Shield Master Fund and First Guardian Master Fund, which were structured as MIS.

2. This submission has been prepared by members of the Business Law Section's Financial Services Committee, and the Legal Practice Section's Superannuation Committee, collectively, referred to throughout, as the Committees.

3. In this submission the Committees have focused on legal aspects of the proposals in the Consultation Paper (**Proposals**) in which members of the Committees have expertise or direct experience and wish to comment. Other stakeholders may be more suitably placed to comment on other matters canvassed in the Consultation Paper.

4. In this submission, the Committees consider each of the Proposals through the lens of whether they would or could have helped to prevent the consumer harm that occurred in the Shield and First Guardian Master Fund cases. Consideration is also given to whether the changes would be "good law" in the sense that they would produce a net regulatory benefit. In short, some of the Proposals would be beneficial and others would not, for the reasons set out below.

Proposal 1: Enhance the regulatory framework for compliance

Proposal 1.1: Introduce stricter compliance plan requirements, such as by requiring a detailed description of the nature of the scheme and its investment strategy, and information outlining how significant risks will be identified, monitored and managed.

5. In a 2023 submission to Treasury's *Review of the regulatory framework for managed investment schemes* ("**2023 Review**"), committees of the Business Law Section opposed a suggestion that compliance plans be more detailed, and more tailored to individual schemes.[1] These committees continue to be of that view.

6. Subsection 601HA(1) of the *Corporations Act 2001* (Cth) already requires compliance plans to set out "adequate measures" that the responsible entity is to apply in operating the particular scheme to ensure compliance with the Corporations Act and the entity's constitution. As noted in the 2023 submission, it is important for responsible entities who operate multiple registered schemes to seek to minimise non-substantive differences between compliance plans because uniform compliance arrangements are generally less complex to administer (and hence, inadvertent breaches of compliance plans may be less likely to occur). That submission noted the concern that changes to the law that required greater particularity could make the optimal functioning of compliance processes more challenging for responsible entities, without necessarily improving consumer protection outcomes.

7. From the perspective of protecting consumers who invest in managed investment schemes, the fundamental practical value of a compliance plan is that it requires responsible entities (**RE**s) to establish and operate incident detection systems for errors and breaches in their business, and a chain of reporting to senior management and, if required, to the Australian Securities and Investments Commission (**ASIC**). The existing law already requires a compliance plan to set out measures to comply with each relevant obligation in the Corporations Act and the scheme's constitution, how compliance will be checked, who is responsible, and how frequently the checking will occur. The fact that a breach of the compliance plan is a breach of the law empowers the compliance personnel in an organisation to require other staff members to monitor and report as the plan provides.

8. Typically, especially for an RE that operates multiple schemes, a large volume of detailed policies (which may extend to hundreds of pages) dealing with how compliance is operationalised in practice, sits alongside the compliance plan. The details in those policies are not part of the compliance plan because they change from time to time, generally only apply to a subset of the personnel that have particular functions, and would make the compliance system unwieldy and unworkable if every line had to be monitored in case it amounted to a breach of the law.

---

[1] Law Council of Australia, *Submission to the Treasury's review of the regulatory framework for managed investment schemes* (6 October 2023), 10.

9. In its 2025 surveillance report,[2] ASIC conducted a desktop review of compliance plans that did not take into account whether RE compliance systems were working well in practice, or RE policies and procedures. ASIC did not engage in any consultation before publishing the report, but only looked at compliance plan documents in isolation. Members of the Financial Services Committee have reported that some REs, who considered their compliance processes to be legally compliant and diligently carried out, felt that they were unfairly accused of "poor practice", and believed there was a misunderstanding of how compliance systems operate in practice. Certainly, where ASIC identified compliance plans that did not address breach reporting, complaints handling or product design and distribution obligations, those plans were in breach of existing laws, and it was appropriate to call out that conduct as "planning to fail".

10. In summary, the Financial Services Committee submits that:

    (a) there will be no need for a compliance plan to include a more detailed description of the scheme and its investment strategy for ASIC's surveillance purposes if data collection (Proposal 5) is introduced;

    (b) requiring compliance plans to be more individually tailored to particular schemes could undermine the efficient operation of existing compliance systems in REs that operate multiple schemes, and provide no more consumer protection than the existing law;

    (c) ASIC should not be empowered to mandate content requirements beyond the level of detail already required by Part 5C.4 of the Corporations Act as interpreted in ASIC Regulatory Guide 132 *Funds management: Compliance and oversight* (**RG 132**), because that level of detail requires specific knowledge of the activities and processes of the particular scheme that ASIC would not have; and

    (d) there is no need for compliance plans to further outline how significant risks in the scheme will be identified because there are already separate requirements for companies that are REs (and so also hold an Australian financial services licence (**AFSL**)) to maintain adequate risk management systems (section 912A(1)(h) and ASIC Regulatory Guide 259 *Risk management systems of fund operators*) and to address "compliance risks relevant to all assets invested in by the registered scheme" in the compliance plan (see paragraph 149 of RG 132).

---

[2] Australian Securities and Investments Commission, *Review of managed fund compliance plans: 'Failing to plan is planning to fail'* (2 June 2025).

Proposal 1.2: Amend the liability framework for compliance plans, such that liability attaches only to material contraventions of a plan, to incentivise higher quality plans

11. In its submission to the 2023 Review, the Business Law Section previously advocated for a change to breach reporting requirements in respect of compliance plans, and to the extent that this Proposal would have that effect, its implementation would be very welcome. The submission noted that:

> *The effect of paragraphs 912D(4)(b) and 601FC(1)(h) of the Corporations Act is that any breach of a compliance plan, irrespective of its level of materiality, gives rise to a "reportable situation", which the responsible entity must notify to ASIC. This is the case because subsection 601FC(1) is a civil penalty provision (and therefore a breach of any limb of subsection 601FC(1) is automatically reportable). Consequently, ASIC must be notified of breaches of the compliance plan which are inconsequential, and the Committees consider that this is not a productive use of the finite resources of the responsible entity or ASIC. Possible ways to address this issue include: (a) providing that paragraph 601FC(1)(h) is not a civil penalty provision; or (b) amending the Corporations Regulations to prescribe section 601FC(1)(h) as one of the civil penalty provisions which will not automatically give rise to a "reportable situation" if it is breached.*[3]

12. Since that time, ASIC has modified some aspects of the reportable situations regime (*ASIC Corporations and Credit (Breach Reporting—Reportable Situations) Instrument 2024/620*) but the amendments do not alter the requirement for REs to report immaterial breaches of a compliance plan to ASIC. The unnecessary burden on both REs and ASIC in resources spent on these reports remains.

13. As Treasury suggests in the Consultation Paper, a legislative change to introduce a materiality requirement would alleviate the genuine concern that REs have about including any compliance steps that are not strictly required by law in their compliance plans (because it could add to the risk of increasing breach reports on trivial matters not relevant to consumer protection, such as whether an internal report was not given strictly on time because a staff member was unexpectedly on leave).

14. With regard to amendment of the liability framework to the effect that certain low-level non-compliance with a compliance plan does not amount to a breach of the Corporations Act, this may be helpful but would need to be very explicitly drafted so that financial services personnel who are required to report incidents in the business to their compliance personnel are able to clearly understand what contraventions are to be regarded as "material". One way to approach this would be to align it with the current concepts used in the reportable situations regime. The test of whether a non-compliance is "material" could be whether it is "significant" within the meaning of sections 912D(5) and 912D(4)(d)(i) of the Corporations Act, which generally speaking refer to breaches that cause material loss to investors or are systemic or demonstrate

---

[3] Law Council of Australia, *Submission to the Treasury's review of the regulatory framework for managed investment schemes* (6 October 2023), 10.

an inadequate compliance process. The modifications would need to be reflected not only in section 601FC(1)(h) (the RE's duty) but also section 601FD(1)(f) (the RE directors' duty).

Proposal 1.3: Make existing audit and assurance standards mandatory for auditors of compliance plans

15. The Committees are not in a position to comment on specific requirements of the audit and assurance standards issued by the Auditing and Assurance Standards Board (**AUASB**). However, given mandatory auditing standards apply to other audits required under the Corporations Act (financial reports, sustainability reports), there is a risk that investors, and even industry participants, may assume that compliance plan audits required under the Corporations Act are also carried out in accordance with appropriate mandatory auditing standards.

16. Accordingly, the Financial Services Committee supports the principle of making audit and assurance standards mandatory to reduce this confusion and to underpin the quality and consistency of compliance plan audits, as well as accountability for breaches of the relevant standard.

17. Given the AUASB already has power to make auditing standards for financial reports and sustainability reports under the Corporations Act, extending this power to also make auditing standards for compliance plans is preferable to giving ASIC a power to set a mandatory standard for auditors of compliance plans.

Proposal 1.4: Responsible entities should be required to notify ASIC of the appointment, removal or resignation of committee members.

18. The Financial Services Committee has no objection to this proposal. It would add somewhat to the regulatory burden on REs, but should support ASIC's surveillance activities, such as detecting whether an RE has failed to have sufficient appropriate committee members appointed for longer than the permissible 14 days, or if an individual held so many compliance committee positions that it would not be feasible for them to properly discharge their duties.

Proposal 2: Require a majority of external directors on the boards of responsible entities

19. The Financial Services Committee notes that the current framework in Part 5C.5 of the Corporations Act already provides for independent oversight of registered managed investment schemes. Under subsection 601JA(1), a RE must establish a compliance committee if less than half of its directors are external directors (within the meaning of subsection 601JA(2)). Where at least half the directors are external directors, no compliance committee is required.

In practice, therefore, the existing law provides two pathways to satisfy the independent oversight requirement for registered schemes:

(a) having a majority of external directors on the RE's board; or

(b) establishing a compliance committee with a majority of external members (subsection 601JB(1)).

20. Proposal 2, as described in the Consultation Paper, appears to expressly propose to eliminate this optionality by mandating a majority of external directors on the board of every RE, regardless of whether a compliance committee is in place. The Financial Services Committee has material reservations about this approach, for the reasons set out below.

The role and potential of the compliance committee

21. The compliance committee regime is a legally distinct and purpose-specific mechanism for oversight of a registered scheme's compliance. Under subsection 601JC(1) of the Corporations Act, a compliance committee's statutory functions include:

(a) monitoring the extent to which the RE complies with the scheme's compliance plan and reporting its findings to the Responsible Entity;

(b) reporting to the Responsible Entity any suspected or actual breach of the Corporations Act involving the scheme, or of the scheme's constitution;

(c) reporting to ASIC if the committee is of the view that the RE has not taken, or does not propose to take, appropriate action to deal with a matter reported under (b); and

(d) assessing at regular intervals whether the compliance plan is adequate and making recommendations to the RE on any changes.

22. The compliance committee therefore operates closest to the operational realities of the scheme and with a specific compliance mandate, rather than the broader corporate governance mandate of a board.

23. In the Financial Services Committee's view, a well-constituted and appropriately empowered compliance committee has the potential to be a more effective instrument for identifying compliance failures and misconduct, including the type of conduct that gave rise to the Shield and First Guardian Master Fund collapses, than the imposition of a majority of external directors on the RE's board. This is because:

(a) board-level oversight, by its nature, is high-level and periodic. Board meetings occur infrequently (typically quarterly or monthly) and deal with a wide range of strategic and corporate governance matters, which limits the depth of scrutiny that can be applied to scheme-level compliance at any given meeting;

(b) compliance committee members, by contrast, are specifically focused on compliance with the scheme's compliance plan and the relevant provisions of the Corporations Act, therefore having a more singular mandate to identify and escalate compliance issues relating to the scheme;

(c) the compliance committee regime requires the appointment of members with relevant expertise (consistent with subsection 601JB(1), which requires at least three members with a majority being external members), and members owe specific duties under section 601JD in connection with their compliance committee role, including duties to act honestly, exercise care and diligence, and not to make improper use of their position or information gained as a committee member; and

(d) compliance committee members have a direct ASIC reporting obligation under paragraph 601JC(1)(c) where the committee is of the view that the RE has not taken, or does not propose to take, appropriate action to deal with a matter reported by the committee. This is a powerful and potentially underutilised escalation mechanism that operates independently of the RE's governance structure.

24. The Financial Services Committee considers that the compliance committee framework, if strengthened and more actively promoted, could deliver substantially improved governance outcomes for scheme members without the commercial and structural disruption, and difficulties associated with mandating a majority of external directors on the RE's board. The Committee's specific suggestions for strengthening the compliance committee regime are set out further below.

Inhibiting factors to mandatory external directors

25. The Financial Services Committee identifies the following structural and practical obstacles to imposing a requirement for a majority of external directors on the boards of all REs:

(a) *Corporate group structures*: Many REs are wholly-owned subsidiaries of larger financial services groups (including banks, insurance companies and diversified fund managers). In such groups, it is standard practice and sound governance for subsidiary boards to be comprised entirely or predominantly of executives of the parent of the corporate group, to maintain clear accountability and effective integration with group-wide governance, risk and compliance frameworks. Imposing a majority of external directors on such subsidiary boards is commercially anomalous and could introduce governance tension between the external directors and the parent of the corporate group. It would also be inconsistent with the treatment of wholly-owned subsidiaries in other regulated sectors.

(b) *Availability of suitably qualified external directors*: The pool of appropriately experienced and truly independent directors with deep knowledge of managed investment scheme operations, compliance, and relevant regulatory frameworks is limited. A mandatory requirement

applied across the entire RE sector simultaneously would place significant strain on this talent pool, likely driving up the cost of external director appointments, costs that are ultimately borne by investors in the scheme.

(c) *Cost and proportionality*: External directors command substantial fees reflecting their experience and the responsibilities they assume. For smaller or boutique REs managing niche registered schemes, the cost of additional external director appointments may be disproportionate to the scale of the scheme and the assets under management, and could have adverse consequences for the viability and accessibility of those schemes for investors.

(d) *Interaction with existing governance requirements*: REs are already subject to the full suite of director's duties, continuous disclosure obligations (where applicable), financial reporting requirements and AFSL obligations. The additional governance benefit of mandating external directors (over and above these existing obligations and over and above a well-functioning compliance committee) may be marginal, while the costs are material.

(e) *Risk of conflicts among external directors*: In a relatively concentrated financial services market, the same small pool of experienced external directors may serve on the boards of multiple REs, including those that manage competing schemes or have overlapping investor bases. This creates a potential for conflicts of interest that are difficult to manage and could, counterintuitively, undermine the independence that the proposal is intended to achieve.

(f) *Evidence of causation*: The consumer harm in the Shield and First Guardian cases appears to have involved deliberate disregard of legal obligations by the relevant actors. The Financial Services Committee is not persuaded that the presence of a majority of external directors on those RE boards would necessarily have prevented the alleged misconduct of the various parties involved in retail consumption of these products, particularly where the misconduct was concealed or misrepresented. The effectiveness of any governance reform should be assessed against the specific failure modes that caused the harm, rather than adopted as a presumptively beneficial intervention.

Recommended reforms to strengthen the compliance committee as an alternative

26. Rather than mandating a majority of external directors on all RE boards, the Financial Services Committee recommends that the Government consider a package of targeted reforms to strengthen the compliance committee regime and to ensure that the "board external director" alternative is available only to REs that genuinely satisfy a substantive independence standard. Specific reforms could include:

    (a) *Minimum qualifications for compliance committee members*: Prescribing minimum qualifications or experience requirements for compliance committee members, including relevant expertise in financial services law,

compliance or audit, to ensure committee members are capable of substantively interrogating the RE's compliance processes.

(b) *Enhanced information access rights*: Expressly providing that compliance committee members have unrestricted access to the RE's compliance personnel, internal audit function, compliance records and scheme documentation, and that the RE must not impede the committee's exercise of its functions.

(c) *Direct ASIC reporting promotion*: Amending ASIC regulatory guidance (in particular, RG 132) to actively promote the use of the compliance committee's direct ASIC reporting power under paragraph 601JC(1)(c) and providing clear guidance on the circumstances in which that power should be exercised, including in cases of suspected deliberate misconduct by the RE or its officers.

(d) *Public reporting*: Requiring REs to include a compliance committee report in the scheme's annual report to members (or equivalent investor communication), summarising the committee's activities during the year and any matters referred to the board or ASIC. This would improve transparency and accountability and give investors meaningful visibility of the scheme's compliance governance.

(e) *Tenure and rotation*: Introducing maximum tenure periods for compliance committee members to mitigate the risk of familiarity impairing independence over time, while providing for appropriate transition arrangements to preserve institutional knowledge.

27. These reforms would target the compliance committee's effectiveness as a scheme-specific oversight mechanism, without imposing a governance model on RE boards that is commercially, materially disruptive for a large portion of the REs in the industry, and a financial disadvantage to scheme investors.

28. In response to the specific questions posed in connection with Proposal 2, the Financial Services Committee says:

Question	*Response*
Question 4: Should responsible entities of registered MISs be required to have a majority of external directors on their boards? What would constitute an external director for this purpose?	Not as a mandatory universal requirement. For the reasons set out above, the Financial Services Committee does not consider that mandating a majority of external directors on the boards of all REs is a proportionate or operationally workable response to the identified failures. The existing compliance committee framework, if appropriately strengthened, provides a more targeted and operationally proximate governance mechanism. If a board external director majority requirement is retained in some form, the definition of "external" should be clear, prescriptive and genuinely independence-based, rather than merely requiring that a director be a "non-executive". A director who is a non-executive of the RE but an executive of its parent entity should not qualify as "external" for this purpose.
Question 5: Are there a sufficient number of suitably qualified and independent persons available in Australia to serve as external directors across all responsible entities of registered managed investment schemes?	No. The Financial Services Committee does not consider that the current pool of suitably qualified and genuinely independent persons is sufficient to meet the demand that would be generated by a mandatory requirement applied simultaneously across the entire registered RE sector. The pool of experienced independent directors with deep knowledge of managed investment scheme operations, compliance and relevant regulatory frameworks is not unlimited. A sector-wide mandatory requirement would place material strain on that talent pool, likely drive up the cost of director appointments (costs ultimately borne by scheme investors) and risk undermining genuine independence through over-concentration of appointments across competing REs. The Financial Services Committee considers this a significant practical impediment to implementation of Proposal 2 in its current form.
Question 6: Are there other changes required to improve the management of conflicts of interest and oversight of responsible entities?	Yes. The Financial Services Committee considers that the package of targeted reforms to the compliance committee regime described above represents a more proportionate and operationally proximate response to the governance failure modes identified in the Shield and First Guardian cases. Those reforms, addressing minimum qualifications, independence criteria, information access rights, direct ASIC reporting, public reporting and tenure rotation, are specifically calibrated to the identified failures and would materially improve conflict management and oversight without the structural and commercial disruption of mandating external director majorities. The Financial Services Committee recommends those reforms as an alternative to Proposal 2.

Question	*Response*
Question 7: Should the requirement for a compliance committee be retained as an alternative to having a majority of external directors?	Yes. Where regulatory change and enhancement is required, the Financial Services Committee strongly recommends that the compliance committee be retained as a standalone (not merely alternative) oversight mechanism, and that its functions and constitutive requirements be strengthened in the manner described above. The compliance committee provides scheme-proximate, specialist oversight that a board of directors (with broader governance responsibilities and less operational familiarity with the scheme) may not be able to replicate.
Question 8: What exemptions or phase-in arrangements would be required if a mandatory external director majority were introduced?	If the Government proceeds with this proposal notwithstanding the Committee's reservations, a meaningful phase-in period of at least two years would be essential to allow REs operating within corporate group structures to re-organise their governance arrangements and to allow the market for suitably qualified external directors to adapt. Exemptions should be considered for: a. wholly-owned subsidiaries of entities that are themselves subject to robust prudential or regulatory oversight (e.g. ADI subsidiaries subject to APRA oversight); and b. REs that have a compliance committee constituted in accordance with strengthened requirements (as described above).
Question 9: What would the impacts of the proposal be, including compliance costs?	Material compliance costs would rise across the RE industry, particularly for smaller operators and wholly-owned subsidiaries. These costs include: a. recruitment of additional external directors; b. increased board fees; c. restructuring of subsidiary governance arrangements within corporate groups; and d. potential disruption to existing schemes pending governance restructure. These costs would ultimately be borne by investors. In the Financial Services Committee's assessment, these costs are unlikely to be justified by a commensurate improvement in consumer protection outcomes, given that the existing compliance committee framework, if appropriately strengthened, can deliver more targeted oversight at a lower cost to industry.

29. If Proposal 2 is not implemented as outlined in the Consultation Paper, and the alternative solutions are adopted, the Financial Services Committee recommends that the equivalent change be made to the Corporate Collective Investment Vehicles regime, to introduce the option of a Compliance Committee for those structures, to ensure regulatory parity in the choice of investment vehicle.

Proposal 3: Prohibit responsible entities of registered MISs from conducting related party transactions, with limited exceptions

30. The Financial Services Committee notes that there are existing restrictions on related party transactions in the Corporations Act, as has been noted in the Consultation Paper. REs must obtain member approval to give financial benefits to related parties, subject to limited exceptions—one being where the benefit is given on arm's length terms. Moreover, REs also have a statutory duty under paragraph 601FC(1)(c) of the Corporations Act to act in the best interests of the members, and if there is a conflict between the members' interests and its own interests, give priority to the members' interests.

31. The Financial Services Committee invites Treasury to consider whether the benefits given to related parties of the relevant RE in the Shield and First Guardian matters were on arm's length and/or could genuinely be reasonably considered to have been in the best interests of the scheme members. If it is the case that consumer harm was caused due to non-compliance with existing law, then this would not suggest that the existing law was deficient—rather it suggests that the existing law was disobeyed and the disobedience was not detected and/or acted on in a sufficiently prompt manner to prevent the consumer harm which occurred.

32. As the Consultation Paper has noted, there are a number of legitimate business structures that use related party transactions which do not result in consumer harm. ASIC has given comprehensive guidance in Regulatory Guide 76 *Related party transactions* about how the arm's length exception should be applied in practice. Members of the Financial Services Committee have experience working with REs who have robust arrangements for internal board approval of related party transactions, which involve providing evidence of terms offered by unrelated parties to demonstrate that the proposed terms of the related party transaction are no less favourable than arm's length terms.

33. The Financial Services Committee submits that the existing legal framework, which has been in place for over 25 years, is sufficiently clear, effective and appropriately designed to protect MIS members if the law is followed. The Financial Services Committee is of the view that there is no justification for burdening the entire industry with new legislation targeting the same outcome as the existing laws merely because a small minority of bad actors have disregarded their obligations and caused consumer harm. Even if new laws are made, they are equally likely to be ignored and breached by such bad actors, who are intrinsically inclined to pursue their self-interest and personal financial gain at the expense of scheme members. The Financial Services Committee therefore strongly believes that improved early detection of breaches of the existing law would be a more optimal and efficient solution than changing the law.

34. In response to the specific questions posed in connection with Proposal 3, for the reasons stated above, the Financial Services Committee says:

Question	*Response*
Question 10: Should responsible entities of MISs be prohibited from investing or lending money to companies that are controlled by a member of the responsible entity's board or companies that are related bodies corporate of the responsible entity? What exceptions would be required?	No. The existing law provides appropriate parameters within which REs should operate. Existing legitimate business structures should not be disrupted. If the existing law is complied with, consumer interests will be protected. Therefore, the appropriate response is to encourage compliance with the existing law and put in place measures to facilitate earlier detection of non-compliance with a view to limiting the extent of potential consumer harm
Question 11: Are any other changes required to ensure investment decision making by the responsible entity is in the best interests of scheme members?	No. This is because REs already have a duty to act in the best interests of members under the existing law and this extends to their decision making.
Question 12: What would the impacts of the proposal be, including compliance costs?	Not applicable, because the existing laws are capable of delivering the intended outcome.
Question 13: Where a responsible entity has a separate investment manager, should the investment manager be prohibited from being a related party?	No. If the investment manager is a related party of the RE, the RE simply needs to be particularly mindful of its existing statutory duties in section 601FC and the laws with respect to related party transactions.

Proposal 4: Amend the framework for setting financial requirements for responsible entities

35. The Financial Services Committee makes the following comments on Proposal 4, in response to the specific questions for consideration:

Question	*Response*
Question 14: Should more specific financial resource requirements be imposed on responsible entities (in addition to the general obligation to have adequate resources under section 912A(1)(d) of the Corporations Act)?	The Committee accepts that a corporation fulfilling the role of RE under Chapter 5C of the Corporations Act should be an "entity of substance" from a financial resource perspective, and that this requirement should sit separately from the general obligation in section 912A(1)(d). The Committee suggests that Treasury's focus should be on providing clarity and consistency in respect of these requirements—and the imposition of specific and clear financial resource requirements is an important component of that. A key aspect that is not referenced in the Consultation Paper is the separate net tangible assets (**NTA**) requirements that apply to licensees with a custodial and depository services authorisation (typically wholesale trustees) - as set out in *ASIC Corporations (Financial Requirements for Custodial or Depository Services Providers) Instrument 2023/648*. While a separate "custodial" authorisation is not required if a licensee is authorised to operate registered (retail) schemes, many industry participants carry out both roles. To the extent any changes are introduced to the NTA requirements applying to REs, Treasury and ASIC should ensure there is appropriate consistency between the two obligations (noting the retail / wholesale distinction).
Question 15: Should the MIS financial requirements (including the NTA requirement for responsible entities) continue to be set by ASIC using its exemption and modification powers in the Corporations Act or should the requirement be set out in primary legislation or regulations?	The Committee supports any efforts to reduce the complexity of an already highly opaque regulatory regime for financial services participants in general, and responsible entities (as a cohort of participants subject to greater regulation) in particular. The existing complexity increases compliance costs, while also increasing the chances of an inadvertent breach of relevant rules and regulations. The financial requirements applying to REs are already complex and the guidance around those requirements (in Regulatory Guide 166 *AFS licensing: financial requirements*, in particular) is daunting. Consequently, it would be preferable for the architecture of the MIS financial requirements to be set out clearly in the primary legislation or regulations, rather than by way of ad-hoc ASIC instruments, with details that may need to change from time to time, in the regulations.

Question	*Response*
Question 16: Should the objective of the MIS financial requirements be specified in primary legislation or regulations to provide more clarity about the purpose of the requirements?	For the reasons set out in the Committee's response to Question 15, the Committee's preference is for the MIS financial requirements (and financial requirements for other industry participants) be set out in the primary legislation or regulations. This includes the relevant objectives of the MIS financial requirements.
Question 17: Are any other changes to the framework for determining MIS financial requirements required?	The Committee supports sensibly balanced NTA and other financial requirement obligations that reflect the role of the RE under Chapter 5C. The Committee sees the quantum of those NTA requirements as largely being a matter for policy, but with a view to ensuring the requirements are feasible and fit for purpose without imposing an unreasonable burden on innovation. The key is ensuring clarity and certainty for REs.
Question 18: What would the impacts of the proposal be, including compliance costs?	The Committee notes that while amending the existing framework (including by setting more specific requirements) is likely to initially increase compliance costs for REs, if the new framework is appropriately legislated and provides clear structure and guidance to industry participants, then there is scope for lower ongoing compliance costs as a result of the greater certainty afforded by a well drafted framework.

Proposal 5: Increase ASIC's data collection powers on the retail MIS sector

36. The Financial Services Committee makes the following comments on Proposal 5, in response to the specific questions for consideration:

Question	*Response*
Question 19: Should a new legislative framework be introduced for recurrent collection of data by ASIC on MISs?	The Financial Services Committee supports the increase in ASIC's data collection powers specifically designed to assist ASIC in risk-based supervisory work and fostering the more effective exercise of its existing powers where appropriate. These powers should complement existing data and reporting requirements, to avoid duplication for REs who already submit the relevant information through Australian Prudential Regulation Authority (**APRA**) reporting by superannuation trustees. In this respect, the Financial Services Committee submits that reforms should also promote improved sharing of relevant data between ASIC and APRA, noting the extent to which managed investment schemes underpin the investment options offered by superannuation trustees.

Question	*Response*
Question 20: What types of recurrent data could help to detect risks, including conduct or fund level risks in the retail MIS sector?	Please refer to the response below under question 21 below.
Question 21: What data should be collected about MISs?	Data collection prior to registration of a scheme and on a recurrent basis should provide ASIC with key RE and fund profile information to facilitate identification of early warning indicators or other triggers for risk-based enquiry. This may include data collection on matters such as: • Investment strategy • Asset class level exposures (including as between listed and unlisted sub-classes and by look-through of underlying funds or investment vehicles) • Use of borrowings • Liquidity profile • Valuation frequency and source • Material service providers such as investment managers, investment advisers, custodians and administrators • Related party investments, service providers, expenses, financing • Relevant conflicting duties or interests of directors or officers of the RE in connection with service providers or other counterparties • Funds under management and member numbers • Distribution arrangements We note that only some of these aspects will be known prior to the establishment of the MIS.

Question	*Response*
Question 22: What event notifications should be provided to ASIC? For example, should there be a notification when redemptions are frozen or suspended?	Event notifications should be confined to risk-based notices to supplement recurrent reporting, as opposed to imposing an unnecessarily burdensome update regime. The Financial Services Committee agrees that this should include notification where an event of a material or significant nature causes an RE to freeze or suspend redemptions for more than a limited period (e.g., in excess of 30 days). Materiality tests in this regard, should be prescribed and adopted to prevent such notifications becoming excessively burdensome on REs, or alarmist to investors and the market. Additional matters for notification may include: • Material changes to investment strategy • Material change in liquidity profile or actual redemption timeframes (with permissible timeframe under the constitution also reported) • Material related party transactions (other than investing in a registered MIS, where the responsible entity has previously reported similar inter-funding) It is the Financial Services Committee's recommendation that notifications of this nature should not be viewed as an indication of RE wrongdoing or failure, but instead as a communication of MIS operations for increased transparency.
Question 23: What would the impacts of the proposal be, including compliance costs?	The Financial Services Committee notes that the introduction of an ASIC data collection regime for registered MISs would create additional compliance costs, resourcing and systems development requirements for REs. The Committee emphasises the importance of ensuring that the frequency and scope of the required reporting is commensurate with the need for ASIC to strengthen its oversight to assist in avoiding harm to investors. Additionally, the proposed regime should be progressed in conjunction with defined purpose-specific sharing of data between regulators and consistency in reporting taxonomy. The Financial Services Committee considers that a structured, orderly and well-designed regular data collection process would be easier for REs to manage than ad hoc requests, notices and investigations issued by ASIC seeking large amounts of information within short periods of time for purposes which may not be clear to the recipient (which can place an unanticipated strain on internal resources, often in circumstances where the RE is ultimately not found to have done anything wrong).

Proposal 6: Alerts to ASIC about superannuation switching

37. In the Superannuation Committee's view, three uncertainties limit meaningful consultation on Proposal 6, as follows:

    (a) The purpose of the proposed alert regime is not stated with precision in the Consultation Paper. It is unclear whether the objective is to prevent problematic switching conduct in real time (and so enable regulatory triage and surveillance) or to facilitate enforcement action and prosecution of alleged breaches after the fact. Without clarity of purpose, it is difficult to provide commentary in a way that balances member detriment and the trustee role in a manner that is proportionate and administrable.

    (b) The proposal focuses on the concept of "high risk" switching, but that term is ambiguous and the examples in the Consultation Paper are varied. The problem which is sought to be solved is not clear because the Consultation Paper does not define what is high risk switching. It could refer to switching activity that increases a member's investment risk profile, switching induced by misleading or conflicted advice, patterns suggestive of fraudulent or criminal conduct, or some combination of these. It is also unclear whether:

        - "risk" is to be assessed at the level of an individual member, a cohort, or across a fund's membership;
        - the risk is to member outcomes, regulatory contraventions, market integrity or financial crime; and
        - the assessment is to be objective, subjective or benchmarked against specific indicators.

        Without a precise definition of the targeted conduct, any trustee obligation to identify and alert on "high risk" switching would be inherently uncertain, highly inconsistent across the industry and vulnerable to hindsight bias.

    (c) The proposal does not specify whether the focus of concern is problematic conduct by superannuation trustees, by financial advisers and advice licensees, by promoters and third parties, or by members acting on misinformation or scams. This issue is important because the appropriate alert methodology depends on the entity in question. For example, adviser-related conduct may be most effectively addressed through licensee supervision and existing reportable situation obligations, whereas suspected criminal or fraudulent activity is better channelled through the anti-money laundering and counter-terrorism financing regime. Absent clarity on the target actors, the proposal risks duplicating existing frameworks, blurring accountability and generating low-value reports.

38. As a result, the Superannuation Committee is only able to properly comment on two of the questions for consideration on Proposal 6, as outlined below:

Question	*Response*
Question 24: Would a mandatory alerts regime for superannuation trustees be the most effective means of improving ASIC's visibility of problematic super switching behaviour?	The Consultation Paper does not outline the expected role of superannuation trustees in any proposed alert regime—in particular, it is not clear whether trustees would be expected to be a gatekeeper for high risk switching or merely to facilitate ASIC's identification of "high risk" switching activities. The Superannuation Committee would be concerned if the proposal involved recasting superannuation trustees as gatekeepers for industry-wide switching risks. Trustees are fiduciaries with statutory obligations to act in members' best financial interests, to manage conflicts, and to maintain robust governance, risk and compliance frameworks within their own registrable superannuation entity (**RSE**) businesses. They are not financial system regulators, enforcement agencies or industry surveillance bodies. Placing a duty on trustees to identify and alert ASIC to "high risk" switching would improperly shift to them functions that should properly sit with regulators and law enforcement, and the Superannuation Committee considers that those agencies are better placed to perform given their powers, data holdings and whole-of-market visibility. Further, any such proposal would require trustees to deploy analytical capabilities, behavioural surveillance and data-matching operations that extend well beyond prudent superannuation fund operations. It would likely require the development and maintenance of complex data analytics, together with continuous monitoring of adviser behaviour and third-party activity beyond the trustee's reasonable sphere of control. Such an obligation would be costly, duplicative of regulatory functions, and would expose trustees to material enforcement and litigation risk for judgement calls made in uncertain circumstances—for example, would a trustee who had suspicions of high risk switching be liable if they implemented the switch because they were required to do so by law? A gatekeeper role can be compared to the existing legislative mechanisms in section 912DAB of the Corporations Act which requires Australian financial services (AFS) licensees, including superannuation trustees, to notify ASIC of reportable situations concerning another AFS licensee where the notifying licensee has reasonable grounds to believe that such a situation has arisen. Importantly, this regime does not require trustees to engage in active surveillance or industry-wide data analysis to identify potential reportable situations at large. Rather, it is triggered when the trustee, in the course of operating its business and complying with its own obligations, has reasonable grounds to believe a reportable situation exists. Any proposed alerting obligation that required trustees to themselves identify high risk switching would therefore represent a significantly different and more onerous obligation.

	In addition, there could also be significant challenges for trustees in adopting and implementing this type of gatekeeper role while not breaching the tipping off criminal offences in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth). If the policy objective is to improve regulators' ability to detect and act upon problematic switching patterns, the Superannuation Committee recommends that the Government rely on the APRA established data collection architecture by specifying additional switching-related data elements and indicators under APRA reporting standards. Trustees already report extensive member, product and transaction data to APRA. Augmenting those standards to include standardised, comparable switching metrics would enable APRA, and through appropriate inter-agency arrangements ASIC, to undertake whole-of-system analytics and risk detection without imposing ambiguous, judgement-based alerting duties on individual trustees. This approach would promote consistency, reduce duplication, and leverage APRA's supervisory capabilities.
Question 28: Under a data reporting approach: What data should be reported? Are there existing data or reporting lines which could be leveraged	The Superannuation Committee recommends that the data to be reported should be factual information held by trustees. For example: • Advice fee deductions: Amount, date and name of licensee. • Switching requests from vulnerable cohorts: Name, date of birth, amount and receiving fund details. It would then be the role of ASIC to apply appropriate analytical tools to the data it receives to identify unusual or suspicious activity. Consistent with its comments on Question 24, the Superannuation Committee recommends leveraging the existing APRA reporting regime under the *Financial Sector (Collection of Data) Act 2001* (Cth). This is because superannuation trustees have already invested heavily in developing IT systems to enable compliance with the APRA reporting requirements.

Alternative reforms

39. We acknowledge that Treasury proposes to consult on additional proposals to tackle inappropriate lead generation, creating a safer framework for superannuation switching, and strengthening superannuation trustee governance standards, as well as considering the sustainability of the Compensation Scheme of Last Resort.

40. However, the Financial Services Committee would like to briefly draw to Treasury's attention other possible reforms that could, potentially to a greater extent than some of the proposals in the Consultation Paper, contribute to

providing increased protection for consumers from harms such as arose in the Shield and First Guardian cases:

- **Wholesale client test:** Reforms to this test were supported in submissions to the 2023 Review and the 2024 Parliamentary Joint Committee review of the wholesale investor test, including from the legal profession and many parts of the financial services industry. Reforms to the test could be revisited in the context of other changes currently under consideration.
- **Design and distribution obligations (DDO):** It may be questioned whether the scope of the DDO regime could be expanded.
- **Product disclosure:** Behavioural science research has shown that disclosure documents are generally not read by investors, so do not serve the consumer protection function they were intended to have. Although the original intention of a target market determination was as an internal document between the issuer and distributor, typically REs ask investors to read them. With only minor reforms, their purpose could be redirected to a consumer-facing document, and their "traffic light" system (reinstating the amber) used as a simple warning system for investors by colour-coding product lists.
- **Licensing:** The grant of an AFSL to a prospective RE is a limited form of gatekeeping and operates in a similar way to the application to register a scheme. In neither case does ASIC have power to refuse the application if the documents lodged and other specific requirements comply with the law. Providing ASIC with power to refuse licensing or registration in very limited and clearly defined cases of proposed products or business models that would clearly not be suitable for retail investors could be considered, although any such proposal would require extensive consultation so as not to stifle appropriate innovation.
- **Simplification**. As noted by the Australian Law Reform Commission in its Report 144 *Confronting complexity: reforming corporations and financial services legislation*, the current "labyrinthine" complexity of financial services laws makes them difficult to comply with and enforce, and for consumers to understand their rights. As you would be aware, ASIC has initiated a simplification initiative in relation to its processes and documents, and support by Treasury for this through stewardship and reform of complex legislation is essential for real progress in that regard.

41. In suggesting these matters, the Committees commend Treasury for considering the clarity of insight on the question of how collective investments should be regulated in the original CAMAC report that was the foundation for the legislation in Chapter 5C of the Corporations Act.[4]

42. In particular Part 1.2 of that report (Policies and principles) sets a clear framework for thinking on regulation in this space, breaking down the issues into investment risk, institution risk and compliance risk, noting that the laws

[4] Corporations and Markets Advisory Committee, *Collective Investments: Other People's Money* (1 September 1993).

cannot and should not try to eliminate investment risk, observing that "If the law attempted this, it would fail". In the succeeding 33 years, the managed funds sector in Australia has undergone extraordinary growth and many aspects of its operation have changed, but certain fundamental principles have not.

Commentary on the process

43. Consultation on the Consultation Paper officially closed on 27 February 2026. While the Committees are grateful for being allowed a brief extension of time to submit this document, nonetheless they remain of the view that the length of the consultation period was inadequate, and that at the very least the consultation process should have been for a minimum period of four weeks.

44. The Committees consider that rushed processes seldom lead to high quality outcomes and strongly encourage Treasury to take the time to genuinely listen to those stakeholders who have been able to make submissions within the truncated timeframe.

Conclusion

45. The Committees would welcome the opportunity to discuss this submission, and on the concepts canvassed in the Consultation Paper generally with representatives of Treasury. In the first instance, please contact the following representatives, should you have any questions:

    - Joanne Dwyer, Chair of the Superannuation Committee [redacted]; or
    - Celeste Norman, Funds and Wealth Management Lead of the Financial Services Committee [redacted].

Yours sincerely



James Popple
Chief Executive Officer