Law Council
OF AUSTRALIA

Business Law Section

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Regulatory Reform and Implementation
Australian Securities and Investments Commission
GPO Box 9827
MELBOURNE VIC 3001

By email: rri.consultation@asic.gov.au

Dear Sir/Madam

CS 53—Proposed remake of six legislative instruments relating to managed investment schemes

1. This submission on *CS 53 Proposed remake of six legislative instruments relating to managed investment schemes* (the Consultation) is made by the Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**).

2. The Committee thanks the Australian Securities and Investments Commission (**ASIC**) for the opportunity to provide feedback. The Committee notes that the six instruments the subject of the Consultation (together, the **Instruments**) are due to sunset on 1 October 2026, and that ASIC proposes to remake them to continue the relief they provide for a further five years, with only minor and technical changes and the removal of certain transitional provisions.

Key Points

3. The key matters the Committee wishes to bring to ASIC's attention are as follows:

   (a) Where relief provided by an Instrument continues to operate effectively, the Committee supports its continuation. That said, the Committee recommends that that long-standing class relief of this kind is more appropriately reflected in the primary law (the *Corporations Act 2001* (Cth)) or in regulations, rather than being perpetually renewed by sunsetting legislative instrument.[1]

   (b) The Committee considers that the absence of draft remade instruments from the Consultation limits stakeholders' ability to assess the precise effect of the proposed changes, and respectfully suggests this affects the transparency of the process. Similarly, the statement that ASIC proposes to "remove transitional provisions that are no longer necessary" would be considerably more useful if it identified the specific provisions and paragraphs affected in each Instrument.

[1] A clear objective of the sunsetting regime is to ensure parliamentary oversight.

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(c) The Committee is concerned that the proposal to remove section 6 of *ASIC Corporations (Attribution Managed Investment Trusts) Instrument 2016/489* may be misconceived, because registered schemes that are not presently attribution managed investment trusts (**AMITs**) may wish to elect into the AMIT regime in the future and would, at that time, require a mechanism to modify their constitutions.

(d) All regulatory guides and ASIC website material referring to the 2016 Instruments should be updated once the remade 2026 instruments come into effect, so that all related materials remain accurate and consistent.

Submissions

General observations applicable to all six Instruments

Continuation of effective relief, and the case for locating it in the substantive law

4. The Committee supports the continuation of relief under each Instrument to the extent that the relief continues to operate effectively and remains a necessary and useful part of the legislative framework. The Committee agrees with ASIC's assessment that the Instruments continue to perform that function.

5. The Committee observes, however, that several of the Instruments provide relief that has been in place in substantially the same form for a considerable period, in each case continuing relief previously provided by earlier ASIC class orders. Where relief of this nature is settled, well understood and operating effectively, the Committee considers there is merit in Treasury and ASIC giving consideration to whether the exemptions are more appropriately reflected in the Corporations Act 2001 (Cth) or the *Corporations Regulations 2001* (Cth), rather than continuing indefinitely as relief that must be remade each time it approaches its sunsetting date. Locating settled relief in the substantive law would improve accessibility and certainty for affected parties and reduce the recurring regulatory burden of the sunsetting and remaking cycle. The Committee acknowledges that this is a matter for Government as much as for ASIC.

Absence of draft instruments and transparency

6. The Committee respectfully submits that the absence of draft remade instruments from the Consultation materials limits stakeholders' ability to provide fully informed feedback. The Consultation states that, aside from minor and technical changes to improve clarity and consistency, the content of the Instruments is proposed to be left largely unchanged. Whether a change is properly characterised as "minor and technical" is, however, a matter that stakeholders can only assess by reference to the actual drafting. Providing the draft instruments, or a marked-up comparison against the existing Instruments, would materially improve the transparency of the process and the quality of feedback ASIC receives.

Identification of transitional provisions proposed to be removed

7. The Consultation states that, "[w]here relevant, we are proposing to remove transitional provisions that are no longer necessary". The Committee considers that this statement, expressed at that level of generality, does not provide stakeholders

with sufficient context to assess the proposal. The Committee suggests that ASIC identify, for each Instrument, the specific provisions and paragraphs proposed to be removed, so that stakeholders can confirm that the provisions are in fact spent and that their removal has no unintended consequences. The only transitional provision presently identified in the Consultation is section 6 of the AMIT Instrument, which the Committee addresses below, and which the Committee does not consider to be merely transitional.

Consequential updates to regulatory guides and ASIC materials

8. A number of ASIC regulatory guides, information sheets and website pages refer to the Instruments by their current (2016) citations. If the Instruments are remade with new (2026) citations, the Committee recommends that ASIC review and update all such materials at the time the remade instruments come into effect, so that cross-references remain accurate and the regulated population is not directed to repealed instruments. The principal regulatory guides affected appear to include, but are not limited to:

   (a) Regulatory Guide 87 *Charitable investment fundraising and school enrolment deposits* (RG 87), which addresses both the Charitable Investment Fundraising Instrument and the School Enrolment Deposits Instrument;

   (b) Regulatory Guide 91 *Horse breeding schemes and horse racing syndicates* (RG 91), which addresses the Horse Schemes Instrument;

   (c) Regulatory Guide 140 *Strata schemes and management rights schemes* (RG 140), which addresses the Serviced Apartment and Property Rental Schemes Instruments; and

   (d) Regulatory Guide 134 *Funds management: Constitutions* (RG 134), relevant to the AMIT Instrument addressed below.

ASIC Corporations (Serviced Apartment and Like Schemes) Instrument 2016/869 and ASIC Corporations (Property Rental Schemes) Instrument 2016/870

9. The Committee understands that ASIC proposes to consolidate these two instruments into a single instrument. Instrument 2016/869 provides managed investment, licensing, hawking and disclosure relief in relation to strata schemes and management rights schemes; Instrument 2016/870 provides analogous relief in relation to property rental schemes.

10. The Committee does not object in principle to the consolidation, provided it is genuinely a matter of form and does not alter the substance or scope of the relief presently available under either instrument. The Committee notes that the two instruments, while both concerned with property-related arrangements, address distinct factual arrangements and confer relief defined by reference to different concepts. Consolidation carries a risk that definitions or conditions expressed differently in each instrument are harmonised in a way that inadvertently narrows or broadens the relief. The Committee reiterates its recommendation that the draft consolidated instrument be made available so that stakeholders can confirm that the relief available to each category of scheme is preserved without unintended change.

ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813

11. This instrument grants conditional relief to charitable investment fundraisers from the fundraising, managed investment scheme and debenture provisions of the Corporations Act, and provides licensing exemptions where a charitable investment fundraiser qualifies as a wholesale charitable investment fundraiser. The Committee supports the continuation of this relief, which supports the activities of the charitable and not-for-profit sector. The Committee notes that the relief was developed in consultation with the Australian Prudential Regulation Authority (**APRA**), and that some charitable investment fundraisers are religious charitable development funds that rely on APRA's exemption from the *Banking Act 1959* (Cth). Given that interaction, the Committee recommends that any changes to this instrument continue to be made consistently with the APRA framework, so that no inadvertent inconsistency arises between the two regimes.

12. Given the material reliance the charitable sector is likely to place on this relief, the Committee considers continuity to be particularly important, and recommends that any "minor and technical" changes be confirmed as not affecting the conditions on which charitable investment fundraisers presently rely.

ASIC Corporations (School Enrolment Deposits) Instrument 2016/812

13. This instrument exempts schools that require enrolment deposits from certain managed investment scheme registration requirements, and from specified disclosure, fundraising and licensing obligations under the Corporations Act. The Committee supports the continuation of this relief. The arrangements to which it applies are well understood, of long standing, and the relief avoids the disproportionate application of the managed investment scheme and fundraising regimes to ordinary school enrolment deposit arrangements.

ASIC Corporations (Horse Schemes) Instrument 2016/790

14. This instrument provides conditional relief to promoters and managers of small-scale horse racing syndicates from the requirement to register the syndicate as a managed investment scheme, and establishes co-regulatory arrangements between ASIC and horse racing governing bodies. It also provides exemptions from scheme registration, licensing, product disclosure and hawking provisions for operators of certain small-scale, private horse breeding schemes. The Committee supports the continuation of this relief.

15. ASIC has invited feedback on two specific matters in relation to this instrument:

    (a) whether the relief is fit for purpose and whether it can be amended to reduce complexity or compliance burdens while maintaining appropriate consumer protections; and

    (b) whether the key thresholds in the relief are appropriate, particularly the limits on the amount that may be raised from the issue of interests in a horse racing syndicate, and the number of participants in the syndicate, for the purposes of section 5 of the instrument.

16. Consistent with its usual practice, the Committee does not ordinarily comment on the merits of policy, and considers that the appropriateness of the section 5 thresholds (including the monetary limit on amounts raised and the cap on participant numbers) is a question best informed by the experience of industry participants and the relevant racing governing bodies, who are better placed than the Committee to assess the practical operation of those thresholds. The Committee therefore defers to industry and the co-regulatory bodies on the calibration of the thresholds.

17. The Committee makes one observation of a legal and structural character. To the extent that ASIC is minded to amend the thresholds to reduce complexity or compliance burden, the Committee suggests that any such amendment preserve the clarity and certainty of the existing bright-line tests, and that the co-regulatory framework with the racing governing bodies be maintained, as that framework is integral to the consumer-protection rationale for the relief.

ASIC Corporations (Attribution Managed Investment Trusts) Instrument 2016/489

18. This instrument provides relief to responsible entities to address issues arising in implementing the tax system for attribution managed investment trusts (**AMITs**). In summary, section 5 exempts a responsible entity from the duty to treat members holding interests of the same class equally when making an attribution in accordance with the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**); and section 6 modifies the Corporations Act to provide an additional method by which a responsible entity may modify (or repeal and replace) the scheme's constitution to the extent reasonably necessary or incidental to the scheme being operated as an AMIT in accordance with the ITAA 1997. The Committee supports the continuation of the section 5 relief.

19. ASIC proposes to remove the relief in section 6 on the basis that it was intended to assist responsible entities transitioning to the AMIT regime, and that sufficient time has passed since that regime was introduced. The Committee respectfully submits that this characterisation may be too narrow, and that the rationale for removal of section 6 may be misconceived, for the following reasons.

    (a) Election into the AMIT regime is ongoing in nature, not a one-off transitional event. The AMIT regime is elective. While there was understandably a concentration of constitutional amendments at the time the regime commenced, the population of registered schemes is not static. The responsible entity of a registered scheme that is not presently an AMIT (including a scheme established after the commencement of the regime, or a scheme that did not previously qualify or elect) may determine that the scheme is eligible to, and should become an AMIT in the future. Such a scheme would, at that future point, need to amend its constitution to satisfy the AMIT requirements.

    (b) The mechanism in section 6 addresses a continuing need and is not merely a transitional one. Section 601GC of the Corporations Act provides two methods for changing the constitution of a registered scheme (i.e., by special resolution of members or by the responsible entity if it reasonably considers the change will not adversely affect members' rights). A change made to enable a scheme to operate as an AMIT may not be one that the responsible entity can be satisfied will not adversely affect members' rights, with the consequence that

the second method may be unavailable and the responsible entity may be left to the special-resolution method, which is comparatively costly and uncertain. The notional section 601GCA inserted by section 6 provides a third, tailored method (subject to member-protection safeguards) and applies even where the constitution otherwise restricts the methods of amendment. That tailored method responds to a need that is not confined to the "transition" to the AMIT regime at the time of the AMIT regime's commencement, as it applies equally to a scheme electing into the AMIT regime today or in the future.

(c) Removal of section 6 may create a barrier to, or confusion regarding AMIT adoption or election. If section 6 is removed, a registered scheme wishing to elect into the AMIT regime after the remake of the AMIT Instrument may face a more onerous constitutional-amendment process than schemes that transitioned earlier. That outcome would be inconsistent with the policy objectives underlying the AMIT regime, which include facilitating its take-up across eligible managed investment trusts, and would create an arbitrary distinction based on the timing of a scheme's election.

(d) The AMIT election is not subject to any closing date. A trust is an AMIT for an income year where, relevantly, it is a managed investment trust in relation to that income year, the rights to income and capital arising from each membership interest are clearly defined at all times when the trust is in existence in the income year, and the trustee has made a choice for the trust to be an AMIT in respect of that income year (or the trust was an AMIT for an earlier income year). That choice, once made, cannot be revoked, but there is no date by which an eligible trust must make it. Accordingly, a registered scheme may first satisfy the eligibility requirements and elect to become an AMIT well after the regime's 2016 commencement—for example, where the scheme is established, or first becomes a managed investment trust, or first satisfies the clearly-defined-rights requirement, only at a later time. The constitution of such a registered scheme may require modification at that later time to enable it to be operated as an AMIT. The continuing availability of the election, unconstrained by any deadline, confirms that the constitutional-modification mechanism in section 6 addresses a continuing need rather than a purely transitional one.

(e) For these reasons, the Committee recommends that ASIC retain the relief in section 6 of the AMIT Instrument in the remade instrument. If ASIC nonetheless considers that the relief in section 6 should not continue in its present form, the Committee recommends that ASIC consult specifically on that point, supported by an explanation of how a registered scheme electing into the AMIT regime after the remake would be expected to effect the necessary constitutional changes.

Conclusion and further contact

20. The Committee would welcome the opportunity to discuss any aspect of this submission with ASIC.

21. Please contact Ms Pip Bell, Executive Liaison for the Financial Services Committee [redacted], or Ms Celeste Norman, Funds, Wealth and Consumer Lead of the Financial Services Committee of the Business Law Section [redacted].

Yours sincerely



Adrian Varrasso
Chair, Business Law Section