Law Council
OF AUSTRALIA

Business Law Section

3 September 2025

Ms Kate Metz
Senior Executive Leader, Regulatory Reform and Implementation
Australian Securities and Investments Commission
GPO Box 9827
Melbourne VIC 3001

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

Dear Ms Metz

Consultation Statement 27 *Proposed remake of relief instrument for managed investment product consideration* (**CS 27**)

1. This submission has been prepared by the Financial Services Committee and the Corporations Committee (the **Committees**) of the Business Law Section within the Law Council of Australia in response to CS 27, which was released by the Australian Securities and Investments Commission (**ASIC**) on 5 August 2025.

2. The Committees thank ASIC for the opportunity to provide feedback on the proposal contained in CS 27 and for granting a short extension of time to provide a response.

Background

3. *ASIC Corporations (Managed Investment Product Consideration Instrument 2015/847* (the **Instrument**) modifies the application of certain provisions of the *Corporations Act 2001* (Cth) for managed investment schemes that were registered with ASIC prior to 1 October 2013.

4. The Instrument succeeded ASIC Class Order [CO 05/26] *Constitutional provisions about the consideration to acquire interests*, which was formulated based upon ASIC's interpretation of the meaning of "adequate provision" in sections 601GA(1)(a) and 601GA(4) with respect to constitutional provisions about the consideration to acquire an interest in a registered managed investment scheme and withdrawals, respectively. In the absence of such relief, based upon ASIC's interpretation of "adequate provision", responsible entities of registered schemes would be unable to lawfully exercise certain pricing discretions which are widely recognised as forming an important part of the day-to-day operation of registered schemes.

5. The Instrument applies to responsible entities of registered schemes, other than time-sharing schemes, which were registered with ASIC before 1 October 2013, and have not opted in to rely on *ASIC Corporations (Discretions for Setting the Issue Price and Withdrawal Price of Interests in Managed Investment Schemes)*

Instrument 2023/693 (the **2023 Instrument**) by meeting the relevant requirements of that legislative instrument.

6. ASIC estimates that there could be 1762 registered schemes in respect of which the responsible entity currently relies on the Instrument.

7. Schemes that were registered with ASIC after 30 September 2013 have the benefit of a different form of relief, which was initially made in Class Order [CO 13/655] *Provisions about the amount of consideration to acquire interests and withdrawal amounts*, which was succeeded by the 2023 Instrument.

8. In CS 27, ASIC states that it has assessed that the Instrument is operating effectively and efficiently and continues to form a necessary and useful part of the legislative framework. ASIC is therefore proposing to remake the instrument with minor changes, which are designed to:

    (a) simplify the requirements to document exercises of discretion affecting the pricing of interests;

    (b) reduce the level of prescription in those documentation provisions; and

    (c) ensure the instrument is in line with ASIC's current drafting style.

Summary of submission

9. The Committees note that ASIC's interpretation of "adequate provision" has been a longstanding source of contention with the managed funds industry. On the assumption that ASIC is not open to revisiting its interpretation, the Committees are supportive in principle of the proposal in CS 27.

10. However, the Committees are concerned about the lack of detail and transparency in ASIC's consultation process and believes that ASIC should be consulting on the end result of its proposal rather than an expression of a high-level concept.

11. The Committees also invite ASIC to reconsider the obligation under the 2023 Instrument for responsible entities of schemes registered before 1 October 2013 seeking to rely on the 2023 Instrument to "publish and maintain" on their website a notice that they are relying on the 2023 Instrument. They do not believe this requirement produces a strong regulatory benefit.

Submissions

General observation

12. The Committees wish to express the following concerns about the CS 27 consultation process:

    (a) ASIC has not articulated which provisions of the Corporations Act the Instrument grants relief from or explained what it is about those provisions that prevents the exercise of pricing discretions by the responsible entity; and

    (b) ASIC has described its proposal to make changes to the Instrument only in an abstract manner without providing any accompanying draft legislative instrument or explanatory statement.

13. This necessarily means that only stakeholders who are familiar with the policy history are in a position to meaningfully respond to CS 27 without having to look at other extrinsic ASIC legislative instruments and supporting materials. The Committees consider that a more comprehensive and transparent approach should ideally have been adopted.

Committees' position on the proposal

14. The Committees note that the necessity of the relief contained in the Instrument is predicated upon ASIC's interpretation of "adequate provision" in sections 601GA(1)(a) and 601GA(4), which has long been contested by the managed funds industry on the basis that it is unnecessarily narrow and inflexible.

15. Assuming that ASIC is not prepared to reconsider its interpretation of "adequate provision" then, as a matter of principle, the Committees agree that ASIC should remake the Instrument to provide certainty for responsible entities of registered schemes who currently rely on it. The Committees believe there are responsible entities who rely on the Instrument and that for some responsible entities it may not be practicable to transition to reliance on the 2023 Instrument (for example, a meeting of members may need to be held to approve changes to the scheme constitution, the costs of which would likely be borne by the members).

16. At a high level, the Committees support ASIC's proposal to make the requirements of the Instrument governing the documentation of exercises of discretions less onerous and more aligned with the 2023 Instrument.

17. The Financial Services Committee does not believe there should be any unnecessary distinction in regulatory treatment among registered schemes based purely on the point in time at which they were registered with ASIC.

18. However, without having the opportunity to review a draft legislative instrument, the Committees are not in a position to understand the detail of the proposal or properly assess whether the proposal would be likely to succeed in addressing its stated objective.

19. As noted above, the Committees believe there is room for improvement in this consultation process.

Issues with transitioning to the 2023 Instrument

20. The Committees note that, under notional section 601GAG of the Corporations Act, inserted by the 2023 Instrument, the responsible entity of a scheme registered before 1 October 2013 who wishes to rely on the 2023 Instrument rather than the Instrument must "publish and maintain" a notice on its website to the effect that it is relying on the 2023 Instrument.

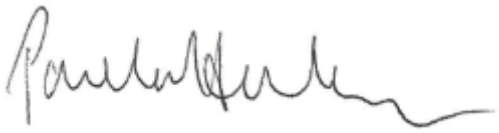
21. The Committees question whether this obligation is reasonably necessary or sufficiently useful. Whether or not a responsible entity relies on the Instrument or the 2023 Instrument with respect to a particular registered scheme, the Product Disclosure Statement under which interests in the scheme are offered must tell prospective members that the responsible entity has a policy with respect to its exercise of pricing discretions and that this can be made available to them on request. The Committees consider this to be sufficient disclosure to prospective investors and queries whether a typical retail investor would gain any material benefit or understanding from a website statement that makes reference to the responsible entity's reliance on an ASIC legislative instrument which is unlikely to be understood or meaningful to the investor.

22. The Committees submit that dispensing with this requirement would be consistent with the promotion of regulatory simplification, which is one of ASIC's current key focus areas.

Conclusion

23. The Committees would be pleased to further engage with ASIC on the matters raised in this submission. Please contact Financial Services Committee Co-Chair Pip Bell [redacted] and/or Corporations Committee Chair Philippa Stone [redacted], as appropriate.

Yours faithfully



Professor Pamela Hanrahan
Chair
Business Law Section