Compliance

3.1 Introduction

Under the MIA, a registered managed investment scheme must have a compliance plan, setting out the measures that the RE is to apply to ensure the operation of the scheme complies with the Corporations Act and the scheme's constitution.[1] There is also a requirement that the compliance plan be audited.[2] The role of monitoring the RE's adherence to the compliance plan rests with its board, where that board has a majority of external directors.[3] Where this is not the case, a compliance committee must be established to undertake compliance monitoring. If a compliance committee is used, it must have at least three members, the majority of which must be external members.[4] Compliance committees are required to regularly assess the adequacy of the compliance plan, and are also required to report to the RE breaches of the Corporations Act or the scheme's constitution, and report to ASIC if those breaches are not adequately addressed by the RE.[5]

There was a broad range of opinion in the submissions on the effectiveness of the compliance arrangements under the MIA. While REs themselves have argued that there has been an increased focus on compliance under the MIA, this has also been observed by others involved in the managed investment industry, with many claiming that the compliance 'culture' has improved with the introduction of the MIA.[6]

However, the degree of compliance under the MIA regime has received some criticism. These criticisms include allegations that the compliance plan audit is an 'after-the-event' process, which does not materially add to investor protection, given the existing safeguards of a majority independent board or a

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1 Section 601HA.
2 Section 601HG.
3 External director is defined in subsection 601JA(2).
4 External member is defined in subsection 601JB(2).
5 Section 601JC.
6 For example, Ernst & Young and Paul Dortkamp.

compliance committee monitoring compliance.[7] The 'after-the-event' nature of audit and regulatory checking was also highlighted as a more general failing of the MIA's compliance arrangements.[8]

3.2 Compliance to date under the MIA

While it is not possible for a compliance regime, however strict, to totally eliminate breaches of the legislation or a scheme's constitution, it is encouraging that a number of submissions affirmed the increasing profile of the compliance function within REs. However, because regulatory surveillance of compliance was not conducted prior to the MIA, it is not possible to point to survey data that indicate an improvement (or deterioration) in compliance. That said, ASIC's Information Release on 2000-01 surveillance outcomes[9] indicates that there is still room for improvement in compliance practices, particularly among smaller participants in the industry. ASIC's survey resulted in remedial action being taken against 69 of the 83 REs surveyed, including revocation of dealer's licences in four cases.[10]

In commenting on these statistics, ASIC noted that the commitment shown by senior management to the compliance process, and the standard of compliance reporting, required considerable improvement in many REs.

However, against this background it needs to be appreciated that ASIC's surveillances were 'targetted', with the majority being conducted in those areas where ASIC anticipated there would be compliance problems. The statistics show that small schemes (defined by ASIC as those with less than $50 million under management) accounted for well over half of the number surveyed. Within this category, there was a particular focus on mortgage and agricultural schemes.

It also warrants noting that the 2000-01 financial year was the first year that the MIA regime had been in full effect, following the two-year transitional period to the new arrangements. Therefore, it is likely that a number of participants in the industry were still coming to grips with the new compliance requirements. Improvement in compliance could be expected as participants

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7 Freehills.
8 Trustee Corporations Association of Australia.
9 IR 01/09, *2000-2001 Surveillance Outcomes for Responsible Entities*, 1 August 2001.
10 REs must have a dealer's licence in order to operate a managed investment scheme.

gain more experience with the process and compliance procedures are further developed.

Nevertheless, there are areas where it is considered that the compliance arrangements can be strengthened, and these are set out in the following sections.

3.3 The compliance committee

3.3.1 Qualifications and experience of compliance committee members

One perceived weakness of the compliance arrangements raised in submissions was the lack of minimum standards or 'benchmarks' regarding the qualifications and/or experience of compliance committee members.[11] At present, as long as a majority of members of the compliance committee are external, there are no further requirements to determine whether committee members have the requisite competence and skill to carry out their duties as required under the legislation.

It is acknowledged that bodies such as the Independent Compliance Committee Members' Forum (ICCMF), which was established specifically for the purposes of the MIA, and the Association of Compliance Professionals of Australia (ACPA), which deals with compliance issues more generally, have increased the awareness and understanding among compliance committee members of their role and responsibilities. These bodies provide a useful service by facilitating the exchange of views among the compliance fraternity.

However, there is some concern that the membership and audience of these bodies is concentrated primarily at the more sophisticated end of the managed investment industry. To a large degree, this is a natural consequence of the location of REs and the managed investment schemes they operate. That is, the more sophisticated REs are generally based in capital cities, making it more convenient for compliance committee members to participate in activities organised by the ICCMF and ACPA. Therefore, these compliance committee members gain the benefit of networking with others in the industry to a greater degree than members from more remote locations.

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11 Freehills.

Thus there is evidence that the 'pool' of people with the appropriate skills to serve on a compliance committee may be somewhat restricted in certain parts of the industry. In any event, it is considered that a case exists for some form of standards to be developed across the whole managed investment industry, to ensure that compliance committee members have knowledge and skills appropriate to the type of managed investment scheme(s) with which they are associated.

It is not intended that standards be prescribed in legislation. It is likely that qualifications and experience requirements will vary depending on the nature of schemes. For example, the skills required of a compliance committee member for an agricultural scheme may differ from those required for a scheme investing in financial assets.

To provide the necessary flexibility, it would be preferable for the standards to be developed cooperatively through consultation between ASIC and the industry. This consultation should also determine the appropriate mechanism to impose the standards. For instance, they could be prescribed by way of a condition on the licence of a RE to operate a managed investment scheme, or be developed as an ASIC Policy Statement.

Recommendation 10

Standards should be developed relating to the qualifications and experience required by compliance committee members. This should be effected through consultation between ASIC and the industry, and draw on existing work of bodies such as the ICCMF and ACPA.

3.3.2 Appointment, removal and retirement of compliance committee members

Currently, there is no requirement for REs to notify ASIC when they appoint or remove a member of a compliance committee, or when a committee member retires. It was argued in one submission that this is a factor which adds to the insecurity of tenure of those members, and thereby may compromise their independence.[12] Another submission suggested that the introduction of rules governing the appointment and dismissal of compliance

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12 Trust Company of Australia Limited.

committee members would increase the likelihood that those members will act upon breaches of the constitution and the Corporations Act, as required under section 601JC.[13] While not necessarily endorsing these views, it is considered important that ASIC and scheme members are made aware of the identity of compliance committee members, and are informed when those members are being appointed or removed, or when they retire.

This would provide ASIC with an additional tool in targetting its compliance surveillance. For example, if compliance committee members were continually being replaced by a RE, this may be a factor indicating tension between the compliance committee and the RE in relation to the operation of the scheme, which might warrant further examination by ASIC.

The requirement to notify ASIC could be based on existing requirements in the Corporations Act relating to notification of the appointment, removal or resignation of directors of a company.[14]

Knowledge of the identity of compliance committee members, and changes to the composition of the committee, would also be useful information for scheme members. Having said that, it is recognised that there are costs involved in notifying scheme members, particularly in large schemes, and that notification every time the membership of a committee changes would be impractical. Therefore, it is considered sufficient if scheme members are notified of changes to compliance committee membership on a yearly basis. This notification could be incorporated within the scheme's annual report.

Another means of more widely publicising the identity of compliance committee members would be for their names to be accessible on the ASIC website. The feasibility of this option should be investigated.

ASIC has noted that there would be a cost to 'build' the capability to enable such information to be available on its website and it would result in ASIC forgoing fees, especially if other information relating to schemes, such as copies of scheme compliance plans and constitutions (currently available at a cost) were also made freely available. In this regard, ASIC has also noted that information relating to company directors is currently not available free of cost, and has posed the question whether more 'free' information should be

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13 Freehills.
14 Sections 201L and 205B.

available on managed schemes than on corporations. Such a question begs a wider, but more significant one — should there, in the Internet age, be any charge for accessing corporate and similar information filed with ASIC?

Recommendation 11

ASIC, and members of a managed investment scheme, should be made aware of the identity of compliance committee members. To this end, REs should be required to inform ASIC and scheme members of the current composition of compliance committees, and when members of a compliance committee are appointed or removed, or when they retire.

Notification to ASIC should be based on existing requirements relating to company directors. In the case of notifying members, it would be acceptable for the annual report to disclose any changes to the membership of the compliance committee that have occurred since the last report.

Going beyond mere notification, should ASIC have formal powers in relation to the appointment or removal of compliance committee members? In respect of the appointment of members, while recognising that little information about compliance committee membership is currently in the public domain, it is not considered that there is sufficient evidence of inappropriate appointments being made to warrant giving ASIC the power to formally approve appointments. In any event, the development of standards relating to qualifications and experience (Recommendation 10) will provide informal appointment criteria.

There is arguably a stronger case for ASIC to have power to remove a member of a compliance committee, where it is not appropriate for that person to continue to serve on the committee. This might arise, for example, where it becomes apparent in the course of a scheme surveillance by ASIC that a member of a compliance committee has failed to carry out his or her statutory duties effectively.

This failure may be because the person is not actively participating in the work of the committee, which may in turn be due to inexperience or lack of qualifications (although published standards should reduce the likelihood of this). A case for removal might also arise where a compliance committee member has been convicted of an offence, the nature of which would make it

inappropriate for the person to continue to serve on a compliance committee, regardless of his or her qualifications or experience.

As a general rule, the RE itself should take action where it becomes aware that a compliance committee member is not adequately performing his or her duties, or where it is otherwise inappropriate for that person to continue to serve on the compliance committee. However, giving a power to ASIC to act in such cases will provide an added incentive for the RE to be vigilant in ensuring the compliance committee membership is appropriate at all times.

It is recognised that removal of a compliance committee member by ASIC has the potential to adversely affect the person's standing in the business community and his or her reputation more generally. Given this, persons subject to a decision by ASIC to remove them from a compliance committee should have the right to apply for a review of the decision by the Administrative Appeals Tribunal.[15]

Recommendation 12

ASIC should have the power to remove a person from a compliance committee where ASIC forms the view that the person is not adequately performing the duties required of a compliance committee member, or where it is otherwise inappropriate for the person to continue to serve on the committee. The power should cover not only temporary suspension, but also permanent banning, subject to ASIC's decision being administratively reviewable.

3.3.3 Non-individual members on the compliance committee

A number of submissions suggested that an external corporate entity should be allowed either to sit on a compliance committee, or to assume the full compliance monitoring function.[16] Some suggested that an external compliance entity should be mandatory, while others put it forward as an alternative to maintaining a board with a majority of external directors, or a compliance committee made up of individuals.

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15 Part 9.4A of the Corporations Act provides for review of ASIC decisions by the AAT, including decisions made under the managed investment provisions in Chapter 5C.

16 Minter Ellison, Trust Company of Australia Limited, Trustee Corporations Association of Australia, and Law Council of Australia.

As discussed previously, at what might be called the more sophisticated end of the managed investment industry, there appears to be a sufficiently large pool of appropriately experienced and qualified people available to sit on compliance committees. However, this may not be the case for schemes which are rurally or regionally based, such as agricultural schemes and mortgage schemes, which are generally operated by smaller REs. It is possible that if Recommendation 10 relating to the development of standards for compliance committee membership is implemented, the pool of available people in this segment of the industry will diminish further.

In light of this, the proposal to allow the RE to engage an external party, (whether a body corporate or some other entity such as a partnership), to conduct compliance monitoring has some appeal. In particular, it may provide a useful alternative for those smaller REs that currently have difficulty in finding individuals to serve as compliance committee members. However, this proposal raises a number of issues:

- It is likely to be most attractive to smaller, less sophisticated REs and there is a danger that they may effectively outsource their compliance responsibilities, and focus less attention on compliance issues. This would be at odds with the MIA's rationale that the RE takes ultimate responsibility for all aspects of the operation of the scheme, including compliance.

- There is a possibility that a compliance entity which is large relative to the RE may come to dominate the RE. This could similarly undermine the central requirement of the MIA that the RE must operate, and have responsibility for, the scheme. Ultimately, however, the RE would have the power to dismiss the compliance entity.

- It would introduce more complexity into the compliance arrangements, such that there would be three possible compliance structures — a board with a majority of external directors, a compliance committee made up of individuals, or a compliance entity.

- To be effective, certification of the appropriateness of the entity chosen to perform compliance monitoring, in terms of the qualifications and experience of its staff, would be required. In particular, it would be necessary to ensure that the individuals on whose experience and qualifications the entity achieved certification actually undertook the

compliance duties, rather than delegating them to more junior staff lacking the requisite skills.

- It is evident from the surveillance statistics that ASIC has found problems during surveillance visits relating to the implementation of compliance and the monitoring of external service providers. There could be a compounding of problems if a significant part of the compliance function was effectively outsourced.

As discussed in section 3.2, the industry is still adapting to the MIA's compliance arrangements. There is certainly room for improvement but overall it is suggested the trend is in the right direction.

Therefore, at this stage, it does not appear that the level of demand or need for change would outweigh the possible negative effects that could arise as a result of such a significant change to the compliance framework. However, if compliance performance (judged by ASIC's surveillance statistics) does not show sufficient improvement in the next few years, implementation of the proposal to allow REs to engage an external compliance entity at their discretion, would be warranted.

3.3.4 External members of compliance committees

Certain criteria must be met in order for a director of the RE to qualify as an external director, or a person to qualify as an external member of a compliance committee.[17]

Presently, a person is ineligible to be an external director of a RE, or an external compliance committee member, if he or she has a material interest in the RE or a related body corporate. This ineligibility extends to the person's relatives. However, relatives of people who are ineligible for other reasons (for example, because they are employees of the RE or are involved in business dealings with the RE) are not themselves ineligible.

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17 Set out in sections 601JA and 601JB respectively.

It has been suggested[18] that the relatives of any person ineligible to be an external director of a RE or an external member of a compliance committee should themselves be ineligible.

It has also been argued[19] that the ineligibility criterion based on a person's material interest in the RE or a related body corporate would benefit from clear standards as to what constitutes 'material'. It was suggested that materiality could be based on whether a person has an interest with an independently verifiable value exceeding a modest fixed amount.

Another criterion for ineligibility applies to a member of a partnership that is, or has been in the past 2 years, involved in business dealings or in a professional capacity with the RE or a related body corporate. It has been suggested that this unfairly prejudices members of accounting and legal firms, and should be removed.[20]

It is difficult to gauge the impact of these suggested changes, both in terms of their effect on the continuing eligibility of current external directors of REs and external members of compliance committees, and more generally in terms of the appropriate degree of independence from the RE that should be required of such directors and committee members. In view of this, it is not proposed to make a recommendation on these changes. Nevertheless, it is important that further consideration be given to these proposals to ensure that the criteria for external directors and external compliance committee members strike an appropriate balance between the need for independence and the opportunity for appropriately qualified people to serve on the board or compliance committee.

3.4 The board of the responsible entity

The legislation contains requirements in relation to the functions and procedures of the compliance committee, and the duties of compliance committee members. It also prescribes matters that the compliance plan must contain in relation to compliance committee arrangements. However, it contains little guidance relevant to the situation where the RE has a board with

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18 ASIC — part two.
19 ASIC — part two.
20 Freehills.

a majority of external directors that undertakes the compliance-monitoring role.

More particularly, the legislation requires that the compliance plan must contain arrangements for ensuring that the compliance committee functions properly, including adequate arrangements for membership of the committee, how often committee meetings are held, and the committee's reports and recommendations to the RE.[21] ASIC has suggested that similar requirements, to the extent appropriate, be applied to the board of the RE where the board conducts compliance monitoring.

The legislation also sets out the compliance committee's functions, and places specific duties on committee members.[22] While there are also specific duties placed on officers of REs[23] (which includes the board of directors), there is no reference to the functions of the board in its compliance monitoring role.

It is acknowledged that there are other provisions in the Corporations Act of general application to company directors.[24] Nevertheless, it is considered important that directors of a RE that undertake the compliance monitoring function in relation to managed investment schemes give due attention to their responsibilities in this regard. This would be reinforced if there were specific requirements in Chapter 5C.

Certain modifications would need to be made to apply the current provisions relating to the compliance committee to the board of directors of the RE. For example, the compliance committee is required to report to the RE any breaches of the compliance plan. It would be nonsensical for the board of the RE to report to itself. Nevertheless, a requirement for the board to take action to remedy breaches it becomes aware of in its compliance monitoring role should be considered. For example, the Board might be specifically required to document the breach in the minutes of its meeting and specify what follow-up action it plans to take, and the result of that action.

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21 Paragraph 601HA(1)(b).
22 Sections 601JC and 601JD.
23 Section 601FD.
24 For example, Part 2G.1 relating to directors' meetings.

Recommendation 13

The requirements in Chapter 5C covering the content of compliance plans in relation to the compliance committee, and the provisions setting out the functions of the compliance committee, should be applied, with appropriate modifications, to the board of the RE, where there is no compliance committee appointed.

3.5 The compliance plan and scheme constitution

3.5.1 Incorporation of provisions by reference into compliance plans and constitutions

The law currently allows a RE to lodge a compliance plan with ASIC which incorporates certain provisions (as in force at a specified time) of the compliance plan of one of its other schemes.[25] ASIC has modified the operation of this provision such that specified provisions, as they are in force *from time to time*, may also be incorporated by reference.[26] This provides the procedure with more flexibility. ASIC has suggested that the content of this modification be included in the legislation itself, and this is supported.

While the 'incorporation-by-reference' provision has proved useful, it has been suggested that incorporation of provisions by reference be permitted from a 'model' compliance plan, that is, a plan that is not specific to a particular scheme.[27] This would overcome the current limitation on incorporation by reference which, because it is linked to the compliance plan of an existing scheme, means that all schemes referring to that plan need to modify their compliance plans if the existing scheme is terminated.

This proposal would not seem to have any adverse effects for investor protection, but rather is a change that will improve administrative efficiency. However, in implementing such a change, it would be important to ensure that REs continue to monitor compliance on an individual scheme basis, even though they may lodge a model compliance plan. In this regard, a model compliance plan should not be seen as a 'one size fits all' or template plan which is routinely applied to each and every scheme. Rather, it is envisaged

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25 Section 601HB.
26 ASIC Class Order 98/50.
27 Minter Ellison and IFSA.

that the model plan would contain a broad range of provisions from which selections could be made and applied to individual schemes.

The MIA is clearly predicated on compliance being conducted on a scheme-by-scheme basis. The suggested changes should not relieve REs of the obligation to lodge a compliance plan for each scheme they operate. However, those individual plans would be able to incorporate part (or all) of the provisions of a model plan.

Further, any change should not make it more difficult for members of a scheme to gain access to copies of the consolidated compliance plans for the individual scheme(s) they invest in. That is, investors should not have to follow a trail of references through a number of documents or different locations on a website in order to familiarise themselves with a scheme's compliance plan.

Copies of scheme compliance plans may be requested from ASIC, for a fee. However, there is presently no ability for a scheme member to request a copy of the compliance plan from the RE. This is in contrast to scheme constitutions, which members may seek a copy of, on payment of a fee.[28] Members should be provided with a similar right to request a copy of the compliance plan from the RE.

Arguments in support of an 'incorporation-by-reference' provision have also been raised in relation to the scheme constitution.[29] Unlike compliance plans, there is currently no provision in the legislation for a scheme constitution to incorporate provisions from the constitution of another scheme operated by the same RE.

It would seem sensible to extend the incorporation-by-reference provisions to scheme constitutions. Likewise, there may be merit in drafting this provision to allow incorporation from a 'model' constitution. However, this must be subject to the same caveats as mentioned in relation to model compliance plans, namely, that any change should not diminish the RE's responsibility to monitor the appropriateness of constitutions on an individual scheme basis, and members should have access to a consolidated copy of the individual constitutions for the scheme(s) they invest in. In this regard, it would be worthwhile clarifying that the right for members to request a copy from the RE

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28 Subsection 601GC(4).
29 Minter Ellison, IFSA, and Ernst & Young.

of a scheme's constitution under subsection 601GC(4) refers to a consolidated copy.

It is understood that some REs make scheme documents such as compliance plans and constitutions available to members free of charge (for example, on a website). This is to be commended and encouraged as best practice throughout the industry.

Recommendation 14

- Section 601HB, relating to the incorporation of provisions from one scheme compliance plan into another, should be amended to incorporate the changes currently provided for in ASIC Class Order 98/50.
- A provision allowing for the incorporation of provisions from one scheme constitution into another should be inserted into the legislation, along the lines of section 601HB (with the amendment suggested above).
- Incorporation-by-reference provisions should allow for incorporation of provisions from compliance plans and constitutions that do not relate to a particular scheme — that is, 'model' compliance plans and constitutions lodged with ASIC, subject to ensuring that REs continue to monitor the appropriateness and adequacy of compliance plans and constitutions on an individual scheme basis, and scheme members have adequate access to consolidated copies of compliance plans or constitutions.
- Subsection 601GC(4) should specify that members may request and receive a consolidated copy of a scheme's constitution from the RE, and a similar right should be given to members to request and receive a copy of a scheme's compliance plan.

3.5.2 Compliance plan audit

ASIC put forward suggestions for law reform relating to the audit of the compliance plan,[30] including that:

- the auditor of the compliance plan should be required to address the audit report to the members of the scheme, on the basis that the report contains

30 ASIC — part two.

useful information to members, who should be entitled to rely on it — currently the compliance plan auditor is only required to give the audit report to the RE;[31]

- the auditor's opinion should relate to whether the compliance plan was adequate at all times throughout the year, not just as at the last day of the year — there is some uncertainty as to the correct interpretation of the existing provision;[32]

- when a scheme is registered, an audit should be carried out on the compliance plan and lodged with ASIC within a period of, say, 9 months, rather than the period currently provided for under the legislation, which may be up to 21 months from the date of scheme registration;[33]

- an opinion of a registered company auditor that the compliance plan is adequate should be required as part of the documentation accompanying an application to register a scheme;[34] and

- the legislation should clarify that the audit of the compliance plan must focus on 'material' issues. Further guidance on the issue of materiality was also called for in another submission.[35]

These proposals, which ASIC has stressed should be considered as a package of measures, are worthy of further consideration. While they may impact on the costs faced by a RE, they have the potential to substantially enhance investor protection. However, they also affect the liability and duties of auditors of compliance plans, and it is important that auditors be given adequate opportunity to comment on the proposals. It is therefore suggested that these matters be progressed through consultation involving the Treasury, ASIC, the auditing profession and other interested parties.

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31 Subsection 601HG(3).
32 Subparagraph 601HG(3)(c)(ii).
33 The 21 month period comes from a combined reading of subsection 601HG(7), which requires the audit report to be lodged at the same time as the scheme financial statements; section 323D, which provides that the first financial year for a scheme may last for a period up to 18 months from registration; and section 314 and subsection 315(3), which provide that schemes must report to members within 3 months of the end of the financial year.
34 Subsection 601EA(4) lists the documents currently required to accompany an application for scheme registration.
35 Ernst & Young.

It has been argued in one submission that the audit appointment for a compliance plan should be made on a firm, rather than an individual basis, as making the appointment personal to an individual auditor caused difficulties for audit firms in reassigning workloads as and when required.[36] The submission suggested that the prohibition in subsection 601HG(2) against the auditor of the compliance plan also auditing the RE's financial statements be reconsidered — the law currently prohibits the same individual conducting both audits, but does not preclude auditors from the same firm being engaged. In contrast, another submission was somewhat concerned by the fact that the auditor of the RE's financial statements and the compliance plan may come from the same firm.[37]

It is recognised that the current arrangements for audit appointments for the RE's financial statements and the compliance plan are something of a compromise, aimed at providing a measure of independence between the two audits, while not unreasonably preventing the RE from using the same audit firm for both purposes. Despite the arguments (on both sides) mentioned above, it is not felt that there is enough evidence to warrant alteration of the current requirements for audit appointments.

3.6 Other compliance-related matters

3.6.1 Insurance for compliance committee members

The legislation prohibits a RE, or a related body corporate, from paying insurance premiums on behalf of compliance committee members, where the insurance covers the committee member for breaches of his or her duties.[38] According to one submission,[39] there is some uncertainty as to whether this prohibition means that compliance committee members must seek their own insurance, or whether they can be included under the RE's existing insurance policy for directors and officers. If the former interpretation is correct, it is suggested that many potential compliance committee members will be deterred by the high cost of seeking insurance. On the other hand, it is argued that the addition of compliance committee members to the existing directors'

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36 KPMG.
37 Trust Company of Australia Limited.
38 Section 601JG.
39 Paul Dortkamp.

and officers' policy would result in little, if any, increase in the overall premium.

The rationale behind the requirement that REs not pay insurance premiums on behalf of compliance committee members is to reinforce their independence from the RE, and ensure that they are personally responsible for their actions. However, it is appreciated that the cost of seeking insurance may, in some circumstances, discourage suitable people from taking up the position of a compliance committee member.

This issue may require further investigation to determine whether the concerns expressed above are widely held. Therefore, it is suggested that the matter be considered by Treasury and ASIC, in consultation with representatives of compliance committee members.

3.6.2 Policy guidance for compliance committee members

It has been suggested that further policy guidance is required on various issues relating to the compliance committee, including its relationship with the RE and other parties, such as the compliance plan auditor.[40] Examples of such issues include the extent to which the compliance plan auditor should be 'directed' by the compliance committee, as opposed to the RE who actually appoints the auditor.

Although Part 5C.5 sets out the functions of the compliance committee and the duties of its members, and the regulations also contain some requirements concerning the relationship between the compliance committee and the RE,[41] it is acknowledged that there may be issues which require more detailed policy guidance. These issues are unlikely to be amenable to prescription in the legislation itself. It is therefore suggested that consultation take place between ASIC and relevant parties to consider the scope of guidance required, and the best means of providing it — whether by way of ASIC policy statements or some other mechanism.

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40 KPMG (see also Ernst & Young).

41 Regulation 5C.5.01 places obligations on the RE, its officers, agents and officers of agents to assist the compliance committee, for example, by allowing the committee access to books of the scheme.