

Recommendations

Chapter 2: Investor protection

Members' rights to remove and replace the responsible entity

Recommendation 1

Changes of a scheme's RE should be effective only if made in accordance with Division 2 of Part 5C.2, and provisions of a scheme's constitution relating to the removal and replacement of a scheme's RE should not override the legislation in any circumstances.

Recommendation 2

For unlisted schemes, the current requirement for an extraordinary resolution to remove or appoint a RE should be replaced with either (but not both) of the following two alternatives:

- a special resolution (that is, 75 per cent of the votes cast at a meeting); or
- a special resolution with the added requirement that the votes cast in favour of that resolution must constitute at least 25 per cent of the total votes of scheme members.

Further consultation should take place on which of these alternatives would be preferable.

For listed schemes, the legislation should clarify that the appointment or removal of a RE requires an ordinary resolution.

Alternative qualifications for temporary responsible entities

Recommendation 3

Official liquidators should be included as entities which can be temporary REs to widen the pool of suitable candidates and lessen delays in the appointment of temporary REs.

Protection of scheme property

Recommendation 4

ASIC should have administrative powers to make binding orders for the protection of scheme property. ASIC should be able to exercise these powers at any time following the revocation or cancellation of a RE's licence, or the removal of a RE (whether by members or ASIC), and pending the appointment of a temporary RE.

The scheme's constitution

Recommendation 5

ASIC should have powers to:

- amend or remove a constitutional provision; and
- require a provision to be inserted into a constitution,

only to the extent needed to ensure that the constitution would comply with any applicable law.

The legislation should be amended to provide that the constitution of a scheme:

- must not contain a provision that is contrary to or inconsistent with any applicable law; and
- is enforceable (excluding any unlawful provisions) between the members and the RE by virtue of the Corporations Act.

Recommendation 6

Section 601 GA should:

- be clarified to remove any ambiguity pertaining to the payment of fees or a right to an indemnity claimed by a RE. This includes the clear application of 'in relation to the performance of its duties' to both 'rights to be paid fees out of scheme property' and to 'be indemnified out of scheme property for liabilities or expenses incurred';

- expressly prohibit the payment of fees or a right to an indemnity where the timing of payment or the entitlement is linked to a change in the RE;
- ensure that payment of fees or a right to an indemnity cannot be claimed in advance of a RE's proper performance of its duties; and
- exclude any person other than the RE having any right in respect of scheme property or against members for fees or an entitlement to an indemnity for services provided to the scheme.

Members' rights to call general meetings

Recommendation 7

Provision should be made in the legislation for members to request the RE of a registered scheme to call a general meeting. The amendment could be based on section 249D which applies to the calling of general meetings by directors of a company on the request of members.

REs should be required to inform members in their schemes' annual reports of members' rights to requisition meetings.

Voting rights of scheme members

Recommendation 8

ASIC should have a discretion to vary the voting rights of members of schemes where it is intended by the scheme that members' voting rights will not be proportionate to their capital contributions.

- The amendment should be drafted so as to ensure that the protection of scheme members and the ability of the RE to properly perform its duties will not be compromised.

Members' rights to withdraw from schemes

Recommendation 9

The types of contracts which are voidable at the option of the person who acquires an interest in a managed investment scheme should be extended to include contracts involving those sales in section 707 which require disclosure.

Chapter 3: Compliance

Qualifications and experience of compliance committee members

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.

Appointment, removal and retirement of compliance committee members

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.

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.

The board of the responsible entity

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.

Incorporation of provisions by reference into compliance plans and constitutions

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 and 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.

Chapter 4: Costs

Differential fees

Recommendation 15

- The requirement in paragraph 601FC(1)(d) that members holding interests of the same class be treated equally should be replaced with a requirement that such members be treated fairly, in respect of the charging of differential fees, subject to the requirement that investors are provided with adequate disclosure to allow them to compare the effect of differential fee arrangements.
- Further consideration should be given to whether there is also a need for the fairness ‘test’ to be interpreted by reference to some other criterion such as economic justification, and whether any interpretational material supporting the fairness test should be located in legislation or in ASIC policy.

Scheme registration — registering multiple trusts/schemes as a single scheme

Recommendation 16

Section 601ED relating to scheme registration should be amended to provide that where an applicant seeks to register more than one trust or scheme as a single scheme, ASIC may determine in writing that each trust or scheme must be registered separately.

- The explanatory memorandum accompanying this change should make clear that ASIC will exercise this discretion based on the degree of interdependence and economic relationship between the trusts or schemes;
- ASIC should issue policy guidance as to how it will exercise this discretion; and
- ASIC decisions should be subject to review by the Administrative Appeals Tribunal.

Chapter 5: Other law reform proposals

Recommendation 17

The following amendments should be made to the Corporations Act and Regulations:

- Amend subsection 601JB(3) to insert ‘and paragraph 4(a)’ after ‘(2)(a)’;
- Amend subsection 601JB(4) to insert ‘or a related body corporate’ after ‘responsible entity’;
- Extend section 601JE to apply to former compliance committee members;
- Amend section 205G to require disclosure by the directors of a RE of a listed scheme equivalent to disclosure required of directors of a listed company;
- Amend the definition of *managed investment scheme* to exclude class actions and costs paid for legal proceedings;
- Amend the definition of *scheme property* to clarify when property ceases to be scheme property;
- Amend section 115 so that it does not apply to registered managed investment schemes;
- Amend section 349 to impose a requirement that the value of scheme property be disclosed in the annual return, and to remove the requirement to identify the top 20 interest holders, and the total number of interests they hold, so far as it relates to members of IDPS-like schemes or, alternatively provide ASIC with discretion to determine an approved form for the annual return;
- Amend paragraph 601A(1)(a) to resolve the uncertainty regarding its ambit (namely, that it is wide enough to support ASIC’s policy requirement for an independently verifiable price); and
- Incorporate regulations 5C.2.02, 5C.4.01, 5C.4.02, 5C.5.01 and 5C.11.06 (with certain modifications) into Chapter 5C, and repeal regulation 5C.11.05A.