

15 February 2024

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

Proposal to remake managed investment scheme legislative instruments

1. This submission is made by the Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**) and relates to a “News” announcement made by the Australian Securities and Investments Commission (**ASIC**) on 18 January 2024, entitled “ASIC proposes to remake managed investment scheme legislative instruments” (the **Proposal**).
2. The Committee thanks ASIC for providing the opportunity and a reasonable timeframe to comment on the Proposal, which involves ASIC remaking each of the following legislative instruments (which are due to sunset on 1 April 2024) for a period of five years:
 - (a) ASIC Class Order [CO 13/1200] *Periodic statements relief for AQUA quoted and listed managed investment scheme manager*;
 - (b) ASIC Class Order [CO 13/1406] *Land holding for primary production schemes*;
 - (c) ASIC Class Order [CO 13/1409] *Holding assets: Standards for responsible entities*;
 - (d) ASIC Class Order [CO 13/1410] *Holding assets: Standards for providers of custodial and depository services*;
 - (e) ASIC Class Order [CO 13/1621] *Exemption and declaration for the operation of mFund* (the **mFund Instrument**).

Submissions

3. In principle, the Committee agrees with ASIC’s observation that these legislative instruments are “generally operating effectively and efficiently and continue to form a necessary and useful part of the legislative framework”. The Committee also considers it appropriate for ASIC to monitor the appropriateness of these legislative instruments having regard to its regulatory experience, feedback from relevant stakeholders, and outcomes from the Review of the Regulatory Framework for Managed Investment Schemes.

4. However, the Committee notes the Australian Securities Exchange's publicly stated intention to close the mFund Settlement Service with effect from 31 May 2026,¹ and encourages ASIC to consider whether the mFund Instrument might in fact become redundant upon the cessation of the mFund Settlement Service (which would be earlier than the other proposed sunset date of 1 April 2029).
5. The Committee further notes that:
 - (a) the Proposal does not refer to the legislative powers that ASIC exercises to grant relief, or to the relevant provisions of the *Corporations Act 2001* (Cth) which are the subject of such relief;
 - (b) ASIC has not issued a formal consultation paper or provided any draft replacement instruments for stakeholder review and feedback; and
 - (c) ASIC has not included the Proposal under the Consultations section of its website (not doing so makes it difficult for stakeholders to follow matters on which ASIC has engaged in public consultation).
6. For the reasons stated above, the Committee is uncertain whether the process undertaken by ASIC with respect to the Proposal is commensurate with the level of regulatory scrutiny for the review of sunseting legislative instruments that Parliament intended when it enacted the *Legislation Act 2003* (Cth).
7. The Committee believes it would be more appropriate to extend the relevant legislative instruments (with the possible exception of the mFund Instrument) for a period of 10 years rather than five years, and for the instruments to be reviewed with a sufficient level of rigour and genuine inquiry at those 10 yearly intervals.
8. In the event that ASIC proceeds with the Proposal, then the Law Council assumes and expects that ASIC will promptly update all regulatory guides, information sheets and website pages that cross-refer to the current legislative instruments, so that future users will be able to readily navigate the ASIC policy and corresponding relief.

Conclusion and further contact

9. The Committee would be pleased to discuss any aspect of this submission with ASIC.

Yours sincerely

Dr Pamela Hanrahan
Chair
Business Law Section

¹ See <https://www.asx.com.au/markets/trade-our-cash-market/overview/mfund/mfund-wind-down-and-closure>