



SUBMISSION

Consultation – Proposed remake of **ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968**, which is due to expire on 1 October 2026.

The Commission has requested submissions concerning whether **Legislative Instrument 2016/968**:

- should be extended for a further period, and
- if so, should any substantive and/or simplification changes be made to the **policy settings** and **terms of the relief** set out in the **Instrument**?

Submissions – Submissions are due by 5pm (AEST) on Tuesday, 28 April 2026 and are to be sent to IM.sunsettingconsultation@asic.gov.au.

Introduction

1. While there is much to be said for doing little or nothing when remaking the terms of a '*sun-setting*' **Legislative Instrument**, so as to minimise the need to amend the existing '*compliance measures*' in place at '**Retail MDA Providers**', this is not a sufficient excuse for leaving '*inefficient or poorly worded regulation*' untouched.
2. The continuation of '*terms of relief*' generally consistent with those specified currently by **Legislative Instrument 2016/968**, amended to reflect reforms in relation to '**Reportable Situations**', '**Ongoing Fee Arrangements**' and '**Target Market Determinations**', and to accord with the recommendations presented in this Submission, is justified and required on and from 1 October 2026. Doing so will benefit both '**Retail MDA Providers**' and their '**Auditors**'.
3. Since the implementation of the **Financial Services Reform Act**, the **Corporations Act** has made no direct reference, by whatever name, to '**Managed Discretionary Accounts**' or '**Managed Discretionary Account Services**' and has not provided a particular foundation for **Legislative Instrument 2016/968** or its predecessor **Class Order 04/194**. The Commission has built the conditions of its '*regulatory relief*' for '**Retail MDA Services**' from scratch. They are extensive in scope and reflect, for the most part, the logic of the '*regulatory regime*' applying to '**Responsible Entities**', based on the flawed presumption that all '**Retail MDA Services**', however structured, most likely qualify as a '**Managed Investment Scheme**' and, in the absence of '*relief*' and given the participation of '**Retail Clients**', would have to be '*registered*' and operated by a '**Responsible Entity**'. It is also presumed that all '**Retail MDA Services**', however structured, may qualify as a '**Miscellaneous Financial Investment Product**', but no distinct '*terms of relief*' apply in this case. The '*relief*' granted is the same for both categories of '*product*', but the focus of its '*terms*' is on countering the obligations faced by '**Responsible Entities**'. As a consequence, being insufficiently nuanced, it is a blunt **Instrument**, and therefore, by definition, '*inefficient*', and these '*inefficiencies*' are exacerbated by certain additional expectations presented in **Regulatory Guide 179** and the requirements of other relevant **Legislative Instruments**. It is, for instance, **Legislative Instrument 2016/968** which requires the '**FSG/SFSG**' for a '**Retail MDA Service**' to present information in relation to '*fees*' and '*costs*' (in the interests of '*harmonisation*') in accordance with the prescriptions of **Part 2 of Schedule 10** of the Corporations Regulations (as amended by **Legislative Instrument 2019/1070**) and the expectations of **Regulatory Guide 97**.
4. The presumption that all '**Retail MDA Services**', however structured, are most likely to be '**Schemes**' needing '*relief*' from the '*registration*' obligation and having to be operated by a '**Responsible Entity**' (unless the '**Retail MDA Provider**' is a '**Responsible Entity**' and wishes to provide the service in the form of a '**Registered Scheme**') has also been the basis for justifying the '*harmonisation*' of the '*conditions of relief*' with the regulations or '*relief*' applying to '**Responsible Entities**', '**Platforms**' (both '**IDPS-Like Schemes**' and '**IDPS**') and '**Custodial & Depository Services**', in

the interests of *'regulatory neutrality'* and avoiding any incentive for *'regulatory arbitrage'*. This is the root cause of the *'regulatory inefficiencies'* borne by **'Retail MDA Providers'**.

5. The aim must be to correct these *'inefficiencies'* in a manner which causes least impact on the *'compliance measures'* currently in place at **'Retail MDA Providers'**. **Regulatory Guide 179**, which has long needed amendment to qualify its expectations beyond the limits of **Legislative Instrument 2016/968**, should be reviewed at the same time and amended to accord with the reach of the remade **Instrument**.

6. **Regulatory Guide 179** notes the following in relation to the Commission's purposes in relation to the regulation of **'Retail MDA Services'**:

RG 179.5 Our overriding objectives when regulating MDAs are to help promote investor and financial consumer trust and confidence in the provision of MDAs, and to apply the **minimum appropriate regulation** to the provision of MDAs by MDA providers. This is consistent with the framework for the regulation of financial products and services under the Corporations Act.

RG 179.7 Our **regulatory approach seeks to allow for flexibility in the structuring of MDAs** by ensuring that our **requirements for MDA providers are appropriate** and therefore tailored to take into account the nature of the financial products and services involved in providing the MDA.

Our view is that these objectives have not been achieved.

7. **Regulatory Guide 179** also notes the following in relation to the Commission's approach to regulating **'Retail MDA Services'**:

RG 179.19 We have given MDA providers relief in ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968 because they have more limited functions than responsible entities of registered schemes. However, **we generally apply a regulatory approach to MDAs that is similar to our approach to registered schemes to the extent that the transactional and custodial functions undertaken by MDA providers are similar to those of responsible entities.**

Some history

8. Some of us have experienced the evolution of the regulation of **'Retail MDA Services'** since well before the implementation of the **Financial Services Reform Act** (during the period 11 March 2002 to 11 March 2004). **'Managed Discretionary Account Services'** offered by **ASX Market Participants** were, for more than a decade prior, subject to particular **ASX Business/Market Rules**. The Commission issued a *'policy proposal'* concerning **'MDA Services'** in April 2003, which commenced a *'consultation process'*. On 6 January 2004, the Commission announced it had *"...finalised its policy approach to the regulation of managed discretionary account services..."*, which came into effect on 11 March 2004. The Commission granted *'relief'* to the various types of **'MDA Provider'** by means of **Class Order 04/194**, and set a *'transition period'* during which providers had to do certain things, including varying their *'AFS Licence'* to secure the *'financial service/product authorisations'* specified by that **Class Order 04/194**, by 10 December 2004. **'Retail MDA Providers'** had to comply with this **Class Order** in full on and from 11 December 2004. **Policy Statement 179**, which was released on 15 March 2004, mapped the *'transitional arrangements'* and provided *'guidance'* on the *'relief'* presented in **Class Order 04/194**.
9. During 2005 and 2006, the Commission consulted **ASX Market Participants** concerning its **'no action position'** in relation to **'discretionary trading'** on **'family member accounts'**. In 2012, the Commission commenced a review of the **'MDA Sector'**. In March 2013, the Commission released **Consultation Paper 200 (Managed Discretionary Accounts)**. It expected to release its amended **Class Order** and **Regulatory Guide** in April 2014, but in March 2014, the Commission announced it had decided to defer implementation of the changes in the light of the **Financial System Inquiry** and the **Future of Financial Advice Reforms**.
10. The finalisation of **Legislative Instrument 2016/968**, after a lengthy consultation process and some controversy, was rushed and it was released (with *'transitional arrangements'*) mere hours before the *'sun-set'* of **Class Order 04/194**. The rush is evident in its *'poor drafting'* in parts.

Our critique of Legislative Instrument 2016/968 and Regulatory Guide 179

11. **'Retail MDA Services'** do require effective regulation, commensurate with the *'risk'* to the client that is associated with the *'grant'* of discretion to a **'Retail MDA Provider'** in relation to investment matters and the management and control of property.
12. Our critique of **Legislative Instrument 2016/968** and **Regulatory Guide 179** now follows. The issues raised are categorised in one of two ways; those relating to the **'Definitions & Policy Considerations'** (which might be said to be *'Macro-Matters'*) and those relating to **'Procedural**

Over-Reach (*Micro-Matters*). The latter is itself divided into two parts, one of which is dedicated to the scope of *'notional'* Section 912AEC (*Asset-Holding*).

Summary

13. In short, this submission argues in favour of the following amendments to the *'relief'* granted by **Legislative Instrument 2016/968** (and to the *'guidance'* provided by **Regulatory Guide 179**):
- title the remade **Legislative Instrument** *'Retail Managed Discretionary Account Services'*;
 - the references to **'MDA'** in the **'Definitions'** (**Part 1**) should read **'Retail MDA'**;
 - permit other arrangements than simply obliging the **'Retail MDA Provider'** to be authorised to provide **'Custody Services'** if an **'External Retail MDA Custodian'** does not hold each **'MDA Client Portfolio Asset'**;
 - don't necessarily require the involvement of an **'External Retail MDA Custodian'** if the **'Retail MDA Provider'** is not authorised to provide **'Custody Services'**;
 - modify the prohibition against **'Retail MDAs'** holding interests in an **'Unregistered Scheme'** to expressly permit **'Retail MDAs'** to use **'Investor-Directed Portfolio Services'**;
 - modify the **'automatic exclusions'** from the *'relief'* specified in **Part 2** so that they do not necessarily apply universally to the **'Retail MDA Provider'** and to align the **'Breach Reporting'** protection with the current **'Reportable Situation Regime'**;
 - given that **'Retail Personal Advice'** is prescribed in relation to (i.e. embedded in) **'Retail MDA Services'**, confirm that the **'Target Market Determination'** obligations do not apply to a **'Retail MDA Provider'**;
 - modify the obligation to present **'fee'** and **'cost'** information in the **'FSG/SFSG'** in accordance with the format prescribed by **Part 2** of **Schedule 10** of the Corporations Regulations (as modified by **Legislative Instrument 2019/1070**), and align **Regulatory Guides 97** and **179** accordingly;
 - confirm that the exemption from the requirement to provide a **'SoA'** in the case of **'Further Advice'** is available following the annual review of the continuing suitability of the **'Retail MDA Contract/Investment Program'** [it is acknowledged at RG 179.145, but should appear in the remade **Instrument**];
 - remove the references to the **'Fee Disclosure Statements'** in **Regulatory Guide 179**;
 - recognise the extent and utility of the **'Retail MDA Contract'**, **'Retail MDA Reporting'** and **'Retail MDA Review'** obligations and provide *'relief'* from the **'Ongoing Fee Arrangement'** obligations in relation to securing annually the **'Authorisation to Deduct'** or **'Authorisation to Arrange the Deduction'** of **'Ongoing Fees'** unless the **'Payer'** is not the **'Retail MDA Client'**;
 - permit the **'period of notice'** for **'termination'** to extend beyond **'2 Business Days'** in order to allow for a period reasonably necessary to address, in the client's interests, the considerations in play at the time (the **'Retail MDA Contract'** obliges the **'Retail MDA Provider'** to act in the *'best interests'* of the **'Retail MDA Client'** at all times);
 - withdraw the presumption that all **'discretionary trading'** by a **'Representative'** of an **'AFS Licensee'** on behalf of a **'Family Member'** is necessarily a service provided by the **'AFS Licensee'** as part of its **'Financial Services Business'**, and amounts to a **'Retail MDA Service'**, and delete **Sections 13** and **14** of **Part 2**, which grant *'relief'* to **'Market Participants'**. No *'relief'* should be necessary for any *'dealings'* by a **'Representative'** on behalf of **'Family Members'** under a genuine **'personal family arrangement'** at *'arm's length'* from the business of the **'AFS Licensee'**;
 - the **'Financial Requirements'** applying to a **'Retail MDA Provider'** that is *'authorised'* to provide **'Custody Services'** include various **'NTA Requirements'** that should be reworded in the interests of clarity and with the range of likely **'Incidental Providers'** in mind. The possibility of avoiding a **'NTA Requirement'** (legitimately) requires having to identify a **'Provider'**, a **'Sub-Custodian'** of a **'Provider'** or an **'Eligible Custodian'**, in the *'service-chain'*, that is the holder of all the *'financial products'* and *'beneficial interests'* in *'financial products'* to which the **'Custody Services'** provided (i.e. arranged) by the **'Retail MDA Provider'** relate, which is problematic (particularly so if the **'Retail MDA Provider'** is not actually providing or arranging any **'Custody Services'**). **Legislative Instrument 2023/648** should allow the **'Retail MDA Provider'** to qualify as an **'Incidental Provider'** when using a **'Platform'** to facilitate its **'Retail MDA Services'**, where the **'Platform Operator'** is subject to **Legislative Instrument 2023/647**; and

- the **'Asset-Holding Requirements'** for a **'Retail MDA Provider'**, set out in the most lengthy *'notional'* provision in **Part 3**, may be *'harmonised'* with those applying to providers of **'Custody & Nominee Services'**, **'IDPS/IDPS-Like Services'** and **'Responsible Entities'**, but they are unnecessarily prescriptive and intrusive and, in addition to the **'Retail'** exposure and limited scale of **'Retail MDA Funds under Management'**, make securing the involvement of a **'Custodian'** or **'Sub-Custodian'** difficult. They should be *'streamlined'* for **'Retail MDA Providers'** and **Regulatory Guides 132 and 133** *'streamlined'* accordingly

I. DEFINITIONS & POLICY CONSIDERATIONS

The title of '*Legislative Instrument 2016/968*' and '*Regulatory Guide 179*'...

14. Both are titled '*Managed Discretionary Account Services*', but should be titled '*Retail Managed Discretionary Account Services*'. This is not the only instance of the naming of '*guidance*' and '*instruments*' which mislead by purporting to address arrangements which apply in both the '*Retail*' AND '*Wholesale*' contexts.
15. **Legislative Instrument 2016/968** and **Regulatory Guide 179** make it clear that the '*conditions of relief*' are not applicable to an '*Wholesale-Only MDA Service*':

RG 179.9 This guide does not apply to:

- (a) other types of managed investment schemes, such as investor-directed portfolio services (IDPSs) and IDPS-like schemes; and
- (b) MDA services offered only to wholesale clients, as defined in s761G of the Corporations Act (see RG 179.10), other than wholesale clients that are acting under a custodial arrangement.

RG 179.10 We provide relief for MDAs offered or issued to retail clients in ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968.

Note: To benefit from this relief, you must comply with certain conditions and requirements: see RG 179.41–RG 179.42.

RG 179.11 However, if you offer or issue an MDA only to wholesale clients, you do not need to rely on our relief to provide these services because the managed investment scheme provisions in Ch 5C of the Corporations Act and the disclosure requirements in Pt 7.9 of the Corporations Act only apply when financial products and services are offered or issued to retail clients.

Note 1: When we refer to 'MDA client' or 'client' in this guide, we are referring to a retail client unless otherwise specified.

Note 2: Regulation 7.1.27 of the Corporations Regulations 2001 (Corporations Regulations) provides that, when a client is a wholesale client in relation to a financial product, the client remains a wholesale client in relation to that product. The effect of reg 7.1.27 is that the MDA provider can continue to treat a client as a wholesale client in relation to the MDA. For example, when a client contributes at least \$500,000 to an MDA, the client is a wholesale client for any dealing provided on behalf of that client by the MDA provider as part of the operation of the MDA, such as any custodial or depository service, or any financial product advice.

16. During its '*life*', **Regulatory Guide 179** has become more '*transparent*' in this respect, but it still leaves doubt as to whether a provider of '*Wholesale-Only MDA Services*' requires '*authorisations*' (which some do have) to issue to, deal on behalf of, and provide '*financial product advice*' to '*Wholesale Clients*' in relation to either or both of:
- interests in managed investment schemes that are limited to a right to receive MDA services; and
 - miscellaneous financial investment products that are limited to a right to receive MDA services.

Yes, **Parts 2** and **3** specify the '*relief*', but the key definitions of '*MDA Service*' (which construes this '*service*' as a class of '*product*') and '*MDA Provider*', presented in **Part 1**, either aren't or are only partially limited to the '*Retail*' context.

17. The '*guidance*' released in support of any '*instrument*' should have a section addressing (explicitly and meaningfully) the relevance (if any) of its measures in the '*Wholesale*' context. This can be difficult to discern from the definitions and the technical description of the '*relief*'. We assist '*AFS Licensees*' develop and implement '*compliance measures*', and can attest to the confusion a '*title*' and a '*limited explanation*' do cause.

Classification of '*MDA Services*' as a '*Financial Product*'

18. The Commission has long made its position clear:

RG 179.1 An MDA means a *facility*, other than a registered managed investment scheme (registered scheme) or an interest in a registered scheme, with the following features:

- (a) a person (MDA client) makes contributions;
- (b) the client portfolio assets are managed on an individual basis by another person (MDA provider) at the MDA provider's discretion, subject to any agreed limitation; and
- (c) the client and the MDA provider intend that the MDA provider will use the client portfolio assets to generate a financial return or other benefit for the client.

RG 179.3 We consider that an MDA **generally falls** within the definition of both a '*managed investment scheme*' in **s9** of the Corporations Act and a '*facility for making a financial investment*' in **s763B** of the Corporations Act.

Note: Instead of offering an MDA under our relief, you may provide these services through a registered scheme.

However, the apparent basis for applying this view to all '*Retail MDA Services*', regardless of its structure, has long appeared '*fragile*'.

19. **Section 763B** is worded as follows:

Section 763B Meaning of makes a financial investment

A person (the investor) makes a financial investment if:

- (a) the investor gives money or money's worth (the contribution) to another person and **any** of the following apply:
 - (i) the other person uses the contribution to generate a financial return, or other benefit, for the investor;
 - (ii) the investor intends that the other person will use the contribution to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated);
 - (iii) the other person intends that the contribution will be used to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated); and
- (b) the investor has no *day-to-day* control over the use of the contribution to generate the return or benefit.

Note 1: Examples of actions that **constitute** making a financial investment under this subsection are:

- (a) a person paying money to a company for the issue to the person of shares in the company (the company uses the money to generate dividends for the person and the person, as a shareholder, does not have control over the *day-to-day* affairs of the company); or
- (b) a person contributing money to acquire interests in a registered scheme from the responsible entity of the scheme (the scheme uses the money to generate financial or other benefits for the person and the person, as a member of the scheme, does not have *day-to-day* control over the operation of the scheme).

Note 2: Examples of actions that do **not constitute** making a financial investment under this subsection are:

- (a) a person purchasing real property or bullion (while the property or bullion may generate a return for the person, it is not a return generated by the use of the purchase money by another person); or
- (b) a person giving money to a financial services licensee who is to use it to purchase shares for the person (while the purchase of the shares will be a financial investment made by the person, the mere act of giving the money to the licensee will not of itself constitute making a financial investment).

20. However, **Legislative Instrument 2016/968** chooses to define and use the term '*Miscellaneous Financial Investment Product*', which is derived from Section 763B and is worded as follows:

miscellaneous financial investment product means a facility:

- (a) through which, or through the acquisition of which, a person makes a financial investment as defined in **section 763B** of the Act; and
- (b) that is **not otherwise a financial product** under section 764A of the Act.

21. The definition of '*Managed Investment Scheme*', at **Section 9**, is worded as follows:

managed investment scheme means:

- (a) a scheme that has the following features:
 - (i) **people contribute money or money's worth as consideration to acquire rights (interests)** to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);
 - (ii) **any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property**, for the people (the **members**) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);
 - (iii) the **members do not have day-to-day control over the operation of the scheme** (whether or not they have the right to be consulted or to give directions); or
 - (b) a time-sharing scheme;
- but does not include the following:**
- (c) a partnership that has more than 20 members but does not need to be incorporated or formed under an Australian law because of regulations made for the purposes of subsection 115(2);
 - (d) a body corporate (other than a body corporate that operates as a time sharing scheme);
 - (e) a scheme in which all the members are bodies corporate that are related to each other and to the body corporate that promotes the scheme;
 - (f) a franchise;

- (g) a statutory fund maintained under the *Life Insurance Act 1995*;
- (h) a regulated superannuation fund, an approved deposit fund, a pooled superannuation trust or a public sector superannuation scheme;
- (i) a scheme operated by an Australian ADI in the ordinary course of its banking business;
- (j) the issue of debentures or convertible notes by a body corporate;
- (k) a barter scheme under which each participant may obtain goods or services from another participant for consideration that is wholly or substantially in kind rather than in cash;
- (l) a retirement village scheme operating within or outside Australia:
 - (i) under which the participants, or a majority of them, are provided, or are to be provided, with residential accommodation within a retirement village (whether or not the entitlement of a participant to be provided with accommodation derives from a proprietary interest held by the participant in the premises where the accommodation is, or is to be, provided); and
 - (ii) which is not a time-sharing scheme;
- (m) a scheme that is operated by a co-operative company registered under Part VI of the *Companies (Co-operative) Act 1943* of Western Australia or under a previous law of Western Australia that corresponds to that Part;
- (ma) a contribution plan;
- (maa) an ESS contribution plan for an offer of ESS interests that is eligible to be made under Division 1A of Part 7.12;
- (mb) the provision of a crowd-funding service;
- (n) a scheme of a kind declared by the regulations not to be a managed investment scheme.

Note 1: Paragraph (c)—A partnership with less than 20 members will usually not require registration because of paragraph 601ED(1)(a) and under section 115 a partnership with more than 20 members can only operate if covered by regulations made for the purposes of subsection 115(2).

Note 2: Paragraphs (c) and (i) have an extended meaning in relation to Chapter 8 (see subsection 1200A(3)).

Note 3: Under section 1213E, a **notified foreign passport fund** is to be treated as a managed investment scheme for the purposes of this Act.

22. It is very apparent from the logic and focus of the *'conditions of relief'* that it has been convenient for the Commission to rely far more heavily on its view that a MDA is a *'Managed Investment Scheme'*, in order to pursue *'harmonisation'* across the regulation of *'Managed Investment Schemes'*, *'Platforms'* and *'Custodial & Nominee Services'*. It would appear that *'Facilities for making a Financial Investment'* are far less common, in which case there isn't a depth to the arrangements typically deployed, which may be used as a foundation for *'conditions of relief'*.
23. However, it has always struck us that analysis that construes any *'MDA Service'* to be a *'Managed Investment Scheme'* is fragile. Firstly, the term *'Scheme'* infers *'pooling'* of interests and a *'common enterprise'*, yet the *'conditions of relief'* granted by **Legislative Instrument 2016/968** (and its predecessors) generally prohibit the pooling of *'MDA Client Portfolio Assets'* for particular purposes and require each *'MDA Portfolio'* to be managed discretely. The references in **Regulatory Guide 179** to a *'MDA Service'* meeting certain attributes of the definition of a *'Managed Investment Scheme'* are *'selective'* (see below). And secondly, the fact that the Commission also acknowledged that a *'MDA Service'* may also or either be a *'Miscellaneous Financial Investment Product'*, when the definition of the latter prevents the *'facility'* from also being another category of *'Financial Product'*, strikes us as logically inconsistent. In our view, relying on the definition of *'Miscellaneous Financial Investment Product'* is less problematic.
24. In case the Commission ever chooses to regulate the two categories differently, many *'MDA Providers'* secured *'authorisation'* to issue, deal in, and provide *'financial product advice'* in relation to both:
 - interests in managed investment schemes that are limited to a right to receive MDA services; and
 - miscellaneous financial investment products that are limited to a right to receive MDA services.
25. Examples of the *'selective'* application of the definition of *'Managed Investment Scheme'* in **Regulatory Guide 179** are as follows:

RG 179.28 When a client gives **access to, and control of, client contributions** to an MDA provider, the provider has the ability to use these funds or assets to produce benefits for the client in the same way as if the provider held the legal title. We consider that these arrangements meet **s9(a)(i)** of the definition of a managed investment scheme in the Corporations Act that deals with how people make contributions to the scheme.

RG 179.32 **Trading discretions** of this nature give the MDA provider the power to convert or dispose of the funds and assets representing that client's contributions when operating the MDA. We consider that these arrangements meet the requirement in **s9(a)(iii)** of the definition of a managed investment scheme in the Corporations Act because the client has no day-to-day

control over their portfolio assets (even if the client has the legal title to those assets and the discretionary trading is carried out under a power of attorney or other authorisation).

RG 179.39 Generally, a client participates in an MDA with the intention that they will derive benefits, including from:

- (a) the MDA provider's expertise in investment selection;
- (b) the MDA provider's ability to respond quickly to market developments by trading in the client's portfolio assets without referring to the client; and
- (c) possible cost reductions in the services offered as part of the MDA, which may include consolidated reporting and bulk ordering (although there is no pooling of different clients' portfolio assets for investment purposes, such as accessing wholesale investments: see RG 179.37).

RG 179.40 When coupled with the other features of an MDA (e.g. the client not having day-to-day control over their portfolio: see RG 179.32), we consider that MDAs generally fall within the definition of both a managed investment scheme (s9 of the Corporations Act) and a facility for making a financial investment (s763B of the Corporations Act).

26. On the matter of '*pooling*', **Regulatory Guide 179** states the following:

RG 179.36 Assets in the client's portfolio under an MDA can be held in two ways: see RG 179.27. The management of each client's assets as a discrete portfolio involves:

- (a) where the legal title to the assets is held by the MDA provider or the agent of the MDA provider (e.g. where the client has a beneficial interest in the assets)—the identification of those assets as belonging to that particular client; or
- (b) where the legal title to the assets is held by the client—an authorisation arrangement, such as a power of attorney or signatory arrangement.

It is noteworthy that RG 179.36 neglects the scenario involving an '*External MDA Custodian*'.

RG 179.37 In either case, under the requirements of our relief, the **MDA provider must not pool one client's portfolio assets with any other client's portfolio assets for investment purposes (e.g. to access wholesale investments)**. This is because pooling would be inconsistent with the policy basis for our relief that the client's assets are managed as a discrete portfolio belonging to that client.

Note: For guidance on the application of this requirement to an AFS licensee providing MDAs on a regulated platform, see RG 179.192.

RG 179.38 However, an MDA provider will typically carry out some transactional and other functions relating to client portfolios on a collective basis (e.g. placing bulk orders or conducting research into financial products in which portfolio assets are to be invested). ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968 does not prohibit this. **Where this occurs, there may be pooling for administrative cost savings that are to be passed on to clients, which would satisfy s9(a)(ii) of the definition of a managed investment scheme.**

Note: ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968 does not prohibit carrying out transactions between client portfolios. However, if an MDA provider is a participant of a licensed market, it may be subject to restrictions relating to such transactions under the market's operating rules.

The application of other '*Legislative Instruments*' and '*Guidance*' to '*Retail MDA Services*'...

27. If the '*Retail MDA Provider*' is authorised to provide '*Custody, Depository or Nominee Services*' then, in addition to **Legislative Instrument 2016/968**, it is or may also be subject to the following '*notional*' provisions of the Corporations Act, as inserted by other **Legislative Instruments**:

- **Section 912AAC (Minimum standards for providers of Custodial or Depository Services)**, which is inserted by **Legislative Instrument 2024/17**;
- **Section 912AAD (Agreements with Sub-Custodians to hold Custodial Property)**, which is inserted by **Legislative Instrument 2024/17**;
- **Section 912AAE (Agreements with Retail Clients for Custodial or Depository Services)**, which is inserted by **Legislative Instrument 2024/17**;
- **Section 912AC (Adequate financial resources for Custodial or Depository Services Providers)**, which is inserted by **Legislative Instrument 2023/648**.

Legislative Instrument 2016/1156 only applies where the client retains sole discretion to acquire or dispose of '*financial products*' held by the '*Nominee/Custody Service*'. **Legislative Instrument 2024/17** may be a source of '*double-jeopardy*' for the '*Retail MDA Provider*'. '*Notional*' Section 912AAC overlaps significantly with '*notional*' Section 912AEC. '*Notional*' Section 912AAE requires the '*Retail MDA Provider*' to have a '*Custody Services Agreement*' with a '*Retail Client*', which is to have particular '*minimum terms*'. The remade **Instrument** and **Regulatory**

Guide 179 should make it clear that this obligation does not apply in the case of **'Retail MDA Services'**.

28. In addition to **Regulatory Guide 179**, and as a consequence of the flawed presumption that all **'Retail MDA Services'** (however structured) most likely qualify as a **'Scheme'**, all **'Retail MDA Provider'** are also subject to the **'un-nuanced'** expectations of the following:

- **Regulatory Guide 132 [Funds Management: Compliance & Oversight]**, which is published for **'Responsible Entities'** and **'Australian Passport Fund Operators'** (parts are relevant to **'IDPS Operators'** and **'Operators of Unregistered Schemes'**) [RG 179.54 highlights the requirements in relation to **'Compliance Plans'**];
- **Regulatory Guide 133 [Funds Management & Custodial Services: Holding Assets]**, which is published for **'Responsible Entities'**, **'IDPS Operators'** and **'Custody Services'** responsible to Clients for Assets held [RG 179.54 confirms it only applies (except the **'Compliance Committee'** requirement) where the **'MDA Client'** or their **'Agent'** do NOT hold **'Legal Title'** to **'MDA Portfolio Assets'**];
- **Regulatory Guide 97 [Disclosing Fees & Costs in PDS and Periodic Statements]**; and
- **Regulatory Guide 259 [Risk Management Systems of Fund Operators]** .

RG 259.11 This guide is for responsible entities of registered schemes and corporate directors of CCIVs but is also relevant for: (a) AFS licensees not currently operating a fund; (b) investor directed portfolio services (IDPS) and **managed discretionary account (MDA) operators**; and (c) entities operating unregistered managed investment schemes.

Note: A **'Fund Operator'** is defined as the responsible entity of a registered scheme or a corporate director of a CCIV.

RG 259.13 We expect IDPS and **MDA operators** to consider this guidance when establishing and reviewing their **risk management systems**, as these services would need to be registered schemes if they could not rely on our relief for IDPSs and MDAs.

The 'Financial Service/Product Authorisations' required to provide 'Retail MDA Services'

29. **'Notional' Section 912AE** is worded as follows:

Section 912AE – Requirements for the provision of MDA services

- (1) Sections 912AEA to 912AEG apply to a financial services licensee that:

- (a) holds an Australian financial services licence authorising it to deal in either or both of:
 - (i) interests in managed investment schemes that are limited to rights to receive **MDA services**; and
 - (ii) miscellaneous financial investment products that are limited to rights to receive **MDA services**; and
- (b) provides, or offers to provide, **MDA services** to a person as a **retail client**.

This provision is incomplete. It should repeat the definition of **'MDA Provider'** or simply adopt the term **'MDA Provider'** as follows:

Section 912AE – Requirements for the provision of MDA services

- (1) Sections 912AEA to 912AEG apply to a financial services licensee that is a **MDA provider** and provides, or offers to provide, **MDA services** to a person as a **retail client**.

The current wording is a source of confusion to the general reader not familiar with the **'licensing regime'**. The unqualified reference to **'deal'**, rather than **'deal by issuing'**, is too broad. Yes, technically, **'deal'** includes **'issuing'**, **'dealing on behalf of'**, **'arranging'** and **'underwriting'**, but a plain reading seems to infer **'dealing'** on behalf of a client in **'MDA Services'** provided by a third-party **'AFS Licensee'**.

30. In addition to the categories of **'financial product'** to be covered by their **'Retail MDA Service'**, **'Retail MDA Providers'** usually secure 'authorisation' to provide **'Financial Product Advice'** and to **'Deal on behalf of a Client'** in relation to (their own) **'MDA Services'**. Logically, this should be necessary, given its recognition as a distinct class of **'financial product'**, but it isn't required by the **Legislative Instrument**. Technically, this would also permit providing **'Advice'** and **'Dealing Services'** to a **'Retail Client'** in relation to **'Retail MDA Services'** offered by a third-party **'Retail MDA Provider'**.

The definition of 'MDA Service'...

31. **Legislative Instrument 2016/968** defines '**MDA Service**' as follows:

MDA service means a service provided by a MDA provider with the following features:

- (a) a person (**client**) makes client contributions; and
- (b) the client agrees with the MDA provider that the client portfolio assets will:
 - (i) be managed by the MDA provider at its discretion, subject to any limitation that may be agreed, for purposes that include investment; and
 - (ii) be held legally or beneficially by the client; and
- (c) the client or the MDA provider intend that the MDA provider will use client contributions of the client to generate a financial return or other benefit for the client (even if no such benefit is in fact generated).

A '**MDA Service**' is recognised as a category of '**Financial Product**' for '**licensing purposes**'. **Legislative Instrument 2016/968** provides the formal basis for doing so, but this '**solution**' can only apply in the '**Retail**' context. The definition and its recognition as a distinct category of '**Product**' have no relevance in the '**Wholesale**' context, in which case the definition presented in the **Legislative Instrument** should not suggest otherwise. Those providing '**Discretionary Account Services**', but only to '**Wholesale Clients**', should not expect to have to secure authorisations which refer to '**MDA Services**'.

The definition of 'MDA Provider'...

32. **Legislative Instrument 2016/968** defines '**MDA Provider**' as follows [reiterated by RG 179.25]:

MDA provider means a person who holds an Australian financial services licence that authorises:

- (a) dealing by way of issue in either or both of:
 - (i) interests in managed investment schemes that are limited to a right to receive MDA services; and
 - (ii) miscellaneous financial investment products that are limited to a right to receive MDA services; and
- (b) dealing in all the financial products that may be acquired with client portfolio assets under the MDA contract; and
- (c) except where an external MDA adviser has contracted directly with each **retail client** to whom the MDA provider provides MDA services to provide financial product advice relating to the investment program—providing personal advice to people as **retail clients** in relation to the MDA; and
- (d) except where an external MDA custodian has contracted directly with each **retail client** to whom the MDA provider provides MDA services to hold each client portfolio asset that is a financial product or a beneficial interest in a financial product—providing custodial or depository services,

in relation to those client portfolio assets.

33. Here is an example of a material '**inefficiency**' arising as a consequence of construing all '**MDA Services**', however structured, as most likely to be a '**Managed Investment Scheme**'. In the general case, the operator of the '**Scheme**' must be authorised to issue '**Interests**' in the '**Scheme**' and is usually also authorised to provide '**Custodial Services**' in order to hold or arrange for a third-party '**Custodian**' to hold '**Scheme Property**'. If the operator is not authorised to provide '**Custodial Services**', a third-party '**Custodian**' must contract directly with each '**Scheme Member**' in order to hold their interest in '**Scheme Property**'.
34. If the '**MDA Provider**' is NOT authorised to provide '**Custody Services**', an '**External MDA Custodian**' must be involved and comply with their obligations under '**notional**' Sections 912AFA to 912AFE. No other path is permissible. At the end of part (d), the definition does not go on to say "...depository services, but only if the MDA provider holds or arranges the holding of each client portfolio asset that is a financial product or a beneficial interest in a financial product,...".

35. Firstly, why should authorisation or the involvement of an **'External MDA Custodian'** be required if, in all instances, for the sake of *'ownership-transparency'*, the **'MDA Client'** holds *'legal title'* to their **'Client Portfolio Assets'**? In other words, the **'Retail MDA Provider'** isn't in the business of holding *'legal title'* to, or a *'beneficial interest'* in, **'MDA Client Portfolio Assets'**, nor does it need to arrange for a **'Custodian'** to do so. Secondly, in the general case, why should it be necessary to be authorised to provide **'Custody Services'** or involve an **'External MDA Custodian'** if the **'MDA Client'**, as part of the **'MDA Service'**, becomes a client of a licensed and similarly regulated **'Platform'** (to take advantage of the efficiencies arising from the administrative, reporting and custody elements of a **'SMA/IMA Structure'**)?
36. Far more flexibility should be permitted in relation to the **'Custody Arrangements'** for **'Client Portfolio Assets'**, which may be embedded in a **'Financial Product'** such as an **'IDPS-Like Scheme'** or an **'IDPS'**. **Legislative Instrument 2016/968** should already recognise and *'cross-reference'* to the possibility of **'MDA Client Portfolio Assets'** being held an **'IDPS'** or an **'IDPS-Like Scheme'**, operating in accordance with:
- in the case of an **'Investor Directed Portfolio Service'**:
 - *'notional' Section 912AD (Requirements for the operation of an IDPS)*, which is inserted by **Legislative Instrument 2023/669**; and
 - *'notional' Section 912AA (Adequate financial resources for Responsible Entities & IDPS Operators)*, which is inserted by **Legislative Instrument 2023/647**; and
 - related *'Guidance'*; or
 - in the case of an **'IDPS-Like Scheme'**:
 - *'notional' Section 912AA (Adequate financial resources for Responsible Entities & IDPS Operators)*, which is inserted by **Legislative Instrument 2023/647**; and
 - *'notional' Section 601FAA (Minimum standards for Asset Holders)*, which is inserted by **Legislative Instrument 2024/16**; and
 - related *'Guidance'*.
37. Use of an **'IDPS'** or **'IDPS-Like Scheme'** to *'hold'* and *'administer'* all **'MDA Client Portfolio Assets'** should not require *'authorisation'* to provide or arrange **'Custody Services'**. Although they embed **'Custody Services'**, each is recognised as a **'Financial Product'** in its own right.
38. By requiring authorisation to provide **'Custody Services'** or the involvement of an **'External MDA Custodian'**, it may be that the Commission was simply wishing to ensure the holder of *'legal title'* to, or a *'beneficial interest'* in, **'Client Portfolio Assets'** was subject to appropriate **'regulatory standards'**, including **'Financial Requirements'**. **'IDPS Operators'** and **'Operators of IDPS-Like Schemes'** are licensed and otherwise regulated in accordance with the Corporations Act, and the **'Financial Requirements'** which apply to those **'Operators'** are *'harmonised'* with those applying to providers of **'Custody Services'**.
39. It is extremely difficult to find a **'Custodian'** prepared to act as an **'External MDA Custodian'**, due to their aversion to **'Retail Services'** and the issue of scale.

Investment in **'Unregistered Schemes'**...

40. **'Notional' Section 912AEC(22)** states as follows:
- (22) The licensee must ensure that the **client portfolio assets** of a person who entered in a MDA contract **do not include**:
- (a) interests in a managed investment scheme that is **not a registered scheme** or a notified foreign passport fund; or
 - (b) interests in a scheme that is not a managed investment scheme because of paragraph (e) of the definition of **managed investment scheme** in section 9 of the Act; or
 - (c) *[Subject to Section 912AEC(23)]* a non-limited recourse product.
41. An **'Investor Directed Portfolio Service'** is recognised as a distinct category of **'Managed Investment Scheme'**, but is not a **'Registered Scheme'**. It avoids having to be **'registered'** by continuing to comply with the *'conditions of relief'* provided by **Legislative Instrument 2023/669**. Although their use is anticipated by *'notional' Section 912AEF(6)*, in relation to **'Client Reporting'** where *"...all transactions are effected....and all client portfolio assets are held through one or more regulated platforms..."*, holding or use of an **'IDPS'** amounts to holding an interest in an **'Unregistered Scheme'** and is prohibited. Use of an **'IDPS-Like Scheme'**, a **'Registered Scheme'**, is

not prohibited. This prohibition needs to be amended to expressly permit arrangements involving use of an **'IDPS'**.

Notifying ASIC of **'Breaches'** – The **'MDA Provider'**

42. **Part 2** of **Legislative Instrument 2016/968** lists the **'Exemptions'** available to particular parties from the obligation to comply with particular **'Financial Services Laws'**, subject to specified **'Exclusions'** and **'Conditions'**. In short, **Part 2** sets out the **'relief'** available under **Legislative Instrument 2016/968** and its limits.
43. **Section 5** of **Part 2** sets out the extent of the **'Exemption'** for **'MDA Providers'** and **'External MDA Custodians'** [i.e. the circumstances in which the **'Exemption'** no longer applies (i.e. when the **'MDA Provider'** is **'excluded'** from relying on the **'exemption'**)].
44. The **'exclusion'** at **Section 5** is worded as follows:
 - (3) The exemption in subsection (1) **does not apply** to a person if:
 - (a) ASIC has given a notice in writing to the person stating that it may not rely on the exemption and has not withdrawn that notice in writing; or
 - (b) 10 business days have elapsed since the person became or should reasonably have become aware of matters that give the person reason to believe that it has failed, other than in an immaterial respect, to comply with the following provisions of the Act (as notionally inserted by this instrument) without full particulars of the failure having been notified to ASIC (to the extent that the person knows those particulars or would have known them if they had undertaken reasonable enquiries):
 - (i) in the case of a MDA provider— sections 912AEA to 912AEG;
 - (ii) in the case of an external MDA custodian— sections 912AFA to 912AFE.
45. If the **'exclusion'** applies, the **'MDA Provider'** can no longer rely on the **'relief'**, to any extent, and must cease providing **'MDA Services'** immediately to avoid breaching all the **'Financial Services Laws'** no longer the subject of **'relief'**. The **'exclusion'** is a **'very blunt instrument'**. It applies to the **'MDA Service'** universally, not just to a particular element of the service or a particular client(s) of the service.
46. If ASIC gives notice, for due cause, then so be it. The possibility that this notice may be withdrawn counts for little because the interests of the **'MDA Clients'** demand that the management of their **'MDA Portfolios'** revert to them personally, as soon as practicable, or be liquidated, if so instructed by the client. Their **'MDA Portfolios'** can't rest unattended in **'suspended animation'** in the hope of early withdrawal of the notice. In effect, the initial notice will close the **'MDA Service'** concerned.
47. The **'exclusion'**, which in the case of the second trigger is unnecessarily convoluted, also comes into **'automatic effect'** without the involvement of ASIC if, within 10 Business Days after the **'MDA Provider'** had reason to believe or should have had reason to believe that it had breached, other than in an immaterial respect, any of **'notional'** Sections 912AEA to 912AEG AND the **'MDA Provider'** has not already notified ASIC of the **'full particulars'** of the breach(es). This **'exclusion'** is particularly draconian. If triggered, the **'MDA Provider'** can no longer rely on the **'relief'**, to any extent, and must cease providing **'MDA Services'** immediately to avoid breaching all the **'Financial Services Laws'** addressed by the **'relief'**. It also applies to the **'MDA Service'** universally, not just to a particular element of the service or a particular client(s) of the service. **Also, it does not align with the **'Reportable Situation'** obligations which came into effect after the release of Legislative Instrument 2016/968.**
48. The expectation that ASIC be notified with 10 Business Days reflected the **'Self-Reporting of a Significant Breach'** obligation under Section 912D as it stood prior to the **'Reportable Situation Regime'** coming into effect. The assessment of whether the matter was **'significant'** had to consider the same parameters as now listed in Section 912D(5). The **'Reportable Situation Regime'** now requires the **'Self-Report'** to be made within 30 Days or if the investigation of the matter takes longer than 60 Days.
49. If the notification is made to ASIC within the 10 Business Days, then the **'relief'** continues to be available unless or until ASIC does (or doesn't) notify the **'MDA Provider'** it can no longer rely on the **'relief'**. Does the **'MDA Provider'** then face arguing with the Commission about when it should have reasonably become aware of matters that gave it reason to believe it had failed to comply

with the particular **'Condition'** concerned, and the scope of the particulars it would have known (at the earlier date) if it had undertaken reasonable enquiries?

50. The **'Exclusion'** should align with the **'Reportable Situation Regime'** and allow for a graded response in relation to the operation of the **'MDA Service'**, commensurate with the nature and extent of the breach. It should also take into account the parallel obligation to notify and remediate **'Retail MDA Clients'**, who are provided with **'Personal Advice'** and are adversely affected by a **'Reportable Situation'** [Section 912EA/EB]. It should allow for the **'MDA Service'** provided to a particular **'MDA Client(s)'** to be **'terminated'** as a solution. It should also allow a period within which the breach may be corrected (and remediated), thereby avoiding **'termination'**.
51. **Regulatory Guide 179** has the following to say, which should be amended to accord with the amended **'exclusion'**:

RG 179.101 If you become aware of matters that give you reason to believe that you have failed, other than in an immaterial respect, to comply with a condition of our relief, or the financial services laws including your AFS licence conditions, you must notify ASIC in writing of details of the breach. You must do this as soon as practicable and, in any event, within 10 business days of becoming aware of the breach.

Note: For further information about your obligation to report to ASIC certain breaches (or likely breaches) of your obligations, see **Regulatory Guide 78 Breach reporting by AFS licensees** (RG 78).

RG 179.57 An MDA provider that breaches an AFS licence obligation—including the obligations that apply because of ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968—will be in breach of its obligations as an AFS licensee to comply with the relevant financial services laws.

Note: If you become aware that you can no longer meet or have breached any condition of our relief or the financial services laws, including your AFS licence conditions, you must notify ASIC: see RG 179.101.

Notifying ASIC of 'Breaches' – The 'Third-Parties' also granted 'relief', subject to 'Conditions'

52. **Sections 6 to 14** include **'Exemptions'** and related **'Conditions'** that apply to a third-party **'AFS Licensee'** involved in providing **'financial services'** to a **'MDA Provider'**. The **'Exemptions'** are available in relation to:
- **Persons involved in acquiring MDA service** (Section 6);
 - **Dealers contracted by MDA provider** (Section 7, subject to the Conditions of Section 8);
 - **Issue of client portfolio assets** (Condition 9, subject to the Conditions of Section 10);
 - **Exemption – Securities Offers** (Section 11, subject to the Conditions of Section 12); and
 - **Market participants who provide MDA Services to family members only** (Section 13, subject to the Conditions of Section 14).

53. In the case of **Section 8, 10 and 12**, but NOT **14**, these **'Conditions'** are worded as follows:

A person who relies on an exemption in subsection 7(1) [or 9(1) or 11(1)] must not knowingly cause the MDA provider to fail to comply with sections 912AEA to 912AEG of the Act (as notionally inserted by this instrument) or be knowingly concerned in the MDA provider not complying with those sections.

This **'Condition'** only applies where an **'Exclusion'** is included in the related **Section**.

54. **Sections 7, 9 and 11** include an **'Exclusion'** which withdraws the availability of the **'Exemption'** in two circumstances. Firstly, if ASIC notifies the third-party **'AFS Licensee'** concerned that it can no longer rely on the **'Exemption'**, in which case, if the services are **'mission critical'** and can't be readily arranged with another provider in the very short-term, that provider would have to establish a direct **'Retail Services'** relationship with each **'Retail MDA Client'**, if in fact their **'authorisations'** permit servicing **'Retail Clients'**.
55. Secondly, and more problematically, the **'Exemption'** does not apply if:

10 business days have elapsed since the licensee became or should reasonably have become aware of matters that give the licensee reason to believe that it has failed, other than in an immaterial respect, to comply with the condition in section 8 [or 10 or 12] without full particulars

of the failure having been notified to ASIC (to the extent that the licensee knows those particulars or would have known them if they had undertaken reasonable enquiries);

56. Again, this **'Exclusion'**, which is unnecessarily convoluted, comes into **'automatic effect'** without the involvement of ASIC if, within 10 Business Days after the third-party **'AFS Licensee'** had reason to believe or should have had reason to believe that it had failed, other than in an immaterial respect, to comply with the particular **'Condition'** AND the **'AFS Licensee'** has not already notified ASIC of the **'full particulars'** of the failure(s).
57. If the notification is made to ASIC within the 10 Business Days, then the **'relief'** continues to be available unless or until ASIC does (or doesn't) notify the **'AFS Licensee'** it can no longer rely on the **'relief'**. Does the **'AFS Licensee'** then face arguing with the Commission about when it should have reasonably become aware of matters that gave it reason to believe it had failed to comply with the particular **'Condition'** concerned, and the scope of the particulars it would have known (at the earlier date) if it had undertaken reasonable enquiries?
58. This **'Exclusion'** is particularly draconian. If triggered, the **'AFS Licensee'** can no longer rely on the **'relief'**, to any extent, in order to provide the agreed services to the **'MDA Provider'** and must cease doing so immediately, to avoid breaching the **'Financial Services Laws'** addressed by the **'relief'**, unless the **'AFS Licensee'** is able to service directly the **'Retail MDA Clients'** concerned. Again, the **'Exclusion'** applies universally, not just to a particular element of the services concerned or a particular **'MDA Client(s)'**. Nor does it align with the **'Reportable Situation Regime'**, which came into effect after the release of **Legislative Instrument 2016/968**. It should also take into account the obligation on these **'services providers'** to report the **'Retail MDA Provider'**, a provider of **'Personal Advice'** to **'Retail Clients'**, if they observe an individual **'Financial Adviser'** engaging in conduct which forms part of **'Reportable Situation'** arising at the **'Retail MDA Provider'** [Section 912DAB].
59. We suspect that during the life of **Legislative Instrument 2016/968** no such notifications have been made to the Commission.

'Target-Market Determinations' should not apply to the 'Retail MDA Provider'...

60. The purpose of the **'Target Market Determination'** elements of the **'Design & Distribution Obligations'** concerning **'Financial Products'** available to **'Retail Clients'** is explained in Section 994B(8).
- (8) A target market determination for a financial product must be such that it would be reasonable to conclude that, if the product were to be issued, or sold in a regulated sale:
- (a) to a retail client in accordance with the distribution conditions--it would be likely that the retail client is in the target market; and
- (b) to a retail client in the target market--it would **likely be consistent with the likely objectives, financial situation and needs of the retail client**.
61. **'Retail Product Distribution Conduct'** by **'Regulated Persons'** in relation to the **'financial product'** concerned must accord with the **'Distribution Conditions'** set out (among other information) in the **'Target Market Determination'** (**'TMD'**). **'Regulated Persons'** must take reasonable steps that result in, or would be reasonably likely to result in, their **'Retail Product Distribution Conduct'** being consistent with the **'TMD'** UNLESS the conduct is **'Excluded Conduct'** [Section 994E(3)]. **'Excluded Conduct'** means providing **'Personal Advice'** or an **'Excluded Dealing'** (i.e. **'arranging'** for the **'Retail Client'** to apply for, or acquire, the **'financial product'**, for the purpose of implementing **'Personal Advice'**) [Section 994A]. The maker of the **'TMD'** for a **'financial product'** must take reasonable steps that will, or are reasonably likely to, result in **'Retail Product Distribution Conduct'** (other than **'Excluded Conduct'**) being consistent with the **'TMD'** [Section 994E(1)]. Hence the incentive, in the **'Retail'** context, for **'Issuers'** to **'prefer'** the involvement of a **registered 'Financial Adviser'** in relation to an application by a **'Retail Client'** for their **'financial product'**.
62. **'Personal Advice'** is embedded in a **'Retail MDA Service'** (a category of **'financial product'**), which is provided by the **'Retail MDA Provider'** or an **'External MDA Adviser'** [*notional* Section 912AEB(5) or (6)]. The purpose of the **'TMD'**, which must be made available to the public **'free of charge'** [Section 994B(9)], is to facilitate a **'solution'** for a **'Retail Client'** which is likely to be consistent with their **'objectives, financial situation and needs'**. Those providing **'Personal Advice'** have to meet a higher standard. The recommended course of action (or inaction) must (among other things) be in the **'Retail Client's'** **'best interests'** and **'appropriate'**. As a matter of logic, the **'Design & Distribution Obligations'** are superfluous in the case of **'Retail MDA Services'** and should not apply to a **'Retail MDA Provider'** (if the **'Retail MDA Provider'** acts as **'Investment Manager'** for a **'product'** accessible to the public through a regulated **'Platform'**, then a **'TMD'**

would be required for each **'Model Portfolio'** concerned). The question then becomes whether Sections 994AA and 994B capture a **'Retail MDA Provider'**, which is deemed to be the operator of an **'Unregistered Scheme'** and the **'Issuer'** of interests in its **'Scheme'** (its **'Retail MDA Service'**).

63. Section 994B specifies when a **'TMD'** must be made for a **'product'** (e.g. a **'Retail MDA Service'**). The exemptions at Section 994B(3) and CR 7.8A.20 do not capture a **'Retail MDA Service'**. The list at Section 994B(1) includes a **'product'** for which a **'PDS'** must be prepared, but a **'Retail MDA Provider'** is given **'relief'** from this obligation (this **'relief'** applies whether the **'Retail MDA Service'** is treated as an **'Interest'** in a **'Managed Investment Scheme'** or a **'Miscellaneous Investment Product'**). Section 994B(1)(ba), which isn't useful, captures a **'financial product'** which is defined by Section 765A not to be a **'financial product'** and is **'issued'** or **'sold'** to a **'Retail Client'**. In accordance with Section 994B(1)(c), a number of categories of **'product'** or **'service'** are captured by CRs 7.8A.05 to 7.8A.10.
64. CR 7.8A.10 captures **'Custody Services'**, which aren't otherwise captured by the **'TMD'** requirements, where the **'product'** includes a **'Custody Service'** (which not all **'Retail MDA Services'** do) and it is to be provided to a **'Retail Client'**. If so, the **'Issuer'** of the **'product'** must make a **'TMD'**. Another disincentive to being authorised to provide **'Custody Services'**.
65. Section 994AA(1) also captures a **'financial product'** within the meaning of Division 2 (**'Unconscionable Conduct & Consumer Protection in relation to Financial Services'**) of Part 2 (**'Consumer Protection in relation to Financial Services'**) of the ASIC Act. **'Financial Product'** is defined at Section 12BAA. Section 12BAA(4) captures a **'Miscellaneous Investment Product'**. Section 12BAA(7) includes, in relation to a **'Managed Investment Scheme'** (which a **'Retail MDA Service'** is deemed to be):
 - an interest in the **'Scheme'**;
 - a legal or equitable right or interest in an interest in the **'Scheme'**;
 - an option to acquire, by way of issue, an interest or right in relation to either of the above.

It isn't clear why the reach of Section 994B should need to extend to **'financial products'** listed in Section 12BAA, which happen to replicate Sections 764A and 765A of the Corporations Act, other than to ensure the **'Consumer Protection Regime'** applies to the **'Design & Distribution Obligations'**.

The **'Design & Distribution Obligations'** should not apply to **'Retail MDA Provider'**...

66. If the **'Retail MDA Provider'** happens to be authorised to provide **'Custody Services'** in a manner embedded in (i.e. **'incidental'** to) their **'Retail MDA Services'** (a **'product'**) [CR 7.8A.10], it would appear that the **'TMD'** requirements are triggered. This would be the case even if the **'Retail MDA Provider'** does not actually provide **'Custody Services'**, having secured the authorisation to avoid having to involve an **'External MDA Custodian'** in its **'Retail MDA Services'**. The fact rather than the deployment of the authorisation is the trigger.
67. If NOT so authorised, but being the **'Issuer'** of **'Interests'** in **'Managed Investment Schemes'** limited to rights to receive **'Retail MDA Services'** and/or **'Miscellaneous Financial Investment Products'** limited to rights to receive **'Retail MDA Services'**, then the **'TMD'** requirements can be avoided because no **'PDS'** is required [Section 994B(1)(b)]. There should be no distinction between those with authorisation to provide **'Custody Services'** and those that aren't so authorised.
68. In any event, the **'Design & Distribution Obligations'** should NOT apply to a **'Retail MDA Provider'**, given **'Excluded Conduct'** is embedded in the **'Retail MDA Service'**. The **'product'** can't be issued (i.e. the **'Retail MDA Contract'** can't be signed) unless the prospective **'Retail MDA Client'** has already received **'Personal Advice'** as to its **'suitability'**. It can't be acquired until the **'Retail MDA Contract'**, which includes an **'Investment Program'** presenting the detail required for a **'SoA'**, is signed and returned.
69. It's not the first time insufficient account has been taken of the **'regulatory regime'** already in place for **'Retail MDA Providers'** when designing new legislation (the **'Fee Disclosure Statement'** requirements are another example). The remade **Legislative Instrument** should provide the necessary **'relief'**.

Can an **'Authorised Representative'** act as **'Retail MDA Provider'**?

70. The **'Licensing Regime'** allows the operation of discrete **'financial services businesses'** (which may have distinct branding) by **'Authorised Representatives'** under the **'AFS Licence'** held by their **'AFS**

Licensee'. The question arises whether this is possible in the case of a '**Retail MDA Service**'. The '*relief*' provided to the '**Retail MDA Provider**' requires the '*licensee*' (not a '*providing entity*') to do many things, including provide the '**FSG/SFSG**', be the counter-party to the '**Retail MDA Contract**' and ensure certain things in relation to the holding of '**Client Portfolio Assets**'.

71. In the interests of certainty, the remade **Instrument** and **Regulatory Guide 179** should state whether an '*Authorised Representative*' (or any '*Representative*') may operate a separate '**Retail MDA Service**' under the '*AFS Licence*' and '*relief*' granted to the '**Retail MDA Provider**'.

II. OVER-REACH OF THE PROCEDURES SPECIFIED

The disclosure of 'Fee' and 'Costs'...

72. 'Notional' **Section 912AEA** requires the 'FSG/SFSG' to disclose 'fees' in accordance with the format specified by **Part 2 of Schedule 10** of the Corporations Regulations, as guided by **Regulatory Guide 97 ('Disclosing Fees & Costs in PDS and Periodic Statements')**. This requirement is a function of the presumption that all '**Retail MDA Services**', however structured, are most likely a '**Managed Investment Scheme**'.

Section 912AEA ('Financial Services Guide')

- (2) The Financial Services Guide must also contain information about fees and costs in relation to the MDA services that **complies** with Part 2 of Schedule 10 of the *Corporations Regulations 2001* as if:
- (a) a financial product that is either of the following were a managed investment product:
 - (i) an interest in a managed investment scheme that is limited to the MDA services;
 - (ii) a miscellaneous financial investment product that is limited to the MDA services; and
 - (b) the Financial Service Guide were a **Product Disclosure Statement** for such a managed investment product; and
 - (c) the licensee were the **responsible person** (as defined in subsection 1013A(3)) for such a managed investment product.

Note: Part 2 of Schedule 10 of the *Corporations Regulations 2001* is notionally modified in relation to a Product Disclosure Statement for a managed investment product by *ASIC Corporations (Disclosure of Fees and Costs) Instrument 2019/1070*.

73. However, according to **Regulatory Guide 179** [RG 179.133 & Table 7]:

You must include information about fees and costs in relation to the MDA that is **consistent** with Part 2 of Schedule 10 as if the FSG were a PDS for an interest in a registered scheme.

It explains that:

These disclosure requirements will promote confident and informed decision making by investors and financial consumers by helping clients to more readily ascertain the fees and costs involved in a particular MDA, and to compare these with the fees and costs associated with other MDAs, IDPSs and registered schemes. The requirement means that the FSG must disclose management costs not only in the MDA but also in **interposed vehicles**, and reflect the cumulative impact of all these management costs. Additional examples might incorporate typical fees for advice that are charged separately from the fees and costs of the MDA.

Note: For guidance about disclosing fees and costs in PDSs and the enhanced fee disclosure regulations, see **Regulatory Guide 97**.

74. Given **Legislative Instrument 2016/968** is the higher authority, the '**Retail MDA Provider**' must **comply** with **Part 2 (Product Disclosure Statements: Fees & Costs Summary, Example of Annual Fees & Costs and Consumer Advisory Warning)** of **Schedule 10**, as modified by **Legislative Instrument 2019/1070**. [Note: the requirements of **Part 3 (Fees & Costs in Periodic Statements)** are not applied to '**Retail MDA Providers**'.]

75. **Regulatory Guide 179** goes further, expecting inclusion of this information in the '**MDA Contract**':

RG 179.134 Under our relief in Legislative Instrument 2026/968, you must enter into a MDA contract with each client before providing an MDA to that client. The MDA contract **must include** the items set out in Table 8.

Among other things, Table 8 requires the following to be included in the '**MDA Contract**':

information about fees and costs relating to the MDA that **complies with** Part 2 of Schedule 10 of the Corporations Regulations as if the MDA contract were a PDS for a product interest in a registered scheme.

Regulatory Guide 179 also states:

Disclose Fees and Costs

RG 179.155 The MDA contract must contain information about the fees and costs of the MDA in a **manner that is consistent** with **Schedule 10** as if it were a PDS for a registered scheme.

Note: For guidance about disclosing fees and costs in PDSs and the enhanced fee disclosure regulations, see RG 97.

RG 179.156 We think that it is important that fee information is included in the MDA contract—in addition to the FSG—because the MDA contract sets out the terms that govern the relationship between you and the client. This disclosure may be incorporated by reference.

Note: See Table 7 for the fees and costs disclosure obligations in the FSG.

76. **Regulatory Guide 179** is incorrect, misleading and misguided. Firstly, **Legislative Instrument 2016/968** does not require this information to be included in the **'MDA Contract'**, which should have prevented the Commission from being so emphatic. Being expected to present the same information in both the **'FSG/SFSG'** and the **'MDA Contract'** is self-evidently redundant. Secondly, the **'FSG/SFSG'**, being the proxy for the **'PDS'** (the **'Offer Document'**), is the appropriate place for disclosure of the range of **'fees'** and **'costs'** (to facilitate comparison with **'Retail MDA Services'** offered by other **'Retail MDA Providers'**) that can apply to the **'Retail MDA Service'**. It is the **'MDA Contract'** that presents the **'tailored investment solution'** proposed for the client concerned. Its **'Investment Program'**, in compliance with the detailed disclosure obligations prescribed for a **'SoA'**, should only need to address the actual elements of the **'MDA Service'** recommended to, and to be agreed with, the client.

77. **Regulatory Guide 97 (Disclosing Fees & Costs in PDSs and Periodic Statements)** has the following to say in relation to **'Retail MDA Services'**:

Managed Discretionary Account (MDA) Providers

RG 97.18 When an MDA provider **issues** a Financial Services Guide (FSG), it must provide information about fees and costs in relation to its MDA services that **complies** with Part 2 of Schedule 10 to the Corporations Regulations as if the client were being offered a managed investment product: see s912AEA, as notionally inserted by ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968. Part 2 of Schedule 10 as it relates to managed investment products is discussed in Section D of this guide. For further guidance on MDAs, see Regulatory Guide 179 Managed discretionary accounts (RG 179).

It makes reference to the **'FSG/SFSG'**, but not the **'MDA Contract'**.

78. **Regulatory Guide 97** explains how **'fees'** and **'costs'** should be disclosed in **Product Disclosure Statements (PDS)**, **shorter PDS** (if the shorter PDS regime applies) and **IDPS Guides**. The purpose of **'fees'** and **'costs'** disclosure is to ensure that consumers have accurate information to assist their decision-making. A consistent and transparent approach to **'fees'** and **'costs'** disclosure benefits consumers, issuers and market professionals. It is supposed to facilitate ready comparison of equivalent **'Financial Products'** issued by various **'Issuers'**, thereby promoting competition and the development of better, cost-aware **'Financial Products'**.
79. **Part 2 of Schedule 10** of the Corporations Regulations and **Regulatory Guide 97** have been rewritten a number of times. As currently amended by **Legislative Instrument 2019/1070**, it **prescribes** the use of **certain language** and **tables**, and how the information is to be calculated or presented, which is appropriate for a **'PDS'** relating to a **'Registered Scheme'**. It does NOT apply neatly to the offering typically provided by **'Retail MDA Providers'**, and (technically) does not permit **'sensible modification'** of the wording prescribed. It is a **'clumsy regime'** for **'Retail MDA Services'**. In our view, the case has not been made that this regime should be applied to **'Retail MDA Services'**. If the need for particular, additional disclosure for **'Retail MDA Services'** is substantiated, it should be designed specifically for a range of **'Retail MDA Services'**.
80. The current regime is complex at two levels. The first challenge is deciphering **Legislative Instrument 2019/1070** (e.g. having to wrestle with identifying and addressing the implications of having an **'interposed vehicle'**). The second is ensuring that the **prescribed wording** does not confuse or mislead readers of the **'FSG/SFSG'** in relation to **'Fees & Costs'** for the **'Retail MDA Service'** (given the obligations a **'Retail MDA Provider'** has to communicate in an **'efficient, honest & fair'** and **'clear, concise & effective'** manner).
81. The warning and the tables, which must be populated as prescribed, and accompanied by prescribed explanatory text, are as follows:
- the **'Consumer Advisory Warning'**;
 - the table presenting the **'Fees and Costs Summary'** (for either a **'multiple'** or **'single fee-structure'**, as the case requires);
 - the **'Additional Explanation of Fees and Costs'**;
 - the table presenting an **'Example of Annual Fees and Costs'** for a **'Balanced'** or **'Other Investment Option'**); and
 - if more than one **'investment option'** is available, the table of **'Cost of Product for One Year'** information for each **'Investment Option'**, introduced by prescribed text.

82. Many of the *'fee categories'* and some other information (e.g. *'buy-sell spreads'*) are not usually applicable to a **'Retail MDA Service'**, leaving *'a lot of air'* in the tables, adding unnecessarily to an already lengthy section of the **'FSG/SFSG'**.
83. The **'Consumer Advisory Warning'** must use the wording prescribed, which refers the reader to the **'Managed Funds Fee Calculator'** available at the *'Moneysmart'* website. The **'Calculator'** is not that useful in the case of a **'Retail MDA Service'**. But even more problematic is the following *'calculation'*:
- For example, total annual fees and costs of 2% of your account balance rather than 1% could reduce your final return by up to 20% over a 30- year period (for example reduce it from \$100,000 to \$80,000).

Once presented in the **'FSG/SFSG'**, it is *'representation'* made by the **'Retail MDA Provider'**. For the sake of *'transparency'*, this **'projection'** needs explanation. It should explain its assumptions and how the calculation was made (e.g. whether some level of *'return'* or no *'return'* was achieved throughout the 30-year period and the \$100,000 is progressively eroded by the *'annual fee'* each year, and whether any *'time-value'* is attributed to the \$100,000 and the impact of the *'annual fees'* during the period). A case can be made that the increase of 1% over a 30-year period would reduce the *'final return'* by 30%, not 20%.

The *'Statement of Advice'* exemption for *'Further Advice'* should be recognised formally...

84. RG 179.145 recognises that a **'SoA'** need not be given if the **'Personal Advice'** arising following the **'Annual Review'** qualifies as **'Further Advice'**. This should be recognised formally in the remade **Legislative Instrument**.

***'Fee Disclosure Statements'* and authorisation to deduct or arrange the deduction of *'Ongoing Fees'*...**

85. RG 179.116 to RG 179.121 can be deleted as the obligation to provide **'Fee Disclosure Statements'** annually has been repealed. The requirement to provide **'Fee Disclosure Statements'** annually should never have been required in the case of **'Retail MDA Clients'** because of the **'Quarterly/On-Line'** and **'Annual Reporting Regime'** imposed by **Legislative Instrument 2016/968**. The two uncoordinated **'Reporting Regimes'** confused **'Retail MDA Clients'** (e.g. some were led to believe *'fees'* may have been charged twice).
86. The annual and other obligations which apply to securing authorisation from the *'payer'* to deduct or arrange the deduction of *'fees'* from their *'Bank Account'* or similar facility should be repealed or significantly modified in the case of **'Retail MDA Clients'**. The *'fee deduction'* requirements apply in the case of **'Ongoing Fee Arrangements'**, which (unlike **'Retail MDA Services'**) need not be the subject of a *'service agreement'*. The *'payer'* need not be, but is usually related to, the **'Retail MDA Client'**. If the obligations in relation to deducting or arranging the deduction of **'Ongoing Fees'** are not met, the **'Ongoing Fee Arrangement'** must cease, which triggers the **'termination'** of the **'Retail MDA Service'** for the **'Retail MDA Client(s)'** concerned.
87. Where, for instance, a **'Platform'** is used, **'Platform Operators'** have been known to seek their own, parallel **'Authorisation to Deduct'** from the **'Retail MDA Client'**. Another source of confusion for **'Retail MDA Clients'**. These circumstances should not arise.
88. Given the level of *'fee disclosure'* in the **'FSG/SFSG'** and in the **'Investment Program/SoA'**, the obligations in relation to securing and administering annual renewal of the **'Authorisation to Deduct Ongoing Fees'** or **'Authorisation to Arrange the Deduction of Ongoing Fees'** should not apply to a **'Retail MDA Provider'**. The remade **Legislative Instrument** should provide the necessary *'relief'*.
89. There is, however, *a case for them to apply only where the 'payer' is not the 'Retail MDA Client'*.

***'Termination'* of the *'MDA Contract'* – *'Notice Period'*...**

90. *'Notional'* Section 912AEB(1)(c) requires the **'MDA Contract'** to address (among many other things) how it may be terminated, by notice from the **'MDA Client'** or the **'MDA Provider'** to the other, or by notification from the Commission. Concerning the **'notice period'**, the **Legislative Instrument** requires the **'MDA Contract'** to state that the client or the **'MDA Provider'** may

terminate the **'MDA Contract'** by giving a **'period of notice'** which is **not more than '2 Business Days'**.

91. However, **Regulatory Guide 179** contradicts **Legislative Instrument 2016/968**. It states:

RG 179.152 You must disclose in the MDA contract information about how the client may terminate the contract, including:

- (a) how the instruction to terminate must be communicated;
- (b) **how long it will take for the termination to take effect, which must not be longer than is reasonably necessary**; and
- (c) how the client portfolio assets will be disposed of, or transferred to the client, if those assets are not held directly by the client.

RG 179.153 We believe that, to run your MDA effectively and efficiently, you should have in place policies and procedures to **ensure the orderly exit of clients** from MDA contracts.

92. **This maximum 'period of notice' is too short.** The obligation to **'terminate'** the operation of the **'MDA Contract'** in all instances in no more than **'2 Business Days'** is more likely than not to be prejudicial to the interests of the **'MDA Client'**. Yes, there are circumstances in which **'termination'** should be as **'immediate'** as practicable, but in the typical case there should be a **'reasonable opportunity'** for the parties to discuss the consequences of **'termination'** in relation to the management of the **'MDA Portfolio'** and its **'entitlements'** in the short-term, particularly if the **'termination'** will require the liquidation of the **'MDA Portfolio'**, and to agree a **'path forward'** which also ensures that outstanding obligations owed to the other under the **'MDA Contract'** are met before the **'authority'** of the **'MDA Contract'** is **'terminated'**.
93. To the extent these discussions include **'Personal Advice'** to continue the **'MDA Contract'** or in relation to the **'investment strategy'** or particular holdings or **'entitlements'**, a **'SoA'** would be triggered, unless the **'Personal Advice'** fell within the bounds of **'Further Advice'**.
94. The **'MDA Contract'** will usually include reference to circumstances which trigger **'immediate termination'**. Beyond those circumstances, where **'termination'** should be as **'immediate'** as practicable, the more effective course in the short-term (from the perspective of the **'MDA Client'**) would be to rely on the ability of the **'MDA Client'**, as permitted by the **'MDA Contract'**, to withdraw the grant of **'Discretionary Authority'** in whole or part for the time being, and have the manager of the **'MDA'** refer all investment decisions (i.e. recommended courses of action) to the **'MDA Client'** for approval, which may be withheld. **'SoAs'** would be triggered unless this **'Personal Advice'** fell within the bounds of **'Further Advice'**. The withdrawal of **'Discretionary Authority'** would usually trigger **'termination'**, but should allow for the period until **'termination'** takes effect to be no longer than is **'reasonably necessary'**, which would allow a **'reasonable opportunity'** for the parties to discuss the consequences of **'termination'** and agree a **'path forward'** for the liquidation or transfer of the management of the **'MDA Portfolio'** to the client.

The 'Exemption' for 'Market Participants' who provide 'MDA Services' to 'Family Members' only

95. The existence of this **'Exemption'** is firstly, a consequence of the Commission's view that **'discretionary trading'** on behalf of an **'account'** of a **'family member'** by any **'Representative'** of an **'AFS Licensee'** is part of the **'financial services business'** conducted by the **'AFS Licensee'** and qualifies as a **'MDA Service'**, which would require access to **'relief'** unless the **'AFS Licensee'** happened to be a **'MDA Provider'**, and secondly, **'Market Participants'** being able to satisfy the Commission that an **'Exemption'** was appropriate in their case, given their **'supervisory arrangements'** and the obligation under the **'Market Integrity Rules'** [MIR 5.4] that all **'orders'** for a **'Market Transaction'** on behalf of a **'Connected Person'** must have the **'written approval'** of a Director or their delegate, who is obliged to take due account of the context of the **'order'** when considering whether to approve it, before it is placed in the **'Market'**.
96. **Regulatory Guide 179** states the following:

RG 179.201 We consider that, if a representative of an AFS licensee undertakes discretionary trading on behalf of a family member, **that trading would generally be part of the financial services business conducted by the licensee**. As a result, these accounts would be considered MDAs and would be subject to the requirements in ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968, including the licensing requirements.

RG 179.204 In addition to the above, we give our relief because of the high level of trust that generally exists within most family relationships, the professional expertise of the representative, and the alignment of interests that commonly occurs between family members.

RG 179.205 If you are a market participant and the only MDAs you provide are MDAs for your family members or the family members of your representatives, we give you relief from:

- (a) the requirement that the MDA must be registered under s601ED(5) of the Corporations Act;
- (b) the requirement to obtain the AFS licence authorisations relevant to the MDA services you provide, and related provisions in Pt 7.6 of the Corporations Act;
- (c) the financial services disclosure provisions in Pt 7.7 of the Corporations Act; and
- (d) the requirement to prepare a PDS under Pt 7.9 of the Corporations Act.

97. The Commission's view, as expressed in **Regulatory Guide 179**, that this *'discretionary trading'* would **generally be** part of the *'financial services business'* conducted by the *'AFS Licensee'* concerned reflects a *'regulatory logic'* which is *'qualified'*, yet the existence of this **'Exemption'** in the **Legislative Instrument** implies this view has been elevated to a *'universal regulatory principle'*. What we draw from this **'Exemption'** and its *'conditions of relief'* in favour of **'Market Participants'**, because of the particular requirements of the **'Market Integrity Rules'** which only apply to them, is that *'discretionary trading'* on behalf of an *'account'* of a *'family member'*, by a *'Representative'* of any *'AFS Licensee'* which is not a **'Market Participant'**, amounts to a **'MDA Service'**, in which case this *'discretionary trading'* must stop or the *'AFS Licensee'* must have access to *'relief'* (i.e. the *'AFS Licensee'* must become a **'MDA Provider'**).
98. Although there is an argument (in the case of **'Market Participants'**) for the inclusion of this **'Exemption'** for the sake of *'regulatory certainty'*, **the presumption that this particular 'discretionary trading' is automatically deemed to be part of the 'financial services business' of any 'AFS Licensee' concerned is flawed fundamentally and should not continue to stand as a precedent.** This *'logic'* would also deem the *'non-discretionary trading'* and any *'advice'* provided by the *'Representative'* to a **'Family Member'** to be part of the *'financial services business'* of the *'AFS Licensee'*, yet the Commission has chosen not to explain why this is not the case.
99. The Commission's stance should not so unilaterally impede typical *'family arrangements'*. What is to be gained *'materially'* if the *'Representative'* is always required to contact their *'spouse'* to seek an *'instruction to transact'* before seeking approval for it to be placed in the *'Market'*? What is to be gained if an *'account'* is opened in the name of one or more **'Family Members'** at another *'AFS Licensee'* and the *'Representative'* is given authorisation (acceptable to the other *'AFS Licensee'*) to instruct dealings on these *'accounts'*?
100. These are *'private arrangements'* between a *'family member(s)'* and the person who happens to qualify as a *'Representative'*. **'Family Members'** may have access to *'concessionary fees'* for services available from the *'AFS Licensee'*, as a consequence of their *'familial relationship'*, but this does not amount to *'discretionary trading service'* being *'offered'* by the *'AFS Licensee'* to **'Family Members'**. In the **'Retail'** context, it (the **'discretionary dealing service'**) isn't addressed in the **'FSG'** (and therefore, technically, can't be offered to those who qualify as a **'Retail Client'**), and in accordance with usual practise, the *'Representative'* would be required to secure *'written authorisation'* from their *'spouse'* to operate their *'account'*.
101. *'Non-Adult Children'* have no legal standing contractually, and so the *'Representative'* has the status of *'trustee'* when dealing for them, and the property concerned is *'allocated'* to these *'family members'*, which vests when they reach their *'majority'*. It isn't typical third-party property. **In this case, the 'Representative' is operating an 'account' on behalf of themselves, but in their capacity as a 'trustee'.**
102. Where the *'Representative'* (as defined by the Corporations Act) isn't actually a provider of *'Financial Services'* or involved directly in offering or facilitating *'Financial Services'* on behalf of that *'AFS Licensee'*, it certainly can't be argued that he or she is doing so as a *'Representative'*. If the *'Representative'* does provide, or is involved in providing, *'Financial Services'* (e.g. as an *'Adviser'* or *'Research Analyst'*), any perception that the services provided to a **'Family Member'** are provided by the *'AFS Licensee'* can be corrected or negated by an appropriate *'written disclosure'*. Remember too that various benefits, in terms of tax and otherwise, are available to families if investments are made in the name of a *'spouse'* or *'non-adult children'*, which in the case of an *'AFS Licensee'* that isn't a **'Market Participant'** (i.e. in the absence of an **'Exemption'**) would require the *'Representative'* and their *'Family Members'* to use the services of a third-party *'AFS Licensee'*. Other *'laws'* recognise property held variously in a *'spousal-relationship'* to be *'property-in-common'*, and *'Family Law'* does protect the interests of a *'spouse'* and *'non-adult children'*.

The 'relief' available to Market Participants...

103. **Sections 13 and 14 of Part 2** specify the bounds of the *'relief'* and the *'conditions of relief'* available to a **'Market Participant'**. The wording of **Section 13** is unnecessarily difficult and confusing. **Section 13(1)** states that *"...the Market Participant does not have to comply with...Part 7.6 of the*

Corporations Act (other than Divisions 4 and 8) as affected by this instrument...”, which avoids the need for the ‘special authorisations’ required in the case of a **‘MDA Provider’**. Nor does the **‘Market Participant’** have to comply with Part 7.7 in relation to **‘FSG’** content and **‘SoAs/Investment Programs’**.

104. On the matter of causing confusion, **Section 13(1)(c)** does not require compliance with certain obligations which would usually apply in relation to a ‘financial product’ which is “...an equitable right or interest in a financial product arising because of a holding, or an offer to hold or arrange for the holding of, the financial product on behalf of the client as part of the MDA Services...”, yet **Section 13(3)** states that the “...exemption in subsection (1) does not apply to the provision of custodial or depository services by the licensee...”. As we understand it, providing **‘Custody Services’** includes arranging to do so, hence the apparent contradiction and confusion.

Termination when a ‘Non-Adult Child’ turns 18 years of age...

105. We note that in the case of a **‘Family Member’** who is a **‘Non-Adult Child’**, the agreement under which these **‘MDA Services’** are provided must include a provision that it will **‘automatically terminate’** when that **‘Family Member’** turns 18 years of age. For the reasons given above in relation to **‘termination’** of the **‘MDA Contract’**, even though **‘termination processes’** could commence in advance of the **‘birthday’**, there should be due allowance for **‘Market Conditions’** and other issues or contingencies which may arise, which may need to be addressed appropriately beyond that date, for a limited period, in order to protect the client’s interests. Perhaps it would be sufficient for the exercise of **‘discretionary authority’** to cease, in order to require engagement with the **‘New Adult’**?

‘Advice’ is not an element of the ‘relief’...

106. Despite these **‘discretionary dealings’** being recognised as part of the **‘financial services business’** conducted by the **‘AFS Licensee’**, it is noteworthy that **Section 14** does not require any **‘Advice’** (a material element of a **‘MDA Service’**) to be provided by, or sought from, the **‘AFS Licensee’**. The objective of **Section 14** appears to be **‘transparency’**, not **‘suitability’**. The **‘conditions’** imposed by **Section 14** are distinct from those set out in **Part 3**, but are a **‘filleted’** version of the elements of Sections 912AE to 912AEG.
107. In our view, **Sections 13 and 14** should either be applied to all **‘AFS Licensees’** generally, not just **‘Market Participants’**, or deleted. Our preference is that this **‘Exemption’** be deleted, because the premise is *‘fragile’*. However, if it is to stand, it should extend to all **‘AFS Licensee’** providing services in relation to **‘Market-Traded Product’**, because they should have **‘compliance measures’** to adequately address **‘conflicts management’** and **‘client order precedence’** obligations, and the risk of **‘front-running’** or **‘piggy-backing’** client **‘orders’**. If the **‘test’** is whether a **‘Representative’** is undertaking **‘discretionary trading’** on behalf of a **‘family member’** (and not to a wider demographic of relations or friends), then the status of the **‘AFS Licensee’** and the application of the **‘Market Integrity Rules’** should be irrelevant.

The ‘Financial Requirements’ specified by Legislative Instrument 2023/648...

108. The following observations are from the perspective of a **‘Retail MDA Provider’** that is NOT a **‘Market Participant’**, is authorised to provide **‘Custody Services’** and does so as a **‘Incidental Provider’** and in a manner which is intended not to trigger a **‘NTA Requirement’**.
109. The requirements of **Legislative Instrument 2023/648** apply. They are unnecessarily **‘convoluted and complex’**, particularly so in the case of an **‘Incidental Provider’**. **Legislative Instrument 2023/648** does not apply to those **‘Retail MDA Providers’** whose authorisations do NOT include **‘Custody Services’**. These **‘Retail MDA Providers’** are subject to the standard **‘Base-Level Financial Requirements’** and the **‘Surplus Liquid Funds Requirement’**. The **‘Adjusted Surplus Liquid Funds Requirement’** only applies if triggered.
110. Yes, the focus of **Legislative Instrument 2023/648** must be on setting a minimum standard of **‘financial resilience’** and **‘financial risk management’** for those who actually provide, rather than just arrange, **‘Custody Services’**, but the methodology must also be appropriate for those who fall within the definition of **‘Incidental Provider’** and happen to be captured by this **Legislative Instrument** simply because they are authorised to provide **‘Custody Services’**. The regime imposed, which was designed and built by the Commission from scratch, does influence the decisions of affected **‘Retail MDA Providers’** in relation to the structure of the **‘service-arrangements’** put in place, and should be reviewed at the same time amendments to the terms of the **‘relief’** granted by **Legislative Instrument 2016/968** are being considered.

111. In the case of an *'AFS Licensee'* which is authorised to provide *'Custody Services'* and is neither regulated by APRA nor a *'Market/Clearing Participant'*, the fact of this authorisation triggers the requirements of **Legislative Instrument 2023/648** (*'Financial Requirements for Custodial or Depository Services Providers'*), which over-ride particular elements of those of its *'Licence Conditions'* that specify *'Financial Requirements'* and *'Audit Requirements'* [*'notional'* Section 912AC(2)].

112. This **Legislative Instrument**:

- imposes a *'Tailored Cash Needs Requirement'* involving *'Rolling Cash-Flow Projections'* for a minimum of *'12 Months'* rather than the standard *'3 Months'*;
- imposes a *'Special Audit Requirement'*, concerning compliance with this **Legislative Instrument**, which over-rides the *'Standard Audit Requirement'* specified by *'Licence Condition'*; and
- may or may not impose a *'NTA Requirement'*, depending on the nature of the *'Custody Services'* and whether it is *'incidental'* to another *'Financial Service(s)'* provided by the *'AFS Licensee'*.

The *'AFS Licensee'* is made subject to:

- a *'Tailored Cash Needs Requirement'*, which requires [*'notional'* Section 912AC(3)]:
 - a documented *'Rolling 12 Month Projection'* of *'Cash-Flows'*, based on a *'reasonable estimate'* of what is likely to happen during this period;
 - this projection to be approved in writing by all Directors, no less frequently than each Quarter, as satisfying the requirements for the projection;
 - the calculations and assumptions used in preparing this projection, and the reasons why the assumptions are appropriate, to be documented;
 - the *'AFS Licensee'* to document whether, based on the projection of *'Cash-Flows'*, it will:
 - have access when needed to sufficient *'financial resources'* to meet its *'liabilities'* during the projected period of at least *'12 Months'*; and
 - (if applicable) comply with its *'NTA Requirement'* at all times during the projected period; and
 - the projection to be updated if it ceases to cover a period of *'12 Months'* or there is *'reason to suspect'* the updated projection would differ materially from the current projection or would show the *'AFS Licensee'* did not have access when needed to sufficient *'financial resources'* to meet its *'liabilities'* during the period projected and/or did not (if applicable) comply with its *'NTA Requirement'*; and
- the obligation to lodge an *'Auditor's Report'* with ASIC (together with its *'Audited Annual Financial Statements'* in the usual manner), concerning whether the *'AFS Licensee'* complied with the applicable elements of this **Legislative Instrument** [*'notional'* Section 912AC(10)]; and
- a *'NTA Requirement'* which differs depending on whether [*'notional'* Section 912AC(4) – (7)]:
 - the *'Custody Services'* are *'stand-alone'* and may be accessed directly by clients, in which case the minimum *'NTA'* required is at least the greater of **\$10 Million** or **10% of 'Average Revenue'**; or
 - the *'AFS Licensee'* qualifies as an *'Incidental Provider'* and holds *'legal title'* or *'beneficial interests'* on behalf of clients, in which case the minimum *'NTA'* required is at least the greater of **\$150,000** or **10% of 'Average Revenue'**; or
 - the *'AFS Licensee'* qualifies as an *'Incidental Provider'* and ALL the *'financial product'* holdings or *'beneficial interests'* in *'financial products'* to which its *'Custody Services'* relate are held by another *'AFS Licensee'* authorised to provide *'Custody Services'* that the *'AFS Licensee'* (in this case the *'Retail MDA Provider'*) *'reasonably believes'* is [*'notional'* Section 912AC(5)]:
 - NOT an *'Incidental Provider'* AND complies with *'notional'* Section 912AC [i.e. **Legislative Instrument 2023/648**] – the *'Retail MDA Provider'* has a *'reasonable belief'* if it has obtained a *'written assurance'* from the other *'Custodian'* that

(at that time) it is NOT an **'Incidental Provider'** and does comply with **Legislative Instrument 2023/648** [*'notional'* Section 912AC(6) & (8)]; OR

- a **'Sub-Custodian'** appointed by this other **'AFS Licensee'**; OR
- an **'Eligible Custodian'**,

in which case, **no minimum** (i.e. a **'NIL'**) **'NTA Requirement'** applies (i.e. the **'AFS Licensee'** must comply with the **'Licence Condition'** specifying its **'Base-Level Financial Requirements'** and **'Surplus Liquid Funds Requirement'**).

An **'Eligible Custodian'** is:

- an **'Australian ADI'**; or
- a **'Market Participant'** or a **'Clearing Participant'**; or
- a **'Sub-Custodian'** appointed by any of the above.

If a **'NTA Requirement'** applies, then [*'notional'* Section 912AC(7)]:

- at least 50% of the required **'NTA'** must be in the form of **'Cash or Cash-Equivalents'**; AND
- at least 100% of the required **'NTA'** must be in the form of **'Liquid Assets'**.

'Cash or Cash-Equivalents' that are also **'Liquid Assets'** can be double-counted for both purposes. Client funds held in a **'Trust Account'** cannot be counted towards either requirement.

The **'Tailored Cash Needs Requirement'**...

113. Why is it necessary for ALL Directors to approve in writing the **'Projection'** as satisfying the requirements specified for a **'Projection'**?

The calculation of **'Average Revenue'**...

114. **'Average Revenue'** is defined as follows [*'notional'* Section 912AC(12)]:

average revenue means:

- (a) for a financial services licensee in its **first financial year**—the licensee's forecast of its revenue from the calculation date for the remainder of the **first financial year**, pro-rated to a 12-month period; and

Note: **revenue** is defined below.

- (b) for a financial services licensee in its **second financial year**—the aggregate of the licensee's:
 - (i) estimate of its revenue for the **second financial year** to date; and
 - (ii) forecast of its revenue for the remainder of the **second financial year**; and
- (c) for a financial services licensee in its **third financial year**—the average of:
 - (i) the aggregate of the licensee's:
 - (A) estimate of its revenue for the **third financial year** to date; and
 - (B) forecast of its revenue for the remainder of the **third financial year**; and
 - (ii) the licensee's revenue for its **second financial year**; and
- (d) for **all subsequent financial years** of a financial services licensee—the average of:
 - (i) the aggregate of the licensee's:
 - (A) estimate of its revenue for the **current financial year** to date; and
 - (B) forecast of its revenue for the remainder of the **current financial year**; and
 - (ii) the licensee's revenue for the **last preceding financial year**; and
 - (iii) the licensee's revenue for the **second preceding financial year**.

115. **'Revenue'** is defined as follows [*'notional'* Section 912AC(12)]:

revenue means, in relation to a financial services licensee:

- (a) the licensee's **revenue** (within the meaning given by the **accounting standards**); and
- (b) to the **extent it is not the licensee's revenue** (within the meaning of the **accounting standards**)—any amount paid or payable for the performance of the obligations imposed on the licensee to provide custodial or depository services, even if those obligations are performed by another entity.

Note: One consequence of paragraph (b) is that the **revenue of a licensee will include any revenue earned by an authorised representative of the licensee in respect of amounts paid or payable for performing custodial or depository services on behalf of the licensee.**

The inclusion of **'Cash-Flows'** beyond those of the **'AFS Licensee'** can be problematic. They are not required for the purposes of the **'Tailored Cash Needs Requirement'**. The revenue generated by **'Authorised Representatives'** is usually paid by clients directly to the **'AFS Licensee'**.

Why does the wording of paragraph (b) highlight amounts received for the performance of **'Custody Services'** by another entity (e.g. an *'Authorised Representative'*). Surely this logic requires inclusion of *'revenue'* from all *'financial services'* that happen to be provided by an *'Authorised Representative'*?

The definition of **'Incidental Provider'**...

116. **'Incidental Provider'** is defined as follows [*'notional'* Section 912AC(12)]:

incidental provider means a financial services licensee that is authorised to provide a custodial or depository service:

- (a) that **does not provide any custodial or depository services** other than services which:
 - (i) are a need of the person to whom the services are provided because of, or **in order to obtain the provision of other financial services by the licensee or its related bodies corporate**; and
 - (ii) do not form part of an IDPS; and
- (b) whose **custodial or depository services revenue** is less than 10% of its **financial services business revenue**.

In short, the **'Custody Services'** are not accessible directly, in their own right. They are *'bundled'* within another *'financial service'* or within a *'product'* (e.g. a **'Retail MDA Service'**) required by the client.

Those **'Retail MDA Providers'** who have the authorisation to provide **'Custody Services'** usually sought it to avoid the involvement of an **'External MDA Custodian'** (finding a **'Custodian'** prepared to act in this capacity is nigh on impossible) and to permit, if necessary, the *'arranging'* of **'Custody Services'** for clients. They don't usually deploy their **'Custody Services'** authorisation for any purpose beyond their **'MDA Services'**, and they tend to have **'MDA Clients'** use a **'Regulated Platform'** (an **'IDPS-Like Scheme'** or an **'IDPS'**), given the benefits of their administrative, reporting and asset-holding services.

117. **'Financial Services Business Revenue'** is defined as follows [*'notional'* Section 912AC(12)]:

financial services business revenue means, in relation to a financial services licensee, the aggregate of the licensee's:

- (a) **estimate** of the **revenue attributable to the financial services business of the licensee and its related bodies corporate** for the **current financial year to date**, **excluding** any **revenue attributable to custodial or depository services** provided by the **licensee or a related body corporate**; and
 - (b) **forecast** of **such revenue** for the **remainder of the financial year**;
- determined on the basis that the **revenue attributable to custodial or depository services** must **at least include the cost of providing those services**.

The **'revenue attributable'** to a **'financial services business'** includes that generated by its **'Representatives'**. Why the need for the reference to **'Related Bodies Corporate'**? If necessary, why not just refer to **'Representatives'**?

Why exclude **'Custody Services Revenue'** from **'Financial Services Business Revenue'**? The former is legitimately part of the latter. Its exclusion distorts (makes more conservative) the calculation of the ratio of **'Custody Services Revenue'** to **'Financial Services Business Revenue'**, which must not exceed 10% if the *'AFS Licensee'* is to continue to qualify as an **'Incidental Provider'**.

118. **'Custodial or Depository Services Revenue'** is defined as follows [*'notional'* Section 912AC(12)]:

custodial or depository services revenue means, in relation to a financial services licensee, the aggregate of the licensee's:

- (a) **estimate** of the **revenue attributable to custodial or depository services** provided by the **licensee and its related bodies corporate** for the **current financial year to date**; and
 - (b) **forecast** of **such revenue** for the **remainder of the financial year**;
- determined on the basis that **such revenue** must **at least include the cost of providing those services**.

For the reasons given above, determining the cost of providing (i.e. *'arranging'*) these *'arm's-length'* services (embedded in a third-party *'product'*) is highly contrived and meaningless.

The obligations arising from having a **'Relevant Interest'** in each **'MDA Portfolio Holding'**...

119. Having the *'power to dispose'* of each **'Retail MDA Portfolio Holding'** triggers a **'Relevant Interest'** in these **'Holdings'**, which collectively may trigger **'Substantial Holder Notice'** obligations.

Regulatory Guide 179 does not, but should, remind **'Retail MDA Providers'** of the relevance of these obligations, including the special requirements that apply during a *'Takeover'*, particularly where they are active investors in the **'Small/Mid-Cap Sector'**.

The 'Annual Reporting' obligation...

120. *'Notional'* Section 912AEF(4)(a) requires a **summary of the transactions** that "...occurred as part of the MDA services provided to the person during the year including the nature and purpose of those transactions...". An additional summary explanation of the *'nature and purpose'* of a particular type of transaction should not be required if these matters are *'self-evident'* from elsewhere in the *'Annual Report'* (e.g. the purchase or sale of *'securities'*; a transfer to or from a *'cash management account'*). What is to be gained if the purpose of each *'securities transaction'* is explained as being *'in accordance with the investment strategy for the account'*?

III. OVER-REACH OF THE PROCEDURES SPECIFIED – ‘ASSET-HOLDING’

The ‘Asset-Holding’ provisions are unnecessarily onerous and intrusive...

121. Section 912AEC (‘Asset-Holding’) is by far the longest of the provisions directly applicable to ‘Retail MDA Providers’ [i.e. Section 912AE to Section 912AEG], accounting for 14 of the 28 pages presenting these Sections. The requirements are very prescriptive, bureaucratic and intrusive (for the third-party provider of ‘Custody Services’, not just the ‘Retail MDA Provider’). Such a focus on ‘Asset-Holding’ is remarkable, even if the Commission’s purpose was to ensure ‘harmonisation’ with the ‘relief’ available to other providers of ‘Custody Services’.
122. Where they apply, the ‘Retail MDA Provider’ must “...do ALL things necessary to ENSURE...” compliance. This ‘minimum standard’ is a ‘high-bar’ indeed, and unlikely to be achieved in all contingencies, which leaves the ‘Retail MDA Provider’ open to the continuing ‘risk’ of ‘non-compliance’, which ‘risks’ the ability of the ‘Retail MDA Provider’ to continue to provide ‘Retail MDA Services’ [Section 5 of Part 2 of the Legislative Instrument]. Surely “...do ALL things REASONABLY necessary to ENSURE...” would be a sufficient and appropriate ‘benchmark’?
123. The Commission explains:

RG 179.88 We impose minimum standards on MDA providers for holding client portfolio assets to ensure that efficient operational arrangements exist and client portfolio assets are not exposed to unnecessary risks because of the way they are held.
124. The definition of ‘MDA Service’ confirms that it has (among others) the feature that the client agrees with the ‘Retail MDA Provider’ that the ‘Client Portfolio Assets’ will be held legally or beneficially by the ‘Retail MDA Client’ [Section 4 of Part 1 of the Legislative Instrument]. Given the definition of ‘Retail MDA Provider’, if the ‘Retail MDA Client’ holds these assets ‘beneficially’, it would be expected that they would be held ‘legally’ by the ‘Retail MDA Provider’ or a ‘Custodian’ arranged by the ‘Retail MDA Provider’, or by the ‘External MDA Custodian’ or a ‘Custodian’ arranged by the ‘External MDA Custodian’.
125. The Corporations Act does not provide a ‘licensing exemption’ for incidental ‘Custody Services’, and even if all the ‘AFS Licensee’ wishes to do is arrange rather than actually provide ‘Custody Services’ directly, the ‘AFS Licensee’ must nevertheless have the full ‘Custody Services’ authorisation [Section 766E]. Therefore, if the ‘Retail MDA Provider’ is authorised to provide ‘Custody Services’, it permits the ‘Retail MDA Provider’ to be in the business of either providing ‘Custody Services’ directly or arranging for these services to be provided by a third-party ‘Custodian’ to (and in the name of) the client.
126. Except for the prohibition on ‘Client Portfolio Assets’ of a ‘Retail MDA Client’ being ‘pooled’ with any other property to enable an investment to be made or made on more favourable terms [‘notional’ Section 912AEC(1)], the requirements of the ‘Asset-Holding’ provisions [i.e. ‘notional’ Section 912AEC(2) to (25)] do NOT apply if all ‘Retail MDA Clients’ hold ‘legal title’ to their ‘Client Portfolio Assets’, which would not require the ‘Retail MDA Provider’ to be authorised to provide ‘Custody Services’. In these circumstances, having to involve an ‘External MDA Custodian’ would be nonsensical. If necessary, in order to access comprehensive, cost-effective ‘portfolio holding, administration and reporting services’, the ‘Retail MDA Provider’ could open an ‘Account’ on a ‘Regulated Platform’ (by means of acquiring a ‘product’ which is an interest in an ‘IDPS’ or ‘IDPS-Like Scheme’) in the name of each ‘Retail MDA Client’.
127. If the ‘Retail MDA Provider’ is authorised to provide ‘Custody Services’, in order to avoid the involvement of an ‘External MDA Custodian’, and holds ‘legal title’ to ‘Retail MDA Client Holdings’ or a ‘beneficial interest’ in those ‘Holdings’ as a consequence of engaging a third-party ‘Custodian’, then the ‘Asset-Holding’ requirements apply. However, finding an appropriate, cost-effective ‘Custodian’ is difficult, which in part is due to the reach of the ‘Asset-Holding’ provisions. A ‘Platform’ happens to provide better support for a ‘Retail MDA Service’, and by opening an ‘Account’ on a ‘Platform’ in the name of each ‘Retail MDA Client’, the ‘Retail MDA Provider’ can avoid the ‘Asset-Holding’ requirements. [Note: if it is to avoid the ‘NTA Requirement’, a ‘Custodian’ which complies with Legislative Instrument 2023/648 or its ‘Sub-Custodian’ or an ‘Eligible Custodian’ must be bundled within the ‘product’.]
128. Legislative Instrument 2016/1156 does not apply, but Legislative Instrument 2024/17 may be a source of ‘double-jeopardy’ for a ‘Retail MDA Provider’. ‘Notional’ Section 912AAC overlaps significantly with ‘notional’ Section 912AEC. ‘Notional’ Section 912AAE requires the ‘Retail MDA Provider’ to have a ‘Custody Services Agreement’ with a ‘Retail Client’, which is to have particular ‘minimum terms’. Legislative Instruments 2016/968 and 2024/17 appear not to recognise each other. A (separate) ‘Custody Services Agreement’ with each ‘Retail MDA Client’

should not be required where the **'Retail MDA Provider'** is authorised to provide **'Custody Services'**. The range of **'discretions'** and **'services'** listed in the **'FSG/SFSG'** and granted under the **'MDA Contract'** already include providing or arranging **'Custody Services'**. The **'Custody Services Agreement'** required (if applicable) between the **'Retail MDA Provider'** and the **'Custodian'** should be sufficient for arranging the services to be provided to a **'Retail MDA Client'** by a third-party **'Custodian'** [*notional* Section 912AEC(19)].

'Asset-Holding'...

129. Unless the **'Retail MDA Provider'** reasonably considers that either [*notional* Section 912AEC(3)]:

- the **'Client Portfolio Assets'** are located in a place outside this jurisdiction where **'trusts'** are not known to the **'Law'** and it is reasonable for the **'assets'** to be held in accordance with the **'Law'** in that place; OR
- the **'Client Portfolio Assets'** are located in a place outside this jurisdiction and the **'Retail MDA Provider'** reasonably considers that it is not reasonable for the **'assets'** to be held **'on trust'** in accordance with the **'Law'** in that place, and the **'Retail MDA Provider'** has **documented in writing** that:
 - it is satisfied that the **'Client Portfolio Assets'** are held in a manner that, having regard to the relevant **'Laws'**, provides **'reasonably effective protection'** in case of insolvency of the person holding the property; AND
 - the basis on which the **'Retail MDA Provider'** is **'satisfied'**,

THEN:

- the **'Retail MDA Provider'** must **'do all things necessary to ensure'** that if the **'Retail MDA Provider'** holds **'Client Portfolio Assets'** (it is the **'Custodian'**), it holds those assets **'on trust'** for the **'Retail MDA Client'** or the **'Retail MDA Client'** and other clients of the **'Retail MDA Service'** it provides, unless the **'Client Portfolio Assets'** are held under **Division 2 ('Trust Account'** requirements) or **4 ('Special provisions relating to Insurance')** of **Part 7.8** of the Corporations Act.

130. Unless the **'Retail MDA Provider'** reasonably considers that either [*notional* Section 912AEC(3)]:

- the **'Client Portfolio Assets'** are located in a place outside this jurisdiction where **'trusts'** are not known to the **'Law'** and it is reasonable for the **'assets'** to be held in accordance with the **'Law'** in that place; OR
- the **'Client Portfolio Assets'** are located in a place outside this jurisdiction and the **'Retail MDA Provider'** reasonably considers that it is not reasonable for the **'assets'** to be held **'on trust'** in accordance with the **'Law'** in that place, and the **'Retail MDA Provider'** has **documented in writing** that:
 - it is satisfied that the **'Client Portfolio Assets'** are held in a manner that, having regard to the relevant **'Laws'**, provides **'reasonably effective protection'** in case of insolvency of the person holding the property; AND
 - the basis on which the **'Retail MDA Provider'** is **'satisfied'**,

THEN:

- if the **'Client Portfolio Assets'** are held by a person the **'Retail MDA Provider'** engages directly (e.g. a **'Custodian'**) or indirectly (e.g. a **'Sub-Custodian'**), the **'Retail MDA Provider'** must **'do all things necessary to ensure'** they are held in a way so that the **'Retail MDA Client'** or the **'Retail MDA Client'** and other clients of the **'Retail MDA Service'** have a **'beneficial interest'** in the **'Client Portfolio Assets'** (whether directly or indirectly) unless the **'assets'** are held under **Division 2 ('Trust Account'** requirements) or **4 ('Special provisions relating to Insurance')** of **Part 7.8** of the Corporations Act. [Note: this could be satisfied by a person holding the client portfolio assets on trust for the **'Retail MDA Provider'** and the **'Retail MDA Provider'** holding the **'beneficial interest'** in those assets on trust for the client or the clients of the MDA services as a whole.]

'Asset-Holding' – Identifying 'Client Portfolio Assets' and holding them separately from 'Other Property'...

131. The **'Retail MDA Provider'** must ensure that it and must **'do all things necessary to ensure'** that any person it directly or indirectly engages to hold **'Client Portfolio Assets'** [*notional* Section 912AEC(5)]:

- **as far as practicable** identifies the **'Client Portfolio Assets'** as held on behalf of the person for whom they are held; and
- holds the **'Client Portfolio Assets'** separately from property in which the **'Retail MDA Provider'** or the person holding the **'Client Portfolio Assets'** has an interest

and from the property of any other person other than the **'Retail MDA Client'** and other **'Retail MDA Clients'** of the **'Retail MDA Service'** except in relation to:

- Australian or foreign currency; or
- a deposit taking facility of a body carrying on a business of accepting money on deposit including rights under that facility; or
- securities; or
- derivatives,

held separately from property in which the **'Retail MDA Provider'** or the person has an interest other than as a *'trustee'* for a person other than the *'AFS Licensee'* (i.e. the **'Custodian'**), except where property is not held separately to comply with *'notional'* Section 912AEC(6)(f).

132. The **'Retail MDA Provider'** must ***'do all things necessary to ensure'*** that, if **'Client Portfolio Assets'** of a **'Retail MDA Client'** are **NOT held separately** from property in which the **'Retail MDA Provider'** or the person holding the **'Client Portfolio Assets'** has an interest and separately from the property of any person other than the **'Retail MDA Client'** and other **'Retail MDA Clients'** of the **'Retail MDA Service'** [*'notional'* Section 912AEC(6)]:

- the **'Retail MDA Provider'** has put in place and keeps for **7 years** after it was last relied on a ***'written policy'*** in relation to not holding **'Client Portfolio Assets'** separately, which **sets out its reasons** why that policy is appropriate having regard to any extent to which it might expose its **'Retail MDA Clients'** to the risks arising from **'Client Portfolio Assets'** not being held separately and its duties to each **'Retail MDA Client'**; and
- the **'Retail MDA Provider'** **reviews the policy at least every 13 months**, prepares a **written record of the outcome of the review** and keep that record for **7 years**; and
- **adequate records** are to be kept at all times showing each **'Retail MDA Client's'** entitlement to property that includes the **'Client Portfolio Assets'** not held separately; and
- **reconciliation procedures** are performed on each business day in relation to the **'Client Portfolio Assets'** not held separately or if because of the nature of the property, it is ordinary and reasonable commercial practice in the place where the property is located to reconcile property of that kind less frequently, as frequently as would be performed in accordance with that practice; and
- not holding the **'Client Portfolio Assets'** separately does not restrict the ability of the **'Retail MDA Provider'** to exercise its powers in relation to the **'Client Portfolio Assets'** in accordance with its duties, including in relation to voting rights; and
- if the property that includes the **'Client Portfolio Assets'** is not sufficient to meet the entitlements of all persons in relation to that property, the **insufficiency ceases by the second business day** after the insufficiency arises, whether through the provision of additional property by the **'Retail MDA Provider'** or otherwise [*'notional'* Section 912AEC(6)(f)].

'Asset-Holding' – 'Investment Restrictions'...

133. In addition to complying with the limits of the **'discretions'** granted by the **'Retail MDA Client'**, the **'Retail MDA Provider'** must **ensure** (not ***'do all things necessary to ensure'***) that the **'Client Portfolio Assets'** of a **'Retail MDA Client'** do NOT include [*'notional'* Section 912AEC(22)]:

- interests in a **'Unregistered Scheme'** or **'Notified Foreign Passport Fund'**; or
- interests in a **'Scheme'** that is not a **'Managed Investment Scheme'** because of paragraph (e) of the definition of **'Managed Investment Scheme'** [i.e. a **'Scheme'** in which all the Members are **'bodies corporate'** that are related to each other and to the **'body corporate'** that promotes the **'Scheme'** – Section 9 of the Corporations Act]; or
- [unless the requirements of *'notional'* Sections 912AEC(23) & (24) are met] a **'Non-Limited Recourse Product'** (e.g. a **'Margin Lending Facility'** or **'CFD'**).

'Asset-Holding' – Handling 'Entitlements' arising from 'Client Portfolio Assets'...

134. If the **'Retail MDA Contract'** requires the **'Retail MDA Provider'** to consider exercising or to exercise a **'right'** that relates to a **'Client Portfolio Asset'**, the **'Retail MDA Provider'** must fulfil these duties [*'notional'* Section 912AEC(20)]. If not, the **'Retail MDA Provider'** must provide (as soon as practicable after receipt) all the communications it received (assuming it is the **'holder'**) relevant to the exercise of the **'right'** to the **'Retail MDA Client'** and ***'take reasonable steps'*** to implement the instructions from the **'Retail MDA Client'** relating to the exercise of the **'right'** [*'notional'* Section 912AEC(21)].

'Asset-Holding' – 'Pooling' is not permitted in certain circumstances...

135. The **'Retail MDA Provider'** must **ensure** (not **'do all things necessary to ensure'**) the **'Client Portfolio Assets'** of a particular **'Retail MDA Client'** are not **'pooled'** with any other property to enable an investment to be made or made on **'more favourable terms'** [*'notional'* Section 912AEC(1)].

'Organisational Structure'...

136. The **'Retail MDA Provider'** must **'do all things necessary to ensure'** that if it holds **'Client Portfolio Assets'**, it, or if another **'Custodian'** holds those assets, that **'Custodian'**, has an **'Organisational Structure'** that **'supports'** compliance with *'notional'* Section 912AEC(5)(b) [i.e. that **'Client Portfolio Assets'** are held separately from property in which the **'Retail MDA Provider'** or the holder (another **'Custodian'**) has an interest and from property of any other person other than **'Retail MDA Clients'**, except in relation to:

- Australian or Foreign Currency;
- a **'Deposit-Taking Facility'**; or
- Securities; or
- Derivatives;

held separately from property in which the **'Retail MDA Provider'** or the other **'Custodian'** has an interest **other than as a 'trustee'** for a person other than the **'Retail MDA Provider'**, except where the property is not held separately to comply with *'notional'* Section 912AEC(6)(f) [i.e. to make good any deficiency in **'Client Portfolio Assets'**, which must be corrected within 2 Business Days by means of property provided by the **'Retail MDA Provider'** or otherwise].

137. **Regulatory Guide 179** does nothing more than reiterate this requirement. It provides no meaningful explanation of relevant **'benchmarks'** for such an assessment. **Regulatory Guide 133** [RG 133.34 to RG 133.43] just addresses **'conflicts management'** and **'staff segregation'**, **'staff competence'** [RG 133.44 to RG 133.47] and **'resourcing'** [RG 133.48 to RG 133.50], all of which are addressed by *'notional'* Section 912AEC. However, the attributes of a supportive **'Organisational Structure'** go beyond these matters, into territory which is difficult to examine and assess. The fact that the **'Custodian'** or **'Sub-Custodian'** is (usually) an **'AFS Licensee'** and obliged by one of its **'General Obligations'** to remain **'Organisationally Competent'**, with competent **'Responsible Managers'** placed appropriately in its **'Management Structure'**, is assigned **'no value'**.

'Structure of the Business' – 'Conflicts'...

138. The **'Retail MDA Provider'** must **'do all things necessary to ensure'** that if it holds **'Client Portfolio Assets'**, it, or if another **'Custodian'** holds those assets, that **'Custodian'**, **structures its business** so that [*'notional'* Section 912AEC(11)]:

- **'Custodial Staff'** can report directly or through other **'Custodial Staff'** to the Directors or Governing Body of the **'AFS Licensee'** concerned; and
- the duties of:
 - **'Direct Managers'** of **'Custodial Staff'**; and
 - **'Indirect Managers'** of **'Custodial Staff'** that are not the most **'Senior Officer'** or **'Employee'** of the **'AFS Licensee'** or the jurisdiction in which the **'AFS Licensee'** or the **'Custodian'** is based; and
 - **'Custodial Staff'**,

do not extend to **'other functions'** that **may create 'conflicts'** including that **'Custodial Staff'** and those **'Managers'** are not responsible for **'investment decisions'**, **'trading decisions'** or other **'discretionary decisions'** resulting in the transfer or disposal of the **'Client Portfolio Assets'**, other than **'discretionary decisions'** in relation to a **'deposit account'** at an **'ADI'** (where the balance is payable on demand) and **'discretionary decisions'** relating to acquisition or disposal of **'foreign currency'**; and

- **'Custodial Staff'** and persons involved in for **'investment decisions'**, **'trading decisions'** or other **'discretionary decisions'** resulting in the transfer or disposal of the **'Client Portfolio Assets'**, other than **'discretionary decisions'** in relation to a **'deposit account'** at an **'ADI'** (where the balance is payable on demand) and **'discretionary decisions'** relating to acquisition or disposal of **'foreign currency'**, are **'located sufficiently separately'** during the performance of their duties to reduce, so far as practicable, the risk of **'inappropriate influence'** on decisions relating to holding of those **'assets'**.

139. Again, **Regulatory Guide 179** just reiterates these obligations, as does **Regulatory Guide 133**, without acknowledging the extent of the work required to **'interrogate'** the **'Custodian'** or **'Sub-Custodian'** in relation to all these matters. This is territory which is difficult to examine and

assess, particularly so in the case of a **'Sub-Custodian'**, yet the **'Retail MDA Provider'** is obliged to **'do all things necessary to ensure'** this outcome. The fact that the **'Custodian'** or **'Sub-Custodian'** is (usually) an **'AFS Licensee'** and obliged by one of its **'General Obligations'** to maintain adequate **'Conflicts Management Arrangements'** is assigned **'no value'**.

Segregation of **'Custodial Staff'**...

140. The **'Retail MDA Provider'** must **'do all things necessary to ensure'** that if it holds **'Client Portfolio Assets'**, it, or if another **'Custodian'** holds those assets, that **'Custodian'**, segregates **'Custodial Staff'** from staff performing other functions in a way that minimises to potential for a **'conflict'**, IF **'conflict'** exists or might arise between their duties as **'Custodial Staff'** and the interests served or advanced by others who perform duties to make **'investment decisions'**, **'trading decisions'** or other **'discretionary decisions'** resulting in the transfer or disposal of **'Client Portfolio Assets'** other than **'discretionary decisions'** in relation to a **'deposit account'** at an **'ADI'** (where the balance is payable on demand) and **'discretionary decisions'** relating to acquisition or disposal of **'foreign currency'** [**'notional'** Section 912AEC(8)].

'Custody Staff' – **'Competence', 'Capacity'** and **'Available Resources'**...

141. The **'Retail MDA Provider'** must, for its own **'Custodial Staff'** ensure that, and for **'Custodial Staff'** of any **'Custodian'** **'do all things necessary to ensure'** that the **'Custodian'** ensures that; [**'notional'** Section 912AEC(12)]:
- **'Custodial Staff'** have the knowledge and the skills necessary to perform their duties properly;
 - **'ongoing training'** and **'educational programs'** are provided to **'Custodial Staff'** that provide **'reasonable assurance'** that they have knowledge that remains at a level necessary for performing the assigned duties, including knowledge of the **'AFS Licensee's'** obligations under **'notional'** Section 912AEC to the extent relevant to enable the **'Custodial Staff'** to perform their particular duties; and
 - **'Custodial Staff'** have the necessary time and authority to perform their duties as **'Custodial Staff'**; and
 - resources are made available to **'Custodial Staff'** to the extent necessary for them to adequately perform their duties as **'Custodial Staff'**.
142. The Commission should acknowledge the extent of the work required to **'interrogate'** the **'Custodian'** or **'Sub-Custodian'** in relation to all these matters, and how a **'Retail MDA Provider'** is to determine what should be required for particular roles or a function at a third-party **'Custodian'** or **'Sub-Custodian'**. This is territory which is difficult to examine and assess, and is **'commercially sensitive'**; yet the **'Retail MDA Provider'** is obliged to **'do all things necessary to ensure'** this outcome. The fact that the **'Custodian'** or **'Sub-Custodian'** is (usually) an **'AFS Licensee'** and obliged by one its **'General Obligations'** to remain adequately resourced and to ensure its **staff remain competent and adequately trained** is assigned **'no value'**.

Documented **'Policies & Procedures'**...

143. In addition to the documented **'processes', 'policies'** and **'procedures'** required (if applicable) by **'notional'** Section 912AEC(3) [see 128 above] or Section 912AEC(6) [see 130 above], the **Legislative Instrument** also requires the following to be documented.
144. The **'Retail MDA Provider'** must **'do all things necessary to ensure'** that if it holds **'Client Portfolio Assets'**, it, or if another **'Custodian'** holds those assets, that **'Custodian'**, has a **documented policy** that is [**'notional'** Section 912AEC(9)]:
- **approved** by its Directors or Governing Body, or a Senior Manager authorised to give such approval[or, in the case of a **'foreign company'** that is carrying on business in this jurisdiction or registered under Division 2 of Part 5B.2 of the Corporations Act, its most Senior Officer or Employee in this jurisdiction with responsibility for managing the functions of **'Custodial Staff'**; and
 - **designed to ensure** that **'Custodial Staff'** are not influenced because of a **'conflict'** mentioned in **'notional'** Section 912AEC(8) to act other than in accordance with their duties.

Such a review requires a good understanding of the entire business of the **'Custodian'**, due consideration and the time to do these things. Again, this **policy** is difficult to assess to the standard required.

145. The **'Retail MDA Provider'** must **set out in writing** and implement a **'reasonable process'** for ['notional' Section 912AEC(15)]:
- **determining if it should hold 'Client Portfolio Assets'** or engage a **'Custodian'** to do so, unless either choice is determined by its **'Contractual Obligations'**, and if it is to engage a **'Custodian'** which person will be the **'Custodian'** and on what terms; and
 - to **monitor and assess the performance** of any **'Custodian'** of its obligations as a **'Custodian'** and **'do all things necessary to ensure'** that a **'Custodian'** it engages **sets out in writing** and implements a **'reasonable process'** to **monitor and assess the performance** of its obligations by any **'Sub-Custodian'**.

Again, if a **'Custodian'** is to be engaged, this obligation requires a good understanding of the entire business of the **'Custodian'** and its arrangements with (if any) a **'Sub-Custodian'** concerned (which are **'commercially sensitive'**), due consideration of the **'reasonableness'** of the **'process'** given the context, and the time to do these things. Performance must be monitored and assessed, which necessarily involves consideration of **'commercially-sensitive'** information, and the arrangements in relation to monitoring and assessing the performance of each **'Sub-Custodian'** must be assessed for **'reasonableness'**.

The process for determining if it should hold **'Client Portfolio Assets'** or engage a **'Custodian'** to do so, and if it is to engage a **'Custodian'**, which person will be the **'Custodian'** and on what terms, must involve the application of a **reasonable written policy**:

- **approved** by its Directors or Governing Body, or a Senior Manager authorised to give such approval [or, in the case of a **'foreign company'** that is carrying on business in this jurisdiction or registered under Division 2 of Part 5B.2 of the Corporations Act, its most Senior Officer or Employee in this jurisdiction with responsibility for managing the functions of **'Custodial Staff'**]; and
- **which addresses potential 'conflicts of interest' and other considerations relevant to the interests of each 'Retail MDA Client'.**

If a **'Custodian'** is to be engaged, its **documented processes** have to be examined in order to **'test'** their **'scope'**, **'reasonableness'** and likely **'effectiveness'** for the purposes of the **'Retail MDA Services'** concerned.

146. The **'Retail MDA Provider'** must not permit a **'Custodian'** or a **'Sub-Custodian'** to be involved in **'discretionary decisions'** concerning a **'Deposit Account'** UNLESS the **'Retail MDA Provider'** is satisfied that the **'Custodian'** or **'Sub-Custodian'** has **set out in writing** and **'implements reasonable processes'** for ['notional' Section 912AEC(16)]:
- determining which **'Account'** to use; and
 - **'monitoring performance'** by the **'Issuer'** of the **'Account'** of its obligations in relation to that **'Account'**; and
 - taking action in case of failure of the **'Issuer'** of the **'Account'** of its obligations in relation to that **'Account'**.

If a **'Custodian'** is to be engaged, yet another documented process to be **'interrogated'** in order to assess is **'scope'** and **'reasonableness'**. Implementation must also be **'tested'**.

147. The **'Retail MDA Provider'** must ['notional' Section 912AEC(18)]:
- **review** the **'appropriateness'** of the **'written policies and processes'** required under **'notional'** Section 912AEC(15) and any **'written processes'** it relies on to comply with **'notional'** Section 912AEC(16) **at least once every 13 Months**; and
 - if directed by ASIC in writing, arrange for a report on the **effectiveness** or **reasonableness of the processes or policies** to be prepared and given to ASIC.

Engaging a **'Custodian'** to hold **'Client Portfolio Assets'**...

148. If a **'Custodian'** is to be engaged, the lengthy, intrusive requirements of **'notional' Section 912AEC(19)** require a **'written agreement'** with the **'Custodian'**, the terms (and **'sense'**) of which differ depending on whether the **'Retail MDA Provider'** does or does not hold a **'beneficial interest'** in the **'Client Portfolio Assets'** on behalf of the **'Retail MDA Client'**. **This provision does not apply whee the 'Retail MDA Provider' holds 'legal title' to 'Client Portfolio Assets'.**
149. If the **'Retail MDA Provider'** holds a **'beneficial interest'** in the **'Client Portfolio Assets'** on behalf of the **'Retail MDA Client'**, it must have a **'written agreement'** with the **'Custodian'** that meets the requirements of **'notional' Section 912AEC(19)(c) to (e)**, except [**'notional' Section 912AEC(19)(a)**]: to

- to the extent that, in relation to **'Client Portfolio Assets'** held outside of this jurisdiction, the **'Retail MDA Provider'** holds documents that demonstrate that it is not reasonably practicable to engage another person to hold **'Client Portfolio Assets'** who is willing to include such matters in the agreement; or
 - where the **'Custodian'** is controlled by the **'Retail MDA Provider'** and the **'Retail MDA Provider'** is liable to its **'Retail MDA Client'** for the acts and omissions of the **'Custodian'** as if they were the acts or omissions of the **'Retail MDA Provider'**.
150. If the **'Retail MDA Provider'** does NOT hold a **'beneficial interest'** in the **'Client Portfolio Assets'** on behalf of the **'Retail MDA Client'**, the **'Retail MDA Provider'** [*'notional'* Section 912AEC(19)(b)]:
- must have a **'written agreement'** with the **'Custodian'** that meets the requirements of *'notional'* Section 912AEC(19)(c) to (e); and
 - must **'do all things necessary to ensure'** the **'Custodian'** has a **'written agreement'** with each person (i.e. **'Sub-Custodians'**) the **'Custodian'** engages to hold **'Client Portfolio Assets'** and the **'written agreement'** meets the requirements of *'notional'* Section 912AEC(19)(c) to (e) as if the person were the **'Custodian'** and the **'Custodian'** were the **'Retail MDA Provider'**, except:
 - to the extent that, in relation to **'Client Portfolio Assets'** held outside of this jurisdiction, the **'Retail MDA Provider'** holds documents that demonstrate that it is not reasonably practicable to engage another person to hold the **'Client Portfolio Assets'** who is willing to include such matters in the agreement; or
 - where the person is controlled by the **'Custodian'** and the **'Custodian'** is liable to its client for the acts and omissions of the person as if they were the acts or omissions of the **'Custodian'**.

The terms of the **'Agreement'**...

151. The **'Agreement'** (i.e. the **'Custody Services Agreement'**) is to have provisions [*'notional'* Section 912AEC(19)(c)]:
- specifying **reasonable rights** that the **'Retail MDA Provider'** has for the **ongoing review** and **monitoring** of the **'Custodian'** and any **'Sub-Custodian'** and the standards against which their performance will be assessed [*'notional'* Section 912AEC(19)(c)(i)]; and
 - to the effect that the **'Custodian'** must **certify to the 'Retail MDA Provider' in writing at least every 13 months** that the **'Custodian'** believes on reasonable grounds that the **'Custodian'** and each **'Sub-Custodian'** have met since the date of the previous statement in writing or the commencement of the **'Agreement'**, and the **'Custodian'** has no reason to believe that the **'Custodian'** and each **'Sub-Custodian'** will not continue to meet [*'notional'* Section 912AEC(19)(c)(ii)]:
 - in the case of the **'Custodian'**, the terms of the **'Agreement'** [*'notional'* Section 912AEC(19)(c)(ii)(A)]; and
 - in any case, the requirements that the **'Retail MDA Provider'** must **'do all things necessary to ensure'** under *'notional'* Sections 912AEC(5) to (13), 912AEC(15)(b) and Section 912AEC(17) are met by the **'Custodian'** or the **'Sub-Custodian'** in relation to the **'Client Portfolio Assets'** held by the **'Custodian'** or a **'Sub-Custodian'** (except to the extent that the **'Retail MDA Provider'** is not complying with a requirement under *'notional'* Section 912AEC(6)(a) or (b) and the **'Custodian'** is not aware of any non-compliance) [*'notional'* Section 912AEC(19)(c)(ii)(B)];
- other than:
- as disclosed in writing to the **'Real MDA Provider'** [*'notional'* Section 912AEC(19)(c)(ii)(C)]; or
 - that the **'Custodian'** reasonably believes are trivial [*'notional'* Section 912AEC(19)(c)(ii)(D)], and
- the **'Custodian'** acknowledges that it or the **'Sub-Custodian'** must continue to meet those obligations; and
- to the effect that the **'Custodian'** must acknowledge to the **'Retail MDA Provider'** on request that **'Client Portfolio Assets'** to which the **'Agreement'** relates are held *'on trust'* and for whom they are held *'on trust'* and notify any other person where the **'Custodian'** is aware to do so might protect the rights or equitable interest of the

'Retail MDA Provider' or the **'Retail MDA Client'** that the assets are so held unless the **'Retail MDA Provider'** directs in writing otherwise [*'notional'* Section 912AEC(19)(c)(iii)]; and

- specifying how instructions will be given by the **'Retail MDA Provider'** to the **'Custodian'** [*'notional'* Section 912AEC(19)(c)(iv)]; and
- to the effect that the **'Custodian'** must not take or grant a security interest, mortgage, lien or other encumbrance over, or in relation to, the **'Client Portfolio Assets'** held under the **'Agreement'** unless it is in accordance with the **'Agreement'** and does not cover unpaid fees of the **'Custodian'** [*'notional'* Section 912AEC(19)(c)(v)]; and
- specifying how the **'Custodian'** will maintain records of the **'Client Portfolio Assets'** to which the **'Agreement'** relates and the transactions in relation to those assets including by whom, when and how transactions were authorised [*'notional'* Section 912AEC(19)(c)(vi)]; and
- specifying procedures for reconciliation each business day or if it is ordinary and reasonable commercial practice to reconcile certain assets less frequently, in accordance with that practice, by checking information the **'Custodian'** is given as to the existence and quantity of **'Client Portfolio Assets'** against the records of the **'Custodian'** and for reporting by the **'Custodian'** concerning the outcomes of the reconciliation in case of any unreconciled matter [*'notional'* Section 912AEC(19)(c)(vii)]; and
- to the effect that the **'Custodian'** must provide all reasonable access and assistance to any **Auditor** engaged to audit the **'Retail MDA Provider's'** financial statements or statements and records concerning the holdings or transactions of **'Retail MDA Clients'** [*'notional'* Section 912AEC(19)(c)(viii)]; and
- to the effect that the **'Custodian'** will provide the **'Retail MDA Provider'** with written notice and contact information of any other person holding **'Client Portfolio Assets'** or to be appointed by the **'Custodian'** [*'notional'* Section 912AEC(19)(c)(ix)]:
 - as soon as reasonably practicable [*'notional'* Section 912AEC(19)(c)(ix)(A)]; and
 - in any event before the assets are held, except in exceptional circumstances identified in the agreement [*'notional'* Section 912AEC(19)(c)(ix)(B)]; and
- to the effect that the **'Retail MDA Provider'** may terminate the **'Agreement'** without [*'notional'* Section 912AEC(19)(c)(x)] :
 - payment other than in relation to entitlements previously accrued or the reasonable expenses involved in transfer of the assets to the **'Retail MDA Provider'** or another **'Custodian'** [*'notional'* Section 912AEC(19)(c)(x)(A)]; and
 - limiting any right to damages the **'Retail MDA Provider'** may have under the **'Agreement'**, including recovering expenses referred to in [*'notional'* Section 912AEC(19)(c)(x)(A) if the **'Custodian'** is in breach [*'notional'* Section 912AEC(19)(c)(x)(B)];

if the **'Retail MDA Provider'** has **reasonable grounds for believing** that:

- there is or has been an act or omission of the **'Custodian'** or a **'Sub-Custodian'** that results in the **'Custodian'** being in breach of the **'Agreement'** [*'notional'* Section 912AEC(19)(c)(x)(C)]; and
- as a result of the act or omission, to a **material extent** the **'Custodian'** or a **'Sub-Custodian'** is not complying with or is unlikely to comply with the requirements that the **'Retail MDA Provider'** must ***'do all things necessary to ensure'*** under *'notional'* Sections 912AEC(5) to (13), (15)(b) and (17) are met by the **'Custodian'** or the **'Sub-Custodian'** in relation to **'Client Portfolio Assets'** held by the **'Custodian'** or that the **'Custodian'** arranged to be held, having regard to any remedy provided or that may be expected to be provided by the **'Custodian'** or the **'Sub-Custodian'** [*'notional'* Section 912AEC(19)(c)(x)(D)]; and
- to the effect that on termination of the engagement, **'Client Portfolio Assets'** must be transferred to the **'Retail MDA Provider'** or as the **'Retail MDA Provider'** directs within a reasonable period, subject to reasonable provisions for the obligations of the parties at termination, including the payment of outstanding fees and charges to the **'Custodian'** and any costs of the transfer [*'notional'* Section 912AEC(19)(c)(xi)]; and

- to the effect that the **'Custodian'** must **notify material or systemic breaches** of the **'Agreement'** by it or by the **'Retail MDA Provider'** in writing to the **'Retail MDA Provider'** within a reasonable time of becoming aware of the breach [*'notional'* Section 912AEC(19)(c)(xii)] [**Note: this should align with the **'Reportable Situation'** regime.**]; and
- specifying the terms on which the **'Custodian'** is authorised to engage another person to hold **'Client Portfolio Assets'** to which the **'Agreement'** relates and providing that any such engagement must be either [*'notional'* Section 912AEC(19)(c)(xiii)]:
 - under a **'written agreement'** meeting the requirements of *'notional'* Section 912AEC(19)(c) to (e) (including this sub-subparagraph, *'notional'* Section 912AEC(19)(c)(xiii)(A) and *'notional'* Section 912AEC(19)(c)(xiii)(B) as if the person engaged were the **'Custodian'** and the **'Custodian'** were the **'Retail MDA Provider'** except to the extent that, in relation to assets held outside of this jurisdiction, the **'Custodian'** has provided written reasons to the **'Retail MDA Provider'** as to why it reasonably considers that it is not practicable to engage a person that is willing to include such matters in the **'Agreement'** [*'notional'* Section 912AEC(19)(c)(xiii)(A)]; or
 - an arrangement with a **'related body corporate'** of the **'Custodian'**, where the **'Custodian'** has a **'written agreement'** with the **'Retail MDA Provider'** that it is liable to the **'Retail MDA Provider'** for the acts and omissions of the **'related body corporate'** as if those acts and omissions were the acts or omissions of the **'Custodian'** [*'notional'* Section 912AEC(19)(c)(xiii)(B)]; and
- to the effect that the **'Custodian'** must establish and maintain **business continuity arrangements** that are **reasonable** for a **business of the nature, scale and complexity** of the **'Custodian's'** business [*'notional'* Section 912AEC(19)(c)(xiv)] [**Note: these arrangements are very **'commercially-sensitive'** and how is a **'Retail MDA Provider'** expected to assess their **'reasonableness'**?**]; and
- to the effect that the **'Custodian'** must not disclose any confidential information relating to **'Client Portfolio Assets'**, apart from any disclosure to ASIC or as required or permitted by law or by the **'Retail MDA Provider'** in writing [*'notional'* Section 912AEC(19)(c)(xv)].

152. The **'Retail MDA Provider'** engaging a **'Custodian'** to hold **'Client Portfolio Assets'** **must ensure** that [*'notional'* Sections 912AEC(19)(d) & (e)]:

- the **'Agreement'** with the **'Custodian'** has reasonable liability provisions and does not include provisions that exclude the liability of the **'Custodian'** for direct loss that it would have if the exclusion were not included except in particular circumstances that the **'Retail MDA Provider'** considers to be reasonable and contains, if appropriate, **reasonable indemnity provisions** in relation to losses caused to the **'Retail MDA Provider'** or to the relevant **'Retail MDA Client'** or **'Retail MDA Clients'** by the acts and omissions of the **'Custodian'** that relate to that **'Agreement'** [*'notional'* Section 912AEC(19)(d)]; and
- it does not, under the **'Agreement'** with the **'Custodian'** or otherwise, permit the granting of a security interest, mortgage, lien or other encumbrance in favour of the **'Custodian'** or its associates unless the **'Retail MDA Provider'** reasonably believes, **for reasons it has recorded in writing**, that any conflict that may arise as a result of the security interest, mortgage, lien or encumbrance will not materially increase the risks that the **'Custodian'** will fail to meet its obligations and the **'Retail MDA Provider'** must keep the **written record of reasons** for 7 years after the security interest has ceased [*'notional'* Section 912AEC(19)(e)].

Instructing the **'Custodian'** or **'Custodial Staff'** – **'Conflicts'**...

153. The **'Retail MDA Provider'** must have **'reasonable procedures'** for giving instructions to the **'Custodian'** or where there is no **'Custodian'**, any (of its own?) **'Custodial Staff'**, in relation to **'Client Portfolio Assets'** that include how the instructions are given and **'reasonable controls'** to ensure the instructions are properly authorised and carried out [*'notional'* Section 912AEC(4)].

154. The **'Retail MDA Provider'** must **'do all things necessary to ensure'** that if it holds **'Client Portfolio Assets'**, it, or if another **'Custodian'** holds those assets, that **'Custodian'**, undertakes **'reasonable checks'** to find out and document if there has been any attempt to **'inappropriately influence'** **'Custodial Staff'** and takes **'reasonable action'** (to what end?) in the event this happens [*'notional'* Section 912AEC(10)].

The obligations when engaging a 'Custodian' also apply to a 'Sub-Custodians'...

155. The **'Retail MDA Provider'** must also comply with *'notional'* Sections 912AEC (7) to (12) as if any **'Sub-Custodian'** were the **'Custodian'**, except to the extent that, in relation to **'Client Portfolio Assets'** outside this jurisdiction, it is not reasonably practicable for the **'Retail MDA Provider'** to *'do all things necessary to ensure'* that the **'Sub-Custodian'** does a particular thing [*'notional'* Section 912AEC(13)] [**Note: reaching into the arrangements at a 'Sub-Custodian' is 'commercially-sensitive' and difficult.**].

Records...

156. The **'Retail MDA Provider'** must ensure it keeps records of **'Client Portfolio Assets'** in a way that enables the holding of those *'assets'* to be conveniently and properly audited by an **'Auditor'** of the **'Retail MDA Service'** and *'do all things necessary to ensure'* that any **'Custodian'** or **'Sub-Custodian'** keeps such records in relation to any *'asset'* that is held by the **'Custodian'** or **'Sub-Custodian'** [*'notional'* Section 912AEC(17)].
157. The **'Retail MDA Provider'** must keep records demonstrating how it complies with *'notional'* Section 912AEC(2) to (13) for 7 years [*'notional'* Section 912AEC(14)].

Feel free to contact me to discuss any of the matters addressed above. [REDACTED]

[REDACTED]

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