Law Council
OF AUSTRALIA
Business Law Section

24 April 2026

NTA requirements—Consultation feedback
Regulatory Reform and Implementation
Australian Securities and Investments Commission
GPO Box 9827
MELBOURNE VIC 3001

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

Dear Sir/Madam

ASIC Consultation Paper 388—Net Tangible Assets requirement for responsible entities

1. This submission is made by the Financial Services Committee (**Committee**) of the Business Law Section (**BLS**) of the Law Council of Australia in response to Consultation Paper 388 (**CP 388**), published by the Australian Securities and Investments Commission (**ASIC**) on 18 March 2026, which seeks feedback on proposals to amend the net tangible assets (**NTA**) requirement that applies to responsible entities (**REs**) of registered managed investment schemes (**registered schemes**) and certain other Australian financial services (**AFS**) licensees.

2. The Committee notes that Treasury is separately conducting a review of the governance and financial requirements framework for registered schemes: see *Enhancing oversight and governance of managed investment schemes* (Treasury Consultation Paper, 10 February 2026) (**Treasury MIS Consultation**). The Committee encourages ASIC to liaise closely with Treasury to ensure that the outcomes of both reviews are coherent and mutually reinforcing, and to avoid the risk of unnecessary duplication or inconsistency of requirements.

Key Points

3. The Committee's key observations are as follows:

   (a) The NTA requirement has a single logical regulatory objective, to ensure that an RE is an entity of substance, such that its shareholders have sufficient equity in the business to maintain its ongoing viability. This "barrier to entry" function should be the primary basis on which NTA thresholds are calibrated. The objectives stated in CP 388 at paragraph 6(a), (c) and (d), that NTA can be used to fund operating costs, transition costs and immediate unexpected expenses, are inconsistent with the legal structure of the NTA requirement, which prohibits drawdown of NTA assets for those purposes. All threshold-setting decisions should flow from the entity-of-substance objective.

(b) A CPI-based increase to restore the real value of thresholds that have been unchanged since 2013 is the most calibrated and principled approach. The Committee supports Option 1 as a standalone measure, subject to ASIC verifying that the 2013 baselines were themselves appropriately set.

(c) The proposal to impose a minimum NTA of $150,000 per scheme operated would impose a disproportionate burden on multi-scheme operators and is not consistent with the entity-of-substance rationale. The Committee strongly opposes this element of Option 2.

(d) A transition period of only six months is inadequate. Many REs would need to raise capital from shareholders or the market, which takes time and may not always be possible at short notice. The transition period should be at least 12 months, and preferably 24 months, consistent with practice for significant regulatory change. Grandfathering should be considered in appropriate cases.

(e) The concessional NTA requirement should be retained. REs and their custodians have structured their arrangements in reliance on it, and abrupt removal would cause significant market dislocation.

(f) The Committee also urges ASIC to take this opportunity to simplify and clarify the drafting of the relevant instruments, which are currently difficult to apply without specialist legal advice.

Objectives of the NTA Requirement (Section A of CP 388)

The primary rationale for the NTA requirement

4. The Committee notes an important inconsistency in the characterisation of the objectives of the NTA requirement in paragraphs 6 and 7 of CP 388. ASIC correctly states in paragraph 7 that the NTA requirement is *not* intended to address market or credit risk, prevent insolvency, or compensate clients for unexpected losses. However, paragraphs 6(a), 6(c) and 6(d) suggest that NTA is available to meet operating costs, transition costs and immediate unexpected expenses.

5. The Committee submits that these characterisations are not consistent with the legal structure of the requirement. Under the current regime, an RE is required to *maintain* its NTA at or above the required minimum at all times. If an RE were to draw down on its NTA assets to meet operating costs, transition costs or any other expenses, it would immediately fall below the required minimum and be obliged to report a breach of its AFS licence conditions to ASIC under section 912D of the *Corporations Act 2001* (Cth). The NTA requirement does not function as a reserve fund that can be drawn upon, it is a floor on net asset value.

6. The Committee therefore submits that the only coherent and legally accurate rationale for the NTA requirement is the objective stated in paragraph 6(b) of CP 388: to ensure that the RE *"is an entity of substance and [its] shareholders have sufficient equity in the business to ensure success".*

7. In other words, the NTA requirement functions as a regulatory barrier to entry: it ensures that only entities of adequate financial substance can obtain and retain AFS licences to operate registered schemes. This is the principle that should govern all decisions about how to calibrate the requirement.

8. The Committee recommends that ASIC amend the description of the objectives of the NTA requirement in any revised regulatory guide to more accurately reflect this legal reality, and to remove or qualify the statements in paragraphs 6(a), 6(c) and 6(d) to the extent that they imply that NTA assets can or should be drawn upon to meet costs and expenses.

Group structures and eligible undertakings

9. The Committee notes that the entity-of-substance rationale can give rise to disproportionate outcomes where a financial services group operates multiple licensed entities (for example, to provide specialist RE boards or to address conflicts of interest). In such cases, each licensed entity must meet its own NTA requirement, even where the group as a whole clearly satisfies the substantiality objective. The Committee considers that the regulatory objective could be met where one entity within the group satisfies the NTA requirement and provides a formal undertaking in support of its group licensees.

10. The Committee notes that ASIC previously permitted large listed entities to provide eligible undertakings in favour of licensed subsidiaries, but that this option was removed in 2011 by ASIC Class Order [CO 11/1140]. The Committee recommends that ASIC reconsider reintroducing this mechanism, appropriately calibrated and conditioned, as part of the current review. This would allow the NTA requirement to operate proportionately in group contexts while still ensuring that the regulatory objective is met.

Unlicensed entities and gaps in the regulated population

11. The Committee notes that ASIC can only impose NTA requirements on AFS licence holders. There may be circumstances in which entities deal with client funds without holding an AFS licence (for example, because they have been appointed as authorised representatives of another licensee). The Committee suggests that ASIC may wish to engage with Treasury about whether targeted law reform should address any resulting gaps, particularly where unlicensed entities perform functions that are functionally equivalent to those of a licensed RE.

Regulatory complexity and simplification

12. The Committee wishes to draw ASIC’s attention to a concern raised by committee members with significant experience advising on compliance with the current financial requirements: the existing legislative instruments are complex and difficult to understand, and industry participants frequently struggle to apply them without specialist legal advice. This is not consistent with the principle that ASIC-made laws should be capable of being understood and applied by the regulated population. It can also give rise to inadvertent non-compliance.

13. The Committee strongly urges ASIC to treat regulatory simplification as a core objective of this review. Any amendments to the instruments should be drafted in plain and accessible language, using the drafting principles adopted as part of ASIC's broader simplification program. The instruments should also be stable on the basis that frequent incremental amendments compound complexity and impose ongoing compliance costs on industry.

Options for Increasing the NTA Requirement (Section B of CP 388)

Option 1—CPI-linked increase (Proposal B1)

14. The Committee supports Option 1 as the most rational and proportionate approach to adjusting the NTA thresholds. Restoring the real value of thresholds that have remained unchanged since 2013 is a principled basis for adjustment that does not involve the introduction of new policy settings.

15. The Committee notes, however, that the appropriateness of a CPI-based adjustment depends on whether the 2013 baseline thresholds were themselves calibrated correctly by reference to the entity-of-substance objective. The Committee is not aware of a detailed published analysis by ASIC that established those levels as optimal. ASIC should, at a minimum, confirm that the 2013 settings remain an appropriate baseline before applying a CPI uplift to them.

16. In response to the specific questions in CP 388:

    (a) B1Q1/B1Q2: Subject to the observation above, the Committee supports a CPI-linked increase as an appropriate and calibrated adjustment to maintain the real value of the NTA thresholds. CPI is a reasonable measure for this purpose, provided it is applied to a verified baseline.

    (b) B1Q3: CPI is an appropriate index for adjusting thresholds whose purpose is to reflect the cost of operating a financial services business of minimum substance. The Committee does not propose an alternative measure.

    (c) B1Q5 (Indexation mechanism): The Committee supports the introduction of an ongoing CPI indexation mechanism, provided that:

        (i) adjustments are made at regular intervals (for example, every three years) rather than annually, to give industry stability and time to plan;

        (ii) thresholds are rounded to convenient amounts; and

        (iii) ASIC provides advance notice of any adjustment to allow for an adequate transition period.

    (d) B1Q4/B1Q6/B1Q7: A CPI uplift from the 2013 levels is a modest adjustment. The Committee does not anticipate significant competitive impacts from Option 1 alone, though individual REs that are currently operating with NTA close to the minimum level may need to raise additional capital. Any such impact reinforces the need for an adequate transition period (see paragraphs 23–26 below).

Option 2—Increase the $150,000 minimum (Proposal B2)

17. The Committee has significant concerns about both sub-options under Option 2.

    (a) **Option 2(a)—increase to a higher fixed dollar amount (up to $1 million):** A fixed increase of the minimum to $1 million would represent a more than six-fold increase on the current $150,000 minimum, above and beyond any CPI adjustment. This would impose a significant compliance burden on smaller and emerging REs, with potential adverse consequences for competition, innovation and market diversity. The Committee is not persuaded that the entity-of-substance objective requires a threshold of this magnitude for an RE that uses an external custodian. If ASIC is minded to pursue a higher fixed minimum, the Committee submits that the increase should be moderate, evidence-based, and accompanied by a thorough analysis of its competitive and market impacts.

    (b) The Committee notes the international comparisons cited in paragraph 20 of CP 388 (Singapore: approximately AU$1.2 million; UK: approximately AU$218,000 plus 0.02% of assets under management above AU$435 million). The Committee cautions against direct comparisons with other jurisdictions without taking into account differences in the broader regulatory architecture, including the extent to which comparable jurisdictions impose additional operational risk requirements, diversification requirements and other structural safeguards not present in Australia's regime for registered schemes.

    (c) **Option 2(b)—per-scheme minimum of $150,000:** The Committee strongly opposes this element of Option 2. The proposal to require minimum NTA of $150,000 *per scheme operated* would impose a disproportionate burden on multi-scheme operators and is inconsistent with the entity-of-substance rationale.

    (d) In practical terms, an RE that operates 34 registered schemes would face a minimum NTA obligation exceeding $5 million under this formula ($150,000 × 34 = $5.1 million), which would exceed the $5 million cap in limb (ii) of the concessional NTA requirement (0.5% of average fund assets, capped at $5 million) and effectively render that cap meaningless for a significant cohort of operators.

18. The Committee notes that:

    (a) The entity-of-substance objective relates to the RE as a whole, not to each scheme it operates. A large, well-capitalised RE operating many schemes is clearly an entity of substance, regardless of the number of schemes.

    (b) The 0.5% of average fund assets limb of the concessional NTA requirement already provides a fund-size-sensitive measure that scales with the overall size of the RE's funds under management across all schemes, providing appropriate risk-scaling without penalising efficiency of scale.

    (c) There has been significant margin compression in the funds management industry in recent years, making economies of scale important to sustainability. A per-scheme minimum would disproportionately disadvantage REs that have achieved operational efficiency through multi-scheme structures, and may incentivise consolidation of scheme structures in ways that are not in the interests of investors.

(d) The Committee recommends that ASIC not adopt Option 2(b)(i). If Option 2 is to be pursued at all, Option 2(a) with a moderate increase to the fixed minimum (in the range of CPI-adjusted $150,000 to $300,000) would be more proportionate, provided that it is accompanied by an adequate transition period.

Option 3—Increase the $5 million cap (Proposal B3)

19. The Committee accepts that there is a reasonable basis for reviewing the $5 million cap under the concessional NTA requirement. As ASIC notes in paragraph 22, this cap has been in place since 2002, pre-dating the current registered schemes regime. The operating risk associated with growth in funds under management does not plateau at $5 million of NTA, and the average revenue limb is uncapped.

20. The Committee supports a CPI-based adjustment to the cap (consistent with Option 1) as the most defensible approach. ASIC's indicative CPI-adjusted figure of $6.9 million appears reasonable as a starting point. The Committee does not, on the current information available, support a material increase beyond the CPI-adjusted level without a more detailed analysis of the relationship between the cap and the underlying risk it is intended to address.

Liquidity component (Proposal B4)

21. The Committee considers that the existing liquidity component (50% of NTA in cash or cash equivalents, 100% in liquid assets) is broadly appropriate. It provides a meaningful assurance that the RE can call on liquid resources if needed, while allowing the remaining NTA to be held in less liquid but sound assets.

22. In response to the specific questions:

(a) <u>B4Q2:</u> If Option 1 is adopted, the $150,000 cash / cash equivalents minimum should be updated in line with CPI to maintain parity with the adjusted NTA minimum. The Committee supports this as a consequential and proportionate adjustment.

(b) <u>B4Q4:</u> The current proportional formula (cash or cash equivalents = at least 50% of required NTA; liquid assets = 100% of required NTA) is logical and administratively simple. The Committee supports retaining this approach rather than adopting an alternative formula.

Transition period (Proposal B5)

23. The Committee opposes the proposed six-month transition period as inadequate, particularly in the event that ASIC adopts Option 2 or a significant increase to the $5 million cap under Option 3.

24. It would be rare for a responsible entity to have surplus undeployed capital available to be committed as an accretion to its NTA at short notice. In many cases, raising the required additional capital would involve:

(a) a capital contribution from a parent entity, which requires parent board approval and may need to be sequenced with capital allocation decisions across the group;

(b) a capital raising from external investors, which requires preparation of disclosure documents and market conditions that are conducive to the raising; or

(c) restructuring of the RE's balance sheet or related party arrangements, which may require ASIC notification or approval and commercial negotiation with third parties.

25. Where an RE is unable to meet materially increased NTA requirements within a short timeframe, the consequences could include the need to close down the business, change the RE, or terminate schemes. These outcomes would have direct and potentially significant adverse consequences for scheme members. The Committee submits that a transition period of at least 12 months is the minimum acceptable, and that a period of 24 months would be more appropriate and consistent with the lead times associated with many other significant regulatory reforms.

26. The Committee also recommends that ASIC consider grandfathering arrangements for REs that are operating in compliance with the current requirements at the date of the change. Grandfathering could, for example, allow existing REs a longer transitional period or permit them to meet new requirements on a phased schedule tied to the size of any capital shortfall.

Alternative approaches (Proposal B6)

27. In response to question B6Q2, the Committee identifies the following additional factors that ASIC should consider when setting the NTA requirement:

(a) The requirement should be calibrated to be proportionate to the size and complexity of the RE's operations, not simply as a flat threshold. The existing multi-limb formula (greater of fixed minimum, percentage of fund assets, and percentage of revenue) provides a reasonable foundation for proportionality, and should be maintained.

(b) ASIC should consider the potential impact of any increase on the competitive structure of the funds management industry, particularly the risk that materially higher thresholds create barriers to the entry of smaller and boutique managers, reducing market diversity and the choice available to investors.

(c) To the extent that the Treasury MIS Consultation results in new legislative financial requirements for REs, ASIC's instrument-level requirements should be adjusted to avoid overlap or double-counting. The two reviews should be coordinated so that any increase in NTA thresholds does not operate in addition to new primary legislative requirements that address the same underlying risk.

Appropriateness of the Concessional NTA Requirement (Section C of CP 388)

28. The Committee strongly supports the retention of the concessional NTA requirement. Many REs have structured their operations, and entered into contractual arrangements with external custodians, specifically in reliance on the availability of the concessional treatment. If ASIC were to remove the concessional category, those REs would potentially face:

    (a) a significant and unexpected increase in NTA obligations (from $5 million maximum under the concessional requirement to $10 million minimum under the non-concessional requirement), which they may be unable to meet within a short transition period;

    (b) an inability to exit their custodian arrangements without triggering break costs under custodian contracts; and

    (c) potential stamp duty on the transfer of scheme assets back into the RE's name.

29. These consequences would also be commercially unfair. An RE that has incurred the cost of engaging an external custodian specifically to meet the requirements for concessional treatment would face both the ongoing cost of that custodian *and* a materially higher NTA obligation. This dual burden is not consistent with the regulatory objective of the NTA requirement.

30. The Committee notes ASIC's observation at paragraph 35 of CP 388 that the holding of scheme assets by a custodian does not constitute the provision of a custodial or depository service by that custodian (see RG 133 at RG 133.15), and that the ultimate responsibility for the operation of the scheme remains with the RE. The Committee accepts this characterisation but submits that it does not affect the case for retaining the concessional requirement. The use of an appropriately qualified external custodian reduces the operational and custody risk associated with scheme assets, which is one of the factors that justifies the lower NTA threshold.

31. The Committee recommends that the concessional NTA requirement be retained in its current form, subject to CPI adjustment of applicable thresholds as contemplated by Option 1.

NTA Requirements for Other AFS Licensees (Section D of CP 388)

IDPS operators and corporate directors of retail CCIVs (Proposal D1)

32. The Committee supports ASIC's proposal to align the NTA requirements for IDPS operators and corporate directors of retail CCIVs with any changes made to the RE requirements. ASIC's rationale (that these entities perform functionally similar roles and that regulatory parity is appropriate) is well-founded. The Committee does not identify any practical difficulties with this approach, subject to the same concerns about transition timing that apply to any increase in NTA thresholds.

Licensed custodial or depository service providers (Proposal D2)

33. The Committee supports ASIC's view that it would be appropriate to review and, if relevant, increase the NTA requirements for licensed custodial or depository service providers, given the alignment between those requirements and the requirements for REs. However, the Committee recommends that such a review be conducted as a separate consultation, given that the regulated population for custody services is broader and includes entities with business models and risk profiles that differ materially from REs.

34. The Committee also draws ASIC's attention to what it considers to be a drafting issue in the current *ASIC Corporations (Financial Requirements for Custodial or Depository Service Providers) Instrument 2023/648*. The definition of "incidental provider" in that instrument is understood to refer to trustees of wholesale trusts, but its current wording, which requires that the custody service be provided because of, or in order to obtain, other financial services provided by the licensee or a related body corporate, does not clearly capture all entities in that position, and in particular may not capture entities that do not provide any financial services other than custody. The Committee recommends that ASIC review and clarify this definition as part of any consequential amendment to Instrument 2023/648.

35. As a general matter, ASIC-made laws should be capable of being understood and applied by the regulated population without resort to legal advice. The Committee encourages ASIC to apply this principle to the drafting of all instruments amended or remade as part of this review.

AFS licensees without NTA requirements (Proposal D3)

36. The Committee notes that certain AFS licensees including managed discretionary account providers, operators of unregistered managed investment schemes, financial advice licensees and crowd-sourced funding intermediaries, are not currently subject to NTA requirements.

37. The Committee's preliminary view is that the introduction of NTA requirements for licensees that do not currently have them should be approached with caution, and should be preceded by a standalone, dedicated consultation that addresses the specific business models, risk profiles and regulatory context of those licensees. A blanket extension of RE-style NTA requirements to all AFS licensees without such analysis could impose disproportionate compliance costs on smaller or lower-risk providers and reduce diversity and competition in the relevant markets.

38. The Committee acknowledges ASIC's concern about regulatory parity and the prevention of arbitrage and agrees that those are legitimate considerations. The Committee would support a future consultation that examines specific categories of AFS licensee on their merits, with a view to introducing appropriately calibrated financial requirements where the evidence supports doing so.

Conclusion and further contact

39. The Committee thanks ASIC for the opportunity to provide feedback on CP 388. The Committee's overarching submission is that any changes to the NTA requirement should be anchored in the entity-of-substance rationale, should be proportionate and evidence-based, and should be accompanied by an adequate transition period and a genuine commitment to simplifying and clarifying the instruments.

40. The Committee would welcome the opportunity to discuss any aspect of this submission with ASIC. Please contact [redacted], Co-Chair of the Financial Services Committee (committeechairfsc@gmail.com), or [redacted], Funds, Wealth and Consumer Lead of the Financial Services Committee, of the Business Law Section ([redacted]).

Yours sincerely

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Chair, Business Law Section