

CS-053 Proposed remake of six legislative instruments relating to managed investment schemes

ASIC

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Introduction

This submission approaches ASIC's proposal from a simple starting point. The best regulatory part is no part where the ordinary law can do the work. Relief should not exist merely because it is familiar, convenient or administratively tidy. Every exemption from the ordinary Corporations Act framework should have to justify itself by clear public purpose, clear evidence, clear limits and clear protection for the people who carry the risk.

Simplicity is the ultimate sophistication. A regulatory system should be as simple as possible for the public, not merely simple for regulated entities. It should be clear when an arrangement is a managed investment scheme. It should be clear when financial services licensing is required. It should be clear when disclosure, hawking restrictions, equal treatment duties or investor protections apply. If a relief instrument makes life easier for operators, agents, schools, charities, racing promoters or responsible entities by making the public's position harder to understand, that is not real simplicity. It is complexity shifted onto the weaker party.

ASIC's consultation should therefore not be treated as a routine remake of six technical instruments. These instruments deal with different activities, different risk profiles and different public policy questions. Serviced apartment schemes are not the same as property rental schemes. Charitable investment fundraising is not the same as school enrolment deposits. Horse schemes are not the same as attribution managed investment trusts. Each instrument should have been considered separately, with its own evidence base, its own public purpose analysis and its own assessment of who gains and who carries the risk.

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The omnibus approach is a weakness of this consultation. It encourages the instruments to be seen as an administrative package rather than as separate departures from ordinary law. That matters because a relief instrument is not neutral. It changes the legal perimeter. It decides who must comply with the ordinary rules and who does not. It decides which risks are controlled at the front end and which risks are left to be discovered later through complaints, surveillance or loss.

This submission does not proceed from the assumption that all relief is wrong. Some relief may be justified where the ordinary law captures low risk arrangements in a way that is disproportionate. Some transitional relief may have been justified at the time it was made. Some technical relief may still be needed where two legal regimes interact awkwardly. However, the burden should sit with ASIC and the beneficiaries of the relief to show that the exemption remains necessary, proportionate, confined and safe.

The submission applies a controlled sunset approach. That means existing arrangements should not be thrown into immediate disorder where people have relied on the instruments in good faith. It also means ASIC should not remake broad relief for another five years merely because disruption is possible. A managed transition should be used to identify who relies on each instrument, how much money is affected, what complaints or breaches have arisen, what risks are hidden, and whether investors, members, families or supporters understand which ordinary protections do not apply.

At the end of that transition, relief should continue only where ASIC can justify it in a narrower, evidence based and more transparent form. Where the case for relief is weak, the instrument should sunset. Where the case for relief is strong but the conditions are inadequate, the instrument should be remade with stronger safeguards. Where the relief served a transitional purpose, it should end.

The central question in this submission is therefore not whether these instruments are convenient. The central question is whether they serve good public purpose. That requires asking who gains, who loses, who carries the risk, whether the relief enables rent seeking or regulatory arbitrage, whether complexity is being shifted onto the public, and whether ASIC has enough visibility to supervise what it has exempted.

On that approach, ASIC should not remake the six instruments largely unchanged. It should treat sunset as a real public interest checkpoint, not as an administrative renewal date.

For clarity, this submission addresses each instrument separately, because each raises its own public purpose, risk and evidence questions. ASIC's proposal to combine the two property instruments is also addressed separately.

ASIC Corporations Serviced Apartment and Like Schemes Instrument 2016/869

Position

ASIC should not remake the ASIC Corporations Serviced Apartment and Like Schemes Instrument 2016/869 unchanged. My preferred position is controlled sunset, with a managed transition for existing arrangements and any future relief confined to narrower, better evidenced and more protective circumstances.

The instrument should either be allowed to sunset after a defined transition period, or be remade only in a substantially narrower and stronger form. A simple five-year renewal is not justified on the material ASIC has published, because the instrument does not merely remove technical inconvenience. It removes or softens important parts of the ordinary Corporations Act framework for property-based arrangements that may operate in substance as managed investment schemes.

Nature of the instrument

This instrument deals with property arrangements that sit directly on the boundary between real estate and financial services. A person may think they are buying a strata unit, serviced apartment, hotel unit, motel unit or resort unit, while in substance also entering an income producing managed investment arrangement operated by someone else. That arrangement may involve management rights, rental income assumptions, occupancy risk, operator control, furniture and equipment costs, body corporate dynamics, withdrawal rights, valuation risk and exit complexity.

The concern is not that every serviced apartment or resort arrangement is improper, and it is not that every property management arrangement should be forced into the full managed investment scheme regime. The concern is that this instrument gives operators, real estate agents and other market participants relief from important financial services protections without ASIC demonstrating that the relief remains necessary, proportionate, safe and well understood in practice.

Who gains and who carries the risk

The instrument gives concentrated benefits to operators, promoter developers, real estate selling agents and the property sales channel. It reduces the need for managed investment scheme registration. It reduces the need for an Australian financial services licence in relation to general advice and dealing in interests in the strata scheme. It relieves certain hawking restrictions. It also allows real estate selling agents to give general advice and arrange interests in a strata scheme without holding an Australian financial services licence, where the agent reasonably believes the scheme is covered.

That is a significant regulatory concession. It lets property schemes operate closer to the real estate regulatory perimeter and further away from the ordinary financial services perimeter. The commercial benefit is immediate and obvious for the supply side, because regulatory cost, licensing burden and scheme registration requirements are reduced.

The investor's benefit is more conditional. The investor may benefit where the scheme is genuinely simple, genuinely optional, genuinely property based and genuinely understood. The instrument contains some protections, including withdrawal rights, limits on certain payments, trust account requirements, audit requirements and transfer procedures for management rights. Those protections should be acknowledged, but they do not answer the core concern that an ordinary buyer may still be sold an income producing managed arrangement through a real estate sales process.

Real estate agents and financial product risk

A real estate selling agent may be competent to sell land, but that does not mean the agent is competent to explain managed investment scheme risk, operator conflict, occupancy assumptions, rental pooling, withdrawal limits, management rights, furniture fund deductions, valuation risk or the loss of ordinary financial services protections. The financial product character of the arrangement should not disappear merely because the sale occurs through a property channel.

This is the main fit for purpose problem. The instrument appears to recognise that the conduct can be financial services conduct, then excuses the real estate selling agent from the ordinary licensing requirement. That may be convenient for the property sales channel, but ASIC has not shown that it is safe for consumers. In practical terms, the instrument can allow property agents to operate close to investment promotion while remaining outside the ordinary financial services licensing framework.

That is not a minor technical issue. It is a regulatory perimeter issue, because once projected returns, occupancy rates, managed letting, income yield, rental pooling or operator management become central to the sale, the transaction is no longer merely a property sale in substance. It becomes property wrapped around financial product risk.

Rent seeking and regulatory arbitrage

The instrument risks increasing rent seeking unless it is tightly confined. It may allow private actors to capture the commercial benefits of selling and operating income producing property schemes while avoiding the full cost of managed investment scheme registration, financial services licensing, product disclosure and hawking controls.

Where the arrangement is genuinely incidental to ordinary property management, relief may reduce unnecessary compliance cost. However, where the property is marketed by reference to income, yield, occupancy, managed letting, rental pooling or projected returns, the relief can become regulatory arbitrage. The product remains investment like, but the regulation is softened because it is wrapped in property.

That does not serve good public purpose. A good public purpose test should look at substance, not label. If the buyer is being induced into an income producing arrangement controlled or managed by someone else, the regulatory focus should be the investor's real exposure, not the legal form of the property transaction.

Complexity

The instrument may reduce complexity for operators, but it increases complexity for investors, ASIC and the public. Instead of a clear rule that managed investment schemes should be registered and financial services conduct should be licensed, the instrument creates a conditional carve out. It depends on whether the scheme meets detailed conditions, whether the agent reasonably believes the scheme is covered, whether the interest appears to be covered, whether the investor understands the arrangement, and whether ASIC can detect problems after they occur.

That does not simplify the regulatory system in any meaningful public sense. It shifts complexity away from the regulated party and onto the investor, the regulator and the enforcement system. The person least able to navigate that complexity is likely to be the buyer, who may believe they are buying property while not understanding that important financial services protections may not apply.

The 500,000-dollar threshold

The 500,000-dollar threshold is problematic and should be reviewed. A property value of 500,000 dollars is not proof of sophistication. In current Australian property markets, 500,000 dollars may be an ordinary entry price. It does not show that the buyer understands managed investment scheme law, financial services relief, operator conflicts, valuation risk, withdrawal rights, furniture fund deductions or the practical consequences of losing ordinary retail protections.

ASIC should not use property price as a substitute for evidence of investor capacity. If ASIC believes the threshold remains appropriate, it should explain why that amount remains meaningful in 2026, what proportion of affected buyers are treated as outside ordinary retail protections because of it, and whether those buyers receive clear warnings about what protections do not apply.

Valuation risk

Valuation relief is also concerning because valuation matters in these arrangements. Property value, management rights value, furniture and equipment value, occupancy assumptions and income expectations can all affect the investor's decision, ongoing position and ability to exit. The instrument relies too heavily on the responsible entity forming reasonable grounds that valuation is in members' best interests or needed for fair operation.

That trigger is too subjective. If any relief continues, valuation should be required when management rights are transferred, where there is a material decline in income or occupancy, where related party dealings are involved, where withdrawal rights are affected, where fees depend on value, or where market conditions materially change. A valuation framework should not depend mainly on the judgement of the party already operating within the structure.

ASIC's regulatory burden

ASIC should also consider its own regulatory burden. This instrument may reduce formal registration and licensing work, but it creates a hidden supervision burden. ASIC must supervise a boundary area where financial product risk is embedded in property transactions and partly handled by real estate actors. That is not necessarily lighter regulation. It may simply be less visible regulation.

The instrument moves ASIC from front end control to after the event policing. That is a poor design choice where investor harm may not become visible until after the money has been committed and the buyer has already lost bargaining power, access to documents, practical leverage and the ability to unwind the transaction easily.

Warning examples from nearby failures

Real life failures in nearby areas show why ASIC should be cautious. Sterling First should not be treated as a direct failure of this instrument unless ASIC can show that the scheme relied on this instrument or its predecessor relief. Ralan should not be treated as a direct failure of this instrument either. Both are still relevant warning examples because they show that property, housing security, investment promotion, projected returns and financial product structures can become blurred, and that consumers can be harmed when property arrangements are presented in ways that obscure the financial risk.

Those examples do not prove that this instrument failed. They prove that the risk environment is not benign. They show why ASIC should not remake broad property related financial product relief on trust, especially where real estate sales channels may be used to present arrangements that have investment substance.

Evidence ASIC should provide

ASIC should be required to publish evidence before remaking the instrument. It should identify how often the relief has been used, who has used it, how many investors have been affected, how many complaints have arisen, how many breach reports have been received, whether ASIC has conducted surveillance, whether any investor losses have occurred, whether any real estate agents have misused the relief, whether consumers understood the loss of ordinary protections, and whether the 500,000-dollar threshold remains defensible.

Without that evidence, ASIC is asking the public to accept renewal on trust. That is not enough for a relief instrument that softens the ordinary managed investment scheme, financial services licensing and hawking framework.

Positives and negatives of sunset

The positives of allowing the instrument to sunset are clear. It would restore regulatory clarity. Arrangements that are in substance managed investment schemes would need to face the ordinary managed investment scheme, licensing, disclosure and hawking framework unless ASIC granted more targeted relief. It would reduce regulatory arbitrage. It would make the financial product character of these arrangements more visible. It would reduce the risk that consumers are told, in effect, that they are merely buying property when the substance is property combined with managed investment risk.

The negatives of immediate sunset should also be acknowledged. Some existing schemes may be practical, low risk and genuinely property management based. Immediate sunset without transition could create disruption, uncertainty, restructuring cost and additional individual relief applications to ASIC. Investors in existing schemes may also face avoidable confusion if the transition is abrupt. Those concerns support a controlled sunset, not an automatic five-year remake.

Controlled sunset

ASIC should not remake the instrument unchanged for another five years. Instead, ASIC should adopt a controlled sunset process. Existing schemes should be given a defined transition period. During that period, ASIC should require operators relying on the relief to notify ASIC, notify investors, identify the nature of the relief relied on, disclose the protections that do not apply, and provide basic data about the scheme, complaints, breaches and investor outcomes.

At the end of that transition period, broad standing relief should cease unless ASIC has remade it in a much narrower form. Any narrower replacement should be confined to genuinely incidental property management arrangements where participation is truly optional, investor control is real, marketing is not investment driven, real estate agents

are not functioning as unlicensed investment promoters, and investors receive clear plain language warnings that ordinary managed investment scheme and financial services protections may not apply.

Conclusion

The current instrument gives concentrated benefits to the supply side while spreading risk across investors, ASIC and market integrity. That is not a sound public purpose balance unless ASIC can prove that the relief remains necessary, safe, narrow and well understood.

ASIC should not preserve broad relief merely because it is familiar. The proper course is controlled sunset, with transition for existing arrangements and a narrower, evidence-based replacement only if ASIC can show that such relief remains necessary, proportionate, confined and safe.

ASIC Corporations Property Rental Schemes Instrument 2016/870

Position

ASIC should not remake the ASIC Corporations Property Rental Schemes Instrument 2016/870 unchanged. My preferred position is controlled sunset, with a managed transition for existing arrangements and any future relief confined to clearly justified, narrow and genuinely low risk property management circumstances.

This instrument is less elaborate than the serviced apartment instrument, but that does not make it harmless. Its brevity is part of the problem. It grants broad relief from managed investment scheme registration, Australian financial services licensing, hawking and disclosure obligations, while placing comparatively little detail around consumer protection, reporting, surveillance, investor notification or ASIC visibility.

Nature of the instrument

The instrument applies to a property rental scheme, which is defined as a managed investment scheme involving owners of interests in real property making those interests available for commercial or residential letting or rental purposes, including day to day management of any lease arrangement. It does not apply where the owners acquired their interests jointly as a result of participating in the scheme, and it does not apply to serviced apartment, hotel, motel or resort complex arrangements, which are dealt with separately.

The important point is that the instrument begins from the position that the arrangement may be a managed investment scheme, then relieves it from the ordinary

managed investment scheme and financial services framework. A real estate agent operating a property rental scheme does not have to comply with the scheme registration requirement. A person providing a financial service in relation to an interest in a property rental scheme does not need an Australian financial services licence for that service. The interest is exempt from the hawking prohibition and from key Part 7.9 disclosure provisions.

That is not merely technical relief. It is broad perimeter relief.

The note to the instrument says the relief should not be taken to imply that ordinary leasing or property management by real estate agents necessarily involves a managed investment scheme, particularly where the owner has day to day control through being able to give directions to the agent. That is a sensible clarification, but it also reveals the core issue. The public purpose case for the instrument is strongest where the arrangement is ordinary property management and the owner retains real control. The case is weakest where control, information, income expectations and practical decision-making shift away from the owner and into an organised rental structure operated by someone else.

Who gains and who carries the risk

The immediate winners are real estate agents, property managers, platform style operators, rental pooling structures and other market participants who benefit from being treated as ordinary property service providers rather than as financial services providers or managed investment scheme operators. The instrument reduces regulatory cost, licensing exposure, disclosure burden and scheme registration risk.

Some property owners may also gain where the arrangement is genuinely ordinary property management. If a landlord appoints a local licensed real estate agent to manage a property, receives rent, can give directions, can terminate the agency, and retains meaningful day to day control, full managed investment scheme regulation may be disproportionate. In that setting, the instrument may reduce unnecessary legal uncertainty.

The risk is that the relief does not clearly stop at that simple case. The broader the rental arrangement becomes, the more the owner may lose practical control. Where the owner is placed into a standardised rental arrangement, pooled letting system, centralised platform, income sharing arrangement, guaranteed rent structure, related party management model or scheme operated across multiple properties, the relationship can move away from ordinary agency and closer to financial product risk.

In that setting, the property owner carries risk while the operator gains relief.

Financial services conduct through a property wrapper

The central problem is the same perimeter issue seen in the serviced apartment instrument, although in a simpler form. A transaction can look like property management while operating in substance like an investment arrangement. If the owner's return depends on an organised rental system, central operator control, pooled arrangements, platform rules, occupancy management, related party services, standardised documents or income representations, the investor is not merely receiving property administration. The investor is relying on a scheme.

The instrument gives licensing relief to a person who provides a financial service in relation to an interest in a property rental scheme. That language matters. It acknowledges that financial services conduct may be occurring, then removes the ordinary licensing requirement. That may be justified in a narrow ordinary agency context, but ASIC has not shown that it remains justified as broad standing relief.

A real estate licence should not be treated as a substitute for financial services competence where the arrangement involves managed investment scheme risk. A property manager may understand leases, tenants, maintenance and rent collection. That does not mean the property manager is competent to explain scheme risk, pooling risk, income representation risk, operator conflict, loss of disclosure protections, hawking relief or the practical consequences of relying on an unregistered managed investment scheme structure.

Rent seeking and regulatory arbitrage

The instrument risks increasing rent seeking where organised property rental arrangements use the property label to avoid the financial services perimeter. The supply side may receive the benefits of financial product style intermediation without carrying the full obligations that would ordinarily attach to managed investment schemes and financial services.

Where the arrangement is ordinary property management, the relief may reduce unnecessary compliance cost. However, where the arrangement is marketed as a passive investment, rental return product, platform yield opportunity, managed rental system or income producing property structure, the relief can become regulatory arbitrage. The scheme remains investment like in substance, but regulation is softened because the underlying asset is real property.

That does not serve good public purpose. Good public purpose requires the law to look at substance. If the owner retains real control, relief may be justified. If the owner is relying on another party to operate a scheme from which the owner expects income, then ordinary investor protection principles should not be displaced without strong evidence.

Complexity

The instrument may reduce complexity for real estate agents and property managers, but it increases complexity for property owners, ASIC and the regulatory system. The law says the arrangement may be a managed investment scheme, but then says the ordinary consequences of that status do not apply. That creates a grey zone between property management law and financial services law.

Grey zones are attractive to sophisticated operators because they allow private actors to choose the most favourable regulatory characterisation. They are dangerous for consumers because the consumer does not know which protections apply and which protections have been removed.

The instrument also creates a risk of false comfort. Because the arrangement is handled by a real estate agent, an owner may assume the ordinary property law framework is enough. Because ASIC has granted relief, the operator may assume that the arrangement is effectively endorsed as low risk. Neither assumption is necessarily safe.

ASIC's regulatory burden

The instrument may reduce formal registration and licensing work, but it may add a hidden supervision burden. ASIC must maintain a relief instrument for arrangements that sit on the boundary of property and financial services, without the same front-end visibility that registration and licensing would provide.

The instrument does not appear to require routine notification to ASIC by persons relying on the relief. It does not appear to require public reporting of use. It does not appear to require an operator to give owners a plain language warning that ordinary managed investment scheme registration, AFS licensing, hawking and Part 7.9 disclosure protections may not apply. It therefore risks leaving ASIC with limited visibility until complaints or losses emerge.

That is poor regulatory design. A relief instrument should not reduce visible regulatory burden by creating a class of arrangements that are harder to see until after harm occurs.

Fit for purpose concerns

The instrument is fit for purpose only if its purpose is narrow legal certainty for ordinary property management where owners retain day to day control. It is not fit for purpose if it operates as broad relief for organised property rental schemes that have the substance of managed investment arrangements.

The present instrument does not draw that line strongly enough. It relies heavily on the definition of property rental scheme and on a note explaining that ordinary real estate management will not necessarily involve a managed investment scheme where the owner can give directions to the agent. That note is useful, but it is not enough. The instrument should contain operative conditions that preserve owner control, require clear termination rights, prohibit misleading income representations, require disclosure of lost protections, and prevent the relief being used for rental pooling, yield products or passive investment structures unless separately justified.

The absence of detailed conditions may have been acceptable when the relief was viewed as narrow avoidance of doubt. It is harder to justify now, because property markets, rental platforms, managed accommodation models, build to rent structures, short stay platforms and investment marketing channels have all become more sophisticated. ASIC should not assume that the old boundary between ordinary property management and financial product risk remains simple.

Warning examples from nearby property failures

I do not identify a confirmed public failure of Instrument 2016/870 itself. That absence should not be treated as proof of safety. It may simply reflect the fact that reliance on the instrument is not sufficiently visible. If ASIC does not publish who relies on the relief, how often it is used, what complaints have arisen and whether any surveillance has occurred, the public cannot know whether the instrument has operated safely or whether problems are simply hidden inside private property arrangements.

Ralan is a useful warning, not because it proves this instrument failed, but because it shows how property transactions can become investment promotions when real estate sales, projected returns and financial arrangements are blended together. The Ralan example shows that the property wrapper does not neutralise financial risk. Once returns, income, passive reliance or centralised financial control become central to the transaction, the public purpose of financial services regulation becomes engaged.

Lion Property Group is another warning, again not as a direct example of this instrument, but as an example of property-based investment structures being presented as tangible and asset backed while the real risk sat in scheme design, related party dealings, debt, valuation, control and information asymmetry. That type of failure reinforces the need for caution before ASIC renews broad relief at the boundary between property and financial services.

These examples do not prove that Instrument 2016/870 failed. They prove that the risk environment is not benign. They also show why ASIC should not rely on labels such as property, real estate, rental management or letting arrangement as though those labels

remove the need for financial services protection where the substance of the transaction is investment like.

Evidence ASIC should provide

ASIC should publish evidence before remaking the instrument. It should identify who uses the relief, how often it is used, how many property owners are affected, whether operators relying on the relief notify ASIC, whether ASIC has received complaints, whether any breach or misconduct data exists, whether investors or property owners understand that financial services protections may not apply, and whether the relief has been used in arrangements involving rental pooling, guaranteed returns, platform models or passive investment marketing.

ASIC should also explain why a broad licensing exemption remains appropriate. If a person is providing a financial service in relation to an interest in a property rental scheme, ASIC should explain why that person should not ordinarily be licensed, or at least subject to clear substitute obligations.

ASIC should also identify whether any reliance on this instrument has occurred in arrangements that resemble modern rental platforms, build to rent products, short stay accommodation schemes, rental pooling arrangements or passive property income products. If ASIC cannot answer that question, it should not claim that the instrument remains fit for purpose.

Without that evidence, ASIC is asking for another five-year extension on trust. That is not adequate.

Positives and negatives of sunset

The positive of allowing the instrument to sunset is that it would restore regulatory discipline at the boundary between property and financial services. Arrangements that are genuinely ordinary property management would likely remain outside managed investment scheme regulation because they would not be managed investment schemes in substance. Arrangements that are in substance managed investment schemes would be required to face the ordinary consequences of that status unless ASIC granted narrower relief.

Sunset would also reduce the risk of regulatory arbitrage. It would make it harder for organised rental schemes to claim the commercial benefit of investment like arrangements while avoiding the ordinary registration, licensing, hawking and disclosure framework. It would also push ASIC to identify the precise cases that actually need relief rather than preserving broad relief by default.

The negative of immediate sunset is that some legitimate property managers and landlords may face uncertainty. There may be practical property management arrangements that sit close enough to the managed investment scheme definition to create legal risk, even though they do not raise serious investor protection concerns. Immediate sunset could increase legal advice costs, cause restructuring uncertainty and generate individual relief applications to ASIC.

Those negatives are real, but they do not justify automatic renewal. They justify controlled sunset.

Controlled sunset

ASIC should adopt a controlled sunset process rather than remake the instrument unchanged. Existing users of the relief should be required to identify themselves to ASIC during a transition period. They should be required to notify affected property owners that the arrangement has relied on relief from managed investment scheme registration, AFS licensing, hawking and disclosure provisions. They should also provide ASIC with basic data about the structure, number of owners, use of pooled arrangements, income representations, termination rights, complaints and disputes.

At the end of the transition period, the broad standing instrument should cease unless ASIC has developed a narrower replacement. Any replacement should be limited to arrangements where the owner retains real control, can give directions, can terminate the arrangement without unreasonable restraint, is not locked into rental pooling, is not sold a passive income product, and receives clear warning of any protections that do not apply.

If ASIC wishes to preserve relief for more complex arrangements, it should do so only through a separate, evidence-based instrument with stronger conditions, not through a broad generic property rental carve out.

Conclusion

The ASIC Corporations Property Rental Schemes Instrument 2016/870 may have a legitimate narrow purpose where it protects ordinary real estate management from unnecessary managed investment scheme uncertainty. However, the current instrument goes further than that by providing broad relief from scheme registration, AFS licensing, hawking and disclosure obligations for property rental schemes.

The supply side benefit is clear, while the consumer protection case is not adequately evidenced. The instrument may reduce compliance complexity for property operators, but it increases regulatory ambiguity for property owners, ASIC and the public. It risks permitting rent seeking and regulatory arbitrage where financial product style arrangements are presented through a property management wrapper.

ASIC should not remake the instrument unchanged for another five years. The proper course is controlled sunset, with a managed transition for existing arrangements and a narrower replacement only if ASIC can show that continued relief is necessary, proportionate, confined and safe.

ASIC Corporations Charitable Investment Fundraising Instrument 2016/813

Position

ASIC should not remake the ASIC Corporations Charitable Investment Fundraising Instrument 2016/813 unchanged. My preferred position is controlled sunset, with a managed transition for existing arrangements and any future relief confined to genuinely charitable, clearly disclosed, low risk and properly supervised fundraising.

This instrument is different from the property instruments because there is a stronger public purpose argument for some relief. A genuine charity may need to raise funds for welfare, education, religious, community, housing, health, disability, aged care or other charitable purposes. Lower compliance cost may allow more funds to reach the stated charitable activity. That should be acknowledged.

However, charitable purpose is not a substitute for investor protection. A charity label does not remove financial product risk. It may increase the need for protection because supporters may trust the organisation, the mission, the religious or community connection, or the moral purpose more than they would trust an ordinary commercial issuer.

The instrument should therefore not be remade by habit. ASIC should be required to demonstrate that the relief remains necessary, proportionate, confined, safe and well understood.

Nature of the instrument

The instrument applies where a charity, or trustee of a charity, raises funds to support charitable purposes through the issue of debentures or interests in a managed investment scheme. That means the instrument is not dealing only with donations. It is dealing with arrangements that may have investment substance because the person providing the money may expect repayment, redemption, interest, return or distribution.

The instrument gives relief from parts of the ordinary fundraising, managed investment scheme, debenture, hawking, disclosure and licensing framework. It also contains conditions, including identification statements, breach reporting, restrictions on short term investment products, retail warnings, investor understanding statements, financial statements and audit obligations.

Those conditions are important, but they do not answer the central issue. The instrument still permits financial product style fundraising to occur under reduced ordinary protections. The fact that the issuer is a charity changes the moral setting, but it does not remove the need for financial discipline, transparency, liquidity management, governance and accountability.

Who gains and who carries the risk

The immediate beneficiaries are charitable organisations that can raise funds more cheaply and more easily than they could under the ordinary financial services and managed investment scheme framework. Sponsors, associated charitable bodies, religious networks and related entities may also benefit where the instrument supports internal or community-based capital raising.

Supporters may also benefit where they knowingly choose to support the charitable purpose and understand that the investment is not a bank deposit, not an ordinary regulated investment, and not subject to the usual investor protections. In that narrow case, the instrument may serve public purpose by allowing community capital to support genuine charitable work.

The risk is carried by retail supporters, parishioners, donors, volunteers, elderly members, community members, staff, associated clients and others who may trust the charity more than they understand the financial product. That trust may be genuine, but it can also make people vulnerable. A person may assume that a church, school, welfare body, aged care provider, housing charity or community organisation is safer because it is mission based. That assumption may be wrong.

The warning language required by the instrument is itself an admission that the risk is real. Investors must be told that the investment is not subject to the usual protections, that they may be unable to get some or all of their money back when expected or at all, and that the investment is not comparable to investments with banks, finance companies or fund managers. If those warnings are necessary, then ASIC should not treat the relief as routine or low risk.

Charity status and public sector failure

Charity status should not be treated as automatic proof of public virtue. Some charitable organisations are small, local and genuinely community based. Others are large, professionalised institutions with substantial revenue, substantial assets, professional management, legal advisers, financial advisers and senior executives on high incomes.

Many charities also operate in sectors that exist, or have expanded, because the public sector has failed to provide adequate public housing, health care, aged care, disability

support, education, community services, income security or social infrastructure. In that setting, a charity may be doing useful work, but it may also be occupying a space created by public undercapacity.

That matters because moral purpose can obscure institutional power. A charity may hold brand trust, religious authority, community loyalty, tax concessions and public legitimacy. The supporter may hold far less information, far less bargaining power and far less capacity to understand the financial structure. If the charity then issues debentures or managed investment scheme interests under reduced protections, the weaker party may be carrying financial risk while the stronger institution receives cheaper funding.

Good public purpose requires the Commonwealth to fund essential public services directly where public need exists. It should not rely on charitable institutions raising investment like money from supporters under reduced financial protections to fill gaps left by public underinvestment.

Rent seeking and regulatory arbitrage

The rent seeking issue is different from the property instruments, but it is still present. The risk is not ordinary commercial profit seeking in the same form. The risk is reputation arbitrage, regulatory arbitrage and moral cover.

A charity may be able to raise money cheaply because supporters trust the mission. That trust may be legitimate, but it can also allow financial product risk to be softened by moral language. A person may be less cautious because the fundraiser is a church, school, welfare body, aged care provider, community organisation or other charity. That is precisely why weaker protection can be more dangerous, not less dangerous.

If a person gives money as a donation because they believe in the charitable purpose, that is one thing. If a person provides money expecting repayment, redemption, interest, return or distribution, that is different. The transaction has investment substance even if the issuer has a charitable purpose.

The instrument should therefore be tested by substance, not sentiment. It should ask whether the relief reduces unnecessary compliance burden for genuinely modest, transparent and mission-based fundraising, or whether it allows financial product issuance to proceed under a charity label with weaker protections than would apply to other issuers.

Good public purpose is not served by allowing charities to become bank like institutions, fund managers or debenture issuers without equivalent safeguards. Nor is it served by allowing charity reputation to lower investor caution while the law lowers investor protection. If a charitable organisation wishes to raise investment like money

from supporters, the starting presumption should be clear disclosure, strong safeguards, public visibility and enforceable accountability.

Associated clients and trust-based vulnerability

The instrument distinguishes between retail associated clients and retail non associated clients. That distinction needs careful scrutiny. A person associated with a charity is not necessarily sophisticated. A parishioner, volunteer, employee, trainee, donor, member of clergy, family member or community supporter may be more trusting because of the relationship, not less vulnerable.

Association can increase influence. It can increase loyalty. It can increase pressure to support the mission. It can make it harder for the person to ask hard questions, refuse the offer, demand documents or challenge the organisation later. ASIC should not assume that association with a charity reduces the need for protection.

In some circumstances, association may be a risk factor. The closer the social, religious, employment or community relationship, the more care should be taken to ensure that the person understands the financial risk and is not relying on trust, loyalty or moral obligation instead of informed assessment.

Complexity

The instrument reduces complexity for charitable fundraisers, but it creates complexity for supporters and regulators. A donation is conceptually simple. An ordinary regulated investment is at least meant to sit inside a recognised financial services framework. This instrument creates a hybrid space where a person may be told that their primary purpose should be to support a charitable purpose, while still being asked to provide money through a debenture or managed investment scheme interest.

That hybrid character is risky. People may not know whether they are acting as donors, lenders, investors, supporters, members of a faith community, employees, volunteers or financial product holders. The more those roles are blurred, the stronger the need for clear warnings, strict limits and public visibility.

The instrument should not allow a charity to receive the emotional benefit of a donation relationship and the financial benefit of an investment relationship while the supporter receives reduced investor protection.

ASIC's regulatory burden

The instrument may reduce front end licensing, disclosure and registration work, but it creates a hidden supervision burden. ASIC must rely on identification statements, sponsor acceptance, breach reporting, retail warnings, audits and after the event monitoring.

The regulatory environment is also fragmented. ASIC may have responsibility for financial services and managed investment scheme relief. The ACNC regulates charity registration and governance. APRA may be relevant where religious charitable development funds or deposit like products are involved. State and territory fundraising laws may also apply. The result can be a system where every regulator appears to have a role, but no single regulator gives the supporter the same protection that would apply to a bank deposit or ordinary regulated financial product.

A person may see a registered charity and assume strong supervision. That assumption may be wrong. ACNC registration is not the same as prudential supervision. A charity being registered does not mean its investment product is safe, liquid, guaranteed or protected by the Financial Claims Scheme.

Fit for purpose concerns

The instrument is fit for purpose only if it is confined to genuinely charitable fundraising where the person providing money understands that their primary purpose is charitable support and that ordinary investment protections do not apply.

It is not fit for purpose if it allows large, professionalised or financially sophisticated charities to raise investment like money from retail supporters under weaker protections than would apply to ordinary issuers. It is also not fit for purpose if it treats community association as a reason for lower protection, when in practice that association may increase vulnerability.

The present instrument contains important conditions, but ASIC has not shown that they are enough in practice. A signed investor understanding statement does not necessarily prove real understanding. A website identification statement does not prove that a supporter has read, understood or assessed the risk. An audit does not guarantee liquidity. A charitable purpose does not guarantee repayment. A sponsor arrangement does not remove the need for ASIC to know how the relief is being used.

Real life warning examples

I do not identify a confirmed public failure of this instrument itself. That absence should not be treated as proof of safety. It may simply reflect limited public visibility over who relies on the relief, how much money is raised under it, what complaints have arisen, what breach reports have been made and whether ASIC has conducted surveillance.

There are nevertheless relevant warning examples from nearby financial product failures. First Guardian, Shield and Australian Fiduciaries show that managed investment structures can cause severe harm even where formal financial services architecture exists. Those examples are not charitable investment fundraisers, but they

show why ASIC should not rely on labels, documents, trustees, platforms, ratings, audits or after the event enforcement as substitutes for strong front-end protection.

Fincorp is also a useful structural warning. It was not a charitable investment fundraiser, but it shows the danger of debenture style fundraising being marketed to retail investors who may think they are entering a relatively safe income product. The lesson is that repayment risk, liquidity risk, priority risk, governance risk and related party risk matter, even where the product appears familiar or respectable.

International charity related failures also show the danger of moral cover. The Foundation for New Era Philanthropy in the United States was a charitable fraud rather than an Australian instrument example, but it demonstrates how trust, philanthropy, religion and moral purpose can be used to lower scepticism and move money into structures that later fail. The relevance is not technical. The relevance is human behaviour. People trust mission-based organisations, and that trust can be exploited or misplaced.

These examples do not prove that Instrument 2016/813 has failed. They prove that the risk environment is not benign and that ASIC should not remake charity based financial product relief on trust.

Evidence ASIC should provide

ASIC should publish evidence before remaking the instrument. It should identify how many charitable investment fundraisers rely on the relief, how much money has been raised or held under the relief, how many retail associated clients and retail non associated clients are involved, how many identification statements have been accepted by ASIC or sponsors, how many breach reports have been received, and how many complaints or disputes are known to ASIC.

ASIC should also identify how many fundraisers hold an Australian financial services licence and how many rely on licensing relief, what types of assets are held, whether there is any offshore exposure, whether there is any related party exposure, whether there have been redemption delays or hardship repayment requests, whether any investors misunderstood the product as being bank like, and whether any charitable investment fundraiser has experienced liquidity stress.

ASIC should explain how it coordinates with the ACNC and APRA, and how the public can distinguish a donation, a charitable investment, a religious charitable development fund product, a debenture, a managed investment scheme interest and a bank deposit.

Without that evidence, ASIC is asking the public to accept another five-year extension on trust. That is not adequate.

Positives and negatives of sunset

The positive of allowing the instrument to sunset is that it would restore discipline to charity based financial product fundraising. Charities that issue investment like products would need to move closer to the ordinary managed investment scheme, debenture, disclosure and licensing framework unless ASIC granted narrower relief. It would reduce the risk that charity reputation is used to lower investor caution while legal protections are reduced. It would also force ASIC to identify which charitable fundraising models genuinely need relief and which should be treated like ordinary financial product issuance.

Sunset would also support a clearer public message. If a person gives money to a charity as a donation, that is a charitable act. If a person gives money expecting repayment, interest, redemption, return or distribution, that is investment like and should be regulated accordingly unless there is a strong public reason for a narrow exemption.

The negative of immediate sunset is that genuine charities may face disruption. Some may have relied on the instrument in good faith. Immediate sunset could increase compliance costs, create uncertainty, interfere with existing funding arrangements, delay charitable projects and push organisations toward more expensive commercial finance. Those concerns are real, but they do not justify automatic renewal. They justify controlled sunset.

Controlled sunset

ASIC should adopt a controlled sunset process rather than remake the instrument unchanged. Existing users of the relief should be required to identify themselves to ASIC during a transition period. They should be required to notify affected holders that the arrangement relies on relief from ordinary fundraising, managed investment scheme, debenture, licensing, hawking or disclosure provisions. They should also provide ASIC with basic data about the amount raised, number of holders, retail associated holders, retail non associated holders, redemption terms, hardship requests, complaints, disputes, liquidity position, related party exposure and offshore exposure.

At the end of the transition period, broad standing relief should cease unless ASIC has developed a narrower replacement. Any replacement should be limited to arrangements where the charitable purpose is genuine, the fundraising is modest and transparent, retail investors receive unavoidable warnings, associated clients are not treated as automatically lower risk, repayment and liquidity risks are clearly explained, and ASIC has sufficient visibility to monitor use of the relief.

If ASIC wishes to preserve relief for large or complex charitable investment fundraising, it should do so through a separate and more demanding instrument, not through broad generic relief. Larger entities that raise substantial investment like funds from retail supporters should be required to meet stronger governance, disclosure, liquidity, audit, reporting and ASIC notification requirements.

Conclusion

The ASIC Corporations Charitable Investment Fundraising Instrument 2016/813 may have a legitimate narrow purpose where it supports genuine charitable fundraising by reducing unnecessary compliance burden. However, charitable purpose does not remove financial product risk. It may increase vulnerability where supporters trust the organisation, the mission, the religious or community relationship, or the moral purpose more than they understand the product.

The supply side benefit is clear. Charitable organisations receive easier and cheaper access to funds. The consumer protection case is less clear and has not been adequately evidenced. The instrument risks allowing charity reputation to operate as moral cover for investment like fundraising under reduced ordinary protections.

ASIC should not remake the instrument unchanged for another five years. The proper course is controlled sunset, with transition for existing arrangements and a narrower replacement only if ASIC can show that continued relief is necessary, proportionate, confined, transparent and safe.

ASIC Corporations School Enrolment Deposits Instrument 2016/812

Position

ASIC should not remake the ASIC Corporations School Enrolment Deposits Instrument 2016/812 unchanged. My preferred position is controlled sunset, with a managed transition for existing arrangements and any future relief confined to genuinely modest, refundable, transparent and administratively necessary enrolment arrangements.

This instrument is narrower than some of the other instruments in this consultation, but it should not be treated as harmless merely because it concerns schools. A payment required as a condition of a child's enrolment is not an ordinary commercial investment choice. It is connected to a family's attempt to secure education, continuity, social stability and opportunity for a child. That context makes the power imbalance important.

Nature of the instrument

The instrument applies to school enrolment deposits and school enrolment debentures where a person deposits money with a school operator, or acquires an interest in a school enrolment deposit scheme, because that payment or interest is required as a condition of enrolment and is incidental to that enrolment.

The instrument gives schools relief from parts of the ordinary Corporations Act framework. A school operator does not have to comply with managed investment scheme registration requirements in relation to a school enrolment deposit scheme. It does not have to comply with fundraising and disclosure provisions in relation to an offer to issue a school enrolment debenture. It receives relief from hawking provisions and Part 7.9 disclosure obligations. A person providing financial services in relation to a school enrolment deposit scheme or school enrolment debenture also receives licensing relief.

That is significant relief. It may be justified where the deposit is genuinely modest, genuinely incidental, clearly refundable and used only for enrolment administration. It is harder to justify where the deposit is large, retained for long periods, non-refundable, unclear, used as working capital, or embedded in a school market where families have little practical bargaining power.

The deeper problem

The deeper question is whether enrolment deposits should exist at all in their present form. If a family can only hold one confirmed enrolment for a student at a time, the main administrative justification for enrolment deposits is greatly weakened. Schools need intake certainty, but that does not require schools to hold parent money under relief from ordinary financial services protections.

A better system would use a confirmed enrolment protocol. A family would accept one confirmed place. The family would have a defined period to cancel or transfer that enrolment. After that date, the school could treat the enrolment as confirmed for staffing, class planning and intake management. Genuine hardship, relocation, disability, family violence, illness and other serious changes should be protected. This would allow schools to manage intakes without using deposits, debentures or financial product style arrangements as the main discipline mechanism.

This matters because the instrument appears to accept the existence of enrolment deposits as normal. It does not ask whether the underlying administrative problem could be solved more simply, more fairly and with less financial risk to families.

Public education and public sector failure

School enrolment deposits sit inside a wider education system where public education should be the universal foundation. A properly funded public education system should

provide high quality schooling for every child, with enough teachers, classrooms, support staff, disability support, transport, technology, health support and local capacity to make public education a real and trusted option.

Where families are pushed toward private schooling because public schools are underfunded, overcrowded, under supported or perceived as second best, private schools gain market power. That market power can then be used to require upfront financial commitments from families seeking stability, safety, continuity, status or opportunity for their children.

This reflects a failure of public capacity. It is not simply a private contract issue. The Commonwealth is the currency issuer and can fund the real resources required for a strong public education system. State and territory governments can then deliver public schooling with proper staffing, infrastructure and support. If public education is properly funded, the pressure that drives families into private scarcity markets is reduced.

That is relevant to this instrument because ASIC should not preserve financial services relief for private school enrolment deposits without asking whether the relief supports good public purpose or merely accommodates a private market created by public underinvestment.

Who gains and who carries the risk

The immediate beneficiaries are schools. They gain enrolment certainty, upfront money, reduced regulatory cost, reduced disclosure burden and relief from licensing and managed investment scheme obligations. A school may say that the deposit helps it plan staffing, classes and facilities. That may be true in a narrow administrative sense, but it does not justify broad relief without evidence.

Families may gain where the deposit is modest, refundable, clearly explained and genuinely used only to manage enrolment administration. In that narrow setting, a deposit may reduce speculative enrolments and assist planning. However, where the deposit is substantial, unclear, non-refundable, retained for long periods or used to support school cashflow, the benefit shifts toward the school and the risk shifts toward the family.

The family carries the financial risk. Parents or guardians may not know whether the money is segregated, whether it is refundable, when it is refundable, whether hardship is recognised, whether the money is used in school operations, or what happens if the school becomes insolvent. The child also carries a practical risk because disputes over enrolment and money can affect schooling, friendships, transport, family planning and educational continuity.

Rent seeking and regulatory arbitrage

The rent seeking issue is different from the property instruments, but it is still present. A school may use reputation, scarcity, selectivity, religious identity, academic branding, social networks and parental anxiety to extract upfront money from families. The enrolment deposit may be described as incidental, but it may also operate as a lock in device, a cashflow tool, a rationing device or a way of transferring financial risk from the school to the family.

This is more concerning where schools already receive public funding, tax concessions, charitable status or public legitimacy. The public should not subsidise a private institution while families are also required to provide upfront money under reduced financial services protections.

The regulatory arbitrage risk is that the arrangement has financial substance, but because it is wrapped in school enrolment, the ordinary Corporations Act protections are removed. If money is required as a condition of access to education, the law should be more careful, not less careful.

Complexity

The instrument reduces complexity for schools, but it may increase practical complexity for families. Parents may think they are paying an enrolment deposit. They are unlikely to understand that the arrangement may otherwise be characterised as a debenture or an interest in a managed investment scheme. They are also unlikely to understand that ASIC has relieved the school from ordinary protections.

The law should not assume that because the payment is connected to schooling, families do not need clear financial protection. The opposite may be true. Because the payment is connected to a child's education, parents may be more emotionally pressured and less likely to treat the arrangement as a financial risk.

The instrument should not allow a school to receive the practical benefit of a financial commitment while families receive neither ordinary investor protection nor a simple public education alternative of equal quality and confidence.

ASIC's regulatory burden

The instrument may reduce formal regulatory burden by removing schools from ordinary managed investment scheme, fundraising, disclosure and licensing rules. However, it may create hidden risk by making reliance on the relief less visible.

ASIC should explain whether it knows how many schools rely on the instrument, how much money is held under school enrolment deposit or debenture arrangements, whether deposits are refundable, whether funds are segregated, whether schools

disclose the absence of ordinary protections, and whether complaints have arisen. If ASIC cannot answer those questions, it should not simply assert that the instrument remains necessary and useful.

A relief instrument should not reduce visible regulatory work by creating a class of arrangements that are harder to see until after harm occurs.

Fit for purpose concerns

The instrument may be fit for purpose only where the deposit is genuinely incidental, modest, refundable, separately accounted for, clearly disclosed and not used as working capital or quasi financing.

It is not fit for purpose if it allows schools to require large deposits or debenture style payments without clear financial safeguards. It is also not fit for purpose if it allows schools to avoid ordinary protections while families receive no clear warning that ASIC's usual investor protection framework does not apply.

A replacement instrument should contain clear conditions. It should limit the size of any deposit. It should require refundability except in narrow and clearly justified circumstances. It should require refund timing. It should provide hardship protections. It should require separate accounting or segregation of funds. It should require disclosure of whether the money is used in school operations. It should require disclosure of what happens if the school becomes insolvent. It should prohibit using enrolment deposits as working capital, private financing, scarcity pricing or a lock in device.

A better enrolment protocol

The preferred public policy answer is not to normalise school enrolment deposits. The better answer is to reduce or remove the need for them.

A one confirmed enrolment rule would prevent families from holding multiple confirmed places indefinitely. A clear cancellation or transfer window would give schools reasonable intake certainty. A final confirmation date would allow staffing and class planning. A hardship and genuine change protocol would protect families where circumstances change for reasons outside their control.

This model would be simpler and fairer than a financialised deposit model. It would manage school planning through enrolment administration rather than through financial pressure on families.

The existence of a better non-financial alternative weakens the case for remaking this instrument unchanged.

Warning examples from nearby education failures

I do not identify a confirmed public failure of Instrument 2016/812 itself. That absence should not be treated as proof of safety. It may simply reflect limited public visibility over who relies on the relief, how much money is held, what complaints have arisen and whether ASIC has conducted surveillance.

There are relevant warning examples from nearby education related failures. Actura Australia and Edu School Tours show that families can lose significant prepaid education related money when payments are made in advance and the provider fails. These were school travel provider failures, not school enrolment deposit failures, but they show the general risk of education related upfront payments where funds are not clearly protected. Reported affected school communities included Korowa Anglican Girls' School, Firbank Grammar School and Mentone Girls' Secondary College.

Private school financial failure is also not theoretical. Mowbray College entered voluntary administration in 2012 after serious financial distress and then closed. Acacia College also closed in 2012 after its owner concluded that the school was not financially viable. These examples are not direct failures of Instrument 2016/812, but they show why families should not be asked to trust school financial stability without safeguards where money is required as a condition of enrolment.

Reports of private schools using bankruptcy proceedings against families also show that schools should not be assumed to behave differently from other creditors merely because they provide education. Reporting named Sirius College, Oakleigh Grammar, Overnewton Anglican Community College, Trinity Grammar and Wesley College in the context of bankruptcy proceedings brought by private schools against families. I do not rely on those reports to say those schools misused enrolment deposits. The point is narrower and more important. Some schools may act commercially when money is owed. That makes it inappropriate to treat enrolment deposit relief as harmless simply because the institution is a school.

These examples do not prove that Instrument 2016/812 failed. They show that education related financial arrangements can harm families when public capacity is weak, payments are made in advance, protections are unclear, institutions fail, or schools act commercially. ASIC should therefore not remake the instrument unchanged unless it can show who relies on the relief, how much money is held, how families are protected, and what happens when a school or related education provider fails.

Evidence ASIC should provide

ASIC should publish evidence before remaking the instrument. It should identify how many schools rely on the instrument, how much money is held under enrolment

deposit or debenture arrangements, whether deposits are refundable, partly refundable or non-refundable, whether funds are segregated or used as working capital, and whether schools disclose that ordinary Corporations Act protections do not apply.

ASIC should also identify whether parents are told what happens if the school becomes insolvent, whether ASIC has received complaints about refund delays, refusal of repayment or misleading enrolment deposit terms, whether hardship protections exist, whether the relief is used mainly by high fee schools, religious schools, low fee community schools or other categories, and whether public funding recipients are using the relief while also requiring substantial upfront deposits.

ASIC should also examine whether a one confirmed enrolment rule and cancellation or transfer protocol would remove most of the claimed administrative need for enrolment deposits.

Without that evidence, ASIC is asking for another five-year extension on trust. That is not adequate.

Positives and negatives of sunset

The positive of allowing the instrument to sunset is that it would restore discipline to school based financial arrangements. Schools that require deposits, debentures or managed investment scheme interests as a condition of enrolment would need to face the ordinary regulatory consequences unless ASIC granted narrower relief. It would reduce the risk that schools use enrolment deposits as working capital, lock in devices, scarcity pricing or quasi financing. It would also force ASIC and schools to identify which arrangements genuinely need relief and which should be replaced by better enrolment administration.

Sunset would also support a clearer public message. Education should be planned around children and public capacity, not around schools extracting upfront financial commitments from parents.

The negative of immediate sunset is that some schools may face uncertainty. Some modest and genuine enrolment deposits may be dragged into disproportionate regulation. Smaller schools may face legal and administrative costs. There may also be transitional issues for existing arrangements. Those concerns are real, but they do not justify automatic renewal. They justify controlled sunset.

Controlled sunset

ASIC should adopt a controlled sunset process rather than remake the instrument unchanged. Existing users of the relief should be required to identify themselves to ASIC during a transition period. They should be required to notify affected families that the

arrangement relies on relief from ordinary managed investment scheme registration, fundraising, disclosure, hawking or licensing provisions. They should also provide ASIC with basic data about the amount held, refund terms, hardship arrangements, segregation of funds, use of funds, complaints, disputes and insolvency treatment.

At the end of the transition period, broad standing relief should cease unless ASIC has developed a narrower replacement. Any replacement should be limited to arrangements where the deposit is modest, refundable, separately accounted for, clearly disclosed and genuinely necessary for enrolment administration.

Any replacement should also require schools to offer a non-financial enrolment confirmation protocol wherever possible. A family should not be required to provide significant money merely to prove seriousness where a one confirmed enrolment rule, cancellation or transfer window and final confirmation date would achieve the same planning purpose with less financial harm.

Conclusion

ASIC should not treat school enrolment deposits as harmless merely because they are connected to education. A parent paying money to secure a child's school place is not acting like an ordinary investor. The parent may be responding to scarcity, anxiety, public sector underfunding and the desire to secure educational continuity.

The instrument may have a legitimate narrow purpose where deposits are modest, refundable and genuinely incidental to enrolment administration. However, broad relief from managed investment scheme registration, fundraising, disclosure, hawking and licensing obligations should not be remade unchanged without evidence.

The better course is controlled sunset, with transition for existing arrangements and a narrower replacement only if ASIC can show that continued relief is necessary, proportionate, confined, transparent and safe. The broader public policy answer is properly funded public education and better enrolment administration, not financialised enrolment deposits protected by regulatory relief.

ASIC Corporations Horse Schemes Instrument 2016/790

Position

ASIC should not remake the ASIC Corporations Horse Schemes Instrument 2016/790 unchanged. My preferred position is controlled sunset, with a managed transition for existing arrangements and any future relief confined to genuinely small, transparent, recreational and properly supervised horse schemes.

This instrument has a weaker public purpose case than instruments dealing with charitable fundraising or school enrolment deposits. Horse racing syndication and private horse breeding may be lawful and culturally established activities, but they are not essential public services. They sit inside a gambling adjacent industry, depend on speculative animal performance, and expose participants to financial, integrity, regulatory and animal welfare risks.

ASIC has specifically asked whether this relief remains fit for purpose and whether the key thresholds remain appropriate. That question should be taken seriously. The answer should not be an automatic five-year rollover.

Nature of the instrument

The instrument deals with horse racing syndicates and private horse breeding schemes. A horse racing syndicate is a managed investment scheme whose principal purpose is racing one or more horses and distributing prizemoney to participants. The instrument gives promoters and managers relief from the requirement to register the syndicate as a managed investment scheme where conditions are met.

Those conditions include that the promoter holds an Australian financial services licence, is registered by a lead racing regulator, the syndicate has no more than 50 participants, the total amount raised from issuing interests does not exceed 500,000 dollars, and each Product Disclosure Statement has been approved by the lead regulator. The instrument also requires disclosure of fees, costs, conflicts, purchase price, title or finance lease arrangements, and other matters.

The instrument also deals with private horse breeding schemes, including private broodmare schemes and private stallion schemes. For those schemes, the relief is broader in some respects because operators receive relief from scheme registration, Australian financial services licensing, hawking and parts of financial product disclosure.

This is not merely administrative convenience. It is financial services relief for speculative schemes involving living animals, industry promoters, managers, trainers, breeders, veterinarians, auction houses, insurers, racing bodies, prizemoney, residual value and ongoing costs.

Limited public purpose

A narrow public purpose case can be made for small recreational syndicates. Horse ownership may provide enjoyment, social participation and access to an activity that would otherwise be limited to wealthy individuals. The racing industry may also say that syndication supports breeders, trainers, jockeys, stable workers, regional racing clubs and related employment.

That argument should be acknowledged, but it should not be overstated. Broadening public participation in speculative racehorse ownership is not the same as providing an essential public service. The public purpose case is much weaker where the relief helps the racing and breeding industry attract participant money while reducing the ordinary managed investment scheme burden.

A good public purpose test should ask whether the relief protects ordinary participants from unnecessary harm, or whether it helps industry participants sell a high-risk ownership dream under lighter regulation.

Who gains and who carries the risk

The immediate winners are promoters, managers, trainers, breeders, stud operators, racing bodies and the broader racing industry. The instrument gives them a lower cost and familiar pathway for raising participant money. It also allows lead racing regulators to retain a central role in approving documents, supervising promoters and managing industry rules.

Participants may gain enjoyment, access to racehorse ownership, social identity and possible prizemoney. However, they carry the real risk. They may be exposed to ongoing fees, training costs, veterinary costs, insurance costs, poor performance, injury, death, retirement costs, weak liquidity, uncertain valuation, conflicts of interest and reliance on promoters, managers and industry regulators.

The emotional character of racehorse ownership matters. A person may buy into the story, the colours, the stable, the trainer, the breeding line, the prestige and the hope of winning. That is not the same as making a sober investment decision. ASIC should be cautious where an investment is sold through excitement, status, community and hope.

Gambling adjacent risk

Horse racing is not merely an animal-based investment market. It is tied to betting, prizemoney, form, training integrity and race outcomes. That makes the risk profile different from an ordinary managed investment scheme holding passive assets.

A participant in a horse racing syndicate may not only be exposed to the economic performance of the horse. The participant may also be exposed to integrity risk in the racing environment, including trainer conduct, prohibited substances, betting related misconduct, regulatory action, reputational damage and loss of public confidence.

The instrument should therefore not treat horse syndicates as harmless recreational arrangements. A racing syndicate may be recreational in marketing, but financial in structure and gambling adjacent in context.

Co regulatory risk

The co regulatory model is a central fit for purpose issue. The instrument relies heavily on lead racing regulators. Those bodies are required to maintain promoter registers, approve Product Disclosure Statements, review advertising, handle complaints and disputes, monitor compliance, notify ASIC of possible Chapter 7 breaches, and lodge annual reports with ASIC.

That model may reduce ASIC's direct burden, but it also creates risk. Racing bodies are not neutral consumer protection regulators in the same sense as a financial services regulator. They are embedded in the racing industry and may have roles connected to promotion, participation, industry confidence, commercial success and social licence. Those incentives do not always align neatly with retail participant protection, financial services discipline or animal welfare accountability.

ASIC should not assume that industry-based regulation can safely substitute for ordinary managed investment scheme regulation without transparent evidence of performance. If lead regulators are central to the relief model, their performance should be publicly visible.

Thresholds

The 500,000-dollar raising limit and 50 participant limit should not be increased without strong evidence. Those limits are not merely administrative settings. They are consumer protection boundaries.

If the racing industry argues that horse prices, insurance, veterinary costs, training costs and inflation justify higher thresholds, ASIC should not treat that as enough. Higher industry costs do not reduce consumer risk. They may increase it. If more money can be raised under relief, the need for stronger protection also increases.

ASIC should require evidence before changing the thresholds. It should identify how many syndicates are currently near the 500,000-dollar cap, how many are near the 50-participant cap, whether complaints are higher in larger syndicates, whether participants understand the economic risk, and whether any threshold increase would increase retail exposure to speculative schemes.

The better position is that the current thresholds should remain capped, or be tightened, unless ASIC can show that they are preventing genuinely small and low risk arrangements without increasing participant harm.

Private horse breeding schemes

Private horse breeding schemes require separate scrutiny. Breeding can be even more speculative than racing because value may depend on fertility, veterinary outcomes,

bloodline reputation, stud demand, sale markets, future progeny performance and broader industry conditions.

The relief for private horse breeding schemes is significant. Operators receive relief from scheme registration and licensing, and there is relief from hawking and much of the financial product disclosure framework. That is a substantial regulatory concession.

ASIC should not allow private breeding scheme relief to become a low visibility pathway around ordinary financial product protections. Any replacement instrument should require better reporting, stronger disclosure of valuation and related party risk, clearer explanation of fertility and veterinary risk, and stronger controls around conflicts involving breeders, managers, studs, promoters and associated parties.

Animal welfare and aftercare

Animal welfare should not be treated as separate from financial services risk. A horse scheme involves a living animal. Injury, illness, death, retirement, rehoming, euthanasia and aftercare can all affect costs, reputation, scheme viability and participant expectations.

A scheme that markets the excitement of racehorse ownership should also disclose the less marketable realities. Horses may never win. They may not race. They may be injured. They may die in training or racing. They may need expensive care. They may have little residual value. They may require retirement planning when their commercial use has ended.

Any replacement relief should require plain disclosure of welfare obligations, injury risk, insurance limits, retirement planning, rehoming responsibility, euthanasia risk and who pays when the horse is no longer commercially useful. If those matters are not addressed, participants may be sold the upside of ownership while the animal and the participant carry the downside.

Rent seeking and regulatory arbitrage

The rent seeking issue is present in a particular form. Horse racing and breeding involve a network of private commercial actors who may receive money through purchase price, promotion, training, management, insurance, transport, veterinary care, spelling, breeding, sales preparation, auction activity and administration.

The participant may be told they are buying into ownership, but many industry participants can earn revenue regardless of whether the participant ever receives a meaningful financial return. That is not necessarily misconduct. It is a structural risk.

The instrument risks helping the industry convert public enthusiasm into private revenue while reducing ordinary managed investment scheme obligations. If the relief

continues, ASIC should require clear evidence that participants understand that the likely benefit may be recreation, not investment return, and that costs may continue even where performance is poor.

Complexity

The instrument may reduce complexity for promoters and managers, but it creates complexity for participants and for ASIC. A person may think they are buying a small share in a racehorse. In legal substance, they may be acquiring an interest in a managed investment scheme operating under conditional relief.

The participant must understand the difference between ownership enjoyment and financial return, the role of the promoter, the role of the manager, the role of the trainer, the role of the lead regulator, the limits of ASIC oversight, the meaning of Product Disclosure Statement approval, the ongoing costs, the lack of liquidity and the welfare obligations. That is a lot to expect from a person attracted by the dream of being involved in racing.

The more emotionally powerful the product, the clearer the disclosure should be. Complexity should not be hidden behind industry familiarity.

Fit for purpose concerns

The instrument may be fit for purpose only where it is confined to genuinely small, transparent, recreational and low scale schemes, with clear disclosure, hard financial caps, strong conflict controls, lead regulator accountability, ASIC visibility and animal welfare disclosure.

It is not fit for purpose if it allows speculative schemes to be promoted as low risk recreation while participants bear financial and welfare risk. It is also not fit for purpose if lead regulator oversight is treated as sufficient without public evidence that complaints are handled effectively, advertising is controlled, Product Disclosure Statements are properly scrutinised and referrals are made to ASIC where required.

The fact that ASIC has asked whether the relief remains fit for purpose indicates that the question is live. ASIC should answer it with evidence, not with another largely unchanged remake.

Warning examples from nearby racing failures

I do not identify a confirmed public failure of Instrument 2016/790 itself. That absence should not be treated as proof of safety. It may simply reflect limited public visibility over reliance on the relief, complaints, lead regulator performance, ASIC referrals and participant outcomes.

The Darren Weir matter is a warning example about integrity risk, not a direct failure of this instrument. It shows that racing participants can be exposed to risks arising from trainer conduct, regulatory enforcement, reputational harm and confidence in the racing system. Participants in a horse scheme are dependent on the integrity of industry actors they do not control.

Racehorse injury and death reporting is another warning. It does not prove that this instrument failed, but it shows why a horse scheme instrument should not focus only on financial disclosure. Death, injury, training risk and aftercare are part of the real risk environment.

Retired racehorse aftercare is also relevant. Racing authority jurisdiction may not follow the horse for life, while ownership and welfare responsibility can continue after the commercial racing purpose ends. Participants should not be invited into the excitement of racing without clear disclosure of what happens when the horse is injured, retired, unwanted or no longer commercially viable.

The greyhound racing live baiting and mass killing scandals are not horse scheme examples. They are relevant only as a broader warning about animal racing industries and the limits of industry self-assurance where animals, gambling revenue, commercial pressure and public confidence intersect. ASIC should not rely on industry comfort without transparent evidence.

These examples do not prove that Instrument 2016/790 has failed. They prove that the risk environment is not benign and that ASIC should not remake horse scheme relief on trust.

Evidence ASIC should provide

ASIC should publish evidence before remaking the instrument. It should identify how many horse racing syndicates rely on the relief, how much money is raised, how many participants are involved, how many promoters and managers are registered, how many Product Disclosure Statements have been rejected or amended by lead regulators, how many complaints have been made, how many promoters have been removed from registers, and how many matters have been referred to ASIC.

ASIC should also publish lead regulator performance data. Annual reports from lead regulators should be publicly accessible. ASIC should disclose whether it audits lead regulators, reviews their Product Disclosure Statement approvals, checks advertising approvals, monitors complaints handling and tests whether participants understand the risks.

For private horse breeding schemes, ASIC should provide separate data. It should identify how often the relief is used, whether schemes involve related party

transactions, how valuations are set, whether participants receive independent valuation material, whether promoters hold the required interests, and whether any schemes have failed or generated complaints.

ASIC should also require evidence about animal welfare outcomes. It should identify whether Product Disclosure Statements and scheme agreements properly deal with injury, retirement, rehoming, insurance, euthanasia, aftercare and responsibility for costs when a horse no longer has commercial value.

Positives and negatives of sunset

The positive of allowing the instrument to sunset is that it would force ASIC and the racing industry to justify the relief with evidence. It would reduce the risk that a gambling adjacent industry receives automatic regulatory accommodation. It would also allow ASIC to rebuild the instrument around modern consumer protection, animal welfare disclosure, lead regulator accountability and public reporting.

Sunset would also send a clearer public message. Horse schemes are managed investment schemes involving speculative financial exposure and living animals. They should not be treated as harmless merely because they are familiar or recreational.

The negative of immediate sunset is that existing syndicates and promoters may face disruption. Small genuine syndicates may be pushed into disproportionate compliance costs. Lead regulators and ASIC may receive individual relief applications. Participants already in schemes may face confusion about the continuing operation of their interests.

Those concerns are real, but they do not justify automatic renewal. They justify controlled sunset.

Controlled sunset

ASIC should adopt a controlled sunset process rather than remake the instrument unchanged. Existing syndicates and private breeding schemes relying on the relief should be given a defined transition period. During that period, promoters, managers and operators should identify themselves to ASIC and notify participants that the scheme relies on relief from ordinary managed investment scheme, licensing, hawking or disclosure provisions.

Lead regulators should be required to provide public reports during the transition period. Those reports should cover registered promoters, approved Product Disclosure Statements, rejected or amended Product Disclosure Statements, advertising approvals, complaints, disputes, compliance action, removals from registers and referrals to ASIC.

At the end of the transition period, broad standing relief should cease unless ASIC has developed a narrower replacement. Any replacement should retain hard caps, require stronger risk warnings, require plain language disclosure that the scheme is speculative and not a likely investment return product, strengthen conflict disclosure, require public reporting by lead regulators, and add enforceable animal welfare and aftercare disclosure.

Conclusion

ASIC should not treat horse schemes as harmless recreational arrangements. They are managed investment schemes involving speculative financial exposure, industry conflicts, co regulatory dependence, gambling adjacent risk and living animals.

A narrow relief regime may be justified for genuinely small, transparent and recreational syndicates. However, broad renewal is not justified without evidence. ASIC should not remake Instrument 2016/790 unchanged for another five years.

The proper course is controlled sunset, with a managed transition and a narrower replacement only if ASIC can show that continued relief is necessary, proportionate, transparent, accountable and safe.

ASIC Corporations Attribution Managed Investment Trusts Instrument 2016/489

Position

ASIC should not remake the ASIC Corporations Attribution Managed Investment Trusts Instrument 2016/489 unchanged. My preferred position is controlled sunset, with section 6 allowed to expire as ASIC proposes, and section 5 retained only for a managed transition period unless ASIC can show that continuing relief from the equal treatment duty remains necessary, proportionate, transparent, auditable and safe for members.

This instrument is more technical than the property, charity, school and horse scheme instruments. It is not primarily a sales channel relief instrument. It is directed to the interaction between the attribution managed investment trust tax regime and the managed investment scheme obligations in the Corporations Act. That technical character should be acknowledged, but it should not place the instrument beyond scrutiny.

A technical instrument can still shift power. A technical instrument can still reduce member protection. A technical instrument can still make it harder for ordinary members to understand whether they have been treated fairly.

Nature of the instrument

The instrument has two main parts. Section 5 exempts a responsible entity of a registered scheme that is an attribution managed investment trust from the duty to treat members who hold interests of the same class equally, but only to the extent that the responsible entity is attributing trust components to members in accordance with the AMIT tax rules.

That relief exists because tax attribution may not always produce identical outcomes for members who hold interests of the same class. Different members may acquire, dispose of or hold interests at different times. Different tax components may need to be attributed in ways that reflect the AMIT rules. In that limited sense, some technical relief may be necessary to prevent the responsible entity from being caught between tax compliance and the Corporations Act equal treatment duty.

Section 6 is different. It modified Chapter 5C to allow a responsible entity to alter a scheme constitution so the scheme could operate as an AMIT. That was transitional relief. ASIC now proposes to remove it because enough time has passed since the AMIT regime was introduced. That proposal should be supported. A transitional power should not become permanent convenience.

The core issue

The core issue is that section 5 modifies a fundamental managed investment scheme protection. The duty to treat members of the same class equally is not a minor administrative rule. It is part of the basic architecture that protects members from unfair differential treatment by the responsible entity.

ASIC should therefore not treat relief from that duty as routine merely because the reason is tax related. The question is not whether AMIT attribution should continue. The question is whether relief from equal treatment should continue without stronger conditions, better disclosure, better auditability and better evidence that members are not harmed.

Tax compliance may justify a narrow exception. It does not justify an open-ended culture of responsible entity discretion.

Good public purpose and its limits

There is a genuine good public purpose argument for limited relief. If the tax law requires responsible entities to attribute income, capital gains, credits and other tax components in ways that do not map neatly onto a strict equal treatment obligation, then the law should not create unnecessary conflict between the Income Tax Assessment Act and the Corporations Act.

That said, good public purpose is not served by turning tax complexity into a shield for industry convenience. The relief should exist only to the extent required to reconcile the Corporations Act with the AMIT tax regime. It should not weaken member equality beyond that point. It should not reduce member visibility. It should not make members dependent on calculations they cannot understand, systems they cannot inspect and discretion they cannot practically challenge.

The proper test is whether the relief protects members while allowing accurate tax administration, not whether it makes life easier for fund managers, custodians, tax advisers, administrators and responsible entities.

Who gains and who carries the risk

The immediate beneficiaries are responsible entities, fund managers, custodians, registry providers, tax advisers, software providers and fund administrators. The relief reduces legal uncertainty and allows managed funds to operate within the AMIT tax regime without constant constitutional friction or equal treatment breach risk.

Members may also benefit where the relief allows accurate tax attribution, lower administration costs and smoother operation of the scheme. That benefit should be acknowledged, because a badly designed tax administration system can also harm members.

The risk, however, is carried by members. Retail members may receive attribution statements that affect taxable income, capital gains, cost base, tax timing and after tax return. They are largely dependent on the responsible entity's systems, judgement and explanations. If the responsible entity makes an error, uses a flawed methodology, misclassifies components, over relies on advisers, or fails to explain the result clearly, the member may carry confusion, tax amendment costs, delayed advice costs, disadvantage or practical inability to challenge the outcome.

Complexity rent and member power

The rent seeking issue is different from the other instruments. It is not ordinary commercial sales rent seeking. It is complexity rent.

The more complex the regime becomes, the more power shifts to responsible entities, professional advisers, tax lawyers, auditors, registry providers, custodians and software systems. The ordinary member cannot realistically audit the attribution methodology. The ordinary member is unlikely to know whether another member of the same class has been treated differently, why that difference occurred, whether the difference was required by the tax law, or whether the responsible entity's methodology was fair and reasonable.

That creates a structural imbalance. Relief may be justified, but if member equality is displaced because tax attribution is complex, the substitute protections should be stronger transparency, stronger auditability, clearer explanation rights and better regulatory visibility.

Complexity should not become a private advantage for industry or a public disadvantage for members.

ASIC and ATO overlap

This instrument sits between ASIC's managed investment scheme regime and the ATO's tax regime. That overlap creates a risk of regulatory diffusion. ASIC may see the issue as primarily tax administration. The ATO may see the issue as fund reporting and taxpayer compliance. The member may be left dealing with a practical outcome produced by both regimes, while neither regulator clearly owns the member protection problem.

That is why ASIC should not rely on the existence of the AMIT tax regime as sufficient protection. The ATO may be concerned with tax correctness, but ASIC should remain concerned with responsible entity conduct, member equality, disclosure, governance and fair treatment.

ASIC should explain how it works with the ATO on AMIT attribution issues, whether it receives complaints about member tax statements, whether attribution errors are reported, whether responsible entities correct errors in a timely way, and whether members receive plain language explanations when attribution outcomes differ across members of the same class.

Section 6 should sunset

ASIC's proposal to remove section 6 should be supported. That provision was designed to assist transition into the AMIT regime by allowing responsible entities to modify scheme constitutions. The transition period has passed.

A power that allowed responsible entities to alter constitutions because the responsible entity reasonably considered the modification necessary or incidental to AMIT operation should not remain available indefinitely. Constitution change is a serious matter. Scheme constitutions define member rights, responsible entity powers, indemnities and the operating structure of the scheme. A transitional shortcut should not become part of the permanent regulatory architecture.

Removing section 6 is not only appropriate. It is an example of what sunseting is meant to achieve. Relief should be tested against present need, not preserved because it once served a purpose.

Section 5 requires stronger justification

Section 5 is different because AMIT attribution remains part of the current tax system. It may still be necessary for responsible entities to receive limited relief from the equal treatment duty where strict equality would conflict with attribution required under the tax law.

However, ASIC should justify section 5 separately and with evidence. The question is not whether the relief is convenient. The question is whether it remains necessary in its present form and whether members receive adequate substitute protection.

Any replacement should make clear that the relief applies only where differential treatment is strictly required for AMIT attribution. It should not permit broader unequal treatment. It should not allow responsible entities to rely on tax complexity as a general answer to member concerns. It should require responsible entities to maintain auditable attribution records, report material attribution errors, and provide plain language explanations to members where requested.

Real life warning examples

I do not identify a confirmed public failure of Instrument 2016/489 itself. That absence should not be treated as proof of safety. It may simply reflect that attribution methodology, tax statement errors and member level differences are not visible unless ASIC, the ATO, responsible entities or members disclose them.

There are nevertheless important warning examples from the broader managed investment scheme environment. First Guardian, Shield Master Fund and Australian Fiduciaries are not AMIT instrument failures, but they show the continuing importance of responsible entity governance, ASIC visibility, platform oversight, related party controls and member protection. Those collapses show that managed investment scheme structures can cause severe harm when governance, disclosure, conflicts and regulatory visibility fail.

The Vanguard greenwashing case is another warning, not because it involved AMIT attribution, but because it shows that even large and sophisticated responsible entities can make misleading statements in product disclosure, marketing and public communications. The lesson is that formal scale, professional systems and industry familiarity do not remove the need for enforceable accountability.

These examples do not prove that Instrument 2016/489 has failed. They show that responsible entities should not be treated as automatically safe merely because the issue is technical, tax related or embedded in scheme administration.

Evidence ASIC should provide

ASIC should publish evidence before remaking section 5. It should identify how many registered schemes rely on the relief, how many members are affected, how often members of the same class receive different attribution outcomes, what types of attribution differences arise, whether any material attribution errors have occurred, and whether ASIC or the ATO has received complaints.

ASIC should also identify whether responsible entities are required to report attribution errors, whether members receive enough information to understand attribution outcomes, whether the fair and reasonable basis has ever been tested, whether any responsible entity has used the relief in a way that caused member disadvantage, and whether ASIC conducts any surveillance of AMIT attribution practices.

ASIC should also explain how members can challenge attribution outcomes in practice. A theoretical right is not enough if the member cannot understand the calculation, access the methodology, compare their treatment with other members, or obtain a clear explanation.

Without that evidence, ASIC is asking the public to accept another five-year extension on trust. That is not adequate.

Positives and negatives of sunset

The positive of allowing the instrument to sunset is that it would restore discipline to relief from a core member protection. It would force ASIC and responsible entities to identify whether the relief is still needed, how it is used, and what substitute protections are required. It would also prevent section 6 from surviving beyond its transitional purpose.

Sunset would also send a clear message that technical relief is still relief. The fact that an instrument concerns tax administration does not make it exempt from scrutiny. Members are real people. Their tax outcomes, statements, distributions and after-tax returns matter.

The negative of immediate sunset is that responsible entities could face legal uncertainty where AMIT tax attribution produces outcomes that differ between members of the same class. That could increase legal risk, compliance cost, member confusion and the need for individual relief applications. It could also create unnecessary friction between tax law and managed investment scheme law.

Those concerns are real. They justify controlled sunset, not automatic renewal.

Controlled sunset

ASIC should adopt a controlled sunset process rather than remake the instrument unchanged. Section 6 should be allowed to expire as ASIC proposes. Section 5 should

continue only for a defined transition period unless ASIC can justify a narrower replacement.

During the transition period, responsible entities relying on section 5 should notify ASIC, disclose reliance in scheme documents and member tax materials, maintain auditable attribution records, report material attribution errors, and provide plain language explanations to members on request. ASIC should also consult with the ATO about attribution errors, complaints, correction mechanisms and member level transparency.

At the end of the transition period, ASIC should either allow the relief to sunset or remake it in a narrower form. Any replacement should state clearly that the relief applies only to differential treatment required by AMIT attribution. It should include stronger transparency, error reporting, record keeping, audit and member explanation obligations.

Conclusion

ASIC should not treat the AMIT instrument as harmless merely because it is technical. Section 5 modifies a core managed investment scheme protection, namely the duty to treat members of the same class equally. That may be justified where strictly necessary to comply with the AMIT tax regime, but it should not be renewed automatically.

Section 6 should not be remade because its transitional purpose has passed. Section 5 should continue only if ASIC can show that relief from the equal treatment duty remains necessary, confined, transparent, auditable and safe for members.

The proper course is controlled sunset, with section 6 removed and section 5 retained only through a managed transition unless ASIC can justify a narrower evidence-based replacement.

Opposition to combining the two property instruments

ASIC proposes to combine the ASIC Corporations Serviced Apartment and Like Schemes Instrument 2016/869 and the ASIC Corporations Property Rental Schemes Instrument 2016/870 into a single remade instrument. I oppose that proposal.

The two instruments both relate to property arrangements, but that does not mean they should be merged. They have different structures, different risk profiles, different conditions and different consumer protection issues. Combining them risks presenting two distinct forms of relief as though they are one coherent and low risk property category.

The serviced apartment instrument is more detailed. It deals with strata schemes, serviced apartments, hotels, motels, resorts, management rights, operator withdrawal, furniture and equipment funds, trust accounts, transfer of management rights and the role of real estate selling agents. It contains more operative conditions because the arrangements are more complex and more obviously scheme like.

The property rental schemes instrument is much shorter. It provides broad relief for property rental schemes with comparatively few conditions. It relies heavily on the idea that ordinary property management should not be unnecessarily drawn into the managed investment scheme regime. That may be a legitimate narrow concern, but it is not the same concern as serviced apartment, resort or hotel style schemes involving management rights, pooled occupancy and investor reliance on an operator.

Combining the instruments may reduce drafting clutter, but it does not solve the real public policy problem. The real problem is the boundary between ordinary property dealings and financial product risk. A person may believe they are entering a property arrangement while in substance being exposed to managed investment scheme risk, operator control, income assumptions, reduced licensing protection, hawking relief and reduced disclosure protection.

A combined instrument may make that problem harder to see. It may allow ASIC to describe the relief as property related and administrative, rather than confronting the different ways in which property can be used as a wrapper for financial product risk. It may also allow the more detailed serviced apartment conditions to give a false impression that the broader property rental schemes relief is similarly conditioned and similarly safe.

The risks should be assessed separately. Serviced apartment and like schemes should be assessed on their own terms. Property rental schemes should also be assessed on their own terms. ASIC should be required to justify each instrument separately, identify who relies on each form of relief, publish complaints and surveillance data for each category, and explain why each category of relief remains necessary.

The proposal to combine the instruments does not answer those questions. It does not show that consumers understand the relief. It does not show that real estate agents are not crossing into financial product promotion. It does not show that rental pooling, passive income marketing, platform models or managed letting structures are being adequately controlled. It does not show that ASIC has sufficient visibility over who relies on the relief.

For those reasons, combining the instruments should not be supported. It risks obscuring rather than clarifying the regulatory perimeter. It risks preserving broad relief by presenting different arrangements as one administrative package. It also risks

weakening the discipline of the sunseting process, which should require ASIC to justify each relief instrument on its own evidence and its own public purpose.

The better course is not consolidation. The better course is controlled sunset for both instruments, with each instrument assessed separately during a managed transition period. If ASIC believes either form of relief should continue, it should remake that relief in a narrower, evidence based and separately justified form.

A single combined property instrument should be rejected unless ASIC first demonstrates that consolidation will strengthen protections, improve public visibility, preserve separate risk controls and make the property and financial services boundary clearer. On the material currently presented, ASIC has not done so.

Conclusion

The issue in this consultation is not whether these instruments are convenient. The issue is whether ASIC has shown that each exemption still serves good public purpose.

On the material presented, ASIC has not done enough to justify remaking the instruments largely unchanged for another five years. The instruments shift parts of the ordinary Corporations Act framework away from operators, agents, schools, charities, promoters and responsible entities, while placing risk and uncertainty on investors, property owners, supporters, families, participants and scheme members.

That shift may be justified in some narrow cases. It is not justified by habit. It is not justified by industry reliance alone. It is not justified by saying the instruments are familiar, technical or administratively useful.

Relief from ordinary law should carry a public burden of proof. ASIC should show who relies on each instrument, how much money is affected, what complaints or breaches have arisen, what surveillance has occurred, what losses or disputes are known, and whether affected people understand which protections do not apply.

The recurring weakness across the instruments is that legal labels can obscure practical substance. Property can obscure financial product risk. Charity can obscure investment risk. School enrolment can obscure financial pressure on families. Racing culture can obscure speculative financial and animal welfare risk. Tax complexity can obscure member equality.

The law should look through those labels. It should ask who gains, who carries the risk, who has bargaining power, who can understand the arrangement, who can exit, and who is left exposed if the arrangement fails.

For that reason, the proper course is controlled sunset. Existing arrangements should not be thrown into unnecessary disorder, but broad relief should not be renewed automatically. A transition period should be used to collect evidence, notify affected people, test the continuing need for relief, and design narrower safeguards where relief is still justified.

At the end of that process, relief should continue only where ASIC can show that it is necessary, proportionate, confined, transparent and safe. Where the ordinary law can do the work, the special relief should end. Where the case for relief is strong but the safeguards are weak, the relief should be remade in a narrower and stronger form. Where the relief was transitional, it should sunset.

ASIC should also reject administrative consolidation where it obscures different risks. In particular, the two property instruments should not be combined unless ASIC can first demonstrate that doing so strengthens protection, improves visibility and preserves separate assessment of each risk profile.

Sunsetting should be treated as a genuine public interest checkpoint. It is the moment to ask whether delegated relief still serves the public, or whether it mainly serves those who have become accustomed to operating outside the ordinary rules.

ASIC should not remake these instruments largely unchanged. The proper response is separate assessment, public evidence, controlled sunset, stronger safeguards and narrower relief only where clearly justified.

ASIC should concentrate less on creating relief pathways for powerful entities and more on protecting the weaker party from the powerful. That is the real test of this consultation. In the serviced apartment and property rental instruments, the weaker party is the investor or property owner exposed to financial product risk through a property wrapper. In the charitable fundraising instrument, it is the supporter who trusts the mission more than they understand the investment. In the school enrolment deposit instrument, it is the family trying to secure a child's education. In the horse schemes instrument, it is the participant drawn into a speculative and emotionally powerful industry. In the AMIT instrument, it is the member who cannot realistically audit complex tax attribution or unequal treatment.

If ASIC's role is not to recognise those power imbalances, require evidence, strengthen safeguards and protect the party least able to protect themselves, then the public is entitled to ask what purpose ASIC's relief power is serving.