

CS -052 ASIC proposes to remake legislative instrument about client money held in cash common funds

ASIC

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Introduction

I welcome the opportunity to comment on CS 052, ASIC proposes to remake legislative instrument about client money held in cash common funds.

This submission opposes remaking ASIC Corporations Client money Cash common funds Instrument 2016 671 unchanged.

The issue is narrow, but it is not trivial. The instrument allows Australian financial services licensees to place client money into a cash common fund, provided the fund is also a registered scheme. ASIC says the instrument is operating effectively and efficiently, remains necessary and useful, and should be remade with no change to its effect.

That is not good enough.

Client money is not licensee money. It is not working capital. It is not a liquidity convenience. It is not a pool of funds to be placed into more complex private structures merely because that is administratively useful to regulated entities. Client money is money held for someone else. The public purpose of section 981B is protection. Any exception to the ordinary client money architecture must therefore be justified by protection, not convenience.

ASIC has not published a consultation paper. It has not provided a meaningful evidence base. It has not identified the extent to which the relief has been used. It has not published loss history, complaints data, surveillance outcomes, trustee company compliance data, liquidity events, reconciliation failures, enforcement outcomes or

near misses. It has simply asserted that the instrument is operating effectively and efficiently.

That assertion should not be accepted.

Summary position

ASIC should not remake the instrument unchanged.

ASIC should either allow the instrument to sunset, or remake it only after publishing a proper evidence-based justification showing that cash common funds are at least as protective as segregated client money held in an Australian authorised deposit taking institution trust account.

If ASIC remakes the instrument, it should impose stronger conditions, including strict segregation, clear client attribution, daily reconciliation, express limits on offshore exposure, enhanced disclosure, reporting to ASIC, surveillance obligations, public transparency about use of the relief, and a clear explanation of how clients are protected if the fund, trustee company, responsible entity, custodian, bank, investment counterparty or licensee fails.

The consultation is narrow, but the risk is real

ASIC frames this as a simple sunseting matter. That understates the issue.

The instrument is an exception to the ordinary client money framework. Section 981B exists to protect client money received by an Australian financial services licensee. The ordinary logic of that provision is simple. Money received from or on behalf of clients must be placed into approved protective holding arrangements.

The instrument modifies that position by allowing client money to be placed into a cash common fund that is a registered scheme. A cash common fund is a pooled structure. It is not the same thing as a clean, segregated client money trust account at an Australian authorised deposit taking institution. It adds layers. It adds trustee company governance, scheme governance, investment discretion, valuation, liquidity management, custody arrangements, counterparty exposure, record keeping and reconciliation risk.

Those risks may be manageable. They may even be low in some cases. But ASIC has not demonstrated that they are lower than the risks of a simpler segregated client money trust account. Nor has ASIC demonstrated that the additional complexity improves protection for the client whose money is being held.

ASIC should not treat the absence of a visible controversy as evidence of safety. A regulatory structure can appear stable until it fails. That has been one of the repeated lessons of Australian financial services regulation.

The original rationale does not answer the present question

The relief appears to have originated from a legal mismatch. Section 981B allowed client money to be held in certain approved forms, including cash management trusts, but did not naturally include cash common funds, even though ASIC considered cash common funds to be substantively similar to cash management trusts.

That may have been a plausible reason for granting relief in 2004. It is not a sufficient reason to remake the relief unchanged in 2026.

The relevant question is not whether cash common funds resemble cash management trusts. The relevant question is whether placing client money into a cash common fund is at least as safe as holding it in a segregated Australian authorised deposit taking institution trust account.

Similarity to another pooled investment structure does not prove safety. It may simply mean that two complex structures share similar risks.

ASIC should not ask the public to accept equivalence by assertion. If the instrument is to be remade, ASIC should demonstrate why the structure remains necessary, why it remains protective, how frequently it is used, who benefits from it, what risks have arisen, and why client money should be exposed to this form of pooled private arrangement at all.

Licensee flexibility is not the statutory purpose

ASIC says the instrument provides flexibility to licensees while retaining consumer protection.

That framing is backwards.

The purpose of client money rules is not flexibility for licensees. The purpose is protection for clients. Licensee flexibility is only acceptable if it does not weaken that protection. ASIC has not shown that.

Where the choice is between a simpler structure that keeps client money closer to its trust character and a more complex pooled structure that gives licensees additional options, the starting presumption should favour the simpler and safer structure.

Client money should be held in the least complex, least discretionary and least intermediated structure practicable.

ASIC should not preserve a private flexibility measure unless it can demonstrate that the flexibility does not transfer risk from licensees to clients.

The safer benchmark is an Australian ADI trust account

The safest benchmark is clear.

Client money is most strongly protected when it is held in a covered Australian dollar account with an Australian incorporated authorised deposit taking institution, within the Financial Claims Scheme limit, and in a structure that preserves clear client attribution.

Money held above that limit, pooled with other client's money, moved into a managed fund style structure, exposed to investment assets, placed through offshore counterparties, or held behind additional trustee, scheme, custody and reconciliation layers is less safe.

That does not mean every alternative structure is automatically unlawful or unacceptable. It means ASIC should start from the safer benchmark and require a compelling public interest reason before permitting client money to move away from it.

A cash common fund may be called cash. It may be operated by a licensed trustee company. It may be a registered scheme. It may invest only in fixed interest securities or negotiable instruments. None of those labels changes the basic fact that it is a pooled investment style structure rather than a plain client money trust account.

ASIC should therefore answer the obvious question.

Why should client money be placed into a cash common fund rather than held in a segregated Australian authorised deposit taking institution trust account?

On the material published for CS 052, ASIC has not answered that question.

Pooling increases practical vulnerability

Pooling is not a neutral detail.

Pooling can make administration easier for licensees, trustee companies and scheme operators. It can also make practical protection weaker for clients.

Pooling can obscure individual entitlements. It can complicate reconciliation. It can expose clients to common liquidity problems. It can make recovery slower when a failure occurs. It can create disputes about attribution, priority, valuation and beneficial entitlement. It can also make ordinary clients believe their money is sitting safely in a bank like account when it is actually participating in a pooled scheme structure.

That is precisely why ASIC should be cautious.

The question is not whether the fund is called a cash common fund. The question is what happens under stress.

What happens if the trustee company fails?

What happens if the responsible entity fails?

What happens if the licensee fails?

What happens if a counterparty fails?

What happens if there is a liquidity event?

What happens if records are wrong?

What happens if reconciliations are defective?

What happens if money is misapplied?

What happens if there is fraud?

What happens if the fund has offshore exposure?

What happens if a client needs immediate access and the pooled structure cannot return funds quickly?

ASIC's consultation material does not confront these questions in any adequate way.

Offshore exposure should be expressly excluded or justified

CS 052 appears mainly directed to Australian cash common funds operated through licensed trustee company and registered scheme structures. It is not, on its face, a consultation about sending client money to offshore bank accounts.

However, ASIC should not leave any ambiguity.

The broader client money regime already recognises approved foreign bank accounts. Offshore placement creates additional vulnerabilities. It exposes client money to foreign legal systems, foreign insolvency rules, foreign banking protections, foreign court processes, foreign regulators, enforcement delay, recognition problems and practical recovery risk.

Client money protection is time sensitive. If money must be traced, frozen or recovered across borders, the protective moment may already have passed.

ASIC should therefore make clear whether client money held under or connected with this relief can be exposed directly or indirectly to offshore accounts, offshore custody chains, offshore counterparties, offshore investments or offshore insolvency regimes.

If the answer is no, the instrument should say so clearly.

If the answer is yes, ASIC must explain why that exposure is consistent with the protective purpose of section 981B.

Licensed trustee company status is not enough

ASIC should not rely on the phrase licensed trustee company as though it answers the consumer protection question.

Licensing is an entry condition. It is not proof of continuing prudence, competence, independence, liquidity discipline, conflict control, reconciliation integrity or effective protection of client money.

Recent Australian experience gives no basis for complacency. Licensed and regulated entities can fail. Trustees can fail. Responsible entities can fail. Custodians can fail. Auditors can fail. Platforms can fail. Advisers can fail. Regulators can fail to detect risk until after harm has occurred.

The point is not that every licensed trustee company is unsafe. The point is that the label does not do the protective work. Protection comes from structure, segregation, attribution, reconciliation, liquidity, enforceable duties, surveillance, transparency and timely intervention.

ASIC should therefore not remake the instrument unchanged unless it can demonstrate that those safeguards are real in practice, not merely assumed from formal status.

Lessons from Trio and contemporary failures

Trio remains relevant as a warning about pooled investment structures, gatekeepers, custody, fraud and regulatory overconfidence.

Trio does not prove that cash common funds are unsafe. It proves something more precise and more important. It proves that formal regulatory architecture can look clean while real protection fails.

The same lesson appears in more contemporary examples.

Shield, First Guardian, Brite, Halifax and Sterling all show, in different ways, that formal regulatory labels do not protect money by themselves. Licensing, registered scheme status, trustee status, responsible entity obligations, disclosure documents, auditors, custodians, platforms and regulators may all exist while serious risk remains undetected, misunderstood, ignored or acted upon too late.

These examples are not direct factual analogies to cash common funds. They should not be treated as though they are. Their relevance is structural.

They show that money can be placed into apparently regulated structures and still become exposed to misapplication, defective governance, poor due diligence, conflicts, inaccurate records, valuation uncertainty, liquidity problems, inadequate monitoring and delayed regulatory intervention.

That is the lesson ASIC must apply here.

Client money rules should be designed for failure conditions. They should assume that gatekeepers may fail, conflicts may be missed, records may be defective, pooled structures may obscure risk, and ASIC may not intervene until after harm has occurred.

A regime that only works when every gatekeeper performs properly is not strong enough for client money.

Lessons from the Financial Services Royal Commission

The Financial Services Royal Commission is directly relevant to the standard ASIC should apply.

The Commission's central lesson was that financial services law should be judged by whether its purpose is met in practice, not whether regulated entities can point to formal compliance with the words of a rule.

That applies squarely to client money.

The purpose of section 981B is protection of client money. It is not industry convenience. It is not administrative flexibility. It is not the preservation of a legacy relief instrument because it has existed for many years.

The Royal Commission also warned against unnecessary exceptions and qualifications in financial services law. Exceptions complicate the law, weaken the visibility of its purpose and invite regulated entities to focus on technical permission rather than substantive protection.

Instrument 2016 671 is an exception. ASIC should therefore justify it as an exception.

The question is not whether the exception is familiar. The question is whether it remains necessary and whether it protects clients at least as well as the ordinary rule.

ASIC has not made that case.

Lessons from the Bragg inquiry into ASIC

The Senate Economics References Committee inquiry into ASIC investigation and enforcement further strengthens the concern.

That inquiry questioned ASIC's capacity to identify misconduct early, respond to warnings, use its powers effectively and prevent harm before consumers and investors are left carrying the damage.

That matters here because ASIC's CS 052 position relies heavily on institutional assurance. ASIC says it has assessed the instrument and found it operating effectively and efficiently. But ASIC has not published the evidence behind that assessment.

Given the serious parliamentary criticism of ASIC's investigation and enforcement performance, a bare assurance is not enough.

The issue is not whether ASIC can act after harm emerges. ASIC often does act after harm emerges. The issue is whether ASIC can reliably identify and prevent harm before client money is exposed.

Client money protection should not depend on late regulatory intervention. By the time freezing orders, liquidation, court proceedings, remediation negotiations, class actions or enforcement action become necessary, the protection has already failed.

ASIC should design the client money regime so that consumers do not need rescue after the event.

Complaints and enforcement are not a substitute for safe custody

A complaint pathway is not a custody safeguard.

A liquidation process is not a custody safeguard.

A class action is not a custody safeguard.

A regulatory investigation is not a custody safeguard.

Remediation after failure is not a custody safeguard.

Client money should be protected at the point of holding. The regime should not be designed in a way that leaves clients dependent on after the event dispute resolution, insolvency processes, litigation or regulatory discretion.

This is especially important because ordinary clients do not have equality of arms against financial services licensees, trustee companies, responsible entities, fund operators, custodians, banks, auditors and professional advisers. If something goes wrong, the burden falls on the client who has the least control, least information and least capacity to force a timely outcome.

That is bad regulatory design.

If the convenience is private and the failure burden is borne by clients, the instrument should not be remade unchanged.

ASIC should publish the evidence base

ASIC should not simply state that the instrument is operating effectively and efficiently.

ASIC should publish the basis for that conclusion.

At a minimum, ASIC should disclose the extent to which the relief has been used, the number and type of licensees using it, the trustee companies involved, the total value of client money held through cash common funds, any complaints received, any breach reports, any reconciliation failures, any liquidity issues, any delayed access events, any losses or near misses, any surveillance conducted, any enforcement action considered or taken, and any comparison against safer alternatives.

If ASIC has this evidence, it should publish it.

If ASIC does not have this evidence, it should not claim the instrument is operating effectively and efficiently.

A regulator should not remake an exception to a client money protection rule on the basis of institutional confidence alone.

The instrument should not be remade unchanged

ASIC should not remake the instrument unchanged unless it can answer the following core questions.

Why is this relief still necessary?

Who uses it?

How much client money is held under it?

What consumer benefit does it provide?

What licensee benefit does it provide?

Why is that licensee benefit worth preserving?

Is client money as safe or safer in a cash common fund than in a segregated Australian authorised deposit taking institution trust account?

If not, why should the relief continue?

How does ASIC monitor use of the relief?

What breach, complaint, surveillance and enforcement data supports ASIC's position?

Are clients clearly told that their money may be held in a pooled scheme structure?

Are clients told how this differs from an Australian ADI trust account?

Are clients told what happens if the fund, trustee company, responsible entity, custodian, counterparty or licensee fails?

Are clients told whether Financial Claims Scheme protection applies, and if so, how it applies to pooled structures?

Are offshore exposures possible?

Are there daily reconciliation requirements that apply specifically to this structure?

Are there mandatory liquidity requirements?

Are there limits on related party exposure?

Are there express prohibitions on conflicts and self-dealing?

What happens if there is a mismatch between client records and fund assets?

What happens if a client needs immediate access to funds?

Until ASIC answers these questions, remaking the instrument unchanged would be premature.

If ASIC remakes the instrument, conditions should be strengthened

If ASIC decides to remake the instrument despite these concerns, it should not remake it in its present form.

The remade instrument should include stronger protections.

It should require client money to be clearly attributed to each client.

It should require daily reconciliation of client entitlements and total fund exposure.

It should prohibit offshore exposure unless expressly approved and justified.

It should require clear disclosure to clients that their money may be held in a pooled cash common fund rather than a simple Australian ADI trust account.

It should require disclosure of the practical consequences for Financial Claims Scheme protection.

It should impose strict liquidity requirements.

It should prohibit related party exposure.

It should impose strict limits on negotiable instruments and fixed interest assets by credit quality, maturity and liquidity.

It should require independent audit of compliance with the relief.

It should require annual reporting to ASIC.

It should require ASIC to publish aggregated data about use of the relief.

It should require prompt breach reporting.

It should include a shorter review period.

It should include a mandatory public review before any future remake.

Without these conditions, the instrument preserves flexibility for licensees without adequately demonstrating protection for clients.

Good public purpose test

A client money rule serves good public purpose when it protects the person whose money is being held.

It fails that test when it privileges convenience for licensed intermediaries over safety, traceability, simplicity and recoverability.

ASIC should apply a simple test.

Does this instrument make client money as safe or safer than cash in a segregated Australian authorised deposit taking institution trust account?

If the answer is yes, ASIC should publish the evidence.

If the answer is no, ASIC should allow it to sunset.

If the answer is uncertain, ASIC should not remake it unchanged.

The public interest does not require continuation of every legacy relief instrument. It requires protection that can be demonstrated.

Conclusion

ASIC should not remake Instrument 2016 671 unchanged.

The instrument may have originated from an understandable attempt to treat cash common funds similarly to cash management trusts. But that is not enough in 2026. Australian financial services regulation has had too many examples of harm occurring inside apparently regulated structures for ASIC to rely on labels, familiarity and institutional assurance.

Client money should be held in the safest practicable form. The safest benchmark is a segregated client money trust account held with an Australian authorised deposit taking institution, with clear client attribution, strict reconciliation and minimal intermediary discretion. A cash common fund is a pooled structure. It adds complexity. It adds investment and liquidity questions. It adds trustee, scheme, custody and reconciliation layers. ASIC has not shown that those layers improve client protection.

The Financial Services Royal Commission, the Bragg inquiry into ASIC, Trio, Shield, First Guardian, Brite, Halifax and Sterling all point to the same lesson. Formal architecture is not the same as effective protection. Licensing is not protection. Registration is not protection. Disclosure is not protection. A trustee label is not protection. A regulator's bare assertion is not protection.

Protection must be real, tested, evidenced and designed for failure conditions.

ASIC should also treat this consultation as exposing a broader principle. No method of holding client money should be permitted, preserved or expanded merely because it is familiar, convenient or technically lawful. If client money is to be held anywhere other than in a segregated client money trust account held with an Australian authorised deposit taking institution, ASIC should be able to demonstrate that the alternative is as safe as, or safer than, that benchmark. If ASIC cannot demonstrate that, the method should not be treated as an acceptable substitute for genuine client money protection.

ASIC should therefore either allow the instrument to sunset, or remake it only with a published evidence base and substantially stronger conditions. On the material provided in CS 052, ASIC has not made the case for remaking the instrument unchanged.