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By email

Dear Director

Submission – Enhancing oversight and governance of managed investment schemes – consultation

A Introduction

This submission is made by Herbert Smith Freehills Kramer (**HSF Kramer**) in response to the consultation paper on enhancing oversight and governance of managed investment schemes (**MISs**) released by Treasury on 10 February 2026 (**Consultation Paper**).

HSF Kramer is an international law firm with 26 offices located around the globe, which specialises in, amongst other things, financial services and financial services regulation. We regularly advise in relation to a wide range of issues concerning managed investment schemes, including the topics addressed in the Consultation Paper. We also made submissions to the Treasury's earlier consultation, titled *Review of the regulatory framework for managed investment schemes*, in 2023.

The Consultation Paper seeks feedback on the following issues:

(a) enhancing the regulatory framework for compliance;

(b) requiring responsible entities (**REs**) of registered MISs to have a majority of external directors and removing the option of having a mandatory compliance committee instead;

(c) prohibiting REs of registered MISs from conducting related party transactions, with limited exceptions;

(d) amending the framework for setting financial requirements for REs, such as setting more specific requirements;

(e) increasing ASIC's data collection powers in relation to the retail MIS sector; and

(f) alerts to ASIC about superannuation switching.

We have set out our responses to the questions in the Consultation Paper below.

B Enhancing the regulatory framework for compliance

1 Question 1: What are your views on proposals 1.1 to 1.4 to enhance the compliance framework for MISs?

Proposal 1.1 – Introduce stricter compliance plan requirements, such as requiring a detailed description of the nature of the scheme and its investment strategy, and information outlining how significant risks will be identified, monitored and managed.

Under section 601HA of the *Corporations Act 2001* (Cth) (**Act**), compliance plans are required to be "adequate" and to cover the topics set out in that section. This statutory requirement is supported by detailed regulatory guidance issued by the Australian Securities and Investments Commission (**ASIC**) in Regulatory Guide 132 *Funds management: Compliance and oversight* (**RG 132**).

RG 132 was substantively updated in July 2018 and June 2022 and was supplemented by the release in June 2025 of ASIC's findings from a review of compliance plans: see ASIC Media Release 25-090 MR *ASIC uncovers widespread compliance plan deficiencies in the managed investment industry*.

As acknowledged by ASIC at RG 132.16, the current approach to compliance plans is intended to provide flexibility for REs to create compliance plans that are tailored for a particular MIS.

In our view additional and more detailed legislative requirements for compliance plans:

(a) are not warranted or desirable at this stage. RG 132, as updated and supplemented as noted above, has resulted in a significant increase in the length and complexity of compliance plans and many REs find the current extensive regulatory guidance in RG 132 more than sufficient; and

(b) would restrict the flexibility and adaptability of the current approach, which is not desirable given the need for flexibility in relation to compliance plans because of the significant variety of MIS and their different compliance risk profiles. A one size fits all approach for all types of MISs, is likely to result in more complex, longer and unwieldy compliance plans that would be more difficult for REs to use in practice. We consider that bespoke, tailored compliance plans are more helpful to REs, and are more likely to genuinely assist REs comply with their legal obligations.

We submit that the MIS collapses highlighted by the Consultation Paper would not have been prevented by more onerous laws in relation to governance of compliance plans and that, going forwards, the likelihood of other MIS collapses (and the resulting investor harm) would be reduced through changes to other regulatory settings.

If proposal 1 were introduced, there would need to be clarity about:

(c) how the new obligation to "outline how significant risks will be identified, monitored and managed" in a compliance plan relates to a RE's existing obligation to have adequate risk management systems in section 912A(1)(h) of the Act. REs already have a framework in place for the identification, treatment and monitoring of significant risks which will include any risks that apply to the MISs they operate in order to comply with this statutory requirement, and this risk management framework will usually be tailored to the nature, scale and complexity of the MIS and its operations; and

(d) how "significant risks" are defined. Detailed guidance would be needed on this and we submit that it would be appropriate for REs to be able to avail themselves of a 'safe harbour' from liability where they make reasonable enquiries to identify significant risks.

Proposal 1.2 – Amend the liability framework for compliance plans, such that liability attaches only to material contraventions of a plan, to incentivise higher quality plans.

We welcome an amendment that would see liability only attaching to material contraventions of a compliance plan.

Such a change to the current liability framework may encourage REs to prepare more detailed compliance plans because of the reduced risk that a technical, non-material breach of a more detailed compliance plan may:

(a) expose the RE and, possibly, its officers to liability; and

(b) create the need to lodge frequent reportable situation reports with ASIC.

We note that the current settings and best practice already supports compliance plans with detailed compliance plan procedures. A materiality framework would help codify the distinction between substantive obligations (which we expect to be included in compliance plans) from more procedural matters (which may be more appropriately documented in accompanying procedures).

Proposal 1.3 – Make existing audit and assurance standards mandatory for auditors of compliance plans.

We would encourage consultation on this proposal to consider the extent to which this proposal would:

(a) add to the costs of compliance plan audits (which are ultimately passed on to MIS investors and reduce their returns); and

(b) deliver any tangible benefits or improvements to MIS investors.

and how those costs weigh up against those benefits.

Proposal 1.4 – Responsible entities should be required to notify ASIC of the appointment, removal or resignation of committee members.

It is not clear to us that the notification to ASIC of changes to committee members will lead to an improvement in compliance standards across the MIS sector or how notifications of such changes will assist ASIC in its role.

However, if ASIC can demonstrate the benefit of such notifications, and if the process for such notifications is simple and not onerous such that it does not impact the costs and administration of operating a MIS, we would not object to this proposal.

2 Question 2: Should the framework for compliance plans be amended to include more specific content requirements?

Please see our response to Question 1, Proposal 1.1 above.

3 Question 3: Who should set and enforce standards for compliance plan audits?

As a general observation, in our experience auditors are robust in their review of MIS compliance plans.

We would defer to the views of the audit industry as to who is best placed to set and enforce standards for compliance plan audits.

4 Question 4: Are any other changes required to strengthen the compliance framework?

We do not consider that other changes are required to enhance the compliance framework for MISs, which are already significantly more regulated than companies.

In addition to the RE’s obligation to ensure that the compliance plan is adequate, the RE must comply with:

(a) its duties under Chapter 5C of the Act;

(b) as a holder of an Australian financial services licence (**AFSL**), the duties of an AFSL holder under section 912A of the Act, almost all of which are now civil penalty provisions and other obligations in Chapter 7 of the Act;

(c) the conditions on the RE’s AFSL; and

(d) the financial services law, including the *Australian Securities and Investments Commission Act 2001* (Cth).

Significant obligations are also imposed on the directors and officers of the RE under the Act and as fiduciaries.

In our view:

(a) the costs of additional enhancements to the MIS compliance framework across the MIS sector would outweigh the benefits that those enhancements may deliver; and

(b) compliance improvements across the MIS sector would be more likely to be achieved through increased monitoring, supervision and oversight by ASIC in relation to those parts of the MIS sector where customer complaints, AFSL holder reportable situations or audit reports indicate that practices may be in need of review and improvement.

5 Question 5: What would the impacts of the proposals be, including compliance costs?

We consider that implementing proposals 1.1–1.4 will impose additional costs on the operation of registered MISs.

As stated above, in our experience, the updates to RG 132 and the release of ASIC's report on compliance plans in 2025 resulted in an increase in the length and complexity of compliance plans. We consider that the impacts of these proposals would be similar – that is, adding to the length and complexity of the RE's pre-existing compliance framework and increasing the costs of operating MISs at both the design and implementation stage and also on an ongoing basis.

C Requiring a majority of external directors on the boards of responsible entities

6 Question 6: Should responsible entities be required to have a majority of external board members?

A RE currently has the choice to have:

(a) a majority of external directors and no compliance committee; or

(b) a minority of external directors and a compliance committee.

We favour this current flexibility which allows REs to apply board and compliance arrangements which suit their circumstances, resources and business needs. We regularly work with REs who apply each model and have seen that both models can work well and have their respective benefits and disadvantages, and that there is no one clear model which is superior.

The role of a RE board is far broader than that of a compliance committee; there are a range of matters that a RE board considers which do not necessarily require the "detached supervision" that independent directors may bring. This gives rise to three distinct considerations:

(a) comingling the usual functions of the board and compliance functions and dismantling a compliance committee might dilute the overall compliance function and the supervisory role that the independent directors are intended to undertake;

(b) independent directors, whose backgrounds tend to not be in compliance, may lack detailed MIS experience and the expertise required to deliberate on operational and commercial MIS compliance matters. In our experience, RE boards comprise individuals with significant skill and experience across many facets of industry but compliance committee members are generally drawn from compliance backgrounds. They have a depth of experience and knowledge in relation to MIS compliance matters and are adept at asking the probing questions of management needed to be effective in that compliance role. It may be in members' interests for day-to-day decisions to be made by experienced directors and for compliance oversight to be undertaken by those with that specialist compliance knowledge and skill; and

(c) in the context of REs, a compliance committee has specific monitoring and reporting obligations which are arguably better served through dedicated meetings of that committee, rather than pervasively in all board meetings.

RE directors are subject to a range of legal duties (eg, their directors' duties under the Act and their fiduciary duties at general law, including the specific statutory duty to prioritise the interests of members in section 601FD(1)(c) of the Act). We consider that these duties are sufficient to ensure that directors make decisions that are free from inappropriate influence or bias, without requiring the board to comprise a majority of external directors.

We also consider that requiring REs to have a majority of external directors would have practical implications, such as:

(a) increasing the costs of the RE's operations, which would need to be passed on to MIS members and would reduce the returns to MIS member; and

(b) potential overloading certain directors, if a small number of best-in-class external directors are appointed to a large number of RE boards. Overloading external director commitments would reduce the capacity of each external director to devote the necessary time to each MIS, limiting their ability to effectively scrutinise operational and performance matters. Also, if external directors serve on multiple RE boards, that may lead to more conflicts, particularly for example in relation to property MISs, which may be competing for property assets and tenants.

If there were to be a requirement to have a majority of external directors on a RE board (which we do not consider to be warranted and do not support), we submit that this requirement should apply across the MIS sector and should not be limited to larger REs. While larger REs may be better able to absorb the additional compliance costs, in our experience compliance issues tend to arise in relation to smaller (rather than larger) MIS businesses and it would not be efficient to impose additional compliance costs on the part of the MIS sector which generally performs better in terms of compliance.

7 Question 7: Are there enough external directors available in Australia to meet this proposal?

If the focus of this proposal is to improve compliance, we submit that the issue is not just the number of available external directors but also whether those external directors are appropriately qualified and suitable for RE boards from a compliance perspective. It should not be assumed that the current compliance committee members are qualified to, and prepared to, serve in a director capacity on a RE board.

We consider that the potential for the overloading of external directors is real. As noted above, overloading reduces the capacity of each external director to devote the necessary time to each MIS, which limits their ability to effectively scrutinise MIS operations and performance and may lead to additional conflicts of interest.

While Treasury could impose limits on the number of directorships that a person may undertake, this will only reduce the pool of available, suitable and appropriately qualified external directors, which will exacerbate the problem for REs if they are required to have a majority of external directors on their board.

8 Question 8: Are any other changes required to address conflicts of interest and ensure independent oversight of MISs?

In our view, no changes are required to address conflicts of interest and to ensure independent oversight of registered MISs. As noted above, the Act already prescribes a range of obligations on REs which are aimed at promoting good governance. In our view:

(a) the costs of additional enhancements to the MIS compliance framework across the MIS sector would outweigh the benefits that those enhancements may deliver; and

(b) compliance improvements across the MIS sector would be more likely to be achieved through increased monitoring, supervision and oversight by ASIC in relation to those parts of the MIS sector where customer complaints, AFSL holder reportable situations or audit reports indicate that practices may be in need of review and improvement.

9 Question 9: What would the impacts of the proposal be, including compliance costs?

Our observation is that increased compliance costs and increased costs for operating a registered MIS will usually be passed on to the MIS members and reduce their returns. Where the compliance costs are not paid from the MIS assets and are absorbed by the RE, the RE may seek to increase its management fee, to cover the additional compliance costs.

As a general comment we would expect increases in compliance costs to be easier to absorb and manage for larger REs which have a greater scale than smaller REs and that smaller REs will generally be more impacted by increasing compliance costs.

D Prohibiting responsible entities of registered MISs from conducting related party transactions, with limited exceptions

10 Question 10: Should responsible entities of MISs be prohibited from investing or lending money to companies that are controlled by a member of the responsible entity's board or companies that are related bodies corporate of the responsible entity? What exceptions would be required?

In our view, such a prohibition is unnecessary and would have a significant adverse impacts on the structure and operation of registered MISs.

The Act already prescribes a range of obligations on REs which are aimed at regulating related party transactions and conflicts of interest, including:

(a) the longstanding related party benefits regime in Chapter 2E of the Act as extended by Part 5C.7 of the Act;

(b) the obligations under Chapter 5C of the Act, not only on the RE but also on the directors and officers of the RE, in particular, the current requirement on the RE and its directors and officers to give priority to members' interests where there is a conflict, which is comprehensive in resolving conflicts of interest in favour of MIS members; and

(c) as a holder of an AFSL, the obligations contained in Chapter 7 of the Act, including the obligation to have adequate arrangements for the management of conflicts.

In our view, introducing a prohibition on conducting related party transactions to replace the current related party benefits regime would confer limited regulatory benefit but would significantly limit and constrain current structure and practices including in relation to permitting a promoter of a MIS to recoup their initial investment and outlay through a minimum term of a management agreement with the RE of the MIS.

Increased monitoring, supervision and oversight by ASIC of conflicts of interest and related party transactions may be a more effective and efficient way to ensure the related party benefits regime is being appropriately complied with.

We do not agree with the proposition that a ban on related party contracts "would help ensure investment decision making by the responsible entity is in the best interests of members" because there are many related party transactions that are in the best interests of members and, where a related party benefit is not on arms' length terms or better, there is currently a prescribed regime to obtain member approval to the transaction. The current regulatory settings already help ensure the interests of the RE and the MIS members are aligned.

We also submit that, if such a prohibition were introduced, there would need to be abundant exceptions in order to make the prohibition workable and to achieve a degree of contract flexibility needed for promoters of MISs to continue to promote and launch registered MISs in Australia.

There is currently an extensive and well understood regulatory regime that applies to related party benefits and the arm's length exception is a critical pillar of the related party benefits regime. We expect that once the exceptions are considered, any replacement regime will start to resemble the existing related party benefits regime the arm's length exception, and so we would encourage Treasury to critically test, before recommending any change, whether:

- there are structural defects in the existing related party regime (and we submit that there are not); or
- the related party problems demonstrated by recent MIS collapses relate to the current existing related party regime not being correctly applied and enforced.

We would be in favour of more detailed guidance on what REs should do in order to satisfy themselves that a transaction is on an arms’ length basis, and that they can, therefore, access the safe harbour under the related party benefits regime. This would generate greater regulatory certainty for REs.

11 Question 11: Are any other changes required to ensure investment decision making by the responsible entity is in the best interests of scheme members?

The Act already requires the RE and its officers to act in the best interests of registered MIS members, with reasonable care and diligence and prioritising the interests of MIS members in the event of any conflict between the interests of the RE and the MIS members.

These obligations clearly apply to investment decision making by the RE. We therefore submit that changes to the current legal requirements are not necessary to ensure investment decision making is in the best interests of scheme members.

We submit that improvements in investment decision making by REs would be more likely to be achieved through increased monitoring, supervision and oversight by ASIC in relation to those parts of the MIS sector where customer complaints, AFSL holder reportable situations or audit reports indicate that practices may be in need of review and improvement.

12 Question 12: What would the impacts of the proposal be, including compliance costs?

We consider the proposal, if implemented, would add to compliance costs but that the main impact would be on the structure, prospects and growth of the registered MIS sector.

We expect that the most significant cost impact of a prohibition on related party contracts would be the prohibition of a promoter of a MIS on recouping their initial investment and outlay in launching the MIS through a minimum term of a management agreement with the RE of the MIS.

If a registered MIS promoter is not able to recoup their MIS launch costs through acting as the manager for a minimum term, promoters may not wish to incur the costs of launching new MIS with no certainty of recovering those costs. If promoters are deterred from launching new registered MISs, this will reduce the opportunities for new registered

MIS launches in Australia and reduce competition and new investment opportunities in Australia for MIS investors.

13 **Question 13: Where a responsible entity has a separate investment manager, should the investment manager be prohibited from being a related party?**

In our view, this prohibition is unnecessary, and would adversely impact the structure, prospects and growth of the MIS sector, for the reasons outlined in response to question 12 above.

E Amending the framework for setting financial requirements for responsible entities

14 **Question 14: Should more specific financial resource requirements be imposed on responsible entities (in addition to the general obligation to have adequate resources under section 912A(1)(d) of the Corporations Act)?**

As legal advisers, we defer to appropriately qualified financial experts in relation to the assessment of financial resource requirements.

15 **Question 15: Should the MIS financial requirements (including the net tangible asset requirement for responsible entities) continue to be set by ASIC using its exemption and modification powers in the Corporations Act or should the requirements be set out in primary legislation or regulations?**

We can see the benefits of setting the specific financial resource requirements by ASIC legislative instruments, which ASIC may modify, if necessary, given market developments.

However, regardless of how the requirements are set, we would welcome a simplification of the ASIC instruments setting out the current financial requirements, which are complex and difficult to interpret and implement in practice.

These documents can be challenging for REs to interpret and apply and their complexity adds to the compliance costs of operating MISs, which are ultimately passed back to MIS members.

16 **Question 16: Should the objectives of the MIS financial requirements be specified in primary legislation or regulations to provide more clarity about the purpose of the requirements?**

We do not see a benefit to setting out the purpose of financial resource requirements in the legislation and we consider that industry is already aware of the articulation of the financial resource requirements in Regulatory Guide 166 *AFS Licensing: Financial requirements*.

We would however welcome a simplification of the ASIC instruments setting out the current financial requirements, because they are complex and difficult to interpret and implement in practice.

17 **Question 17: Are any other changes to the framework for determining MIS financial requirements required?**

As noted above, we would welcome a simplification of the ASIC instruments setting out the current financial requirements. The more complex the regulatory framework, the more likely that AFSL holders will misinterpret their regulatory obligations, resulting in inadvertent non-compliance, and additional compliance costs, as AFSL holders seek legal advice to understand their obligations.

18 **Question 18: What would the impacts of the proposal be, including compliance costs?**

A simplified financial resource requirements framework would promote a higher degree of certainty and understanding of these requirements by AFSL holders, who will not need to incur the costs of seeking advice in order to understand their obligations. Simplification may also reduce the incidence of compliance errors or incorrect interpretations of the financial resource requirements.

F Increasing ASIC's data collection powers on the retail MIS sector

19 Question 19: Should a new legislative framework be introduced for the recurrent collection of data by ASIC on MISs?

We would not object to changes to the legislative framework to facilitate recurrent data collection by ASIC on registered MISs, to the extent that such a data collection:

(a) enhances ASIC's ability to detect of misconduct and risks in the registered MIS sector and take earlier, preventative action to prevent investor harm; and

(b) is designed in such a way to minimise costs and ensure that those costs do not outweigh the benefits of the data collection.

As noted above, the MIS collapses highlighted by the consultation paper do not appear to be the result of inadequate legal or regulatory settings. In our view, additional laws in relation to MIS governance of the type proposed in the consultation paper would not have prevented the collapses of, for example, the Shield Master Fund and First Guardian Master Fund.

System changes and builds to facilitate new registered MIS data collection imposes costs on industry which will inevitably be passed on to MIS investors. It will be important that any legislative framework introduced to support recurrent data collection about registered MIS by ASIC:

(a) clearly defines the purpose of the data collection, that is, enhancing ASIC's ability to detect misconduct and other risks;

(b) is sufficiently flexible to ensure that the data collection requirements are appropriate for the significant variety of registered schemes and to enable changes as required in light of market developments;

(c) requires ASIC to consult with industry, on an ongoing basis, to ensure the data collection requirements are practical and efficient; and

(d) does not duplicate existing data collection requirements and genuinely leads to a reduction in ASIC *ad hoc* data collections, which can impose significant costs on industry.

20 Question 20: What types of recurrent data could help to detect risks, including conduct or fund level risks in the retail MIS sector?

Please see our response to question 21 below.

21 Question 21: What data should be collected about MISs?

We submit that only registered MIS data that will in fact increase ASIC's ability to detect misconduct and other risks and which is not available from other sources should be collected, provided that the benefit of such data does not outweigh the cost of producing, providing and analysing it.

The onus should be on ASIC to establish that these conditions are met.

We anticipate that data on the following matters may satisfy these conditions:

(a) categories of assets held by registered MISs, noting that some asset classes would be regarded as high risk;

(b) the proportion of registered MIS assets capable of being realised within defined timeframes, as a proxy for MIS liquidity;

(c) the registered MIS's redemption windows or frequency and when redemptions are suspended or redemption requests are gated; and

(d) leverage data, such as, the level of borrowing or leverage in relation to the registered MIS and whether the borrowing or leverage counterparties are a related party to the RE.

22 **Question 22: What event notifications should be provided to ASIC? For example, should there be a notification when redemptions are frozen or suspended?**

Currently, ASIC receives event notifications in relation to a range of events relevant to registered MISs including:

(a) reportable situations. REs and other AFSL holders in the registered MIS sector must report to ASIC:

(1) significant breaches or likely significant breaches of core obligations;

(2) investigations into whether there are such breaches that continue for 60 days and the outcome of those investigations;

(3) conduct that constitutes gross negligence or serious fraud; and

(4) certain conduct of financial advisers and mortgage brokers (section 912DAA of the Act);

(b) certain contraventions of the Act identified by auditors (sections 311 and 601HG of the Act);

(c) related party transactions requiring member approval (sections 218 and 601LA of the Act); and

(d) certain governance changes by in relation to registered MIS including:

(1) a changes of a constitution (section 601GC);

(2) a change to a compliance plan (section 601HE);

(3) a change of the RE (sections 601FJ and 601FM);

(4) a cessation of MIS auditors (section 601HH); and

(5) proposed MIS name changes (regulation 5C.1.02 of the Corporations Regulations 2001).

Other targeted event notifications, such as the notification of the freezing or suspension of redemptions, may assist ASIC to identify MISs where liquidity and redemption issues are crystalising and to potentially take early regulatory action to protect investors.

However, if further event notification is required, the requirements should be clear and the amount of information required to be provided about the relevant event should be kept to a minimum to avoid unnecessary regulatory burden.

In our experience, the current reportable situations regime imposes costs on AFSL holders that often appear to exceed the regulatory value of the reports to ASIC. The breadth of questions which are required to be answered when submitting a reportable situation report through the ASIC Regulatory Portal makes the current reporting process time consuming for AFSL holders and adds to their costs when they need to seek legal advice to understand the questions and how to respond to them.

23 **Question 23: What would the impacts of the proposal be, including compliance costs?**

Data collections impose significant costs on industry, arising from:

(a) system development and data aggregation costs;

(b) integration across custodians, administrators and service providers;

(c) ongoing reporting resource allocation;

(d) alignment of internal data taxonomies to regulatory definitions; and

(e) potential duplication with existing reporting regimes.

These costs would usually be passed on to MIS investors but if they cannot, due to the scale or situation of the MIS, they may need to be absorbed by the RE personally, which may not be sustainable for the RE and may adversely impact the RE's ability to continue to operate registered MISs or launch new registered MISs.

G Alerts to ASIC about superannuation switching

In relation to questions 24 – 28 raised by the Consultation Paper, we agree with the submissions of the Law Council of Australia in relation to these questions.

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Thank you for providing us the opportunity to comment on the Consultation Paper. If you would like to discuss the matters raised in this submission, please contact any of us at the details below.

Yours sincerely

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