

31 March 2023

Investment Managers  
Australian Securities and Investments Commission  
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Brisbane QLD 4001

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Dear Sir or Madam

**Consultation Paper 367: Remaking ASIC class orders on financial requirements: [CO 13/760], [CO 13/761] and ASIC Instrument 2022/449 (CP 367)**

1. The Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**) has prepared this submission in response to CP 367, which was released by the Australian Securities and Investments Commission (**ASIC**) on 3 March 2023. The Committee thanks ASIC for this opportunity to respond to the proposals set out in CP 367.
2. CP 367 sets out ASIC's proposals to remake the following legislative instruments:
  - (a) Class Order [CO 13/760] *Financial requirements for responsible entities and operators of investor directed portfolio services (Class Order 13/760)*;
  - (b) Class Order [CO 13/761] *Financial requirements for custodial or depository service providers (Class Order 13/761)*; and
  - (c) ASIC Corporations (Financial Requirements for Corporate Directors of Retail Corporate Collective Investment Vehicles) Instrument 2022/449 (**Instrument 2022/449**),each of which would have effect until 1 October 2028.
3. Class Order 13/760 and Class Order 13/761 are due to sunset on 1 October 2023. Instrument 2022/449 is due to sunset on 1 October 2024.

4. The Committee notes that ASIC:
  - (a) has formed the preliminary view that each of the above legislative instruments is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework;
  - (b) is not proposing to make substantive changes to the relief conferred by any of those legislative instruments; and
  - (c) proposes to effectively combine Class Order 13/760 with Instrument 2022/449.
5. The Committee's comments relating to each respective proposal and its corresponding legislative instrument/s are set out below.

**Proposal B1—Class Order 13/760**

6. The Committee has reviewed **Attachment 1** to CP 367, which contains the draft proposed replacement instrument for Class Order 13/760 and Instrument 2022/449.
7. The Committee does not object to Class Order 13/760 and Instrument 2022/449 being replaced by a single legislative instrument and, other than with respect to matters raised below, is comfortable with Proposal B1.
8. The Committee welcomes simplification of the drafting in Attachment 1, and in particular considers that the proposed new definition of “special custody assets” in the proposed new notional subsection 912AA(11) of the *Corporations Act 2001* (Cth) is helpful.

Definitions of “RE and IDPS revenue” and “revenue”

9. The Committee notes the differences between this definition in notional subsection 912AA(11) of the Corporations Act in Class Order 13/760 and Attachment 1 as set out below.

Class Order 13/760 definition	Attachment 1 definition
<p><b>RE and IDPS revenue</b> means, in relation to a financial services licensee:</p> <p>(a) the licensee’s revenue (within the meaning given by the accounting standards); and</p> <p>(b) to the extent it is not the licensee’s revenue (within the meaning of the accounting standards)—any amount paid or payable out of scheme property for the performance of the obligations imposed on the licensee as a responsible entity in connection with the registered schemes it operates, even if those obligations are performed by another entity (including asset management, investment management, property management, scheme administration and custodial and trustee services); and</p> <p>(c) to the extent it is not the licensee’s revenue (within the meaning of the accounting standards)—any amount paid or payable out of IDPS property for the performance of the obligations imposed on the licensee as an operator of an IDPS, even if those obligations are performed by another entity.</p> <p>Note: An amount under paragraph (b) or (c) excludes any audit fees paid or payable to an auditor engaged to meet any audit requirements under the Act.</p>	<p><b>revenue</b> means, in relation to a financial services licensee:</p> <p>(a) the licensee’s revenue (within the meaning given by the accounting standards); and</p> <p>(b) to the extent it is not the licensee’s revenue (within the meaning of the accounting standards)—any amount paid or payable out of scheme property of a registered scheme, IDPS property of an IDPS or assets of a retail CCIV for the performance of the obligations imposed on the licensee in connection with operating that registered scheme, IDPS or retail CCIV respectively, even if those obligations are performed by another entity.</p>

10. The Committee notes that Class Order 13/760 provides asset management, property management, scheme administration and custodial and trustee services as example of amounts paid out of scheme property, which are effectively treated as the licensee’s revenue where the licensee is the responsible entity of a registered scheme. This is not replicated in Attachment 1. Due to the absence of such examples in Attachment 1, it is not clear to the Committee whether ASIC intends to treat these kinds of amounts as revenue of the licensee.

11. The Committee would welcome some clarification from ASIC on this point, even if it is expressed in ASIC Regulatory Guide 166 *Licensing: financial requirements (RG 166)* rather than in a legislative instrument.

Cash needs requirement—requirement for licensee’s directors to approve cash flow projections

12. The Committee notes that:
- (a) in Class Order 13/760, the licensee’s directors must approve cash flow projections (which cover the next 12 months) “at least quarterly”; and
  - (b) in Attachment 1, the licensee’s directors must approve cash flow projections “at least once a quarter”.
13. The Committee is concerned that the wording in Attachment 1 could be construed as requiring the approvals to be given in respect of specific calendar quarters (e.g. quarter ending 31 March 2023).
14. The Committee submits that “at least once every three months” would provide greater clarity and certainty for licensees that they have the flexibility to have the cash flow projections approved at any time in a calendar quarter, so long as the period between approval dates does not extend beyond three months.

Excluded assets definition, paragraph (c)

15. The Committee submits that paragraph (c) of the definition of “excluded assets” in notional subsection 912AA(11) of the Corporations Act has been drafted incorrectly in both Class Order 13/760 and Attachment 1.
16. The Committee has set out below how the definition is currently drafted, and how the Committee believes it should be drafted:

Current drafting	Proposed revised drafting
<p><b><i>excluded assets</i></b> means in relation to a financial services licensee:</p> <p>...</p> <p>(c) assets:</p> <ul style="list-style-type: none"> <li>(i) held as a beneficial interest or an interest in a managed investment scheme; or</li> <li>(ii) invested in a superannuation product in respect of which the licensee or an associate may exercise any form of power or control; and ...</li> </ul>	<p><b><i>excluded assets</i></b> means in relation to a financial services licensee:</p> <p>...</p> <p>(c) assets:</p> <ul style="list-style-type: none"> <li>(i) held as a beneficial interest or an interest in a managed investment scheme; or</li> <li>(ii) invested in a superannuation product, in respect of which the licensee or an associate may exercise any form of power or control; and ...</li> </ul>

17. The Committee submits that the proposed revised drafting above would give paragraph (c) of the definition of “excluded asset” its intended meaning, by treating assets over which the licensee or an associate may exercise any form of power or control as “excluded assets”, irrespective of whether such assets relate to a managed investment scheme or are invested in a superannuation product.

**Proposal B2—Class Order 13/761**

18. The Committee has reviewed **Attachment 2** to CP 367, which contains the draft proposed replacement instrument for Class Order 13/761.
19. Other than with respect to matters raised below, the Committee is comfortable with Proposal B2.

Definition of “incidental provider”

20. The Committee submits that the definition of “incidental provider” in notional subsection 912AC(12) of the Corporations Act in both Class Order 13/761 and Attachment 2 is insufficiently clear as to whether the trustee of an unregistered managed investment scheme, which provides a custodial or depository service by holding assets of the trust, is an “incidental provider”.
21. The Committee submits that it should be possible for such a trustee to satisfy the definition of “incidental provider”, regardless of whether the custodial or depository services are a need of the person to whom the services are provided because of, or in order to obtain the provision of other financial services by the licensee or its related bodies corporate.

Notional subsection 912AC(5) of the Corporations Act

22. The Committee notes the differences between this provision in Class Order 13/761 and Attachment 2 as set out below:

Class Order 13/761 wording	Attachment 2 wording
<p>(5) This subsection applies if the licensee is an incidental provider and all the financial products or beneficial interests in financial products to which the custodial or depository services provided by the licensee relate are held by:</p> <p>(a) a financial services licensee that is authorised to provide a custodial or depository service and that the licensee reasonably believes:</p> <p>(i) is not an incidental provider; and</p> <p>(ii) complies with the requirements of this section; or</p> <p>(b) a sub-custodian appointed by such a financial services licensee; or</p> <p>(c) an eligible custodian.</p>	<p>(5) This subsection applies if the licensee is an incidental provider and all the financial products or beneficial interests in financial products are held by:</p> <p>(a) a financial services licensee that is authorised to provide a custodial or depository service and that the licensee reasonably believes:</p> <p>(i) is not an incidental provider; and</p> <p>(ii) complies with the requirements of this section; or</p> <p>(b) a sub-custodian appointed by such a financial services licensee; or</p> <p>(c) an eligible custodian.</p>

23. The Committee believes that, in Attachment 2, the phrase “to which the custodial or depository services provided by the licensee relate” has been omitted from notional subsection 912AC(5) in error.
24. The Committee submits that these words should be reinstated in Attachment 2 in order to preserve the substantive effect of the relief in Class Order 13/761. This would ensure that financial products which a licensee holds in its personal capacity (rather than when it is providing a custodial or depository service) were disregarded when determining the level of net tangible assets that the licensee is required to hold (as is currently the case under Class Order 13/761).

Excluded assets definition, paragraph (c)

25. The Committee submits that paragraph (c) of the definition of “excluded assets” in notional subsection 912AC(11) has been drafted incorrectly in both Class Order 13/761 and Attachment 2.
26. Below the Committee has set out how the definition is drafted and how the Committee believes it should be drafted:

<b>Current drafting</b>	<b>Proposed revised drafting</b>
<p><b><i>excluded assets</i></b> means in relation to a financial services licensee:</p> <p>...</p> <p>(c) assets:</p> <ul style="list-style-type: none"> <li>(i) held as a beneficial interest or an interest in a managed investment scheme; or</li> <li>(ii) invested in a superannuation product in respect of which the licensee or an associate may exercise any form of power or control; and ...</li> </ul>	<p><b><i>excluded assets</i></b> means in relation to a financial services licensee:</p> <p>...</p> <p>(c) assets:</p> <ul style="list-style-type: none"> <li>(i) held as a beneficial interest or an interest in a managed investment scheme; or</li> <li>(ii) invested in a superannuation product, in respect of which the licensee or an associate may exercise any form of power or control; and ...</li> </ul>

27. The Committee submits that the proposed revised drafting above would give paragraph (c) of the definition of “excluded asset” its intended meaning by treating assets over which the licensee or an associate may exercise any form of power or control as “excluded assets”, irrespective of whether such assets relate to a managed investment scheme or are invested in a superannuation product.

Definition of “revenue”

28. The Committee notes the differences between this definition in notional subsection 912AC(12) of the Corporations Act in Class Order 13/761 and Attachment 2 as set out below.

Class Order 13/761 definition	Attachment 2 definition
<p><b>revenue</b> means revenue within the meaning given by the accounting standards.</p>	<p><b>revenue</b> means, in relation to a financial services licensee:</p> <ul style="list-style-type: none"> <li>(a) the licensee’s revenue (within the meaning given by the accounting standards); and</li> <li>(b) to the extent it is not the licensee’s revenue (within the meaning of the accounting standards)—any amount paid or payable out of the scheme property of a registered scheme, IDPS property or assets of a retail CCIV for the performance of the obligations imposed on the licensee in connection with operating that registered scheme, IDPS or retail CCIV respectively; even if those obligations are performed by another entity.</li> </ul>

29. The Committee submits that the definition of “revenue” as used in Attachment 2 is not consistent with the objective of Attachment 2 continuing the relief granted under Class Order 13/761.

30. The Committee submits that:

- (a) paragraph (b) of the definition of “revenue” in Attachment 2 is only relevant to licensees that hold licence authorisations to operate a registered scheme, investor directed portfolio service or retail corporate collective investment vehicle (**CCIV**); and
- (b) therefore:
  - (i) it ought to be confined in its use to the definition of “revenue” used in Attachment 1, which is applicable to licensees that hold those kinds of authorisations; and
  - (ii) it should not be replicated in Attachment 2—rather, Attachment 2 should retain the definition of “revenue” currently used in Class Order 13/761.



### **Proposal B3—Instrument 2022/449**

31. The Committee has no comment to make specific to Instrument 2022/449.
32. In April 2022 the Committee made submissions to ASIC in response to Consultation Paper 360: *Corporate collective investment vehicles: Preparing for the commencement of the new regime*, which dealt with the financial requirements applicable to the corporate director of a CCIV (Proposal F1).

### **Expiry dates**

33. The Committee notes that Class Order 13/760 and Class Order 13/761 have been in force for the maximum ten-year period since 2013, and ASIC is only seeking to extend the relevant relief in these class orders and Instrument 2022/449 until October 2028.
34. The Committee does not believe it is optimal for ASIC to continue to have to consult on, and remake, legislative instruments that are operating effectively at intervals as short as five years, because this increases pressure on scarce ASIC resources.

### **Other comments**

35. Separately from issuing the new legislative instruments, the Committee suggests that, to improve the ease of navigability of the regulatory regime and reduce potential confusion for the regulated population and their advisers, ASIC should:
  - (a) update RG 166 and other regulatory guides which refer to the current legislative instruments to replace those references with the names of the replacement legislative instruments; and
  - (b) clearly show its current legislative instruments together with references to the former iterations of similar relief which those legislative instruments replaced.
36. If ASIC has any questions or would like to further discuss with any matters raised in this submission with the Committee, please do not hesitate to contact Pip Bell, Chair of the Financial Services Committee ([pbell@pmclegal-australia.com](mailto:pbell@pmclegal-australia.com)).

Yours faithfully



**Philip Argy**  
**Chairman**  
**Business Law Section**