



**CHARTERED SECRETARIES  
AUSTRALIA**

*Leaders in governance*

30 September 2011

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Dear John

## **Managed Investment Schemes**

Chartered Secretaries Australia (CSA) is the independent leader in governance and risk management. As the peak professional body delivering accredited education and the most practical and authoritative training and information in the field, we are focused on improving organisational performance and transparency.

Our members are involved in governance, corporate administration and compliance with the *Corporations Act* (the Act), including working for and with responsible entities (REs) and managed investment schemes (MIS).

CSA welcomes the opportunity to comment upon the Corporate and Markets Advisory Committee's (CAMAC) *Managed investment schemes: discussion paper* (the discussion paper) and generally agrees with the proposed key legislative reforms proposed. CSA notes that the discussion paper primarily deals with issues that arise with the failure of a MIS, that is, administration and insolvency issues.

CSA notes that CAMAC was also requested to examine other proposals to improve Chapter 5C of the *Corporations Act 2001 (Cth)* (the Act). CSA also notes the recommendations made by the Parliamentary Joint Committee on Corporations and Financial Services' (PJC) Report, entitled *Inquiry into aspects of agribusiness managed investment schemes*, released on 7 September 2009, and believes that Chapter 5C of the Act may be enhanced following consideration of governance and risk management in all aspects of the operations of MIS.

CSA's comments, therefore, are made in the view that the current consultation is an opportunity for CAMAC to also report on the need for good governance and risk management frameworks to be implemented in MIS. Such issues may be best dealt with through prudential regulation and the exercise by ASIC of its powers in assessing and granting an AFSL and/or approval as a Responsible Entity.

## **General comments**

The unfortunate collapse of Timbercorp and Great Southern prompted the PJC to conduct an inquiry into the nature of agribusiness MIS, with reference to '...the need for any legislative or

regulatory change<sup>1</sup>. While the PJC Report touched on the ideas of ASIC monitoring the disclosure requirements, licensing and remuneration of MIS, the PJC Report did not directly assess transparency and accountability of a MIS's foundational and ongoing operations.

The issue has again arisen within the framework of the current discussion paper and the terms of reference outlined in the letter of 18 November 2010 from the Parliamentary Secretary to the Treasurer, the Honourable David Bradbury MP. CSA is of the view that the terms of reference to CAMAC do not fully address the transparency and accountability of a MIS's establishment and operation.

Chapter 3 of the discussion paper identifies the problems associated with the identification of 'transactions attributable to each MIS<sup>2</sup>', and the inability to clearly 'identify the affairs of each MIS and determine the rights of parties dealing with an RE as operator of the MIS<sup>3</sup>'. CSA contends that these considerations are primarily governance issues. This is embodied, for example, in the proposed legislative reform entitled '*Reform 1: identification and recording of the affairs of each MIS<sup>4</sup>*' which mirrors the ideals created by the relevant sections of the Act concerning the recording of particular documents and transactions.

CSA notes that elements of a governance framework are exemplified in the requirements for obtaining an Australian Financial Services Licence (AFSL) and compliance with section 912A of the Act. A MIS is required to advise the Australian Securities and Investment Commission (ASIC) about various aspects of risk management, compliance and conflicts of interest in order to obtain an AFSL. Yet despite this, the PJC Report still notes that MIS exhibit systematic uncertainties and potentially risk market failure, thereby requiring some form of further prudential regulation to be considered<sup>5</sup>.

CSA, therefore, believes that more emphasis needs to be given to the importance of a good governance framework existing at the earlier stages of MIS formation and operations. CSA points to the changes in governance and risk management that occurred in listed companies with the introduction of the Australian Securities Exchange (ASX) Corporate Governance Council's *Corporate Governance Principles and Recommendations* (Principles and Recommendations) which recognise the importance of developing stakeholder and investor confidence in the Australian capital market<sup>6</sup>. A RE for a listed MIS is required to report against the Principles and Recommendations. This framework provides a practical guide for listed companies, irrespective of their size or industry, their investors, the wider market and the Australian community.

Nonetheless, the disclosures inherent in this reporting do not fully capture the risk management frameworks that may need to be implemented in order to counter the systemic uncertainties of MIS.

The importance of risk management and good governance at the front end of operations for a MIS and RE cannot be overemphasised. The delineation of roles, responsibilities and disclosures will ultimately benefit the operations of both the MIS and RE, particularly in the circumstances which the discussion paper seeks to address, that is where a RE or MIS is under financial stress.

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<sup>1</sup> Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Aspects of agribusiness managed investment schemes*, (September 2009) [pg vii]

<sup>2</sup> Corporations and Markets Advisory Committee, Australian Government, *Managed investment schemes discussion paper* (June 2011) [pg 27]

<sup>3</sup> *Ibid* at [pg30]

<sup>4</sup> *Ibid* at [pg32]

<sup>5</sup> PJC Report, above n 1, at [pg 37]

<sup>6</sup> ASX Corporate Governance Council, Australian Securities Exchange, *Corporate Governance Principles and Recommendations*, 2<sup>nd</sup> ed with 2010 amendments, p 4

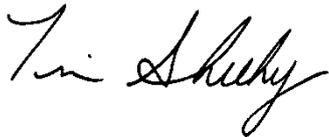
CSA notes, however, that usually by the time that financial stress is disclosed, it is too late. CSA submits that there would be great public benefit if ASIC was to introduce a requirement that any AFSL applicant, and especially where that applicant is to be authorised as an RE, must be able to demonstrate that it has an appropriate risk management and compliance framework in place and operational. Given the large volume of AFSL applicants that ASIC processes CSA submits that ASIC could effect this through requiring applicants to furnish a certificate from a registered auditor with relevant AFSL audit experience or a suitably qualified and experienced independent compliance expert.

CSA acknowledges that this will impose a small additional cost to the obtaining of an AFSL. However CSA submits that the public benefit of ensuring that applicants actually do have appropriate risk management and compliance frameworks in place before they can commence operations more than justifies the marginal cost increase.

CSA is of the view that the administration and insolvency issues canvassed in the discussion paper are extremely important, but would be disappointed should the opportunity not also be taken to consider the governance and risk management frameworks that could be implemented when MIS are first established.

We look forward to reading the final report and recommendations.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Tim Sheehy', written in a cursive style.

Tim Sheehy  
CHIEF EXECUTIVE