

Appendix 3

CAMAC Managed Investment Schemes

Specific recommendations¹

Proposed key legislative reforms

CAMAC recommends:

- every RE be obliged to maintain, for each scheme that it operates, a definitive register of the affairs of that scheme
- every RE be obliged to maintain, for each scheme that it operates, a definitive register of the property of that scheme
- the ASIC record of registration identifying the party who is the RE be definitive
- in lieu of the subrogation remedy, counterparties to agreements with the RE as operator of a scheme have rights to claim directly against the scheme property (irrelevant under the SLE Proposal)
- any provision in a scheme constitution, or otherwise, that affords an RE an indemnity for any form of maladministration on its part in relation to that scheme be unenforceable.

Changing the RE of a viable scheme

CAMAC recommends:

- an incumbent RE be obliged to provide reasonable assistance to a prospective RE in certain circumstances
- restrictions be placed on an RE receiving remuneration in advance
- controls be introduced to prevent an RE from becoming entrenched
- changes be implemented to voting requirements for scheme members to replace the RE of an unlisted scheme
- the court be given an extended power to appoint a TRE
- the court be empowered to appoint as a TRE any person considered suitable
- restrictions be placed on the transfer of rights, obligations and liabilities (s

1 Taken from Corporations and Markets Advisory Committee, *Managed Investment Schemes Report*, July 2012, pp. 14–19, [http://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2012/\\$file/mis_report_july2012.pdf](http://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2012/$file/mis_report_july2012.pdf) (accessed 9 June 2015).

- the powers of the court, upon appointment of a TRE, be expanded
- modifications be made to s 601FS to avoid unintended consequences (irrelevant under the SLE Proposal)
- the duties of a TRE be modified
- the court be empowered to determine the remuneration of a TRE
- the TRE be obliged to provide reasonable assistance to a prospective RE
- the TRE be given the power to place a scheme in VA
- the TRE be obliged to assist an external administrator

Restructuring a financially stressed scheme

CAMAC recommends:

- the legislation define a scheme as being insolvent where the scheme property is insufficient to meet all the claims that can be made against that property as and when those claims become due and payable
- a scheme VA procedure be introduced, with the approach under the SLE Proposal being the preferred option
- the ambit of a scheme moratorium include all rights or claims concerning the RE, scheme members or external parties that might affect the ability of the scheme administrator to restructure the affairs of the scheme
- voting rights on one or more scheme deeds be determined in the first instance by the scheme administrator, with the administrator or affected parties having standing to apply to the court to challenge the administrator's determination
- the court be given a residual power to order that a scheme be discontinued or wound up
- only registered liquidators be eligible to be scheme administrators
- a scheme administrator have similar functions, powers and liabilities to those of a corporate administrator
- the court be empowered to determine the remuneration of the scheme administrator if affected parties cannot agree
- the powers of the court in the VA of a scheme include the equivalent of s 447A
- the scheme administrator or the scheme deed administrator have standing to apply to the court for the appointment of a TRE

Winding up a scheme

CAMAC recommends:

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- scheme members be able to approve the winding up of a scheme by 75% of the votes cast, provided the votes in favour of the winding up constitute at least 25% of the total votes of scheme members
 - the court be empowered to give directions whenever it thinks it ‘appropriate’ to do so
 - there be provision for a solvent winding up of a scheme become an insolvent winding up only a registered liquidator be permitted to conduct the winding up of an insolvent scheme
 - the court be given a power to wind up a scheme on the basis that it is insolvent, and, in consequence, the unsatisfied execution ground for winding up a scheme be repealed
 - where an insolvent scheme and its insolvent RE are being wound up without first going through a VA procedure, the liquidator of the RE administer a combined winding up, unless or until the liquidator determines otherwise, with rights of affected parties to apply to the court for a determination on this matter
 - the Corporations Act provide general procedures for the winding up of an insolvent scheme, comparable to those for the winding up of an insolvent company
 - there be a statutory order of priorities in the winding up of a scheme, providing a first priority for payments to a TRE and thereafter an order of priorities based on that provided for companies in s 556 (which subsequent order of priorities would commence with an equal ranking for payments to a scheme administrator, a scheme deed administrator or a scheme liquidator)
 - a former RE or a new RE with claims against scheme property under its indemnity rights be treated as an unsecured, non-priority, creditor of the scheme
 - there be voidable transaction provisions applicable in the winding up of an insolvent scheme.

Other matters

CAMAC recommends:

- scheme members be given an extended power to call scheme meetings
- scheme members be given statutory limited liability (which should not be subject to any contrary provision in a scheme constitution)

In response to matters raised in the terms of reference, CAMAC:

- recommends against ASIC having a power to convene a meeting of scheme members
- recommends against an obligation to hold an annual general meeting of scheme members

- recommends against additional controls regarding guarantees given by REs in their personal capacity or as operator of a scheme.