SUMMARY PAPER

THE REGULATORY REGIME GOVERNING THE SYNDICATION OF THOROUGHBRED RACEHORSES

1. HORSE RACING SCHEMES ARE SUBJECT TO REGULATION AS MANAGED INVESTMENT SCHEMES

1.1 The managed investment scheme regulatory regime is embedded within the Corporations Act 2001.

1.2 It is a set of compliance rules for unincorporated arrangements (schemes) involving collective investment established by a person (promoter[1]) raising funds from investors which are then applied and managed by the operator of the scheme on behalf of the members as a group.

1.3 The purpose of the rules is to ensure minimum standards of investor protection in relation to the establishment and operation of such schemes.

1.4 The determining criteria of a managed investment scheme can only be the legislated definition of a managed investment scheme complimented by the principles established by the case law, objectively applied.

1.5 "Managed investment scheme" is defined in section 9 as:

> *"(a) a scheme that has the following features:*
>
> *(i) people contribute money or money's worth as consideration to acquire rights ("interests") to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);*
>
> *(ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the "members") who hold interests in the scheme (whether or not as contributors to the scheme or as people who have acquired interests from holders);*
>
> *(iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or give directions); …".*

1.6 The definition is deliberately wide and all-embracing and designed to catch virtually all arrangements targeting collective investment. It would by itself catch virtually all business models and structures, including **co-ownership**, **partnership**, and **unit trust**-based arrangements.

1.7 The analysis of a scheme to determine if it satisfies or falls outside the scope of the definition requires that consideration be given to:

(a) all its key elements, including:

(i) legal structure;

(ii) the nature of the members interests [contributions and rights to benefits]; and

(iii) modus operandi [the realities of how it is designed to operate in practice];

(b) the scheme as being the entire operation [all the activities carried out in relation to the scheme as comprising the scheme's operations];

[1] The promoter test is in section 601ED(1)(b)

(c) the necessary distinction between:

(i) the activities [and rights] of the individual members and those of the group; and

(ii) day-to-day "control in fact" and each of "the legal right to control" and "merely a right to participate in decision-making" [the existence of such rights in the members does not necessarily lead to the conclusion that the members have day-to-day "control in fact" over the operation of the scheme].

1.8 The fundamental distinction which underlies the whole of the definition of a managed investment scheme is between:

(a) schemes where ALL the members have day-to-day control over the operation of the scheme by making ALL the decisions and implementing what is agreed; and

(b) schemes where the members contributions are either:

(i) pooled for use as the property of the scheme; or

(ii) not pooled but used in a common enterprise that constitutes the scheme;

with the day-to-day [routine, ordinary, everyday] activities of the scheme being managed or carried out by a person who is an operator of the scheme on behalf of the members as a group, (whether or not they have the right to be consulted or give directions).

1.9 The objective assessment in determining day-to-day control is necessarily prospective, viewed from the time when the arrangements are made.

1.10 The day-to-day control test is not about ownership or proprietorship, or the legal right to control of the scheme.

- The purpose of the day-to-day control test is to make the important distinction about the nature of the investment each member of the scheme is making.
- If the substance is that ALL the members exercise day-to-day "control in fact" over the operation of the scheme by making ALL the decisions and implementing what is agreed [actually managing or carrying out the routine, ordinary, everyday activities that comprise the scheme's operations], then the scheme WILL NOT be a managed investment scheme.
- However, if the substance is that the members contributions are either pooled for use as the property of the scheme, or not pooled but used in a common enterprise that constitutes the scheme, to produce financial benefits, or benefits consisting of rights or interests in property, and the members collectively appoint a person to operate the scheme [with the authority to actually manage or carry-out the routine, ordinary, everyday activities that comprise the scheme's operations] on behalf of the group, then the scheme WILL be a managed investment scheme (whether or not they have the right to be consulted or give directions).
- It is a negative test in the sense that for the arrangements to be a managed investment scheme they must be such that the members DO NOT have day-to-day "control in fact" over the operation of the scheme, prospectively viewed from the time when the arrangements are made.

1.11 The day-to-day control test includes consideration as to whether a person who provides management services in relation to the property is either:

(a) a mere "agent" who manages the property of each member individually or "investment professional" who simply provides advice to the members on enhancing the value of their own property without exercising control; or

(b) an "operator" of the scheme who manages as a whole the property of the group.

1.12 The management activities of a person who is the "promoter" or "operator" ARE NOT to be imputed to the members in determining whether the members have day-to-day control over the operation of the scheme.

1.13 If the key elements of a scheme satisfy the definition, then its establishment and operation will likely be subject to regulation, EXCEPT if it qualifies as a "private" scheme. To qualify as a "private" scheme it MUST NOT require registration under section 601ED. In other words, it MUST NOT have more than

20 members and the person who established it MUST NOT be [a promoter] in the business of dealing in interests in such schemes.

Horse racing schemes

1.14 Horse racing schemes generally [by practical necessity and in order to comply with the Australian Rules of Racing (ARR)] are sufficiently uniform in their key elements to justify the conclusion that ALL arrangements between 2 or more people (members) to own or lease a racehorse for the purpose of participating in the undertaking of maintaining, training and racing it [the horse as a whole] for their mutual benefit will, prima facie, satisfy the definition of a managed investment scheme.

1.15 The key elements that satisfy the definition are:

(a) the members contributions [of money or money's worth] are either:

(i) pooled for use as the property of the scheme [typical of **partnership** or **unit trust**-based "investment" arrangements]; or

(ii) not pooled but used in a common enterprise that constitutes the scheme [typical of **co-ownership** contract-based "enterprise" arrangements];

to produce financial benefits, or benefits consisting of rights or interests in property;

(b) the scheme is operated by a manager and a licensed trainer on behalf of the members collectively; and

(c) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or give directions).

1.16 The realities of horse racing schemes [typically **co-ownership** arrangements] as they are designed to operate in practice are:

(a) the members contribute to the common enterprise that constitutes the scheme:

(i) the right to use their individual interests in the horse in the operation of the common enterprise; and

(ii) money [in the same proportions as the interests held] to pay operating expenses, including horse expenses;

to facilitate their interests being managed in common [the horse as a whole] for the benefit of the group;

(b) each member's rights to benefits produced by the scheme include the rights to:

(i) participate as a member of the scheme in racing the horse as a whole for the benefit of the group [a benefit derived as the holder of rights or interests in property]; and

(ii) receive distributions of any income (net prize money) earned, in the same proportion as the interest held [a financial benefit produced by the scheme];

(c) each member's interest in the property of the group [the horse as a whole] which is the subject of the scheme's operations, not the scheme itself so far as that is different, from an operational perspective, is inseparable from the interests of the other members; and

(d) the right of the members to manage their interests individually is:

(i) subordinated to the rights of the members collectively and the authority of the manager and the trainer [with actual possession and control of the horse as a whole] to operate the scheme on behalf of the group; and

(ii) limited to voting on those matters specified in the relevant Owners Agreement or Training Agreement as requiring the members' approval (by the requisite majority).

1.17 See the Australian Rules of Racing (**ARR**), particularly AR.63 - Manager and AR.61 – Trainer; Schedule 2 – Trainer and Owner Reform Rules (**TOR Rules**) and the provisions of the TOR Co-owners Agreement (**TOR COA**) [particularly clauses 3.4, 3.5 and 3.9] and the TOR Standard Training Agreement (**TOR**

STA) [particularly clause 2.9]; and Schedule 3 – Syndicate Rules (**SR**). These documents are available at www.racingaustralia.horse .

1.18 The manager and the trainer are both clearly "operators" of the scheme who:

(a) control and direct aspects of the scheme's operations on behalf of the members collectively;

(b) manage as a whole the property of the group [the members' individual interests in common – the horse as a whole]; and

(c) procure the services of other service providers such as veterinarians, farriers, jockeys, agisters and pre-trainers, etc.

Neither of them is a mere "agent" who manages the property of each member individually or "investment professional" who simply provides advice to the members on enhancing the value of their own property without exercising control.

1.19 Accordingly, day-to-day "control in fact" over the operation of the scheme devolves to the manager and the trainer, being the people who, as the operators of the scheme, actually perform "… *the acts which constitute the management of or the carrying out of the activities which constitute the scheme*".

1.20 Conversely, ALL the members DO NOT have day-to-day "control in fact" over the operation of the scheme, prospectively viewed from the time when the arrangements are made. Practical necessity and the ARR require that the members:

(a) agree (by the requisite majority):

(i) to appoint a person (manager) to control and direct aspects of the scheme's operations, including those relating to its legal structure and administration, dealings with racing officialdom, the trainer and other service providers, as required, on behalf of the group [in accordance with the ARR and the terms of the TOR COA or other agreement adopted by the members]; and

(ii) to the manager on behalf of the group appointing a licensed trainer, [including agreeing to the terms of the Trainer's Training Agreement and Fees Notice], to take actual possession and control of the horse as a whole for the purpose of managing or carrying out those activities that collectively comprise the act of training a racehorse [in accordance with the ARR and the terms of the TOR STA or other agreement adopted by the parties]; and

delegate to them the authority to operate the scheme on behalf of the group; and

(b) surrender day-to-day control over their individual interests to the manager and the trainer so that those people can manage the members' interests in common [the horse as a whole] for the benefit of the group, (whether or not they have the right to be consulted or give directions).

1.21 However, a scheme may not possess these characteristics alone. The fact that it may also possess other characteristics such as terms which provide for the members to:

(a) pay their contributions towards operating expenses directly* to the relevant service providers [proportionate direct invoicing and payment of fees and expenses];

(b) be paid their distributions of any income (prize money) directly* via the stakes payment system; [*an alternative to the manager administering these arrangements via a designated scheme bank account] or

(c) participate in decision-making in accordance with the procedure (and requisite majority) set out in the applicable Owners Agreement;

does not take it outside the scope of the definition.

Notes:

1. *It is not significant to this analysis:*
   - *(a) whether the manager and the trainer are the same person or different people;*
   - *(b) whether the members acquired their individual interests from either the manager or the trainer, or another person; or*
   - *(c) whether or not the members are required to pay a fee to the manager for performing the manager's duties.*
2. *In the case of schemes established by promoters dealing in shares/interests it is common for the promoter or nominee to also be the manager [even if the promoter is not a member of the scheme].*

- *In such cases, the first-named registered owner may be the manager in name only, with the promoter or nominee controlling and directing "in fact" those aspects of the scheme's operations that are the manager's responsibility under the relevant Owners Agreement and the ARR. This is often the case with schemes established by licensed trainers acting as promoters.*
- *It is also possible for a person outside of the ownership group who is the manager to be recorded as the first-named registered owner with "nil" equity and the other registered owners as owning "100%" of the horse. This is often the case with schemes established by promoters who are unrelated to the trainer to give them an ongoing commercial profile with the horse during its racing career.*

3. The following observation is quoted from an advice provided to MLP in 2014: "As a practical matter, circumstances where the members appoint a 'manager' who they are not required to pay and the 'manager' must consult the members 'before making significant decisions' may still be consistent with the members not having day-to-day control". In other words, the fact that the manager may not be entitled to remuneration and must consult the members before making significant decisions does not necessarily lead to the conclusion that the scheme is not a managed investment scheme.

1.22 Furthermore, while the Owners Agreement and Training Agreement [both now mandatory under the TOR Rules] set out various powers and duties of the manager and the trainer AND specify that certain decisions cannot be taken by the manager or the trainer without the approval of the members [by the requisite majority] [e.g. change of trainer, gelding, relocation of the horse to race in another jurisdiction, race entry fee above a specified amount, veterinary treatment above a specified amount, etc.], this DOES NOT equate to the members having control over the management of the scheme in the meantime. There are usually few, if any, other restrictions on the authority of either the manager or the trainer to operate the scheme.

1.23 The Owners Agreement or Training Agreement may also include terms that:

(a) empower the manager or the trainer to pursue remedies against a member who is in breach of a payment obligation; or

(b) restrict the members in dealing with their individual interests in the horse or require the sale of the horse as a whole if the members agree (by the requisite majority) that the horse be sold.

1.24 **The case law and the evidence clearly support the conclusion that the characteristics of a managed investment scheme are inherent in horse racing schemes as they are both designed to operate in practice and required to operate by the ARR.** Consequently, there is no apparent basis upon which any person, including a licensed trainer, who is "a promoter" in the business of establishing or operating such schemes, could successfully argue [in any legal forum] that the resultant schemes are outside the scope of the definition. Any such argument would likely be an artificial construction of the arrangements to avoid the legislative intention of the statutory provisions.

1.25 The need for ALL the members to exercise day-to-day control over the operation of the scheme by making ALL the decisions and implementing what is agreed would be impractical and a significant impediment to the operation of such schemes which is only overcome by the members:

(a) appointing a manager and a licensed trainer [with actual possession and control of the horse as a whole]; and

(b) delegating to them the authority to operate aspects of the scheme on behalf of the group.

2. REQUIREMENT FOR SCHEME REGISTRATION

2.1 If the key elements of a scheme satisfy the definition, then its establishment and operation will likely be subject to regulation, EXCEPT if it qualifies as a "private" scheme. To qualify as a "private" scheme it MUST NOT require registration under section 601ED. In other words, it MUST NOT have more than 20 members and the person who established it MUST NOT be [a promoter] in the business of dealing in interests in such schemes.

2.2 Any such scheme established by a person (promoter[2]) who is in the business of dealing in interests in such schemes:

(a) will, prima facie, be subject to regulation under the Act, regardless of the number of members; and

(b) MUST be registered with ASIC as a managed investment scheme, UNLESS it qualifies [and is established] as an unregistered scheme that is:

(i) a personal offer scheme[3];

[2] ibid
[3] section 1012E

(ii) a wholesale scheme[4]; or

(iii) a lead regulator approved (ASIC Instrument[5] compliant) syndicate.

The ASIC Instrument

2.3 The ASIC Instrument is a grant by ASIC to the thoroughbred horse racing industry of conditional relief from specific provisions of the Act considered onerous if applied to small-scale schemes. The relief is in the form of co-regulation, with ASIC exercising its administrative power and appointing the Principal Racing Authorities of the various states and territories as lead regulators and delegating to them the responsibility for administering the terms of the ASIC Instrument within their respective jurisdictions.

2.4 The scope of the relief is limited to the terms of the ASIC Instrument.

2.5 It applies only to small-scale schemes in which "there are no more than 50 participants" and "the total amount sought from the issue of scheme interests to participants does not exceed $500,000", and operates to relieve the promoter and operator of such schemes from the obligation to comply with the provisions of section 601ED relating to scheme registration, which would otherwise require that they be established and operated as ASIC registered managed investment schemes.

2.6 Only promoters and schemes that comply with the terms of the ASIC Instrument are eligible to be administered by the lead regulators. All other promoters and schemes must comply with the Act and remain subject to the direct regulatory power and authority ASIC.

2.7 The relief does not extend to the numerous other provisions of the Act relating to managed investment schemes, including Chapter 7 [Financial services and markets], that are also relevant to the promotion of schemes, and with which promoters must comply.

2.8 Promoters are not relieved from having to comply with those provisions of Chapter 7 relating to licensing, conduct, and transfer of title, etc.

3. REQUIREMENT FOR PROMOTER AND MANAGER TO BE LICENSED

3.1 Under the Act:

(a) if the Scheme falls OUTSIDE of the requirement for registration under section 601ED [because it qualifies as a "private" scheme], then the person who established it WILL NOT require an AFS Licence; and

(b) if the scheme falls WITHIN the requirement for registration under section 601ED [because it has more than 20 members or the person (promoter) who established it is in the business of dealing in interests in such schemes], then the promoter MUST hold an AFS Licence [or be an Authorised Representative of a licensee] before engaging in the activity.

3.2 Under the ARR[6], any person wishing to make an "offer of interests" MUST:

(a) hold an appropriate AFS Licence [or be an Approved Authorised Representative of a licensee];

(b) be on the register of Approved Promoters [or Approved Authorised Representatives] of a lead regulator; and

(c) obtain approval of a PDS for each offer of interests prior to making the offer.

3.3 There is no statutory exemption or ASIC Instrument relief from this statutory requirement for a "promoter" to be licensed, regardless of whether a specific scheme may be relieved by statutory exemption or the terms of the ASIC Instrument from the requirement to be registered.

3.4 The term "promoter" is not defined in the Act or the ASIC Instrument, so must be given an ordinary meaning.

"promoter" is defined:

(a) in ASIC RG91[2016]

[4] section 761G
[5] ASIC Corporations (Horse Schemes) Instrument 2016/790
[6] SR.9

"a person who offers to sell, or invites people to buy, interests in a managed investment scheme".

(b) in AR.2[7] of the ARR

"any person or corporation who for valuable consideration offers or invites any other person or corporation to subscribe for shares or participate in any scheme with objects that include the breeding and/or racing of a horse"; [added 20/11/02 as amended].

3.5 The phrase "in the business of" in section 601ED(1)(b) can reasonably be defined as meaning:

"engaging in a commercial activity with system, repetition and continuity".

3.6 The promoter test requires an objective analysis of the peculiar features of each case, attributing an ordinary meaning to the words "in the business of" and applying the principles established by the case law.

3.7 The manager (and responsible entity) of a horse racing scheme that is:

(a) a registered managed investment scheme;

(b) a personal offer scheme; or

(c) a wholesale scheme;

MUST be licensed.

3.8 Under the ASIC Instrument, the members of a syndicate resulting from a lead regulator approved PDS may, with the approval of the lead regulator, appoint a manager who is not licensed.

4. WHAT INFORMATION MUST BE DISCLOSED TO PROSPECTIVE INVESTORS IN A PDS?

4.1 The Act and the terms of the ASIC Instrument require the promoter of an "offer of interests" in a horse racing scheme to disclose to prospective investors who are "retail clients" all key information about the product on offer that is reasonably required by prospective investors to enable them to make an informed decision whether to invest.

4.2 Under Part 7.9 of the Act, both the nature of the key information about the product that MUST be disclosed to prospective investors who are "retail clients", and the format in which that information MUST be set out in a product disclosure document is prescribed.

4.3 Under the ASIC Instrument, the nature of the key information about the product that MUST be disclosed to prospective investors in a product disclosure document approved by a lead regulator is prescribed.

4.4 The following ASIC Regulatory Guides are essential reading for any person involved in the preparation of a PDS:

(a) RG 97 [Disclosing fees and costs in PDS and periodic statements] issued in March 2017; and

(b) RG 168 [Disclosure: Product Disclosure Statements (and other disclosure obligations)] issued in October 2011.

Additional information that should be included as attachments to a PDS for a typical horse racing scheme

4.5 Given the intricate nature of the contractual arrangements to which an investor will become a party by acquiring an interest in a typical horse racing scheme promoted by a person who is in the business of dealing in interests/shares, the PDS should include as attachments copies of:

(a) the Owners Deed or agreement governing the legal relationship between the co-owners, and between the co-owners and the manager;

(b) the trainer's Training Agreement and Fees Notice;

[7] added 20/11/2002 following the issuing of the Class Order by ASIC on 15/02/2002, as amended

(c) the veterinary certificate upon which the promoter relies as evidencing the horse to be in good health and condition and suitable for syndication; and

(d) the Insurance Certificate, together with a statement to the effect that the full policy wording is available upon request.

The requirement for disclosure in relation to an "offer of shares" in a lead regulator approved (ASIC Instrument compliant) scheme

4.6 The lead regulators have published various *Product Disclosure Guidelines* to assist promoters when compiling a PDS for an "offer of shares" under the ASIC Instrument. Promoters should not interpret such guidelines as prescribing a lesser standard of disclosure for such offers than the statutory provisions prescribe for registered schemes.

4.7 Racing NSW has published the following documents, which appear on its website (at October 2018):

(a) Guidelines for Promoters in NSW [January 2017];

(b) Pro forma Product Disclosure Statement;

(c) Information for Prospective Owners – Promoters may include Management Fees in PDSs; and

(d) Racing NSW – Guide to Ownership Costs.

4.8 All promoters, regardless of the state or territory in which they operate, should read these documents, together with any similar documents published by their own lead regulator, before proceeding to compile a PDS for the sale of interests.

General requirements for a PDS

4.9 The disclosure of key information, in the form of a disclosure statement, must be:

(a) delivered, or made available, for free, to an investor before the point of sale, to afford the investor the opportunity to consider the information and make an informed decision about whether to invest;

(b) delivered or made available in a manner that is appropriate for the target investor;

(c) in plain language and in a simple, accessible and comparable format to facilitate a meaningful comparison of information disclosed for competing products; and

(d) clear, accurate and not misleading to the target investor.

Restrictions on advertising and promotion

4.10 The general requirement under the Act is that a person must not advertise or publicly promote an "offer of interests" in a managed investment scheme where participation is available to "retail clients" UNLESS:

(a) an appropriate PDS is available [section 736]; and

(b) a Form SF88 [PDS in-use notice] has been lodged with ASIC.

4.11 If an "offer of interests" in a horse racing scheme is to be the subject of a PDS approved by a lead regulator under the terms of the ASIC Instrument, then the PDS must be approved prior to the commencement of any advertising or public promotion. Similarly, any advertising or public promotion must also be lodged with and approved by a lead regulator prior to publication.

4.12 The promoter of an "offer of interests" that requires a PDS must comply with the provisions of section 1018A [Advertising or other promotional material for product must refer to PDS] when undertaking any advertising or public promotion. Such advertising or public promotion must specify:

(a) the issuer (or issuer and seller) of the shares and refer to the PDS;

(b) that a PDS is available; and

(c) that a prospective investor should consider the PDS when deciding whether to acquire the interest(s).

4.13 Failure to comply with the provisions of section 1018A(1) is an offence (section 1311 [General penalty provisions]).

4.14 There are no regulations applying to the advertising or public promotion of an "offer of interests" in a horse racing scheme that is a "wholesale scheme", although any advertisement, or public promotion, should clearly specify both the nature of the scheme, and that participation is available only to "wholesale clients".

5. WHAT ARE THE SANCTIONS FOR NON-COMPLIANCE?

5.1 The Act and the ARR prescribe sanctions and penalties which may be imposed on persons who do not comply with the requirements of the regulatory regime.

5.2 ASIC has the power to pursue enforcement action and a range of remedies against persons who breach the provisions of the Act.

5.3 Each Principal Racing Authority, with its jurisdiction:

(a) is responsible for administering the ARR; and

(b) has the capacity to investigate and prosecute any person it suspects of breaching the ARR;

AND as a lead regulator under the ASIC Instrument:

(c) is responsible for administering the terms of the relief set out in the ASIC Instrument; and

(d) has the capacity to refer to ASIC for investigation and prosecution, any person it suspects of breaching the Act. In fact, it is probably fair to say that ASIC has an expectation that each Principal Racing Authority will undertake appropriate surveillance activities and refer suspected breaches of the Act for investigation and prosecution.

ASIC

5.4 ASIC has the power to investigate complaints, or suspected breaches of the Act, and to pursue a variety of enforcement remedies, depending upon the seriousness and consequences of the misconduct. Enforcement action may include prosecution and the imposition of punitive penalties, or orders requiring the payment of compensation.

5.5 If a person operates an unregistered managed investment scheme that is otherwise required to be registered, then there are adverse consequences that may apply, including:

(a) a maximum penalty for individuals of 200 penalty unit points ($22,000) or five years imprisonment, or both, and a maximum penalty for corporations of 1,000 penalty units ($110,000);

(b) upon application to the court by either ASIC, the person operating the scheme, or a member of the scheme, the court may order that the unregistered scheme be wound up[8];

(c) where a court finds that an investor has suffered, or is likely to suffer loss or damage because of the contravention, the court may make orders to compensate that investor for such loss or damage[9]; and

(d) a contract by an investor to subscribe for interests is voidable at the option of the investor[10].

Lead regulators (principal racing authorities)

5.6 The lead regulators also have the power to investigate complaints and suspected breaches of the Act and the ASIC Instrument, and to pursue a variety of enforcement remedies under the ARR.

Compliance Check List

[8] section 601EE
[9] section 1325
[10] section 601MB

5.7 ASIC has overall responsibility for administering the regulatory regime, including the activities of the principal racing authorities as lead regulators for the purpose of administering the terms of the ASIC Instrument relief within their respective jurisdictions.

Set out in the following table is a compliance check list for both a registered managed investment scheme and a scheme that is the subject of a PDS approved by a lead regulator.

ASIC registered managed investment scheme	**Scheme/Syndicate the subject of a lead regulator approved PDS**
Constitution	Agreement
Compliance Plan	
requirement to obtain compulsory managed investments PI insurance	
application to ASIC to register scheme	
PDS	PDS
	application to lead regulator to approve PDS
PDS in-use notice – ASIC Form FS88	PDS in-use notice – ASIC Form FS88
offer and sale of interests • provision of PDS to prospective investors prior to the point of sale • payment of application price by investors applying for interests • receipt of application money by promoter into designated trust account [which money must be refunded, together with any interest earned, if the offer is not fully subscribed and interests allotted] • Cooling-off • transfer of the legal and beneficial title in the horse to investors, unencumbered	offer and sale of interests • provision of PDS to prospective investors prior to the point of sale • payment of application price by investors applying for interests • receipt of application money by promoter into designated trust account [which money must be refunded, together with any interest earned, if the offer is not fully subscribed and interests allotted] • Cooling-off • transfer of the legal and beneficial title in the horse to investors, unencumbered
issuing and allotment of interests	issuing and allotment of interests
registration of scheme with the registrar of racehorses	registration of scheme with the registrar of racehorses
registration of the horse in the name of the scheme (or the members, if no more than 20)	registration of the horse in the name of the scheme (or the individual members, if no more than 20)
establishment of designated scheme bank account	establishment of designated scheme bank account (which obviously can be dispensed with if arrangements are put in place for proportionate direct billing of members for horse costs and proportionate direct payment to members of net Prize money)
accounting and annual financial reports	accounting and annual financial reports
annual syndicate and compliance plan audits – external auditors	
copies of audited annual financial report and compliance audit certificate to be lodged with ASIC and provided to members	copies of annual financial report to be lodged with lead regulator and provided to members
compliance	compliance
surveillance	surveillance
breaches	breaches
penalties	penalties

6. WHAT TYPES OF HORSE RACING SCHEMES ARE PERMITTED UNDER THE ACT AND THE ARR?

6.1 Under the Act any horse racing scheme established by a person (promoter) who is in the business of dealing in interests in such schemes MUST be registered as a managed investment scheme, UNLESS it is [an unregistered scheme that is]:

(a) a personal offer scheme – interests may only be made available by "personal offer" to prospective investors who are either "retail clients", or "wholesale clients". A scheme of this type is not required to be registered, PROVIDED THAT it complies with the 20/12 Rule. There are no prescribed disclosure requirements;

(b) a wholesale scheme – interests may only be made available to prospective investors who are "wholesale clients". A scheme of this type is not required to be registered. There are no statutory requirements (restrictions) relating to either the number of participants, or the total amount

sought, from the "issuing" of scheme interests for this type of scheme. There are no prescribed disclosure requirements; or

(c) a lead regulator approved (ASIC Instrument compliant) scheme – interests may be made available to prospective investors who are either "retail clients", or "wholesale clients". A scheme of this type is relieved from the requirement to be registered, PROVIDED THAT it complies with the terms of the ASIC Instrument. It MUST NOT have more than 50 members and the total amount sought from the issue of scheme interests MUST NOT exceed $500,000. Disclosure of key information in a PDS approved by a lead regulator is required.

6.2 Investors who are "retail clients" are not permitted to participate in a wholesale scheme.

The nature of the legal relationship between joint owners or lessees

6.3 Section 115 states:

*"**Restrictions on size of partnerships and associations***

(1) A person must not participate in the formation of a partnership or association that:

(a) has as an object gain for itself or for any of its members; and

(b) has more than 20 members;

unless the partnership or association is incorporated or formed under an Australian law. …… Note: An offence based on subsection (1) is an offence of strict liability. For strict liability, see Section 6.1 of the Criminal Code".

6.4 All ownership arrangements must also comply with the ARR.

6.5 The number of people who may register directly as the owners or lessees of a racehorse is limited to 20, except for lead regulator approved (ASIC Instrument) compliant syndicates which are limited to 50 owners or lessees [only 20 of whom can be named in the racebook][11].

6.6 The number of people who may register a syndicate (with the Registrar of Racehorses) and own the horse in the name of the syndicate is limited to no more than 20[12].

6.7 The legal relationship between the members of a horse racing syndicate will typically be:

(a) co-ownership;

(b) partnership; or

(c) unit trust.

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This paper and the full paper which it summarizes (with links to all cases and other documents cited in it) are available at www.racehorseownership.com

[11] see AR.69
[12] see AR.69A