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 The term "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] who is "*in the business of dealing in interests in such schemes*".

Horse racing schemes

1.14 Horse racing schemes generally [by practical necessity and to comply with the ARR] are sufficiently uniform in their key elements to justify the conclusion that any programme or plan of action formulated by a person for the purpose of 2 or more people acquiring a thoroughbred horse and using it for racing, [including the ancillary arrangements necessary for achieving that purpose] 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 "common 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 that are **co-ownership** contract-based "common enterprise" 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 (on an ongoing basis) towards operating expenses, including horse expenses, including horse-related and racing expenses, for which co-owners are generally severally liable [in the same proportions as the interests held];

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

(b) the members rights (interest) to benefits produced by the scheme include the rights to:

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

(ii) receive distributions of any income (net prize money) earned, in the same proportions as the interests 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 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.

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 operators of the scheme, actually perform "… ***the acts which constitute the management of or the carrying out of the activities which constitute the scheme***".

[See ***ASIC v Pegasus***[2] *[55]* and *[56]*. Also see ***Burton v Arcus***[3] *[2], [4], [79], [82] and [83],* which cites with approval ***ASIC v Pegasus*** and provides additional authoritative guidance in relation to the application of the principle of "day-to-day control within the context of the third limb of the definition, and ***Racing NSW v Vasili***[4]*.*

1.19 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:

(i) to appoint a person (manager) to control 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*).

1.20 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];

[2] [2002] NSWSC 310.
[3] (Appeal Judgement) [2006] WASCA 0071. Also see (Original Decision) [2004] WASC 244.
[4] Racing Appeals Tribunal NSW 12 June 2019.

(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. *Generally, when an offer of interests is made in a thoroughbred horse being syndicated for racing the following arrangements are predetermined by the offeror/promoter and understood by the investors:*
   - *(a) the nature of the legal relationship between the parties, as this defines the nature of the investors' interests being acquired in the horse and the scheme, and to a significant extent the modus operandi of the scheme; and*
   - *(b) the first appointees as manager and trainer.*
2. *In the case of a scheme formulated as a co-ownership contract-based "common enterprise" arrangement:*
   - *(a) the establishment of the scheme is, in practice, inextricably linked to and happens, as of right, simultaneously with the transfer of the interests in the horse from the offeror/promoter to the investors;*
   - *(b) the members:*
     - *(i) liability to perform obligations, including to contribute both the right to use their individual interests in the horse in the operation of the common enterprise that constitutes the scheme, and money (on an ongoing basis) to pay operating expenses, [in the same proportions as the interests held]; and*
     - *(ii) rights to benefits (interests) produced by the scheme, including to participate as members of the scheme in racing the horse "as a whole" for the benefit of the group, and receive a proportion of any income (net prize money) [in the same proportions as the interests held];*

     apply from the time when the interests in the horse are transferred; 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), prospectively viewed from the time when the arrangements are made.*
3. *Accordingly, the acquisition of interests by co-owners in a thoroughbred horse being syndicated for racing is an offer and acquisition of interests in a managed investment scheme in the same way as the acquisition of units by limited partners was found to be an offer and acquisition of interests in a managed investment scheme in* ***ASIC v McNamara***[5] *[16]* and *[17] and [22].*
4. *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.*
5. *The promoter or nominee will generally also be the manager [even if the promoter does not retain an interest in the horse].*
   - *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.*

1.21 Furthermore, while the **Owners Agreement** and **Training Agreement** [both now mandatory under the **TOR Rules**] generally 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 <u>does not</u> equate to the members having control over the management of the scheme in the meantime. Generally, there are few, if any, other restrictions on the authority of either the manager or the trainer to operate the scheme.

1.22 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 empower the manager to sell or otherwise dispose of the horse "as a whole" if the members agree (by the requisite majority) that the horse be sold or transferred.

1.23 **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 (promoter), including a licensed trainer, who is "in the business of promoting managed investment schemes", could successfully argue [in any legal forum] that the resultant schemes are outside the scope of the definition of a managed investment scheme and not subject to regulation. Any such argument would likely be a misrepresentation of the arrangements to avoid the legislative intention of the statutory provisions.

[5] [2002] FCA 1005.

1.24 The need for all the members to exercise day-to-day control over the operation of the scheme by making all the decisions with unanimity 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 a scheme satisfies the definition of a managed investment scheme and does not qualify as a "private" scheme, then generally registration will be required under section 601ED unless the scheme is eligible for a specific statutory exemption or ASIC Instrument relief from the requirement to be registered.

2.2 A horse racing scheme established as a one-off "private" scheme generally will not require registration. 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 promoted it must not be in "*…in the business of promoting managed investment schemes*".

2.3 A horse racing scheme that "...*was promoted by a person, or an associate of a person, who was, when the scheme was promoted, in the business of promoting managed investment schemes*"[6], generally:

(a) will fall within the requirement for registration under section 601ED, regardless of the number of members; and

(b) must be registered as a managed investment scheme, unless it is eligible for a specific statutory exemption[7] or ASIC Instrument[8] relief from the requirement to be registered because it qualifies as:

(i) a personal offer scheme[9];

(ii) a wholesale scheme[10]; or

(iii) a lead regulator approved (ASIC Instrument[11] compliant) syndicate.

2.4 An "offer of interests" in:

(a) a registered scheme must be the subject of a PDS that complies with the requirements of the Corporations Act; and

(b) an ASIC Instrument compliant syndicate must be the subject of a PDS that:

(i) complies with the requirements of the ASIC Instrument; and

(ii) is approved by a lead regulator.

2.5 Section 601ED(5) states:

> "*A person must not operate in this jurisdiction a managed investment scheme that this section requires to be registered under Section 601ED unless the scheme is so registered*"[12].

Promoter of interests in a horse racing scheme

2.6 The words "*… in the business of …*" in section 601ED(1)(b) import the notion of commercial activity with "*… system, repetition and continuity*". [See ***ASIC v Young & Ors***[13]*, at [53]*].

[6] the promoter test is in section 601ED(1)(b).
[7] sections 601ED(2), 1012E, and 761G.
[8] ASIC Corporations (Horse Schemes) Instrument 2016/790.
[9] section 1012E. A scheme in which offers of interests are only made by "personal offer" and do not require a disclosure document.
[10] section 761G. A scheme in which offers of interests are made only to "wholesale clients" and do not require a disclosure document.
[11] ibid 8.
[12] Section 601ED(5) is subject to section 601ED(6).
[13] [2003] QSC 029.

2.7 The word "promoting" in the context of marketing imports the notion of activities or communications carried out on behalf of a business with the objective of attracting consumers to its products or services and generating sales. Promotional activities may include direct marketing, personal selling, digital promotions (all forms of promotion found on the internet), public relations, sponsorships, and general advertising.

2.8 Whatever activities comprise "promoting" in the context of marketing, in the specific context of section 601ED(1)(b) it is only logical that they include the following activities in relation to formulating managed investment schemes:

(a) offering to sell or inviting people to buy; and

(b) dealing in;

interests in such schemes.

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

2.10 The term "promoter" is defined:

(a) in ASIC RG91[2016] as meaning:

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

(b) in AR.2[14] of the ARR as meaning:

> *"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].*

The ASIC Instrument

2.11 ASIC'S approach to regulating small-scale schemes is set out in RG 91[15]:

> *[RG 91.26] "A horse racing syndicate is an arrangement under which a group of people agree to contribute money in return for a share of prize money won by a racehorse. The syndicate members may contribute money to obtain a percentage ownership stake in the racehorse, or the owner of the racehorse may lease the racehorse to the operator of the syndicate. Sometimes, other benefits are available to members of a syndicate, such as an entitlement to attend social events."*
>
> *[RG 91.27] "Generally, a horse racing syndicate will be a managed investment scheme under s9 of the Corporations Act. ASIC Corporations (Horse Schemes) Instrument 2016/790 provides conditional relief to the promoter and manager of a small-scale horse racing syndicate from the requirement to register the syndicate under the managed investment provisions in Ch 5C of the Corporations Act."*

2.12 The ASIC Instrument is a grant by ASIC to the thoroughbred horse racing industry of conditional relief from specific provisions of the Corporations 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.

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

2.14 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

[14] added 20/11/2002 following the issuing of the Class Order by ASIC on 15/02/2002, as amended.
[15] Regulatory Guide 91 [2016] – Horse breeding schemes and horse racing schemes.

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.

2.15 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 Corporations Act and remain subject to the direct regulatory power and authority ASIC.

2.16 The relief does not extend to the numerous other provisions of the Corporations 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.

2.17 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 Corporations Act, generally:

(a) a horse racing scheme, other than a scheme which qualifies as a "private' scheme under section 601ED, will be subject to regulation as a managed investment scheme;

(b) an "interest" in a managed investment scheme is a "financial product";

(c) a person who operates a financial services business dealing in a financial product or providing a financial service must hold an AFS Licence covering the provision of the financial services[16] [or be an authorized representative of a licensee[17]];

(d) the promoter, manager (and responsible entity) of a horse racing scheme which is:

(i) a registered managed investment scheme;

(ii) a personal offer scheme; or

(iii) a wholesale scheme;

must hold an AFS Licence [or be an authorized representative of a licensee].

3.2 Under the ASIC Instrument, the promoter of a horse racing syndicate which is the subject of a lead regulator approved PDS must hold an AFS Licence, but the members may, with the approval of the lead regulator, appoint a manager who is not licensed.

3.3 There is no statutory exemption or ASIC Instrument relief from the requirement for a "promoter" of such schemes to be licensed, regardless of whether or not a scheme is eligible for a specific statutory exemption or ASIC Instrument relief from the requirement to be registered.

3.4 Under the ARR[18], any person who wants to promote or make an offer of shares in a thoroughbred horse for the purpose of using it for racing must:

(a) hold an appropriate AFS Licence [or be an authorised representative of a licensee];

(b) be on the register of approved promoters [or authorised representatives] of a lead regulator; and

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

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.

[16] Section 911A(1).
[17] Section 911A(2).
[18] SR.9.

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;

(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 (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; 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[19];

(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[20]; and

(d) a contract by an investor to subscribe for interests is voidable at the option of the investor[21].

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

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

[19] section 601EE.
[20] section 1325.
[21] section 601MB.

	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 who is "*…in the business of promoting managed investment schemes*":

(a) will, prima facie, be subject to regulation, 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 unregistered scheme that is:

(i) 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 it complies with the 20/12 Rule. There are no disclosure requirements prescribed by the Act;

(ii) 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 disclosure requirements prescribed by the Act; or

(iii) 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 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][22].

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[23].

6.7 The legal relationship between the members of a horse racing syndicate will typically be co-ownership, partnership, or 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

[22] see AR.69
[23] see AR.69A