Section 11.2 delete the first paragraph and insert the following paragraphs in lieu thereof:

The constitution of a scheme is required to make adequate provision for the winding up of the scheme. Therefore in every constitution for a registered scheme there must be provisions dealing with its winding up. These provisions must at the very least deal with the following matters:

- the identification of and the dealing with the assets, liabilities and scheme property in order to realise them (which may in the case of some contract-based schemes require specific treatment where it may be difficult to easily distinguish scheme property belonging to the scheme being wound up and other assets of the scheme that are to be covered in winding up from assets that are outside any winding up, such as certain non-scheme property);
- how the net proceeds of realisation of the scheme will be apportioned and distributed between members, for example, what criteria will be used to apportion the net proceeds of realisation between members and the priority between them;
- identify the party that will bear the costs of the winding up and in what priority this party will be paid;
- if members are required to continue making payments while the scheme is being wound up, then a specific provision should be included that members are or may be required to continue making payments during this period;
- save for unitised schemes, there should be provisions dealing with what happens if the scheme or the responsible entity is insolvent; and
- provision that provides for an independent audit of the final accounts to be conducted by a registered company auditor or audit firm after a scheme is wound up.

In section 11.3, delete the last paragraph that commences on page 156 and ends on page 157 and replace it with the following paragraph:

The rights conferred on a member pursuant to s 601NB of the Corps Act are statutory rights. While there are circumstances where a person may waive or renounce a statutory right, this is not possible where the provisions of a statute indicate a statutory purpose or policy whereby statutory rights are conferred in the public interest rather than for the benefit of an individual alone. Where this is the case contractual arrangements will not be enforced where they operate to defeat or circumvent such a statutory purpose or policy.

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1. Corps Act, s 601GA(1)(d).
4. Ibid.
Chapter 5C, when read as a whole, evidences a legislative intention that it is in the public interest that scheme members be provided the rights set out in s 601NB.\(^5\) Section 601NB offers a means of terminating a scheme as part of the regulatory framework of Chapter 5C and reflects a legislative policy that such means of terminating the scheme be available.\(^6\) Therefore it is not possible for members to bargain away those rights. An agreement between the members of a scheme and the responsible entity which purports to deprive members of the rights given by Chapter 5C would be prejudicial to their interests and contrary to the protective purposes the subject of regulatory scheme of that Chapter.\(^7\)

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In section 11.8.2 insert the following paragraph between the second last paragraph and last paragraph

However, the principles in Suco Gold are qualified. While the decision is correct, insofar as it is consistent with the conclusion that the trustee’s right of indemnity is trust property available only to meet trust liabilities, the decision does not extend to the issue as to whether the priority regimes of the Corps Act apply to trust property.\(^8\) Nevertheless, despite this qualification of the decision in Suco Gold, it is clear that:

- the trustee’s right of indemnity is not personal property of the trustee;
- the trustee’s right of indemnity is held on trust for the trust creditors; and
- the relevant priority regime under the Corps Act only applies to property of the company and therefore distributions of trust property are not subject to that priority regime.\(^9\)

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Insert the following new section 11.8.4

11.8.4 Disclaimer of leases

Agribusiness schemes are structured on the basis that each member owns a primary production business separate from the other members that is carried on by the member on that member’s own separate parcel of land leased or licensed to the member.\(^10\) If this were not the case, there would be no tax deduction available to the member.\(^11\)

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\(^5\) Ibid at [51].

\(^6\) Ibid.

\(^7\) Ibid at [52].

\(^8\) Re Amerind Pty Ltd (recs & mgrs apptd) (in liq) [2017] VSC 127 at [332] per Robson J, cited with approval in Kite v Mooney, in the matter of Mooney’s Contractors Pty Ltd (in liq)/(No 2) [2017] at [140] per Markovic J.

\(^9\) Re Independent Contractor Services (Aust) Pty Ltd (in liq) (No 2) [2016] NSWSC 106 per Brereton J, followed in Re Amerind Pty Ltd (recs & mgrs apptd) (in liq) [2017] VSC 127 at [94], [243], [333] & [339] and Woodgate, in the matter of Bell Hire Services Pty Ltd (in liq) [2016] FCA 1583 at [36]-[37] per Farrell J.


\(^11\) Ibid.
ASIC has for some years required there to be arrangements in place to protect investors in relation to the use of the underlying land for primary production such as a registered lease over that land.\(^{(12)}\)

As it turns out, these provisions may give members of such schemes false comfort. The High Court held by a majority of 4:1 in relation to leases that had been put in place to protect the investors:

- the liquidators had the power to disclaim the leases to the investors;
- the liabilities of the responsible entity (including its obligations to provide quiet enjoyment and not derogate from the grant of exclusive possession) would be terminated from the day on which the disclaimer took effect, as would the correlative rights of the tenant; and
- each tenant’s estate or interest in the land would be terminated.\(^{(13)}\)

Therefore the holding of what the investors would have regarded as an estate or interest in the land on which their trees were planted was of cold comfort.

In any event, it may be that such a lease is not scheme property despite the above regulatory requirements. There is some case law that suggests that the fact that this asset is required to be held by the responsible entity under the conditions of its licence, does not make that asset, scheme property,\(^{(14)}\) although it should be noted that there is also case law that suggests that such an asset would be scheme property.\(^{(15)}\) If the asset is not scheme property, then the same is not held on trust for the members of the scheme because only scheme property is held upon such a trust.\(^{(16)}\)

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Delete the current section 11.9 and insert the following replacement section 11.9

11.9 CAMAC review of winding up provisions

In 2012, CAMAC issued a report which dealt with this issue (“CAMAC Report”).\(^{(17)}\) This report, amongst other things, recommended a completely new approach to the operation of registered managed investment schemes known as the “Separate Legal Entity (SLE) Proposal” (“SLE Proposal”).\(^{(18)}\)

The SLE Proposal was said by CAMAC to, amongst other things, simplify the external administration process, including for any voluntary administration (“VA”) (the concept of which CAMAC recommended as part of its suggested reforms) or separate winding up procedures for schemes.\(^{(19)}\) CAMAC was of the view that the full separation of the affairs of a scheme

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\(^{(12)}\) Prior to 2 February 2014, ASIC Pro Forma 209 conditions and from that date ASIC Class Order 13/1406 which inserts s 912AAB into the Corps Act.

\(^{(13)}\) Willmott Growers Group Inc v Willmott Forests Ltd (recs & mgrs apptd) (in liq) [2013] HCA 51.

\(^{(14)}\) Willmott Forests (No 2) [2012] VSC 125 at [78], followed in Willmott Forests Ltd (recs & mgrs apptd) (in liq) v Primary Securities Ltd [2013] VSC 574 at [108].

\(^{(15)}\) Huntley Management Ltd v Timbircorp Securities Ltd [2010] FCA 576 at [61], followed in Re Gunns Finance Limited (in liq) (recs & mgrs apptd) (No 2) [2013] VSC 365 at [149].

\(^{(16)}\) Corps Act, s 601FC(2).

\(^{(17)}\) CAMAC Report, Managed Investment Schemes, July 2012.

\(^{(18)}\) Ibid at para 1.6.2 and ch 3.

\(^{(19)}\) Ibid at p 13.
from those of its responsible entity would avoid the types of external administration overlap problems between a scheme and its responsible entity that can arise under the current legal framework.\(^{(20)}\)

The CAMAC Report also dealt with some of the issues involved surrounding the winding up of schemes.

### 11.9.1 Winding up of schemes

CAMAC considered a number of issues concerning the winding up of both solvent and insolvent schemes.

CAMAC noted that there is no current concept in the *Corps Act* of a scheme being solvent or insolvent.\(^{(21)}\) In order to deal with this problem, CAMAC considered that there should be such a concept in relation to registered schemes and therefore recommended that a definition be inserted into the *Corps Act* providing that a scheme is 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.\(^{(22)}\) This would then assist in relation to some other recommendations regarding a new voluntary administration system for insolvent schemes and a new ground for winding up a scheme on the grounds of insolvency.

CAMAC also considered wider powers of direction should be given to the Court. CAMAC recommended that s 601NF(2) of the *Corps Act* should be amended to enable the court to give directions whenever it thinks it appropriate to do so, including in relation to any particular matter arising under the winding up of a solvent or insolvent scheme and that any person conducting the winding up of a scheme, whether solvent or insolvent should have standing to seek court directions under s 601NF(3) of the *Corps Act*.\(^{(23)}\)

CAMAC noted that there were no legislative provisions to deal with schemes transitioning from solvent to insolvent schemes. Therefore CAMAC made some recommendations for change in relation to this issue.\(^{(24)}\)

CAMAC also recommended that a new ground for winding up a scheme on the grounds of insolvency of the scheme rather than using the current “just and equitable” ground as a de facto insolvency ground.\(^{(25)}\)

One of the consequences of CAMAC’s SLE Proposal is that the responsible entity and its directors may be personally liable for any insolvent trading by a scheme operated by the responsible entity.\(^{(26)}\) Therefore this ground would be particularly important if the SLE Proposal was adopted. In this context, CAMAC also considered whether there should be cases where there should be a combined winding up of the responsible entity and one or more of the schemes it operated where all of these were insolvent. In this regard, CAMAC made a number of recommendations.\(^{(27)}\)

CAMAC also made other recommendations regarding other aspects of the winding up of schemes on the insolvency ground largely to the effect of legislating for procedures that align

\(^{20}\) Ibid.
\(^{21}\) Ibid at para 7.2.1.
\(^{22}\) Ibid at para 6.3.2.
\(^{23}\) Ibid at para 7.2.6.
\(^{24}\) Ibid at 7.2.7.
\(^{25}\) Ibid at para 7.4.1.
\(^{26}\) Ibid at para 3.6.
\(^{27}\) Ibid at para 7.4.2.
the winding up on the insolvency ground with the winding up of companies on the insolvency ground,\(^{(28)}\) although it recommended that the order of priorities give first priority to claims by a temporary responsible entity\(^{(29)}\) and where a former responsible entity or a new responsible entity has claims against scheme property under its indemnity rights they be treated as an unsecured, non-priority, creditor of the scheme.\(^{(30)}\)

CAMAC has issued a further discussion paper (“Stage 2 Discussion Paper”).\(^{(31)}\) In this Stage 2 Discussion Paper, CAMAC raises some further issues for consideration in relation to the winding up of schemes.\(^{(32)}\)

11.9.2 Voluntary Administration (“VA”) of schemes

Unlike a company, there is no procedure for a registered scheme to be placed in VA. CAMAC considered that if there was a VA procedure that was specifically designed for schemes this may assist a scheme to recover financial viability, where possible and where there is sufficient support from affected parties.\(^{(33)}\) It therefore recommended that a VA procedure should be introduced.\(^{(34)}\)

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\(^{(28)}\) Ibid at paras 7.5.3-7.5.7.

\(^{(29)}\) Ibid at para 7.5.5.

\(^{(30)}\) Ibid.


\(^{(32)}\) Ibid.

\(^{(33)}\) Above n 17 at para 6.3.1.

\(^{(34)}\) Ibid at paras 6.3-6.4.