In section 12.2.7 delete the last two paragraphs and insert the following replacement paragraphs in lieu thereof:

The following services which may be provided in relation to an unregistered scheme are specifically excluded from being a custodial or depository service:

- the holding of an asset of the unregistered scheme which is a basic deposit product;\(^1\)
- and
- the provider and its associates have no more than 20 clients in aggregate for all custodial or depository services that they provide.\(^2\)

In addition, it should be noted that a custodial or depository service only relates to “financial products” and therefore does not include the holding of assets by the trustee of an unregistered scheme which are not “financial products” such as real property or real property mortgages.

An interesting question arises as to whether the trustee of an unregistered scheme which is in the form of a unit trust is providing a custodial or depository service where the assets of the scheme are a financial product.

A unit trust scheme will generally have a clause contained in the trust deed in the following terms: “unit holders do not own or have any interest in any particular asset in the trust fund”. A trust which has such a provision has the effect that the unit holders do not hold a beneficial interest in any particular asset of the trust but rather only have a right to distribution of the net assets after satisfaction of all liabilities.\(^3\)

Further with such a trust it has been held as follows:

The entitlement of the beneficiaries in respect of the assets held by the trustee which constitutes the “property” to which the beneficiaries are entitled in equity is to be distinguished from the assets themselves. The entitlement of the beneficiaries is confined to so much of those assets as is available after the liabilities in question have been discharged or provision has been made for them. To the extent that the assets held by the trustee are subject to their application to reimburse or exonerate the trustee, they are not “trust assets” or “trust property” in the sense that they are held solely upon trusts imposing fiduciary duties which bind the trustee in favour of the beneficiaries.\(^4\)

Therefore there is a distinction between the trustee holding of the property to which the unit holders are entitled in equity and the trustee holding of the assets of the trust themselves. The custodial or depository service is with respect to the holding of an asset, that is, the financial product or the beneficial interest in the financial product rather than the property to which the unit holders may be beneficially entitled (being what is left after all liabilities have been

\(^1\) Corps Act, s 766E(3)(e) with Corps Regs, reg 7.1.40(1)(a).
\(^2\) Corps Act, s 766E(3)(e) with Corps Regs, reg 7.1.40(1)(c).
\(^4\) Oswal v Federal Commissioner of Taxation [2013] FCA 745 at [48].
satisfied). The unit holders do not have any interest in the assets themselves that can be held on trust for them.

Therefore arguably an asset of the unit trust which is a financial product is not an asset held on trust for the client because it cannot be so held due to the nature of the trust and therefore is not a custodial or depository service.

However, this argument has not been tested so it would be wise for the trustee of an unregistered scheme to hold an authorisation to conduct a custodial or depository service. Certainly, ASIC in the past has been of the view that where assets are held for an unregistered managed investment scheme, an AFSL is required that authorises a custodial or depository service.\(^5\)

Subject to the above comments, in relation to unregistered schemes, this authorisation is only required where the operator of the scheme is operating an unregistered scheme that is not required to be registered by reason of the operation of s 601ED(2) of the \textit{Corps Act.}\(^6\)

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\(^5\) ASIC QFS 7.
\(^7\) Ibid at para 4.43.
\(^8\) ASIC Class order CO 13/760.
• tailored cash needs requirement;\(^{(9)}\)
• net tangible asset (NTA) requirement;\(^{(10)}\)
• audit opinion;\(^{(11)}\) and
• solvency and positive net assets requirement.\(^{(12)}\)

There may be additional requirements depending on the type of financial services and financial products involved in relation to the scheme.\(^{(13)}\)

ASIC will require documentary evidence of compliance with the cash needs and NTA requirements to be provided prior to the issue of the licence or a variation of the existing licence.

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At the end of section 12.4.9 insert the following words:

In one inquiry it was stated as follows:

… given that many of the more egregious instances of consumer loss relate to the failure of managed investment scheme products wider questions about the regulatory and governance frameworks for such schemes, and their risk management obligations, may call for consideration.\(^{(14)}\)

In addition, CAMAC was investigating three options for the modification of the current compliance and risk management framework governing the operation of managed investment scheme prior to its proposed demise.\(^{(15)}\)

The first option proposed was to retain the current framework (ie, compliance plan supplemented by risk management obligations of the responsible entity as a licensee).\(^{(16)}\)

The second option proposed was to introduce a risk management regime specifically for schemes that would operate side by side with the compliance regime and link into the risk management framework for the responsible entities that operate them.\(^{(17)}\)

The third option proposed was to remove the current compliance regime, with compliance to be dealt with as part of a broader risk management framework for schemes that could link in with the risk management framework for the responsible entities that operate them.\(^{(18)}\)

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\(^{(9)}\) *Corps Act*, s 912AA(2)(a), (3) and (8) inserted by ibid and RG 166 at par 166.204-166.205 and Table 8.

\(^{(10)}\) *Corps Act*, s 912AA(2)(b) and (4) inserted by ibid and RG 166 at para 166.209-166.235.

\(^{(11)}\) *Corps Act*, s 912AA(2)(c) and (9) inserted by ibid and RG 166 at paras 166.206-166.208.

\(^{(12)}\) ASIC Regulatory Guide RG 166 at paras 166.32-166.34.

\(^{(13)}\) Ibid at para 166.203(e).

\(^{(14)}\) St John, above n 6.


\(^{(16)}\) Ibid.

\(^{(17)}\) Ibid.

\(^{(18)}\) Ibid.
CAMAC considered that a focus on risk management specifically for schemes as envisaged by the second or third options may be justifiable, given the widespread failure of risk management during the global financial crisis.\(^{19}\)

In March 2013, ASIC issued a consultation paper in relation to risk management systems of responsible entities.\(^{20}\) However, none of the proposals were implemented because ASIC were waiting on the outcome of the 2014 Financial System Inquiry.\(^{21}\) ASIC subsequently issued a further consultation paper following the completion of this inquiry in July 2016.\(^{22}\) However, ASIC said that it did not propose to supplement the guidance in the consultation paper with an ASIC instrument imposing more prescriptive requirements,\(^{23}\) but that it would be issuing some guidance following the consultation paper to assist responsible entities in developing and managing risk management systems appropriate to the nature, scale and complexity of their operations.\(^{24}\)

A regulatory guide was eventually issued by ASIC in March 2017 to provide guidance on how responsible entities may comply with their obligation to maintain adequate risk management systems.\(^{25}\)

The appendix to this regulatory guide provides useful examples of the procedures the responsible entity can adopt in relation to key risks.\(^{26}\)

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19 Ibid.
22 Ibid.
23 Ibid at para 21.
24 Ibid preamble to section B.
26 Ibid at p 32.