Delete the third paragraph commencing “However in a consultation paper …” and insert the following paragraphs:

However, ASIC, in a Regulatory Guide, takes the view that, at least in relation to prospectuses, a prospectus will generally be “clear, concise and effective” if it helps retail investors assess the offer and make informed decisions because it:

- highlights key information (e.g., through an investment overview);
- uses plain language;
- is as short as possible;
- explains complex information, including any technical terms; and
- is logically organised and easy to navigate.\(^{1}\)

Although this Regulatory Guide relates to prospectuses only, nevertheless it is an indication of the view that ASIC may take in relation to a product disclosure statement. ASIC goes on to provide two tables containing details of some widely accepted methods and tools for creating “clear, concise and effective” documents, although it qualifies this information by stating that these tools are not mandatory and will not always be appropriate.\(^{2}\)

Page 215
In section 13.5.3:

delete subclause (c).

Page 215
In section 13.5.4 in subclause (a) insert before the word “information” on the second line the words:

“unless otherwise provided in the regulations,”

Page 216
Amend footnote 55 to read:

55  Corps Act, s 1013C(2) as amended by CO 14/1252 and ASIC Corporations (Amendment and Repeal) Instrument 2015/876 (Cth).

Page 222
Amend footnotes 94 and 95 to read:

94  ASIC Corporations (Consents to Statements) Instrument 2016/72 (Cth).

95  Ibid.

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\(^{1}\) ASIC Regulatory Guide RG 228 at para 228.24.

\(^{2}\) Ibid at paras 228.25-229-29.
Page 222
Add to footnote 97 after “cl 223” the words:
“as amended by CO 14/1252”.

Page 223
Add at the end of footnote 99 the words:
“as amended by CO 14/1252”

Page 223
Add at the end of footnote 100 the words:
“as amended by CO 14/1252”

Page 223 – In section 13.5.5 in subclause (f):
Delete paragraph (1) and in paragraph (2) delete the words and figures “CO 04/1433” and insert the words “Corporations (Disclosure in Dollars) Instrument 2016/767 (Cth)” in lieu thereof.

Page 232
Insert new section 13.5.7A:

13.5.7A Content of PDS for unlisted mortgage schemes from May 2012

Shortly after ASIC introduced RG 45 referred to in section 15.3.7, the global financial crisis occurred. ASIC observed that this event resulted in a substantial increase in requests by investors to withdraw their investments from unlisted mortgage schemes that prevented many investors being able to withdraw their investments. (4)

ASIC considered that this problem highlighted a number of risks associated with the business models of unlisted mortgage schemes that ASIC considered were not adequately addressed by the existing benchmarks or additional disclosure requirements in the original Regulatory Guide. As a result, the Regulatory Guide was amended to address each of the above issues. This Regulatory Guide contains eight new or revised benchmarks and eight new disclosure principles that apply to all unlisted mortgage schemes in which retail investors invest. (5)

Page 242
Insert new section 13.5.8A

13.5.8A Content of PDS for unlisted property schemes from 28 March 2012

ASIC reviewed how the property scheme industry was applying its former version of the current regulatory guide in relation to the content of PDS for unlisted property schemes. (7)

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5 Above n 3 at para 45.3.
6 ASIC Regulatory Guide RG 46, 28 March 2012 version.
7 ASIC Consultation Paper CP 163, Unlisted Property Schemes: Update to RG 46, July 2011.
Following this review, ASIC formed the view that the aim of the former Regulatory Guide which was to ensure that investors received clear and prominent disclosure to help them compare relative risk and return in unlisted property schemes was not being met by the industry.\(^8\) As a result, ASIC said that investors would have found it difficult to identify the document containing the relevant information due to the different methods used in the industry to disclose the information.\(^9\) Therefore, in ASIC’s view, it was clear that making comparisons between like products would have been difficult and time-consuming for investors where the information was not contained in a single document or location, and where the cross-referencing of information was inadequate.\(^10\)

Following this review, ASIC updated its Regulatory Guide. In this updated Regulatory Guide, ASIC has provided six benchmarks for unlisted property trusts that are required to be addressed on an “if not why not” basis similar to the position which occurs with unlisted mortgage schemes.\(^11\) This means that the responsible entity must make a clear statement that the scheme either meets the benchmark or does not meet the benchmark and providing an explanation of how and why the responsible entity deals with the business factor or issues underlying the benchmark in another way.\(^12\) It appears that these six benchmarks were introduced by ASIC to address key issues that ASIC was of the view should be highlighted in disclosure about the schemes and discussed in a manner that allows prospective retail investors to make an informed decision about whether to invest.\(^13\)

There are also eight disclosure principles with which a responsible entity must comply contained in this updated regulatory guide.

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\(^8\) Ibid at para 163.10.

\(^9\) Ibid.

\(^10\) Ibid.

\(^11\) Ibid at paras 46.8-46.10.

\(^12\) Ibid at para 46.28.

\(^13\) Above n 7 at para 163.20.


\(^15\) Senate Economics References Committee Report, *Agribusiness Managed Investment Schemes – Bitter Harvest*, March 2016, at pp xxviii to xxxix.
schemes. The Committee was of the view that agribusiness MIS were complex products and difficult to understand and that disclosure documents had proved inadequate in alerting consumers to the risks of investing in such schemes.\(^\text{16}\) The Committee considered that the “time is ripe” to examine the efficacy of PDS in relation to the conveying of information to retail investors in order to enable them to make informed choices.\(^\text{17}\)

As a result of a consideration of these issues, one of the recommendations was that the Australian Government should consult with industry on ways to improve the presentation of a product's risks in a PDS with the intention of strengthening the requirements governing the contents and presentation of information, particularly on risks associated with the product. As part of this recommendation, the Committee also recommended that the government consider expanding ASIC’s powers to require additional content for PDS for agribusiness MIS and in particular that ASIC carefully examine the risk measures used in Europe and Canada and prepare advice for government on the merits of introducing similar measures in Australia and whether these risk measures could provide a model that could be used for Australian PDS.\(^\text{18}\)

However, prior to this recommendation, ASIC did take some action to deal with some of the issues which were referred to above. Following the issue of the consultation paper referred to above, ASIC eventually issued a regulatory guide in January 2012 with a view to ensuring that retail investors in agribusiness schemes are provided with the information they need to make an informed investment decision.\(^\text{19}\) There are five benchmarks and five disclosure principles set out in this regulatory guide. ASIC considers that the inherent risks for investors in agribusiness schemes mean that the information in the benchmarks and disclosure principles should be:

- addressed prominently in any PDS;
- updated in ongoing disclosure as material changes occur (eg, in a supplementary PDS); and
- supported by any advertising material.\(^\text{20}\)

In addition, ASIC takes the view that a PDS needs to explain in a clear, concise and effective way the following matters:

- the business model of the agribusiness scheme and what the responsible entity will actually do with the money;
- the track record and experience of the senior management; and
- the nature of the investor’s interest in the agribusiness scheme.\(^\text{21}\)

Similar to the benchmarks for unlisted mortgage schemes and unlisted property schemes, the five benchmarks have to be disclosed on an “if not, why not” basis which requires that the responsible entity must state that the scheme either meets the benchmark or that the scheme does not meet the benchmark with an explanation as to why not, and how the issuer deals with the concerns underlying the benchmark in

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16 Ibid at para 9.74.
17 Ibid at para 9.76.
18 Ibid Recommendation 8 at p xxxi.
19 ASIC Regulatory Guide RG 232.
20 Ibid at para 232.4.
21 Ibid at para 232.5.
another way. This has to be contained within the first few pages of any PDS and in ongoing disclosure.

Page 251

Delete the last paragraph and all words to the end of section 13.5.10 and insert the following in lieu thereof

The second option would have in fact been the better option because it would then be clear when the entity is an infrastructure entity whereas with the first option whether the entity is an infrastructure entity or not is dependent upon the interpretation of the word "primary" and therefore could be subject to disputes.

However, ASIC elected to adopt the first option when it issued its Regulatory Guide following the consultation period.

The Regulatory Guide has essentially retained the proposed benchmarks and disclosure principles contained in the consultation paper. Under this Regulatory Guide, ASIC requires that infrastructure entities must disclose against the specified benchmarks on an "if not, why not" basis. This means that where a particular benchmark is not met, the infrastructure entity must explain the reasons for this and how it addresses the issue in another way. This must be done up-front in the PDS and by further appropriate disclosure where material changes occur.

Page 257

Insert the following new section 13.5.11

13.5.11 Content of PDS for Hedge Funds

ASIC became concerned that in relation to hedge funds, in some cases, inadequate disclosure had contributed to investors not understanding the risks when purchasing a hedge fund product. ASIC considers that hedge funds can pose more complex risks for investors than is usually the case for traditional managed investment schemes because of their diverse investment strategies, in many cases involving the use of leverage, derivatives, short selling and complex and offshore structures. Therefore it is important that investors have the knowledge to assess factors such as how their money is to be invested, who makes key decisions for the fund, how the assets will be valued, and how investors can withdraw their money as well as details relating to leveraging, derivatives and short selling. Two consultation papers were issued with a view to addressing these issues.

22 Ibid at para 232.12.
23 Ibid.
25 Ibid at paras 231.18- 231-19.
26 Ibid at para 231.20.
28 Ibid.
29 ASIC Consultation Paper CP 147 and ASIC Consultation Paper CP 174.
Following the consultation period, ASIC introduced a regulatory guide for such funds to address the specific features and risks of hedge funds that ASIC considered needed to be addressed.\(^{30}\)

The regulatory guide contains two benchmarks and nine disclosure principles which are designed to improve disclosure so that investors can make more informed decisions about investing in products of this kind, and to make comparisons between the products and business models of different funds more straightforward.

### Insert the following additional section 13.10

#### 13.10 Possible future reforms

The Financial System Inquiry ("FSI") undertook a wide-ranging inquiry into the Australian financial system. In its final report,\(^{31}\) the FSI concluded that while product disclosure plays an important part in establishing the contract between issuers and consumers, in itself, mandated disclosure is not sufficient to allow consumers to make informed financial decisions.\(^{32}\)

The FSI considered that while ASIC had responded to the emerging risk of significant consumer detriment by providing guidance on the nature of disclosure that should accompany the issue of financial products (such as unlisted mortgage schemes), ASIC did not have power to impose such disclosure requirements. Rather, ASIC sought merely to create an expectation on firms to provide clearer disclosure that outlined the risk and central features of the products. In addition, it noted that ASIC did not have the power in a timely way to an emerging risk of significant consumer detriment such as occurred with agribusiness schemes.\(^{33}\)

The FSI therefore made some recommendations that may impact on product design and disclosure. These are as follows:

- a targeted and principles-based product design and distribution obligation should be introduced which would require product issuers and distributors to consider a range of factors when designing products and distribution strategies, including the type of consumer whose financial needs would be addressed by buying the product;\(^ {34}\)

- a proactive product intervention power be given to ASIC that would enhance the regulatory toolkit available where there is a risk of significant consumer detriment which would only be used as a last resort or pre-emptive measure where there is a risk of significant detriment to a class of consumers so that ASIC could intervene to require or impose amendments to marketing and disclosure materials, warnings to consumers, and labelling or terminology changes, distribution restrictions and product banning,\(^ {35}\) and

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\(^{30}\) ASIC Regulatory Guide RG 240.


\(^{32}\) Ibid at p 193.

\(^{33}\) Ibid at p 207-208.

\(^{34}\) Ibid at p 198.

\(^{35}\) Ibid at p 206.
• remove regulatory impediments to innovative product disclosure and communication with consumers such as the use of online communication tools, new media, self-assessment tools and videos and improve the way risk and fees are communicated to consumers.\(^{36}\)

In relation to the recommendation to improve the way risk and fees are communicated to consumers, the FSI recommended that a self-regulatory, flexible approach to improving communication of risk and fees be introduced this allowing tailoring for different classes of products and avoiding prescriptive regulation, which would involve higher compliance costs. The FSI further recommended that industry should build on existing measures to improve consumer understanding of risk by including risk measures for investment products and consider examples of risk measures used in Europe and Canada.\(^{37}\)

The Senate Economics References Committee supported this approach of the FSI and recommended that:

- ASIC carefully examine the risk measures used in Europe and Canada mentioned by the FSI and prepare advice for government on the merits of introducing similar measures in Australia; and
- the government consider the risk measures used in Europe and Canada mentioned by the FSI to determine whether they provide a model that could be used for Australian PDS.\(^{38}\)

Therefore there may be further reforms in relation to product disclosure which will affect the rules governing disclosure of offers to retail clients of interests in managed investment schemes.

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\(^{36}\) Ibid at p 213.

\(^{37}\) Ibid at p 215.

\(^{38}\) Above n 15 at paras 9.79-9.80.