In fact, it is a regulatory requirement that:

- if the assets of the scheme are not special custody assets or tier $500,000 class assets and if the responsible entity does not hold net tangible assets (NTA) being the greater of $10 million or 10% of average revenue, then all the scheme property and other assets of the scheme not held by members must be held by a custodian appointed by the responsible entity that has an NTA which is the greater of $10 million or 10% of average revenue or by an eligible custodian;

- if the assets of the scheme are special custody assets or tier $500,000 class assets and if the responsible entity does not hold an NTA of $500,000, then all the scheme property or assets of the scheme not held by members that are special custody assets or tier $500,000 class assets must be held by a custodian appointed by the responsible entity (or a sub-custodian appointed by that custodian).\(^1\)

This is despite the fact that under these provisions the custodian does not assume the responsibilities of the trustee under the former prescribed interest system, but rather, the responsible entity is accountable for the acts and omissions of its agent. There is still some uncertainty as to the role of the custodian. At the present time, at best, it appears that the relationship between the custodian and responsible entity is merely a contractual one. This means that it is the terms of the contract between the responsible entity and the custodian that determines the nature of that relationship rather than any statutory provisions.

It has been suggested that when the custodian assumes legal title to assets, which in equity belong to the members of the registered scheme, it holds the same on trust for the members of the scheme as beneficiaries.\(^2\) However, in a later case it was argued that this view was incorrect. To the contrary, it was argued that the position was that the custodian holds the scheme property on trust for the responsible entity and the responsible entity in turn holds its (equitable) interest on trust for the scheme members.\(^3\) The Court did not decide the question because it was not necessary for it to determine that issue.\(^4\) However, this argument accords with the position which was intended by the ALRC in its report where it states: “Where an operator engages a custodian to hold the legal title to scheme assets, the operator should

\(^1\) ASIC Class Orders CO 13/760 and CO 13/761; ASIC Regulatory Guide RG 166 at para 166.209 to 166.235.
\(^2\) Public Trustee of Queensland v Opus Capital Ltd [2013] QSC 131 at [21].
\(^3\) Kern Consulting Group Pty Ltd v Opus Capital Ltd [2014] QCA 111 at [38].
\(^4\) Ibid at [51].
hold on trust for the investors the equitable interest arising under that arrangement. "\(^{(5)}\) The High Court also appears to support this view.\(^{(6)}\)

The Parliamentary Joint Committee on Corporations and Financial Services ("Joint Committee") noted that the use of the word "custodian" has created an expectation gap between what retail investors understand as the role of a custodian and what custodians are legally required to do. The expectation of retail clients was that a custodian would act to protect and secure underlying assets.\(^{(7)}\)

However, ASIC has not taken up this recommendation. The use of the term "custodian" has been maintained under the present regulatory requirements.

The Joint Committee in its report into the collapse of Trio Capital urged that ASIC, as part of its review into custodian businesses, should consider the safeguards that a custodian could put in place to ensure that a custodian is able to identify and report suspicious transfers that do not trigger the anti-money laundering provisions.\(^{(8)}\) ASIC subsequently revised its regulatory guide governing scheme property arrangements in November 2013 to tighten the obligations of a custodian with respect to its relationship with the responsible entity which requires a more proactive role of custodians resulting in a gatekeeper role being contractually imposed on the custodian.\(^{(9)}\)

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Insert the following additional paragraphs between the second and third paragraphs:

The use of the word “best” in the “best interests” duty requires a comparison and a choice between different courses of action available to a responsible entity.\(^{(10)}\) The term “best” also sets a requirement not only as to what must be done by the responsible entity but also in relation as to how it is done.\(^{(11)}\) However, it has been acknowledged that it is difficult to determine the outer boundaries of the best interests duty but it does not mean that the responsible entity must meet the "highest standard".\(^{(12)}\)

The ALRC Report 65 in Chapter 10 examined the role of the scheme operator, the duty to act in the interests of investors, and in particular noted that investors rely heavily on the operator to act in their best interests. It concluded that "the appropriate formulation of the test is that operators must prefer the interests of investors over their own interests where any conflicts arise" and that the law should be amended to "should impose an obligation on the operator of a collective investment scheme to exercise its powers and perform its duties as operator in the best interests of investors rather than in its own, or anyone else’s, interest, if that interest is not identical to the interests of the scheme investors".\(^{(13)}\)

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\(^{(5)}\) Above n 1, vol 1 at [9.14].
\(^{(6)}\) Wellington Capital Ltd v Australian Securities and Investments Commission [2014] HCA 43 at [14].
\(^{(8)}\) Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into the Collapse of Trio Capital, May 2012, at p xxiii.
\(^{(9)}\) ASIC Regulatory Guide RG 133 at para 133.105.
\(^{(10)}\) ASIC v Australian Property Custodian Holdings Ltd (recs & mgrs apptd) (in liq) (controllers apptd) (No 3) [2013] FCA 1342 at [462] per Murphy J.
\(^{(11)}\) Ibid.
\(^{(12)}\) Ibid at [463].
\(^{(13)}\) Above n 1, at para 10.8.
The Federal Court said that this conclusion and recommendation in the ALRC Report 65 informs one as to the content of the best interests duty of a responsible entity,\(^\text{14}\) indicating that the “best interests” duty is directed at requiring compliance by a responsible entity with the duty of undivided loyalty.\(^\text{15}\) The reason for this duty is because members rely heavily on the responsible entity and there is also a potential for a conflict between the responsible entity’s personal interests and those of the members particularly in relation to the fees which the responsible entity may charge.\(^\text{16}\) This statutory duty applies without qualification and mirrors the general law position described above.\(^\text{17}\)

However, notwithstanding the above, it seems that this statutory duty to act in the best interests of the members does not extend the content of that duty beyond the previously understood general law boundaries described above.\(^\text{18}\) It is a foundational duty operating in combination with other duties and encompasses the fundamental duty of undivided loyalty.\(^\text{19}\) The test of whether or not the responsible entity has complied with this duty is an objective one.\(^\text{20}\)

\begin{enumerate}
\item[Ibid at §478.]
\item[Ibid at §479.]
\item[Ibid.]
\item[Ibid.]
\item[Ibid at §484.]
\item[Ibid.]
\item[Ibid at §485.]
\end{enumerate}