At the end of section 7.1 add the following paragraphs:

ASIC Regulatory Guide RG 134, which explains how ASIC regulates the law in relation to the constitutions for registered schemes, was revised in February 2014. This amended regulatory guide applies to all applications to register a scheme lodged with ASIC from 1 October 2013.

Insert new section 7.2A

7.2A Consideration that is to be paid to acquire an interest in the scheme post-30 September 2013 constitutions

As mentioned in paragraph 7.1(1) above, the constitution must make adequate provision for the consideration that is to be paid to acquire an interest in the scheme.

ASIC has now revised its views on what constitutes “adequate provision”. This will depend on the circumstances of the scheme. However, in order to remove uncertainty about whether a constitution makes adequate provision for the consideration to acquire an interest in a scheme, ASIC has issued class order relief which inserts three new sections into the Corporations Act.

ASIC has provided a convenient summary of the operation of the relief provisions and other guidance in relation to the requirements of the constitution to make adequate provision for the consideration to acquire an interest in the scheme in Table 1 in RG 134.

Full details of the requirements are set out in the replacement RG 134 and the above class order.

Insert new section 7.3A

7.3A Investment powers post-30 September 2013 constitutions

As mentioned in paragraph 7.1(1) above, the constitution for a registered scheme must make “adequate provision” for the powers of the responsible entity in relation to making investments of, or otherwise dealing with, scheme property. Details of what is required is set out in the replacement RG 134.

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1 ASIC Regulatory Guide RG 134 dated October 2015.
2 Ibid at para 134.12.
3 Above n 6.
4 Above n 1 at para 134.21.
5 ASIC Class Order CO 13/655.
6 Above n 7.
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Insert new section 7.4A

7.4A Complaints resolution post-30 September 2013 constitutions

As mentioned in paragraph 7.1(1) above, the constitution for a registered scheme must make “adequate provision” for the method by which complaints made by members in relation to the scheme are to be dealt with.\(^7\) Details of what is required is set out in the replacement RG 134.

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Insert new section 7.5A

7.5A Winding up of the scheme post-30 September, 2013 constitutions

As mentioned in paragraph 7.1(1) above, the constitution for a registered scheme must make “adequate provision” for winding up the scheme.\(^8\) ASIC considers that what constitutes “adequate provision” in relation to the winding up of the scheme will depend on the circumstances surrounding the scheme.\(^9\)

ASIC says that winding up a scheme is a process rather than an event. This means that the provisions in the constitution in relation to the winding up of the scheme must deal with the process of winding up rather than only with the event of termination.\(^10\)

Details of what is required is set out in the replacement RG 134.

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Insert new section 7.6A

7.6A Payment of fees out of scheme property post-30 September 2013 constitutions

As mentioned in paragraph 7.1(2) above, if the responsible entity is to have rights to be paid fees out of the scheme property in relation to the performance of its duties, then the constitution for a registered scheme must specify those rights.\(^11\) Details of what is required is set out in the replacement RG 134.

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Insert new section 7.7A

7.7A Indemnity out of scheme property post-30 September 2013 constitutions

As mentioned in paragraph 7.1(3) above, the constitution for a registered scheme must specify any rights of the responsible entity to be indemnified out of scheme property for liabilities or expenses incurred in relation to the performance of its duties.\(^12\) Details of what is required is set out in the replacement RG 134.

\(^7\) Above n 8.
\(^8\) Above n 8.
\(^9\) Above n 1 at para 134.186.
\(^10\) Ibid at para 134.184.
\(^11\) Above n 10.
\(^12\) Above n 10.
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Insert new section 7.8A

7.8A Powers to borrow post-30 September 2013 constitutions

As mentioned in paragraph 7.1(4) above, the constitution for a registered scheme must specify any powers of the responsible entity to borrow or raise money for the purpose of the scheme.

Details of what is required is set out in the replacement RG 134.

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Insert new section 7.9A

7.9A Rights to withdraw from the scheme post-30 September 2013 constitutions

One of the problems with the former prescribed interest schemes was the compulsory buy back provisions (other than for non-mining primary production schemes). One of the areas where major recommendations were made by the ALRC Report 65 that led to the Managed Investments Act 1998 (Cth)\(^{13}\) related to buy back and redemption issues. Among the recommendations that were made was to remove the compulsory buy back requirement and to tie the obligation in relation to buy backs and redemptions to the cash available from the fund.

Therefore the constitution only has to include provisions about withdrawal rights if it is proposed to have such rights. If there are no provisions about withdrawal rights, then the members will not have any right to withdraw from the scheme.\(^{14}\)

If members do have a right to withdraw from the scheme, then the constitution must:

- specify the right; and
- if the right may be exercised while the scheme is liquid (as defined) set out adequate procedures for making and dealing with withdrawal requests; and
- if the right may be exercised while the scheme is not liquid (as defined), provide for the right to be exercised in accordance with Part 5C.6 of the Corps Act and set out any other adequate procedures (consistent with that Part) that are to apply to making and dealing with withdrawal requests.

Any such right to withdraw and any provisions in the constitution setting out procedures for making and dealing with withdrawal requests, must be fair to all members.\(^{15}\)

This requirement works in conjunction with Part 5C.6 of the Corps Act, which places restrictions on what withdrawal provisions may be included in the constitution.

Details of what is required is set out in the replacement RG 134.

However, the meaning of “withdraw” within the context of these legislative provisions is limited to where there is some act by the member that results in the responsible entity returning the whole or some part of the member’s contribution.\(^{16}\) A member does not “withdraw” from the scheme, within the context of these provisions, if the whole or some part of the member’s

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13 Above n 1.
14 AvSuper Pty Ltd v Commonwealth Managed Investments Ltd [2010] NSWSC 1499 at [42].
15 Above n 13.
16 MacarthurCook Fund Management Ltd v TFML Ltd [2014] HCA 17 at [29].
contribution is returned by the responsible entity compulsorily without volition on the part of the member.\footnote{17}

The volition necessary for there to be a withdrawal by a member is not to be found merely in:

- the choice to become a member by subscribing to units on the terms on which they are issued (even in circumstances where those terms were the subject of prior arrangement between the responsible entity in the putative member);\footnote{18} or

- the choice of the member to sue or not to sue to enforce the terms of the issue of the interest in the managed investment scheme.\footnote{19}

There is a difference between:

- an agreement which provides for redemption at a stipulated time (or during a stipulated period) which is not a withdrawal by the member because it does not depend on some voluntary act by the members; and

- an agreement which empowers a member to call for redemption at the time of the member’s choosing which is a withdrawal by the member because it depends on a voluntary act of the member.\footnote{20}

Examples of where a redemption of units may be made by the responsible entity which does not depend on a voluntary act of the member and therefore is not a withdrawal by a member of the scheme to which the above legislative provisions apply are:

- the responsible entity exercising a power conferred by the constitution of the scheme to redeem the units of any unitholder who failed to pay a debt due to the responsible entity or who, having acquired more than 15% of the units on issue, failed to comply with a notice to divest;\footnote{21} and

- the responsible entity performing an obligation to redeem which arises under the terms of issue if that obligation is required by those terms to be performed independently of any act on the part of the member.\footnote{22}

Thus it is possible to have provisions in a Constitution, or to have terms of issue of an interest in the scheme, that provide for compulsory redemption by the responsible entity which operate without volition on the part of the member. In such cases, the legislative provisions relating to withdrawal of members from the scheme do not apply. Therefore if a scheme is illiquid, redemption of the units may be made without using the compulsory procedures set out in Part 5C.6 of the \textit{Corps Act} with respect to illiquid schemes.

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Add the following paragraph immediately before section 7.10.1

The introductory words to the section confer statutory powers of amendment regardless of the current content of the constitution and are not to be read down by any other provisions contained in the constitution.\footnote{23} This applies to both means available for changing the

\footnotesize{\begin{itemize}
  \item \textit{Ibid.}
  \item Ibid at [31].
  \item Ibid.
  \item Ibid at [30]-[31].
  \item Ibid at [29].
  \item Ibid.
  \item \textit{Lewski v ASIC} [2016] FCAFC 96 at [215]-[218].
\end{itemize}}
constitution in that section. Further, if the responsible entity and the members cannot agree to a change to the constitution that would deprive themselves completely of a power to change the constitution.\(^{(24)}\) This statutory power to amend cannot be removed by provisions to the contrary in the constitution.

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Delete all paragraphs in subclause (a) after the second paragraph and insert the following replacement paragraphs:

There have been two points of view taken by the courts as to whether the “members’ rights” include a right to have the scheme operated and administered according to the constitution as it stands at the present time.

The first view suggested that a right in the relevant sense did not include a right to have the scheme operated and administered according to the constitution because if such a right was a right in the relevant sense, this would cause this provision to have no efficacy.\(^{(25)}\) Pursuant to this view, there is a distinction to be made between the nature and quality of the “members’ rights” and the value and enjoyment of those rights.\(^{(26)}\)

However, the weight of authority is now in favour of the second view, namely, that a “members’ rights” does include the right of the members to have the scheme operated and administered according to the existing constitution.\(^{(27)}\)

As stated by the Victorian Court of Appeal in rejecting the first view:

… the right of a member to have a managed investment scheme administered according to the constitution of the scheme is fundamentally the most important right of membership. Without it, all other rights of membership, as well as the continuance, success and security of the scheme, would be at the whim of the responsible entity. Consequently, according to the natural and ordinary use of language, the expression “members’ rights” in s 601GC(1)(b) is in our view calculated to embrace a members’ right to have a managed investment scheme managed in accordance with its terms.\(^{(28)}\)

It was also held that this interpretation did not cause the provision to have no efficacy.\(^{(29)}\) As further stated by the Victorian Court of Appeal “… it logically does not follow from recognition that members’ rights include the rights of members to have a managed investment scheme administered according to the constitution that any change to the constitution will be adverse to members’ rights”.\(^{(30)}\)

\(^{(24)}\) Ibid at [220]; Westfield Management Ltd v AMP Capital Property Nominees Ltd [2012] HCA 54 at [52].
\(^{(25)}\) ING Funds Management Ltd v ANZ Nominees Ltd; ING Funds Management Ltd v Professional Associations Superannuation Ltd [2009] NSWSC 243 at [98]; In the matter of Centro Retail Ltd and Centro MCS Manager Ltd in its capacity as Responsible Entity of Centro Retail Trust [2011] NSWSC 1175 at [35]-[36] (“Centro”).
\(^{(26)}\) ING Funds Management Ltd v ANZ Nominees Ltd; ING Funds Management Ltd v Professional Associations Superannuation Ltd [2009] NSWSC 243 at [96].
\(^{(27)}\) Lewski v ASIC [2016] FCAF 96 at [232].
\(^{(28)}\) 360 Capital RE Ltd v Watts [2012] VSCA 234 at [40], approved in Lewski, ibid at [233].
\(^{(29)}\) Ibid at [32].
\(^{(30)}\) Ibid at [41].
Also as stated by the Full Court of the Federal Court “… it is clearly anticipated by the legislation that there may be amendments that would unequivocally not be adverse to members’ rights”.\(^{31}\)

In addition, according to this second view, the first view that said there is a distinction between something which affects members’ rights and something which merely affects the value or enjoyment of those rights, while being a valid distinction in itself, is not a valid distinction for the purposes of the section.\(^{32}\)

The distinction between the two views is illustrated by two differing decisions in relation to a provision of a constitution of a scheme that fixes the price at which units in the scheme can be issued.

According to the first view, such a provision is a right only to have the units issued at that price at the present time. It is not a right to prevent the issue of new units in the future at a price as determined by a modified provision of the constitution. Therefore such a provision is not a right created or secured by the constitution itself and is therefore not a right in the relevant sense. An amendment to such a provision which changes the price at which units can be issued in the future is not an amendment which impinges upon the incidents and character of a legal right of the members.\(^{33}\)

According to the second view, a provision of a constitution of a scheme that fixes the price at which units in the scheme can be issued is a right of the members to have the scheme administered in accordance with the constitution in its present form and therefore cannot be amended by the responsible entity.\(^{34}\)

However, even if a right is not a right in the relevant sense, nevertheless a responsible entity, in deciding whether or not to make the amendment, will need to have regard to its duty as a trustee to perform the trust honestly and in good faith, for the benefit of the beneficiaries which duty co-exists with its right to amend the constitution.\(^{35}\)

It should be noted that even if the responsible entity amends the constitution pursuant this provision and it does so outside the power to do so because it adversely affects members’ rights, then the amendments, once lodged with ASIC, will be valid until set aside.\(^{36}\)

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\(^{31}\) *Lewski v ASIC* [2016] FCAFC 96 at [232].

\(^{32}\) Ibid at [233].

\(^{33}\) *Centro* [2011] NSWSC 1175.

\(^{34}\) *Premium Income Fund Action Group Inc v Wellington Capital Ltd* [2011] FCA 698 at [33]-[40] per Gordon J which, although being rejected by Barrett J in *Centro*, ibid at [35]-[36], was approved by the Victorian Court of Appeal in *360 Capital RE Ltd v Watts* [2012] VSCA 234 at [25]-[45] and *Lewski v ASIC* [2016] FCAFC 96 at [226]-[235].

\(^{35}\) *Centro* [2011] NSWSC 1175 at [39].

\(^{36}\) *Lewski v ASIC* [2016] FCAFC 96 at [253].
These principles have been followed in a number of subsequent cases.\(^{37}\)

In addition, there have been cases where the courts have upheld the use of this power by a responsible entity to extinguish the rights of the members. However, in each of these cases, the courts have held that the responsible entity (or the liquidators where the responsible entity was in external administration), addressed the question required to be formulated in the section namely that the responsible entity (or the liquidators where the responsible entity was in external administration) had considered that the amendment would not adversely affect members’ rights.\(^{38}\)

The power of the responsible entity to amend the constitution is also not restricted by the fact that the winding up of the registered scheme has commenced.\(^{39}\)

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