Replace the first paragraph in section 8.2 with the following new paragraph:

Similar to the constitution, the compliance plan is “… fundamentally important to the proper operation of the statutory scheme and the protection the statutory scheme is intended to afford to members of managed investment schemes”.¹ In order for a scheme to be registered, it must have a compliance plan which meets certain requirements and is signed by the directors of the responsible entity.² Further, directors of a responsible entity have a duty to take all steps that a reasonable person would take, if they were in the officer’s position, to ensure that the responsible entity complies with, amongst other things, the compliance plan.³ The responsible entity also has an obligation, in exercising its powers and carrying out its duties, to comply with the scheme’s compliance plan.⁴ These requirements follow on from the above recommendation of the ALRC Report 65 that the directors should have responsibility for instituting measures to ensure compliance with the law and the constitution. Directors of a registered scheme have been held liable for breach of their duties under s 601FD (1)(b), (c) and (f) of the Corps Act for, amongst other things, taking scant regard to the contents of a compliance plan.⁵

Add the following section 8.5 at the end of the chapter

8.5 Possible future reforms

The Parliamentary Joint Committee on Corporations and Financial Services (“Joint Committee”) conducted an inquiry into the collapse of Trio Capital Limited and other related matters and issued its report in May 2012.⁶ Amongst other things, the Joint Committee investigated the role of the auditors, the compliance plan and compliance committee and the expectation gap between what investors perceive to be the role of a gatekeeper or the protections within the system and what is actually the case.⁷

The Joint Committee, although being critical of the role of the auditors in relation to the collapse of Trio Capital Limited, recognised that there was a difference between the expectation of what is required of auditors and what they are actually responsible for doing.⁸ This difference relates to some fundamental issues. In particular, the Joint Committee said it was of concern that auditors’ approval of financial statements does not necessarily mean that the actual assets underlying the financial statements exist.⁹ Further, it was also of concern to the Joint Committee that an auditor’s assessment of a compliance plan and the work of the compliance committee essentially only means that they exist.¹⁰ In the view of the Joint Committee, in the case of Trio Capital, it was clear that the requirement for the auditors to demonstrate “professional scepticism” about the

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¹ Trilogy Funds Management Ltd v Sullivan (No 2) [2015] FCA 1452 at [283].
² Corps Act, s 601EB(1)(f) and (g).
³ Corps Act, s 601FD(1)(f)(iv).
⁴ Corps Act, s 601FC(1)(h).
⁵ Above at n 1 at [284].
⁷ Ibid at paras 7.27 to 7.34.
⁸ Ibid at para 7.33.
⁹ Ibid.
¹⁰ Ibid.
information that was given to them was insufficient to prevent the loss of investors’ funds.\(^\text{11}\)

The Joint Committee acknowledged submissions that had been made to the Joint Committee, including ASIC, about the inadequacy of detail in compliance plans. Only limited material is required to be included in a compliance plan,\(^\text{12}\) which was the subject of criticism by some submissions.\(^\text{13}\) Nevertheless it should be noted that it was always intended that the statutory requirements be the minimum required.\(^\text{14}\) As noted by ASIC in its submissions to the Joint Committee, this “approach was intended to provide flexibility for responsible entities to create compliance measures that were tailored for the particular registered managed investment scheme”.\(^\text{15}\)

In its submissions, ASIC argued that the compliance plans were “not being as effective as may have been intended”.\(^\text{16}\) Evidence was also given by ASIC that “if someone has conducted the audit of the particular compliance plan, that is almost enough to get you over the line. There is no sort of detail about the work that needs to be done.”\(^\text{17}\)

The Joint Committee therefore recommended that the government investigate options to improve the oversight and operation of compliance plans and compliance committees. In particular, the Joint Committee said that this investigation should focus on the need for:

- more detail to be included in compliance plans;
- qualitative standards by which compliance plan auditors must conduct their audits;
- liability for the responsible entity and its directors for any contravention of the compliance plan, rather than only for material contraventions, as is currently the case;
- legislative requirements as to experience, competence or qualifications for compliance committee members;
- regulatory or member oversight of the appointment of compliance committee members;
- an approval process for compliance plan auditors so that ASIC has the powers to remove or impose conditions on such approval; and
- governance arrangements to be clearly stated in relation to the proceedings of the compliance committee.\(^\text{18}\)

The then government accepted this recommendation. However, despite this promising response, it is noted that although there were some detailed recommendations made in 2001 regarding a number of these matters,\(^\text{19}\) nothing has occurred.

CAMAC has also issued a discussion paper which raises a number of issues in relation to reforms of the law governing the operation of managed investment schemes.\(^\text{20}\) One of the areas of investigation is whether there need to be amendments to the law.

\(^\text{11}\) Ibid.
\(^\text{12}\) Above n 6.
\(^\text{13}\) Above n 6 at paras 4.5 and 5.19.
\(^\text{14}\) Explanatory Memorandum, Managed Investments Bill 1997 (Cth) at para 10.3.
\(^\text{15}\) ASIC’s Submission at p 36, quoted in above n 6 at para 1.41.
\(^\text{16}\) ASIC’s Submission at p 35, quoted in ibid at para 10.3.
\(^\text{17}\) John Price, Senior Executive Leader, ASIC, in Committee Hansard, 6 September 2011, at p 5.
\(^\text{18}\) Ibid at para 7.35.
\(^\text{19}\) Above n 52.
imposing obligations on any person involved in a scheme to give assistance to ASIC, the auditor of the compliance plan and the compliance committee in relation to compliance.\(^{(21)}\) CAMAC has pointed out that there are presently gaps in the law and considers that there is no reason why any person involved in a scheme should not have an obligation to assist those who have been given supervisory responsibility in relation to compliance for a scheme.\(^{(22)}\)

\(^{21}\) Ibid at section 16.10.
\(^{22}\) Ibid.