16TH ANNUAL BANKING LAW AND PRACTICE CONFERENCE

'The Managed Investments Regime: Implications for Financiers'

1. Our subject

Today we are talking about changes resulting from the Managed Investments Act 1998. In particular, we are interested in the impact of the changes on financiers - people who lend money to managed investment schemes and hope to get it back.

2. Where to start?

A good place to start is to look at what we have now.

That is, the legal relationships between the investor, fund manager and trustee, under the 'old law' in a typical unit trust.

We can then see how that changes under the 'new law'.

That will then lead us to look at consequences of the new relationship.

We will then consider the consequences of the shift from the old to the new.

Finally, we can look at the change in what a managed investment is, under the new law as distinct from a 'prescribed interest', under the old.

3. Triangular Legal Relationship

In a typical unit trust, under the old law, the trust assets are held by the trustee in trust for the investors. The trustee is the legal owner of the assets. The investors are the beneficial owners. Their interest in the trust is divided into units.

The terms of the trust are contained in the trust deed, which must be approved by ASIC under Corporations Law section 1067(2).

The fund manager is also a party to the trust deed. The trustee must buy or sell investments, and borrow, within the limits of its powers under the trust deed, as directed by the manager. This means that the investors rely on the manager to make all commercial decisions affecting the trust and do not expect the trustee to interfere with those decisions, unless they are outside those limits.

The way the manager directs the trustee is governed by the prospectus (or information memorandum) and possibly other representations the manager may have made to investors.

The prospectus gives rise to contractual rights and obligations between the manager and investors. For example, it typically says about borrowings - that there will be some or none, and what limits will apply. The manager will be in breach of its legal obligations, and potentially liable to damages, if it causes the trust to borrow in excess of those limits.

It was thought that this structure, particularly the limited role and responsibility of the trustee for commercial decisions, had the sanction of the courts, following the famous statement by Hope J in *Parkes Management Ltd v Perpetual Trustee Co Ltd 3 ACLR 303.*

Investors who held units in unlisted property trusts in the early 1990's, lost substantial amounts when property prices collapsed. Funds with borrowings were worst hit. When the fund managers had disappeared, investors sued trustees, relying on the general doctrine that trustees must always act prudently, as well as their statutory duty to exercise due diligence and vigilance in 'watching' (later 'protecting') the interests of investors.

So much for the idea that the commercial judgments were the manager's responsibility! Trustees were in a no-win situation - potentially liable to managers (and unitholders) if they declined to accept the manager's direction - yet expected to apply a general test of 'prudence' to decisions made by the manager.

The main purpose of the Managed Investments Act was to resolve the confusion about where the decision-making responsibilities of trustees and managers began and ended.

4. The New Relationship - Straight Line?

So, to overcome the previous problems of dividend responsibility, the MIA gives us the 'single responsible entity' **(SRE)** plus a regulator, the Australian Securities and Investments Commission, with new powers to deal with those SRE's who don't live up to their responsibilities.

The scheme assets now vest in the SRE, who holds them on trust for the investors (now called 'members'). (Corporations Law s. 601FC(2)).

The legal relationship between the SRE and the investors is governed both by the constitution (minimum contents prescribed now by law) and by the prospectus or information memorandum. The 'constitution' is the former trust deed, amended to remove provisions no longer required by law or guidelines and to include additional provisions, such as for compliance and complaints-handling, required by the new law.

The SRE now has both statutory and traditional trust law duties to investors. If things go wrong, it is the SRE that they will sue.

In most cases, in practice, the scheme assets will be held by a separate custodian, because few SRE's can comply with the requirements for holding the assets themselves. In brief, ASIC requires that for SRE's who wish to be their own custodian, the custody function must be handled by what is virtually a stand-alone custody section, with its own reporting lines through to the board of directors.

There is not much doubt that the custodian is itself a trustee - holding scheme assets for the benefit of the SRE - on notice that the SRE is in turn trustee for the scheme members. The custodian will normally be a bare trustee. Some custodians argue that the relationship is that of 'bailee for hire' ie, something like a bank offering to hold a tin box, into which a client (in this case the SRE) can deposit or remove whatever it chooses, the bank having no responsibilities other than safe custody of the contents.

Custodians will expect to be in the same position that trustees previously thought they were in - having no responsibility for commercial judgments, and no duty of prudence.

Unfortunately, since nothing has been done to exclude the trustee's general law duty of prudence for custodians, they may face similar risks of liability as trustees under the old law did.

In fact, it rather looks as if we have a new triangle, with potential for troublesome disputes down the track.

5. Lending to a Responsible Entity

The first question for a prospective lender will be whether the SRE has power to borrow in relation to the relevant scheme, and where applicable, to give security over the scheme assets.

Where there is an independent custodian, the custodian will need to be a party to any mortgage or charge, but will obviously exclude any personal obligation for the debt and any warranties other than as to due execution and corporate power.

In most cases the scheme constitution will confer on the responsible entity all the powers of a natural person or corporation. Corporations Law s.601GA(3) specifically requires that powers to borrow or raise money be specified in the scheme's constitution, if the SRE is to have those powers. Occasionally, for example in master trusts or 'wrap account' structures, you will find that borrowing powers have been excluded.

If the responsible entity has no power to borrow under the scheme constitution, it will have no right of indemnity against the scheme assets, which will therefore not be available to repay the loan, and in the case of secured lending, the security cannot be exercised.

The SRE itself may have bound itself by contract, in terms of the prospectus or information memorandum, or by legally binding representations in those documents, or elsewhere, not to borrow, or to borrow for restricted purposes or within specified limits. Even though these are outside the formal constitution lodged with ASIC, clearly they do form an integral part of the legal relationship between trustee (that is, SRE) and beneficiary (that is, the investors). Essentially, these are legally binding promises about how the powers conferred by the scheme constitution will be exercised. Breach of these promises will result in liabilities on the part of the SRE.

An important question is to the extent to which these may impact on the validity of the exercise of borrowing powers conferred by the scheme constitution. In particular, there is a question as to the extent to which a lender may be regarded as being on notice of these obligations and bound to accept that its interest is subject to them.

Further, the SRE has general statutory obligations, for example, under Corporations Law s.601FC(1). These include duties of honesty, care and diligence, and to act in the best interests of investors, giving them priority over the SRE's own interests The SRE must also ensure that 'all payments out of the scheme property are made in accordance with the scheme's constitution and this Law;' (s.601FC(1)(k)).

Under s.601GA(2), any rights of the SRE to be indemnified out of scheme property for liabilities must be specified in the scheme's constitution and only available in relation to the proper performance of the duties in connection with which the liabilities were incurred.

Would the right of indemnity be lost in respect of borrowings if it were shown that they were not incurred in the 'proper performance' of the SRE's duties? That would seem to be a definite risk.

Furthermore, now that the SRE is a trustee, nothing in the Law purports to exclude trustee obligations under the general law, such as the duty of prudence.

Obviously the possible loss of the right of indemnity is of great concern to lenders, since the right of recourse will then be limited to whatever personal rights may be available against the SRE.

As in the case of loans to trusts, under the existing law, lenders have to be conscious of not becoming knowingly involved in a breach of trust (*Barnes v Addy* (1874) 9 Ch 244).

6. Lending to Unregistered Schemes

The definition of a '**managed investment scheme**' is:

> *'a scheme that has the following features:*
>
> *(i) people contribute money or money's worth as consideration to acquire rights (interests) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);*
>
> *(ii) any of the contributions to be paid are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the members) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);*
>
> *(iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions)'*

(Also, *'time-sharing schemes'*)

There will be schemes which do not require registration.

That may be because they only make excluded issues (for example, where the amount payable by each investor is at least $500,000 or the investor controls at least $10 million of investment money (Corporations Regulation 7.12.06).

It may be because they have less than 20 investors and are not promoted by anyone in the scheme promotion business or deemed by ASIC to be a related to other schemes. (See Corporations Law s.601ED). Others will be excluded because ASIC has granted relief to a particular class of scheme, or specifically.

There are several reasons why lenders need to be careful not to lend to unregistered schemes which require registration.

A person who operates an unregistered managed investment scheme which requires to be registered runs the risk of 200 penalty points and 5 years in prison. (Corporations Law s.601ED(5)).

That may not bother you directly, as the lender, unless somebody decides that your role in the creation or promotion of the scheme is such that you have assisted or participated in the commission of a criminal offence.

The word 'operator' is not defined. In normal circumstances it should exclude lenders, however you would have to be careful where the lender might want to exercise greater than normal measures of control over the true 'operator' of the scheme.

Another consequence of breaching s.601ED(5) is that the investors have a right to void their investment purchase, by giving notice to the person who offered the investment to them. That would result in an obligation to refund the purchase price out of the scheme assets. That obligation may well have priority over the rights of the lender. Since you would only expect investors to exercise that right where the value of the scheme assets has fallen, it seems to represent a significant hazard for lenders. (s.601MB(1)(a)).

Investors have a similar right under s.601MB(1)(b) where their interests were offered, or they were invited to apply for them, in contravention of the prospectus provisions (*Corporations Law*, Part 7.12). Contravention could occur where no prospectus was issued, or where a prospectus was issued (and registered) which failed fully to comply with the requirements, such as for adequate disclosure. (This provision repeats s.1073(2) of the former Law, in substance.) Again, the question may arise whether the lender will rank behind the investors.

In a recent case involving an investment in a managed apartment building, it was held that the investor's right to rescind under s.1073(2) was lost where the investor failed to exercise the right within a reasonable time after being aware of the right to avoid the contract. (*Ellison v Lutre Pty Ltd & anor*, Federal Court of Australia (1999) 17 ACLC 744).

This issue may be particularly relevant to the financing of serviced strata schemes where the lender is relying on pre-sales. If the sales contracts are liable to become void, this obviously effects the security. Interim Policy Statement 140 gives ASIC's views about what constitutes a serviced strata scheme and when relief may be available from a requirement to register as a managed investment scheme.

7. Margin Lending to Investors

Typically a lender will notify the manager of a unit trust that it holds a mortgage or charge or some other kind of security affecting units held by a borrowing investor.

Pursuant to a provision in the trust deed, the manager keeps a record that the lender has an interest in the designated units.

Consent of the lender is then required, under the trust deed, for any transfer of the units. No capital distribution (including a distribution on termination) is to be made without the lender's consent.

All normal distributions are paid directly to the investor.

Occasionally the units may be transferred to a custodian to be held in accordance with the terms of the security arrangement and re-transferred to the investor once the loan is repaid, or alternatively the units may be sold in the event of default.

Where notation of the interests of lenders is provided for in the trust deed, both the trustee and the manager have a responsibility to ensure that the notation is given proper effect.

Under the new law, the SRE alone will be responsible. In particular, a scheme custodian will have no responsibility (as distinct from a custodian holding the units under the security arrangements).

Security arrangements over units in a unit trust which becomes registered as a managed investment scheme will retain their identity as the same units and any provision for recording the interests of lenders will presumably be included in the constitution.

Lenders may wish to satisfy themselves that the form of the provision is in fact retained and has not been altered in any way which weakens their position.

8. Investment by Registered Schemes

Managed investment schemes sometimes need to be registered in order that other registered schemes may invest in them. Investment by a registered managed investment scheme in an unregistered scheme is prohibited. (s.601FC(4)). This absurd requirement applies, even where the scheme invested in would not otherwise require registration.

ASIC has granted limited relief by Class Order 98/55, permitting registered schemes to invest up to 10% of their net assets in unregistered schemes, investment in specified types of foreign schemes and pooled custody arrangements, among others.

It is a problem which arises constantly, where you have SRE's of registered 'retail' schemes wanting to invest in unregistered 'wholesale' schemes.

The relevant question for lenders is whether assets of a registered scheme, which consist of investments in unregistered schemes beyond the limits of the Law and the class order, may be unauthorised investments, which the SRE cannot properly give as security and has an obligation to dispose of.

On one argument, the investment is simply prohibited and exposes the SRE to potential liability to investors. Alternatively, the section may have the consequence that the SRE has no power to invest, contrary to the section and consequently the investment is unauthorised.

9. Related Party Transactions

The related party provisions contained in Corporations Law chapter 2E apply to managed investment schemes by virtue of s.601LA.

Broadly speaking, an SRE is only permitted to give a financial benefit to itself or a related party, in essence, on arms length terms (s.243N), or with specific approval of an investors' resolution (s.243Q).

In considering what constitutes 'arms length terms', in the case of a loan or other financial accommodation, s.243N(2) requires the following matters to be considered (as examples): the amount of the loan or extent of the accommodation, interest or charges, credit risk, security and timetable for repayment of principal and payment of interest.

What can constitute a financial benefit is defined very broadly in s.243G. Examples given are loans, guarantees, releasing or forgiving debts, neglecting to enforce obligations, or assuming obligations, leasing or selling assets, supplying services, issuing securities, issuing options and making gifts.

The provisions apply as between an SRE and parties related to it. (s.601LA(1). Those parties include its directors, and those of its parent company, spouses and other relatives of those directors, and entities any of them control. It also includes an SRE's parent company and other subsidiaries of the parent company.

Rules about remuneration of officers are set out in s.243K.

If they have not done so already, SRE's (or SRE's -to-be) will need to review these rules with care, particularly where they are companies within a group, where invariably services and transactions are handled by various different companies in the group.

10. Which Types of Schemes Need Registration?

Apparently ASIC has received many applications to grant relief excluding particular types of scheme from the requirement to register. ASIC has already issued class and specific relief for that purpose. Some examples of types which lenders may encounter are:

(a) Participating Property Syndicates: the previous class order was extended to 1 July, 1999. It relates to syndicates of up to 15 investors, where the manager provides property management services. The requirements include a 14 day cooling-off period, a written syndicate management agreement to be provided to investors, disclosure of investments likely to be held by the promoter and the promoter's voting rights. This class order (98/64) will probably be replaced in the near future. There is also a class order (98/78) for small property syndicates in broadly similar terms, for those in which the promoter obtains no greater benefits than other investors or is not in the business of promoting property syndicates.

(b) Strata Unit Schemes: Interim Policy Statement 140 has been mentioned above. There are various class orders giving specific exemptions to various types of similar arrangements. For example, Class Order 98/1931 exempts schemes involving owners of strata units, community title or similar interests, used in

one location under a management agreement, for an hotel, serviced apartments or resort complex - provided that the interests are offered for not less than $500,000. Similar schemes where offers were made prior to 6 October 1998 are also exempted, with no condition as to amount invested.

(c) Custody: paragraph 6 of Class Order 98/55 permits the investment of scheme property in a pool, the primary purpose of which is safe custody where the responsible entity is satisfied that no more income is earned than the investors would have earned from investing in the same assets directly, the responsible entity is liable to members for the acts and omissions of the custodian, and the custodian only deals with the assets at the direction of the responsible entity. This relief extends to the responsible entity who does the investing, but does not, as such, apply to the custodian.

11. Transition

Existing unit trusts and other prescribed interest schemes will need to become registered as managed investment schemes under s.601EB no later than 1 July, 2000 (with a few exceptions, such as fixed term property trusts) or be terminated. (s.1457(2)).

By midnight on 30 June 1999, the existing trustee must give a retirement notice, or in rare cases, the manager, otherwise the manager will need to call a meeting of investors to choose a responsible entity. Much effort is being made to secure trustee retirement notices. Trustees vary in their requirements. Most want a comprehensive taxation and stamp duty advice in respect of the implications of registration of funds as managed investment schemes and consequential transfers of assets to custodians.

In many cases trustees are checking that managers have not exceeded their powers to amend the existing trust deeds to create constitutions, pursuant to their statutory powers under s.1460 as varied by class order 98/2159. In fact, the trustees are not parties, and in my view do not have that responsibility. Having taken it on, they run the risk of sharing the liability if they have given a clearance to a document subsequently found to be invalid.

On the other hand, trustees do have a responsibility to review notices which go to investors informing them of the main changes being made to the trust deed in order to produce a constitution. The investors on receiving those notices have 21 days in which to request a vote on the constitution. So far the numbers requesting a vote seem to be minuscule. It is just as well, because if there is a vote, and the vote is no, a manager would be at a loss to know what to do next!

Lenders must of course be confident that they can safely rely on constitutions presented to them. The issue is no different than the issue which already exists in relation to trust deeds which have been subject to various amendments. In practice, it seems that lenders have relied on the fact that trustees had to satisfy themselves of the validity of amendments before executing the documents.

On the whole, trustees are not reviewing compliance plans. That is the responsible entity's territory (although there are some who do, apparently).

Generally trustees want to know that the manager has at least lodged the application for a dealer's licence permitting operation of the required types of scheme, and preferably has received the letter of offer of a licence from ASIC.

The question of indemnities by the responsible entity to the trustee has been contentious in some cases. There has been a concern that if trustees resign, and investors ultimately suffer adverse capital gains tax, or stamp duty liabilities, they might take action, joining the trustee as a party who chose to take a step which gave rise to that result.

As legislation finally seems to be coming through, that risk seems to be fading. It is recognised that the likelihood of liability is small, but the amounts could be huge, so trustees are understandably not keen that they should be the ones to carry whatever risk there may be. The ordinary indemnity for liabilities arising after retirement of the trustee, for which the trustee would have been indemnified had the trustee continued in office, is readily granted.

Managers are also organizing a majority of external members of their compliance committees, or in some cases, 50 % external directors, as required by Part 5.C. An interesting issue still not resolved is whether ASIC will permit corporations to be compliance committee members. Some people are concerned about what would happen if an individual member became suddenly incapacitated or died. There could also be benefits in terms of collective expertise a corporation could draw on, to a greater extent than an individual.

12. Re-settlement

One of the questions which has led to considerable confusion is whether or not the execution by the manager of a constitution pursuant to its statutory powers under s.140 constitutes a 're-settlement', and if so, what that means.

On the one hand it could be argued that the fundamental basis of the scheme has changed by removal of the original structure involving separation of the trustee and manager so that, in a sense, you have 'new' trusts altogether.

On the other hand, the assets remain the same, the financial benefits to which investors are entitled, in terms of income and capital are not altered, and the nature and purpose of the structure remains the same. In essence, the change is no more significant than the retirement and appointment of a new trustee.

The notion of a 're-settlement' suggests that there has been an interruption to the trust relationship, rather than continuity.

It seems far preferable that the trust relationship be regarded as continuous, not only for stamp duty and taxation purposes but also in terms of continuity of rights and obligations dating from when each investor first invested. It also seems desirable that this be determined as a matter of policy rather than leaving it to future courts to determine as a matter of legal metaphysics.

13. Custodians

For a responsible entity to hold scheme assets itself, ASIC's requirements amount to having to have virtually a segregated custody function within the organization - with no common staff, separate reporting lines, and no involvement in the investment management process. Only a few of the largest fund managers are likely to be in a position, or have the wish, to satisfy those requirements, at least initially.

This means that a lender seeking security over scheme assets will find the title vested in the custodian. That will mean having the custodian execute mortgages or charges. Custodians will not normally give warranties of any kind, and will want all liability excluded entirely so far as they are concerned. They are bare trustees. It will be the responsible entity which assumes the liability to repay the loan and pay interest, limited to the scheme assets except where its right of indemnity out of those assets is unavailable because of its own fraud, or breach of its duties.

Where a lender holds security over assets of an existing fund, the question will arise as to whether new securities must be executed by the responsible entity and the new custodian (where there is one). There will be a need, presumably:

(a) to release the existing trustee from liability;

(b) to permit transfer of assets by the existing trustee to the custodian;

(c) to have the responsible entity assume liability for the obligations to the lender;

(d) to have the custodian execute a mortgage or charge over the assets.

Obviously each situation will have its peculiar requirements.

The question of continuity of the trust relationship may have a bearing on whether refinancing exemptions, where applicable, are available. If each managed investment scheme is regarded as a continuous trust, not interrupted by transition, the SRE would simply be a new trustee. On the other hand, if you have a 're-settlement' in the sense that following transition it is considered that a new trust has been created, there may be difficulty in securing those benefits.

There may be other techniques to be employed, such as transfer of assets subject to existing mortgagors or charges rather than the execution of any new mortgage or charge.

14. Withdrawal

Under the new law, schemes are divided into those which are liquid and those which are non-liquid.

Liquid schemes are those which invest in money on deposit, bank accepted bills, marketable securities (or other prescribed kinds of property) or any other property which can be realised for its market value within the period specified in the constitution for satisfying withdrawal requests while the scheme is liquid (section 601KA).

For a non-liquid scheme, the opportunity to withdraw must be offered only to the extent that money will be available to meet withdrawal requests that investors may make in response to the offer (Section 601KB).

For example, if an unlisted property trust sold a property, the SRE could write to all investors to ask who would like to withdraw their money entirely or in part. Depending on the response, it may be possible to satisfy fully all requests for withdrawal or alternatively the available funds may have to be apportioned pro rata among those wishing to withdraw.

It will probably be some time before we know the extent to which this mechanism is found to be useful in a commercial context.

15. Retirement

An SRE is not permitted to retire without calling a meeting of investors to explain the reason for wanting to retire and to enable the investors to vote on an extraordinary resolution to choose a new SRE (section 601FL(1)).

A court may appoint a temporary SRE (section 601FP) who must take steps to appoint a new ongoing SRE (section 601FQ).

16. Termination

Registered managed investment schemes may be wound up at a time, in circumstances or happening of an event, specified in the scheme constitution (section 601NA).

Alternatively, the SRE may take steps to wind up a scheme of which the purpose has been, or cannot be, accomplished (section 601NC).

In the latter case the SRE must give the members notice drawing their attention to their rights to convene a meeting if they wish to do so. If no meeting is called within 28 days after the notice is sent, the SRE may wind up the scheme.

Once the SRE is obliged to ensure the scheme is wound up or after winding up has started, no further interests in the scheme may be issued (section 601NE(3)). However, there appears to be no prohibition on redemption of units where winding up has commenced. Whether redemption is available will depend, of course, on the terms of the scheme's constitution and any representations made in prospectuses.

17. Prospectuses

For any fund for which a prospectus is current, it will be necessary to withdraw that prospectus and issue a fresh one at the date of scheme registration.

This has been a difficult process, because the prospectus has to contain the ARSN's - the official scheme numbers, which are not available until the schemes are lodged for registration. Once lodged, ASIC is required by s.601EB(1)(a) to register within 28 days. The prospectus must be registered within 14 days after it is lodged (unless it is rejected) (s.1020A).

In practice, a copy of the draft prospectus is provided to ASIC at the time the scheme is lodged for registration. ASIC provides the ARSN's and indicates any concerns it has with the draft prospectus. The final draft is lodged officially 14 days before the last day for scheme registration. The future responsible entity has to take the risk of the scheme or prospectus being rejected, and proceed to print. It is an awkward situation, but no better alternative has presented itself.

18. Reform Process

As a result of the *Corporate Law Economic Reform Program Bill 1998*, substantial changes are proposed in respect of fundraising. These go largely in the direction of providing greater flexibility both in terms of point of sale documents, incorporation by reference, and advertising.

Whilst these do not impact directly on lenders, because the offer documents represent part of the legal relationship between the SRE and investor, it will be important for lenders to pay attention to the nature of the offer documentation which has been used in respect of any particular managed investment scheme to which they propose to lend.

Disclaimer

The views presented in this paper do not constitute professional advice and are not intended to be relied upon for that or any other purpose. Specifically, the paper does not represent an official position adopted by Minter Ellison nor by any partners of Minter Ellison.

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Comments: Peter Rowe, Partner Freehill Hollingdale & Page Section Numbers and headings correspond those in Russell Stewart's Paper.

3 Triangular legal relationship

- When do the duties of each of the Trustee and Manager begin and end?
- Changes to the Companies Code - trustees cease to watch over members interests and then had to protect them.
- Lack of good faith between trustees and managers.
- Buy-back covenant is a flawed concept.

4 The New Relationship - Straight Line

- Custodian could have liability for RE's breach of duty.

  Custodian will know what is going on - it holds the cheque book and holds title to all assets.

  Different duty of care but custodian can't shut its eyes.
- Need to have a compliance plan, a compliance committee (in certain cases) and audit of compliance plan.
- Statutory duties do not mean that the remaining duties of a trustee are excluded.

5 Lending to a trustee

- In many respects the new regime has not changed the issues for a lender e.g. it is still necessary to look at power and whether the exercise of the power is in breach of duty, if lending unsecured there is always the risk that the borrower trustee has lost its right of indemnity.
- New opportunities under the new regime.
- In all cases need to consider the question of security and who gives it.
- Consider the purpose of the loan - related party provisions.
- Amendment to the trust deed - loss of indemnity.

6 Lending to unregistered schemes

- Large number of small property syndicates borrowing.
- Lenders must be mindful of ASIC's class orders exempting from registration those schemes.
- The class orders only have effect so long as the class orders are complied with.

7 Margin lending to investors

- Corporations Law imposes obligation to maintain the register.
- Look at the trust deed.

8 Investment by Registered Schemes

- Need to consider whether investment is a MIS.
- What is a MIS? Wholly owned sub-trusts may not be a MIS.
- What if there is a loan to a trustee, which is applied to invest in a sub-trust which is not a MIS.

9 Related party transactions

- This is a potential trap.
- Are the related party provisions a change from the duties of a trustee at law?

10 Which types of schemes need registration

- Wrap accounts and master funds becoming increasingly popular. Accordingly, margin lending in this area will continue to grow.
- Need to carefully consider what is being provided as security - it could be just an interest in a bare trust created by a custodial relationship.

11 Transition

- Trustee involvement in Trust Deed changes. In some cases Trustees form a view which is not correct.
- Level of investor involvement.
- Indemnities - what the Trustees require;
  - what the Trustees are prepared to offer.
- What happens to existing contractual relationships:
  (a) statutory novation and assumption of liabilities;
  (b) amendments to documents.
  (c) Securities and stamp duty.
- Tax consequences.
- Are Sub-Trusts covered?

12 Re settlement

- Changes to the declaration of trust.

13 Custodian

- Stamp Duty.
- The statutory novations do not apply.

14 Withdrawal

- Liquidity is determined by the is period for redemption - could be years.
- Illiquid is not practical.

- Can cause suspensions of redemption.
- No repurchase.

15 Retirement

- Removal by investors.
- Note statutory novation and assumption of liability.
- What happens to the Custodian.
- Amendment of Deed.

16 Termination

- RE can't use termination provisions to entrench itself.

17 Prospectuses

- Important - do not forget them.

18 Reform Process

- Takeovers of trusts - why bother.