A review by Macquarie Legal Practice
[produced 18/11/2020]
of
"Guidance Note – Managed Investment Schemes"
by *Atanaskovic Hartnell* [produced 2 January 2019]
and
"Streamlining horse syndication in Victoria"
by *Racing Victoria* [issued 2 January 2019]

On 2 January 2019 the Australian Trainers Association (ATA) circulated to industry a **"Guidance Note – Managed Investment Schemes"** (**Guidance Note**) produced by law firm *Atanaskovic Hartnell*, purportedly to assist trainers in determining if their syndication activities are subject to the managed investment schemes regulatory regime[1].

On the same day Racing Victoria (RV) issued to trainers a document titled: **"Streamlining horse syndication in Victoria"** (**RV – Advice to trainers**), stating in Part 2 of that document:

> ***"2) Guidance note to Victorian Trainers***
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> *Under instruction from the Australian Trainers' Association, solicitor and former ASIC Chairman, Tony Hartnell AM has developed a Guidance note for trainers which outlines the circumstances in which they would not be captured by the managed investment scheme provisions of the Act. Specifically, where syndicates members continue to have day-to-day control of the activities of the syndicate.*
>
> *In order to demonstrate they are not subject to the provisions of the Act, RV compliance officers may require trainers to provide a simple statement articulating the way in which members retain day-to-day control of the syndicate".*

With respect to the author of the Guidance Note, there are problems with its observations and reasoning, including that:

(a) it contains numerous statements that are conclusory[2] and potentially misleading; and

(b) the questions comprising the Checklist are inconsequential in determining whether a scheme satisfies the definition of a managed investment scheme or falls outside of the scope of the definition. While a "yes" answer may be consistent with the scheme being a managed investment scheme, a "no" answer does not necessarily lead to the conclusion that the scheme is not a managed investment scheme.

With respect to RV, it is inviting trainers to make a statement articulating the way in which members retain day-to-day control of the syndicate that will likely be FALSE, because the evidence supports the conclusion that such schemes are neither designed to operate that way in practice nor permitted to operate that way by the Australian Rules of Racing (ARR).

Even if RV were to accept such a statement, this would not serve to either relieve the trainer from his or her obligation to comply with the law or enable the trainer to avoid the potential consequences of non-compliance.

Furthermore, RV's words quoted above [underlined] do not accurately reflect the wording of the third limb of the definition of a managed investment scheme, which states:

> *"(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 give directions)".*

[1] Corporations Act 2001, including the ASIC Corporations (Horse Schemes) Instrument 2016/790
[2] "Conclusory" means statements consisting of or containing conclusions or assertions for which no supporting evidence is offered

The precise wording of the definition is critical in determining its meaning, with the key words in the third limb of the definition being "day-to-day control", "operation" and "scheme", and the words in brackets serving as a **nonrestrictive modifier**[3] statement to the head statement that precedes it.

The Guidance Note provides the following observations and conclusions:

"***Background to this note***":

[2] "It is important to understand that racing co-ownership arrangements are not "managed investment schemes (MIS) ipso facto ie; by itself alone. However, they may become a MIS in certain circumstances".

"***Day-to-day Control***"

"Co-ownership arrangements will not be a MIS (and therefore are not regulated) if the co-owners themselves retain control over the day-to-day operation[4] *of the syndicate".*

"In other words, co-owners must make, or have the "real" ability to make, the decisions relating to:

(a) the horse's career, and

(b) how the co-owners organize themselves".

"Decisions about the horse's career"

"These are decisions that can best be categorized as "racing"" and "racing related" activities. Examples include racing programs, interstate and overseas racing campaigns., gelding of an entire or the matter of retirement from racing".

"Decisions that you would ordinarily make in your capacity as a trainer without consulting a horse's owners are not decisions relating to the racing scheme's operations. For example, decisions about the composition of the horse's feed or which shoes the horse should wear are decisions you, as the trainer, would make which do not need to be made in consultation with the horse's owners".

"Other examples include decisions you are entitled to make without consulting the owners or a managing owner under clause 2 of Racing Australia's Standard Training Agreement (or any alternative equivalent training agreement".

"Decisions about the organization of co-owners"

"Other day to day control decisions concern the legal relationship between co-owners. Decisions about who can be a co-owner, how, when and why money is paid and how co-owners formally relate to each other are examples of day to day control decisions concerned with the co-owner's legal relations".

"When do co-owners decide"

"Whether co-owners are able to make decisions is not just about what is said in the legal documents (e.g. the training agreement or con-ownership agreement). The co-owners must have actual control in practice, not merely on paper".

"Equally, Trainers are experts in their field (racehorse training). Co-owners can and should consult with trainers to benefit from trainer's advice on racing related decisions. This is no different to relying on the advice of a vet or another expert. Relying on a trainer's expert advice does not mean co-owners are not making decisions or that they lack day to day control".

[3] In other words, any right they (the members) may have to be consulted or give directions DOES NOT limit or restrict the legal meaning of the head statement

[4] The underlined words are incorrectly stated. The correct wording as per the third limb of the definition is "*day-to-day control over the operation of the scheme…"*. Text, context, and purpose are fundamental to statutory interpretation. It is inappropriate to change the text or context of a statutory provision before attributing a meaning.

"In short, co-owners are allowed to rely on a trainer's advice and trainers are able to give advice eon racing decisions. What is important is that co-owners are able to make, and are responsible, for the decisions to rely on that advice".

"***Checklist***"

"This checklist is helpful in deciding whether a co-ownership arrangement you are involved in is a MIS or not. If you answer YES to <u>any</u> of these questions, the arrangement is likely to be an MIS promoted or managed by a trainer (with legal consequences for the trainer):

- *Do you in your capacity as a trainer singularly make the decisions about the horse or the horse's career?*
- *Do you in your capacity as a trainer make decisions about the ongoing operation of the syndicate – that is, how the co-owners organize themselves? For example, changing the terms of, or parties to, the co-ownership agreement or altering the financial arrangements between the co-owners?*
- *In practice, do the co-owners delegate all decisions about the horse's career or the ongoing operation of the syndicate to you as trainer or another person, such as a syndicate manager?*
- *Do you administer all the financial arrangements with the co-owners?"*

"If your co-owners delegate some but not all decisions about the horse's career or the ongoing operation of the syndicate to you as trainer or to another person, whether you are involved in a MIS will be a question of fact and degree. As a result, it is not possible to succinctly state a rule covering every scenario. If you are concerned you might be involved in a MIS you should seek legal advice".

The observations relating to the day-to-day control test:

(a) do not make the necessary distinction between:

(i) the activities [and rights] of the individual co-owners and those of the group [see ***ASIC v Chase Capital Management Pty Ltd***[5] *[67]*]; and

(ii) "control in fact" and "merely a right to participate in decision-making" [see ***Burton v Arcus***[6] *[4]*];

(b) include statements that:

(i) purport to exclude the services provided by the trainer under his or her Training Agreement from comprising aspects of the scheme's operations for the purposes of the day-to-day control test, WHEN the evidence supports the conclusion that "*…the scheme is the entire operation*", as stated by *Owen J* in ***ASIC v Chase Capital*** *[57]* and *[63]*;

(ii) attempt to categorize the trainer as a mere "agent" who manages the property of each co-owner individually or "investment professional" who simply provides advice to the co-owners on enhancing the value of their own property without exercising control, WHEN the evidence supports the conclusion that:

- the manager and the trainer are both clearly "operators" of the scheme who manage or carry out activities in relation to the horse as a whole on behalf of the members as a group [see ***Burton v Arcus*** *[8], [12]* and *[6]*; ***Asset Land v FCA***[7] *[62]* and *[99]* and ***Racing NSW v Vasili***[8] *[21]* and *[22]* and ***FCA Hanbook [2014]***[9] *Perimeter Guidance – Chapter 11 Q.4, Q.6* and *Q.12]*; and
- day-to-day "control in fact" over the operation of the scheme is exercised by the manager and the trainer, being the people who, as operators of the scheme, actually perform

[5] (2001) 36 ACSR 778
[6] (Appeal Judgement) [2006] WASCA 00071
[7] [2016] UKSC 17. On appeal from: [2014] EWCA Civ 435
[8] Racing Appeals Tribunal NSW 12 June 2019
[9] FCA Handbook (UK), Perimeter Guidance – Chapter 11 Guidance on property investment clubs and land investment schemes – PERG 11.1 [Background] and PERG 11.2 [Guidance on property investment clubs], at Q4, Q6 and Q12, which are set out at p20 and 21 of this paper

"*…the acts which constitute the management of or the carrying out of the activities which constitute the scheme*", as stated by *Justice Davies* in ***ASIC v Pegasus***[10] *[55]* and ***Burton v Arcus*** *[2]*.

In ***ASIC v Takaran Pty Ltd***[11], *Barrett J* said:

> *[15] "The essence of a "scheme" is a coherent and defined purpose, in the form of a "programme" or "plan of action", coupled with a series of steps or course of conduct to effectuate the purpose and purse the programme or plan. In some cases, the scope of the scheme will readily be gathered from some constitutive document in the nature of a blueprint setting out all relevant matters. In others, there may be no writing or such as there is may tell only part of the story, leaving the remainder to be supplied by necessary implication from all the circumstances. Profit-making will almost invariably be a feature or objective of the kind of scheme with which s9 definition of "managed investment scheme" is concerned, given the definition's references in several places to "benefits". Whatever is incidental and necessary to the pursuit of the profit (or "benefits") will therefore be comprehended by the scheme, …".*
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> *[16] "It must also be emphasized that a scheme having the characteristics bringing it within the s9 definition of "managed investment scheme" will not necessarily possess those characteristics alone. … A managed investment scheme … may involve elements beyond the core attributes that give it its essential character. Elements which lie beyond those attributes but contribute to the coherence and completeness which make a "programme" or "plan of action" must form part of that "scheme". Every programme or plan of action must be taken to include the logical incidents of and consequences of and sequels to its acknowledged components".*

In ***ASIC v Chase Capital***[12], *Owen J* said:

> *[67] "… The question is whether the members have day-to-day control. It is not difficult to discern the distinction that the legislature was attempting to make. Very broadly, it is between the investment activities of an individual and that of a group. By the express terms of the applications, the investors have delegated "management" of the investment to CCML. There is no reservation of day-to-day or any other control or functions. I am not sure that the appointment of a committee of some of the investors to monitor the investments would make much difference. The question still remains: who has the day-to-day control".*

In ***ASIC v IP Product Management Group Pty Ltd***[13], *Byrne J* said:

> *[22] "It will be recalled that under paragraph (iii) the existence of a right in a member to be consulted or to give directions as to the operation of the scheme does not necessarily lead to the conclusion that that member has day-to-day control over its operation. The law contemplates, therefore, some greater involvement".*

In ***Burton v Arcus*** *McClure JA* said:

> *[4] "…The phrase "day-to-day" means routine, ordinary, everyday management or operational decisions. I am of the view that the term "control" in the definition means authority to decide and direct and not merely to participate in decision-making".*

In ***Burton v Arcus***, *Buss JA* said:

> *[82] "In my opinion, the circumstance that the promoter or operator of a scheme manages the scheme (or certain aspects of it) on behalf of the members does not mean that the members by their agent, the promoter or operator, have day-to-day control in fact over the operation of the scheme. In other words, the management activities of the promoter or operator in relation to a scheme are not to be imputed to the members in determining whether the members have such day-to-day control".*
>
> *[83] "My construction of the third element in para (a) of the definition gives effect to the evident legislative purpose or object embodied in the definition and Ch 5C. If:*
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> *(a) the third element in para (a) of the definition was concerned with the legal right to control and not control in fact; or*

[10] [2002] NSWSC 310
[11] [2003] 1 Qd R 135 at 146
[12] (2001) 36 ACSR 778
[13] (2002) 42 ACSR 343

(b) the management activities of the promoter or operator in relation to the scheme were to be imputed to the members in evaluating whether the third element was satisfied or not, with the consequence that if the promoter or operator had "day-to-day control over the operation of the scheme" then the members, by their agent, the promoter or operator, would have day-to-day control,

the legislative framework for the regulation of managed investment schemes would be seriously, if not entirely, eroded".

In ***Asset Land v FCA*** *Lord Sumption* said:

[97] "Subsection (3)(b) provides that what has to be 'managed as a whole' is the property the subject of the scheme, not the scheme itself so far as that is different".

[99] "The fundamental distinction which underlies the whole of section 235 is between (i) cases where the investor retains entire control of the property and simply employs the services of an investment professional (who may or may not be the person from whom he acquired it) to enhance value; and (ii) cases where he and the other investors surrender control over their property to the operator of the scheme so that it can be either pooled or managed in common, in return for a share of the profits generated by the collective fund …".

[102] "On which side of the line does this case fall? ….".

Furthermore, the Guidance Note DOES NOT explain how ALL the co-owners can retain "day-to-day control over the operation of the scheme", resulting in the scheme not being a managed investment scheme, WHEN the evidence supports the conclusion that:

(a) such schemes are neither designed to operate that way in practice nor permitted to operate that way by the ARR; and

(b) practical necessity and ARR require that the members:

(i) appoint both:

- a manager, to manage and control aspects of the scheme's operations, including those relating to its legal structure and administration, dealings with racing officialdom, the trainer, and other service providers as required on behalf of the group [in accordance with the ARR and the terms of the TOR COA or other agreement adopted by the members]; and

- a licensed trainer, to take actual possession and control of the horse as a whole for the purpose of managing or carrying out those activities that collectively comprise the act of training a racehorse to best advantage of the group [in accordance with the ARR and the terms of the TOR STA or other agreement adopted by the parties]; and

(ii) surrender day-to-day control over their individual interests to the manager and the trainer so that those people can manage the members' interests in common [the horse as a whole] for the benefit of the group, (whether or not they have the right to be consulted or give directions) [see the judgement of *Byrne J* in ***ASIC v IP Product*** *[22]*].

See the Australian Rules of Racing (**ARR**), particularly AR.63 - Manager and AR.61 – Trainer; Schedule 2 – Trainer and Owner Reform Rules (**TOR Rules**) and the provisions of the TOR Co-owners Agreement (**TOR COA**) [particularly clauses 3.4, 3.5 and 3.9] and the TOR Standard Training Agreement (**TOR STA**) [particularly clause 2.9]; and Schedule 3 – Syndicate Rules (**SR**). These documents are available at www.racingaustralia.horse .

Conclusion

There are significant inconsistencies between the Guidance Note and the comprehensive analysis of the same subject-matter set out in Part 1 and Appendix C of the paper titled: ***"The regulatory regime governing the syndication of thoroughbred horses"*** published by this firm, as highlighted above. The analysis in Part 1 of our paper should be relied upon to resolve the inconsistencies.

The following conclusions are based on our analysis.

The determining criteria of a managed investment scheme can only be the legislated definition of a managed investment scheme complimented by the principles established by the case law, objectively applied.

The analysis of a scheme to determine whether or not it satisfies the definition requires that consideration be given to:

(a) all its key elements, including:

  (i) the nature of the members interests [contributions and rights to benefits];

  (ii) legal structure; and

  (iii) modus operandi [how it is designed to operate in practice];

(b) the scheme as being the entire operation [all the activities carried out in relation to the scheme as comprising the scheme's operations]; and

(c) the necessary distinction between:

  (i) the activities [and rights] of the individual members and those of the group; and

  (ii) "control in fact" and "merely a right to participate in decision-making".

The fundamental distinction which underlies the whole of the definition is between:

(a) schemes where ALL the members have day-to-day control over the operation of the scheme by making ALL the decisions and implementing what is agreed; and

(b) schemes where the members contributions are either:

  (i) pooled for use as the property of the scheme; or

  (ii) not pooled but used in a common enterprise that constitutes the scheme;

  with the day-to-day [routine, ordinary, everyday] activities of the scheme being managed or carried out by an operator on behalf of the members as a group, (whether or not they have the right to be consulted or give directions).

The objective assessment in determining day-to-day control is necessarily prospective, viewed from the time when the arrangement is made.

The day-to-day control test is not about ownership or proprietorship, or the legal right to control of the scheme.

- The purpose of the day-to-day control test is to make an important distinction about the nature of the investment each member of the scheme is making.

- If the substance is that ALL the members have day-to-day "control in fact" over the operation of the scheme by making ALL the decisions and implementing what is agreed [actually managing or carrying out the routine, ordinary, everyday activities which comprise the scheme's operations], then the scheme WILL NOT be a managed investment scheme.

- However, if the substance is that the members contributions are either pooled for use as the property of the scheme, or not pooled but used in a common enterprise that constitutes the scheme, to produce financial benefits, or benefits consisting of rights or interests in property, and the members collectively appoint a person to operate the scheme [with the authority to actually manage or carry-out the routine, ordinary, everyday activities which comprise the scheme's operations] on behalf of the members as a group, then the scheme WILL be a managed investment scheme (whether or not they have the right to be consulted or give directions).

- It is a negative test in the sense that for the arrangement to be a managed investment scheme it must be such that the members DO NOT have day-to-day "control in fact" over the operation of the scheme, prospectively viewed from the time when the arrangement is made.

The day-to-day control test includes consideration as to whether a person who provides management services in relation to the property is either:

(a) a mere "agent" who manages the property of each member individually or "investment professional" who simply provides advice to the members on enhancing the value of their own property without exercising control; or

(b) an "operator" of the scheme who manages as a whole the property of the group.

The management activities of a person who is the "promoter" or "operator" ARE NOT to be imputed to the members in determining whether the members have day-to-day control over the operation of the scheme.

See the separate judgements of *Buss JA* and *McClure JA* in ***Burton v Arcus*** *[82] & [83] and [4]*. Also see ***FCA Handbook (UK) [2014]*** *– PERG 11.2* at *Q.4, Q.6* and *Q.12*, and the separate judgements of *Lord Carnwath* and *Lord Sumption* in ***Asset Land v FCA*** *[59], [60] & [62] and [91], [93], [94], [97], [99] & [102]*.

If the key elements of a scheme satisfy the definition, then its establishment and operation will likely be subject to regulation, EXCEPT if it qualifies as a "private" scheme. To qualify as a "private" scheme it MUST NOT require registration under section 601ED. In other words, it MUST NOT have more than 20 members and the person who established it MUST NOT be [a promoter[14]] in the business of dealing in interests in such schemes.

Horse racing schemes

Horse racing schemes generally [by practical necessity and in order to comply with the ARR] are sufficiently uniform in their key elements [structure and modus operandi] to justify the conclusion that any arrangement between 2 or more people (members) to own or lease a racehorse for the purpose of participating in the undertaking of caring for, training and racing it [the horse as a whole] to best advantage for the benefit of the members as a group will, prima facie, satisfy the definition of a managed investment scheme.

The key elements that satisfy the definition are:

(a) the members contributions are either:

  (i) pooled for use as the property of the scheme [typical of **partnership** or **unit trust**-based "investment" arrangements]; or

  (ii) not pooled but used in a common enterprise that constitutes the scheme [typical of **co-ownership** contract-based "enterprise" arrangements];

  to produce financial benefits, or benefits consisting of rights or interests in property; and

(b) the scheme is operated by a manager and a licensed trainer on behalf of the members as a group, (whether or not they have the right to be consulted or give directions).

Consequently, the realities of horse racing schemes [typically **co-ownership** arrangements] as they are designed to operate in practice are:

(a) each member's interest in the horse the subject of the scheme [not the scheme itself so far as that is different] is inseparable from the interests of the other members; and

(b) the right of the members to manage their interests individually is:

  (i) subordinated to the rights of the members collectively and the authority of the manager and the trainer [with actual possession and control of the horse as a whole] to operate the scheme on behalf of the group; and

  (ii) limited to voting on those matters specified in the relevant Owners Agreement or Training Agreement as requiring the members' approval (by the requisite majority).

The manager and the trainer are both clearly "operators" of the scheme who manage or carry out activities in relation to the horse as a whole on behalf of the members as a group. Neither of them is a mere "agent" who manages the property of each member individually or "investment professional" who simply provides advice to the members on enhancing the value of their own property without exercising control.

Accordingly, day-to-day "control in fact" over the operation of the scheme devolves to the manager and the trainer, being the people who, as the operators of the scheme, actually perform "… *the acts which constitute the management of or the carrying out of the activities which constitute the scheme*" [see ***ASIC v Pegasus Leasing*** *[55]*].

[14] The "promoter" test is in section 601ED(1)(b)

Conversely, the members DO NOT have day-to-day "control in fact" over the operation of the scheme, prospectively viewed from the time when the arrangement is made. Practical necessity and the ARR require that the members:

(a) appoint a manager and a licensed trainer and delegate to them the authority to operate the scheme on behalf of the group; and

(b) surrender day-to-day control over their individual interests to the manager and the trainer so that those people can manage the members' interests in common [the horse as a whole] for the benefit of the group, (whether or not they have the right to be consulted or give directions).

However, a scheme may not possess these characteristics alone. The fact that it may also possess other characteristics, including terms that provide for the members to:

(a) pay their contributions towards operating expenses directly* to the relevant service providers [proportionate direct invoicing and payment of fees and expenses];

(b) be paid their distributions of any income (prize money) directly* via the stakes payment system; [*an alternative to the manager administering these arrangements via a designated scheme bank account] or

(c) participate in decision-making in accordance with the procedure (and requisite majority) set out in the applicable Owners Agreement or Training Agreement;

does not take it outside the scope of the definition.

Notes:

1. *It is also not significant to this analysis whether:*
   (a) the manager and the trainer are the same person or different people; or
   (b) the members acquired their individual interests from either the manager or the trainer, or another person.
2. *In the case of schemes established as a result of a licensed trainer dealing in shares/interests it is common for the trainer or nominee to also act as the manager [even if the trainer is not a member of the scheme].*

There is no apparent basis upon which any person, including a licensed trainer, who is [a promoter] in the business of establishing or operating horse racing schemes could successfully argue [in any legal forum] that the resultant schemes are outside the scope of the definition. Any such argument would likely be an artificial construction of the documents to avoid the legislative intention of the statutory provisions.

The need for ALL the members to exercise day-to-day control over the operation of the scheme by making ALL the decisions and implementing what is agreed would be impractical and a significant impediment to the operation of the scheme which is only overcome by the members:

(a) appointing a manager and a licensed trainer [with actual possession and control of the horse as a whole]; and

(b) delegating to them the authority to operate certain aspects of the scheme on behalf of the group.

Risk to unlicensed promoters

A person must not carry on a business [as a promoter] dealing in interests in such schemes, without being:

(a) a licensed promoter or authorized representative of a licensee; and

(b) an approved promoter[15] or approved authorized representative of the lead regulator; in breach of the Act and the ARR.

Unlicensed promoters are exposing themselves to not only the risk of incurring penalties for breaches of the law and the ARR, but also the risk of:

(a) ASIC, the manager, or a member of the scheme, applying to the court for an order requiring the winding up of the scheme[16] because it was established and is being operated illegally; and

[15] A definition of promoter was added to the Australian Rules of Racing (AR) in 2002 along with AR69P, following the issuing by ASIC of Class Order 02/319 [Horse racing]. In 2019 AR69P was renumbered and repositioned as SR9. In August 2020 Racing NSW further amended the Australian Rules of Racing renumbering and repositioning SR9 (with some amendments) as LR53A and added an additional local rule as LR53. LR53 continues to reference AR69P [which is now SR9] and LR53A continues to reference ASIC Class Order 02/319 [which was replaced by ASIC Corporations (Horse Schemes) Instrument 2016/790 on 25/08/2016].

[16] section 601EE of the Corporations Act,

(b) investors exercising their statutory right to declare void the agreements pursuant to which they acquired their interests[17] and claim compensation[18] for the financial loss [initial share price and all ongoing contributions to expenses] resulting from the investment.

This statutory right to compensation is available to investors for a period of six years from the date of the initial investment.

The fact that in most cases these promoters DO NOT have unencumbered ownership of the horses in which they are offering interests, [having acquired them at auction for the purpose of syndication utilizing either credit facilities offered by the sales companies or vendor terms], and ARE NOT using a lead regulator approved PDS and designated application money trust accounts [until the subject share offer is fully subscribed and the horse paid for] adds to the seriousness of the problem, and also represents a significant additional risk to investors which does not arise when promoters comply with the regulations.

Furthermore, it would likely be:

(a) false and misleading for an unlicensed promoter to represent to:

(i) RV (in its dual capacity as Principal Racing Authority and lead regulator); or

(ii) potential investors;

that the investors will, as members of the scheme, have day-to-day control over the operation of the scheme, or their respective interests in the horse that is the subject of the scheme's operations, when the scheme is neither designed to operate that way in practice nor permitted to operate that way by the ARR; and

(b) misleading and deceptive conduct, or unconscionable conduct, under the ***Australian Securities and Investments Commission Act 2001*** for an unlicensed promoter to:

(i) purport to sell interests in a horse the promoter does not own (at the time when the investors agree to purchase and pay for their interests);

(ii) promote investment in a product that is being offered or will operate illegally; or

(iii) represent to potential investors that, as members of the scheme, they will have day-to-day control over the operation of the scheme, or their respective interests in the horse that is the subject of the scheme's operations, when the scheme is neither designed to operate that way in practice nor permitted to operate that way by the ARR.

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For a more detailed analysis of this subject-matter see Part 1 and Appendix C of paper titled: "***The regulatory regime governing the syndication of thoroughbred racehorses***", at www.racehorseownership.com or www.maclegal.com.au .

A version of that paper with links to all cases and other documents cited in it is also available at www.racehorseownership.com .

[17] section 601MB of the Corporations Act
[18] section 1325 of the Corporations Act