REPORT 442

Response to submissions on CP 216 Advice on SMSFs: Specific disclosure requirements and SMSF costs

July 2015

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 216 *Advice on self-managed superannuation funds: Specific disclosure requirements and SMSF costs* (CP 216) and details our responses to those issues.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy.

Contents

A Overview

1 In Consultation Paper 216 *Advice on self-managed superannuation funds: Specific disclosure requirements and SMSF costs* (CP 216), we consulted on proposals to impose disclosure obligations on Australian financial services (AFS) licensees and their authorised representatives when giving personal advice to retail clients on a self-managed superannuation fund (SMSF).

2 Specifically, we invited feedback on the proposals in CP 216 to:

(a) modify the law, by way of class order, to impose disclosure requirements on AFS licensees and their authorised representatives who give personal advice to retail clients on establishing or switching to an SMSF, including:

(i) to warn clients that SMSFs do not have access to the compensation arrangements under the *Superannuation Industry (Supervision) Act 1993* (SIS Act) in the event of fraud or theft; and

(ii) explain other matters that may influence the client's decision to set up an SMSF (e.g. risks and costs associated with an SMSF); and

(b) provide guidance on the costs associated with setting up, running and winding up an SMSF and the point at which an SMSF becomes cost-effective compared with a fund regulated by the Australian Prudential Regulation Authority (APRA).

3 This report highlights the key issues that arose out of the submissions received on CP 216, and our responses to those issues.

4 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 216. We have limited this report to the key issues.

5 For a list of the non-confidential respondents to CP 216, see the appendix. Copies of these submissions are currently on the ASIC website at www.asic.gov.au/cp under CP 216.

Responses to consultation

6 We received 24 (non-confidential) responses to CP 216 from industry associations, advice providers and consumer organisations. We are grateful to respondents for taking the time to send us their comments.

7 We also conducted roundtable discussions with a number of the respondents to CP 216 and other interested organisations.

8 There was general consensus that clients should be provided with appropriate disclosures, including those discussed in CP 216, to assist them in deciding whether to establish or switch to an SMSF. Feedback differed in relation to:

(a) how the disclosures should be provided (e.g. in the Statement of Advice (SOA) or other document);

(b) whether to provide guidance on the costs associated with SMSFs and the extent of guidance (e.g. describing the types of costs versus providing dollar amounts); and

(c) Rice Warner's findings in relation to the minimum cost-effective balance for SMSFs when compared with an APRA-regulated superannuation fund.

ASIC's response

9 In response to the feedback we received, we have decided not to modify the law to impose specific disclosure requirements on AFS licensees and their authorised representatives who give personal advice to retail clients on establishing or switching to an SMSF.

10 We have instead decided to issue the following two information sheets to provide guidance on how advisers can provide advice to clients on establishing or switching to an SMSF in compliance with the conduct and disclosure obligations in Ch 7 of the *Corporations Act 2001* (Corporations Act):

(a) Information Sheet 205 *Advice on self-managed superannuation funds: Disclosure of risks* (INFO 205); and

(b) Information Sheet 206 *Advice on self-managed superannuation funds: Disclosure of costs* (INFO 206).

11 The information sheets provide guidance on the types of risks and costs that should be considered, discussed and disclosed by advisers giving personal advice to retail clients on establishing or switching to an SMSF. They also provide 'compliance tips', which indicate the factors that ASIC is likely to look more closely at as part of our surveillance activities.

B Disclosure requirements

Key points

This section outlines the feedback received on our proposal to modify the law, by way of class order, to impose specific disclosure obligations on AFS licensees and their authorised representatives who give personal advice to retail clients on establishing or switching to an SMSF. The proposed specific disclosure obligations include obligations to:

- warn that SMSFs do not have access to the compensation framework under the SIS Act in the event of theft or fraud on the fund; and
- explain other matters that may influence an investor's decision to establish an SMSF (e.g. the risks and costs associated with an SMSF).

Modifying the law to impose additional disclosure requirements

12 In CP 216, we consulted on proposals to impose specific disclosure obligations on AFS licensees and their authorised representatives when giving personal advice to retail clients to establish or switch to an SMSF.

13 Specifically, we invited feedback on the proposals in CP 216 to modify the law, by way of class order, to impose disclosure requirements on AFS licensees and their authorised representatives to:

(a) warn clients that SMSFs do not have access to the compensation arrangements under Pt 23 of the SIS Act, in the event of fraud or theft; and

(b) explain a range of other factors to assist the client in deciding whether it is appropriate in their circumstances to establish or switch to an SMSF, including:

(i) the responsibilities and obligations of SMSF trustees;

(ii) the risks associated with an SMSF;

(iii) the need to develop and implement an appropriate investment strategy;

(iv) the time and skills required to operate an SMSF;

(v) the costs of managing an SMSF;

(vi) the need to consider and develop an exit strategy; and

(vii) that the laws and policies that affect SMSFs are subject to change.

14 We proposed that these disclosures be given at the same time, and by the same means, as the advice is provided (e.g. in an SOA). We also said that as a matter of best practice, we think that AFS licensees and their authorised

representatives should give the disclosures in person at the time the advice is provided, regardless of whether the advice is (or will be) set out in the SOA.

Stakeholder feedback

Lack of compensation

15 There was general consensus that clients who are advised to establish or switch to an SMSF should receive a warning that they do not have access to the compensation framework under the SIS Act in the event the fund suffers significant loss as a result of theft or fraud.

16 There was no consensus on how this warning should be worded or provided to clients. Suggestions included that it be provided as part of the SOA or the Financial Services Guide (FSG), or that advisers have discretion on how to provide the warning.

17 Some respondents who opposed a mandatory disclosure requirement were concerned that there would be duplication of disclosures because the Australian Taxation Office (ATO) Trustee Declaration Form already includes a warning on the lack of compensation for SMSFs.

18 Other respondents argued that the warning should be provided in a separate document that outlines the risks associated with SMSFs more broadly. They argued that this would be more useful because the lack of compensation is not a relevant consideration for all clients in deciding whether to establish or switch to an SMSF. The SOA could then include the disclosures that are relevant for the individual client.

Other disclosures

19 There was general consensus that the other disclosures (see paragraph 13(b)) are relevant and should be given to clients who are advised to establish or switch to an SMSF.

20 However, there was no consensus on how this information should be worded or provided to clients. Suggestions included that the disclosures should be provided in the SOA, in a separate form or booklet, in an information sheet or as part of the ATO Trustee Declaration Form.

21 Some respondents argued that the disclosures are already required under the existing conduct and disclosure obligations in Ch 7 of the Corporations Act. They argued that it may be more beneficial for ASIC to issue more specific guidance in relation to advice on SMSFs.

22 There were also concerns of duplication because some of these disclosures are already provided in the ATO Trustee Declaration Form. Other respondents also argued that providing these disclosures as part of a separate

document outlining the risks associated with SMSFs more broadly would be more useful for consumers.

ASIC's response

Based on the feedback we received, we have decided not to modify the law to impose specific disclosure requirements on AFS licensees and their authorised representatives when giving personal advice on establishing or switching to an SMSF.

We have instead decided to issue two information sheets (INFO 205 and INFO 206). INFO 205 provides guidance on how advisers can provide advice to retail clients on the responsibilities and risks associated with establishing or switching to an SMSF in compliance with their existing obligations in the Corporations Act. Our view is that the factors set out in INFO 205 should be disclosed by the same means as the advice (e.g. in the SOA). It is good practice that advisers also discuss these factors with clients in person.

Our response takes into account the feedback we received from stakeholders. We also consider that there is now a more heightened awareness of the risks and costs associated with SMSFs. This is partly due to increased publicity about our concerns over inappropriate advice to investors who may be considering an SMSF through public statements, speeches, media releases and on our MoneySmart website. The ATO also includes detailed information on its website and on social media about the responsibilities, risks and costs associated with SMSFs.

We expect that these other sources of information, combined with the two information sheets, will have a similar effect on adviser behaviour as the proposals in CP 216.

We may revisit the need to impose specific disclosure obligations in relation to advice on SMSFs if we continue to see poor SMSF advice.

C Guidance on SMSF costs

Key points

This section outlines the feedback on our proposal to issue guidance on the costs associated with establishing, operating and winding up an SMSF, as well as guidance on the point at which an SMSF structure is likely to be cost-effective compared with an APRA-regulated superannuation fund.

Providing guidance on the disclosure of SMSF costs

23 In CP 216, we sought feedback on a proposal to provide guidance that, when giving advice to retail clients on establishing or switching to an SMSF, advisers must consider and be able to show that they have informed clients of the following costs associated with SMSFs:

(a) setting up an SMSF;

(b) ongoing costs associated with running an SMSF;

(c) winding up an SMSF;

(d) the point at which an SMSF becomes cost-effective compared with an APRA-regulated fund;

(e) the opportunity cost associated with managing an SMSF; and

(f) insurance costs.

24 As part of this proposal, ASIC commissioned Rice Warner to examine the minimum cost-effective balance for SMSFs when compared with an APRA-regulated superannuation fund. We also invited feedback on Rice Warner's findings.

Stakeholder feedback

Guidance on SMSF costs

25 Feedback was mixed on the issue of whether ASIC should provide guidance on the costs associated with SMSFs that should be disclosed to retail clients when giving advice on establishing or switching to an SMSF.

26 Several respondents expressly supported ASIC issuing guidance. Others suggested that ASIC should issue guidance only on the types of costs, rather than providing specific dollar figures. These respondents argued that the costs associated with SMSFs can vary depending on, for example, the types of investments and the service providers used.

27 Respondents who opposed ASIC issuing guidance on the costs argued that the disclosure of costs is currently required under the existing conduct and disclosure obligations and that guidance has already been provided. Others appeared to oppose the proposed guidance on the basis that it would be issued with specific dollar amounts that advisers must use.

28 Some respondents also argued that the costs associated with SMSFs will not always be a relevant consideration for clients; the driver for establishing an SMSF is generally control over retirement savings, rather than costs.

Rice Warner's findings

29 Feedback on Rice Warner's findings was also mixed. Some respondents supported the findings and stated that they are generally representative of current industry views, but are likely to change over time. However, other respondents felt that they did not accord with their experience and either argued the figures were too low or too high.

> *ASIC's response*
>
> As mentioned in Section B, we have decided to issue two information sheets. INFO 206 sets out the types of costs that should be discussed and disclosed to clients when giving advice on establishing or switching to an SMSF. Our view is that the costs set out in INFO 206 should be disclosed by the same means as the advice (e.g. in the SOA). It is good practice that advisers also discuss these factors with clients in person.
>
> We recognise that stakeholder feedback was mixed in relation to the point at which an SMSF becomes cost-effective compared with an APRA-regulated fund. However, we consider there is merit in providing guidance on low-balance SMSFs to ensure advisers consider this when formulating their advice to clients.
>
> We have provided a 'soft benchmark' of $200,000; we consider that SMSFs with balances below this amount are less likely to be in the client's best interests. This benchmark does not preclude an adviser recommending that an SMSF be established below this amount; however, we are likely to look more closely at advice that recommends establishing or switching to an SMSF with a balance below the $200,000 soft benchmark.

Appendix: List of non-confidential respondents

- AMP Services Limited
- Association of Financial Advisers
- Association of Superannuation Funds of Australia
- Bailey, Kym
- Consumer Credit Legal Centre NSW
- Count Financial Limited
- CPA Australia
- Dixon Advisory
- Financial Planning Association of Australia
- Financial Services Council
- Garnaut Private Wealth
- Hewison Private Wealth
- Howard, Darren
- Industry Super Australia and Australian Institute of Superannuation Trustees (joint submission)
- Institute of Chartered Accountants Australia
- Lime Super
- Mortgage and Finance Association of Australia
- National Seniors Australia
- SMSF Owners' Alliance
- SMSF Professionals' Association of Australia (now the SMSF Association)
- Switzer Financial Services
- Taxpayers Australia
- Tria Investment Partners
- Westpac Group