



Consumer Credit
Legal Centre NSW

November 2013

Submission in relation to ASIC's Consultation Paper 216 on
disclosure requirements and costs of SMSFs

by the

Consumer Credit Legal Centre (NSW) Inc

Consumer Credit Legal Centre (NSW) Inc ("CCLC") is a community-based consumer advice, advocacy and education service specialising in personal credit, debt, banking and insurance law and practice. CCLC operates the Credit & Debt Hotline, which is the first port of call for NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies. We provide legal advice and representation, financial counselling, information and strategies, referral to face-to-face financial counselling services, and limited direct financial counselling. CCLC took over 20,000 calls for advice or assistance during the 2012/2013 financial year.

A significant part of CCLC's work is in advocating for improvements to advance the interests of consumers, by influencing developments in law, industry practice, dispute resolution processes, government enforcement action, and access to advice and assistance. CCLC also provides extensive web-based resources, other education resources, workshops, presentations and media comment.

Thank you for the opportunity to comment on ASIC's Consultation Paper 216 on disclosure requirements and costs of operating a self-managed superannuation fund (SMSF).

The Consumer Credit Legal Centre (CCLC) is involved in providing advice (both legal and financial counselling) in relation to superannuation, including early access to superannuation (including access for serious financial hardship and to save the family home) and total and permanent disability claims. CCLC does not provide financial advice and as a consequence is not involved at all in superannuation as an investment decision. Accordingly, CCLC does not provide advice on SMSFs.

The main purpose of this submission is to comment on some problems CCLC has identified with SMSFs through our policy and casework experience. We wish to comment on the following:

- 1. The difficulty in accessing advice for superannuation**
- 2. The problems with property spruikers**
- 3. Disclosure**

1. The difficulty in accessing advice for superannuation

All working Australians are required to have a superannuation fund and receive compulsory contributions from their employer. Unfortunately, if you don't know anything about super then it is really hard to find free and independent information, especially for people from a non-English speaking background.

There is currently no free financial investment advice available to consumers with questions about superannuation. There is also no free legal advice or financial counselling centre where consumers can get comprehensive information about SMSFs. The National Information Centre on Retirement Investments Inc (NICRI) has an information hotline that can give information on investment products and refer callers on for further assistance, but it does not give investment advice or undertake casework. As a consequence, many consumers are switching to SMSFs with poor information about the risks and requirements. This is reflected in PJC's *Trio Report* as well as ASIC's *Report 337*.

A good example of the possible dangers that await consumers who do not understand super and cannot access free advice is the increasing problem of consumers illegally withdrawing funds from their SMSF early and then getting pursued by the ATO. In recent years, various schemes have been identified offering access to a member's preserved superannuation before they retire. Promoters of these schemes claim they can help consumers gain access to this money for any number of reasons, including paying of credit card debts, buying a house, car or even a holiday, and they often target people who are under financial pressure or who do not understand the super laws.

For many consumers in severe financial hardship, mortgage stress or with a terminal illness, withdrawing superannuation funds early can be an extremely important option, when done so legally. Unfortunately, setting up an SMSF to gain improper early access to superannuation is illegal and will attract severe penalties including heavy fines and possibly even imprisonment.

Australia needs a legal centre that can give free legal advice and financial counselling to supplement the information that NICRI provides. NICRI should also be better promoted as a free service, since many consumers are not aware of it.

CCLC contends that it is essential that the government fund a policy, legal advice and casework service for superannuation. The need for this is urgent as it is difficult for working middle income Australians to get access to free or very low cost independent advice.

Recommendation: a Superannuation Legal Centre covering policy, legal advice, casework and extensive website materials should be established and given recurrent funding as a matter of urgency.

2. The problems with property spruikers

CCLC has encountered problems with property spruikers for many years. The schemes that we come across usually involve spruikers that run seminars about how consumers can use real estate to make lots of money. The consumer can then be steered into a whole range of problems including:

- a) Over-priced property (two tier marketing);
- b) High cost mortgage to purchase investment property;
- c) Rent to buy arrangements for property; and
- d) SMSFs to buy property.

The main problem is that property spruikers are steering consumers in a particular direction to property they wish to sell in order to earn commissions. It follows that in this situation the information given is likely to be poor as it not tailored to the consumer's needs and objectives.

When a consumer uses his or her superannuation funds to invest in a single-asset real property SMSF s/he will most likely be forced to borrow money and enter into a mortgage. Should the consumer become unable to service that mortgage, for whatever reason, s/he might not only lose the property (and all of the invested superannuation savings), but s/he could end up owing additional money to the lender. Lenders can legally demand an individual to provide a personal guarantee against personal assets, even in a limited recourse borrowing arrangement (LRBA). Consumers might believe (or be convinced) that real estate is a very safe investment, but a heavily geared investment property can be very high-risk.

CCLC specialises in helping consumers with mortgage stress, and it is not uncommon for us to have callers on our legal advice line in severe mortgage stress from a heavily geared investment property.

CCLC contends that even with rigorous enforcement it is very difficult to stop the problematic conduct by property spruikers. Before September 2007, the capacity for a consumer to use borrowed money to purchase a SMSF real property asset was extremely limited. In 2007 the rules for borrowing funds within a SMSF were relaxed. We believe that law reform is needed to exclude

investment properties from SMSFs because of the high risk to consumers described above. In the alternative, law reform is needed to prevent the borrowing by SMSF trustees from satisfying the requirements of former subsection 67(4A) of the *Superannuation Industry (Supervision) Act 1993* (SISA) where a related party of the SMSF has given the lender a personal guarantee as part of the arrangement. This would at least prevent the possibility of a consumer losing *more* money than was invested from their superannuation funds.

Recommendation: the law should be changed (back) to exclude investment properties from SMSFs, or in the alternative prevent SMSF borrowing where a member of a SMSF has given a personal guarantee as party of the borrowing arrangement.

3. Disclosure

CCLC strongly supports all of the proposed changes to improve disclosure. We also strongly support the disclosure of expected costs. In response to Question C1Q1 we submit that the way that Rice Warner has described SMSF costs in its report could be clearer about the risks of managing a SMSF balance that is below \$200,000. Consumers need to fully understand the level of investment and administration skills that will be required for a trustee to manage a cost-effective SMSF with a balance below \$200,000.

Importantly, CCLC contends that disclosure is only ever a part-solution to any problem and further law reform is needed to address some of the ongoing issues with SMSFs. This is particularly the case because the proposed disclosures will only reach consumers that approach an AFS licensee for advice before switching to a SMSF.

Recommendation: law reform is particularly needed to address the following issues:

- a) A consumer should have a minimum fund balance before they can switch from an APRA regulated superannuation fund to a SMSF (for example \$200,000); and
- b) Excluding single-asset investment in real property from SMSFs.

Thank you again for the opportunity to comment on ASIC's Consultation Paper 216 on disclosure requirements and costs of operating a SMSF. If you have any questions or concerns regarding this submission please do not hesitate to contact the Consumer Credit Legal Centre on (02) 9212 4216.

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