



ASIC review of Regulatory Guide 97 and  
Class Order 14/1252 – Disclosing fees and  
costs in periodic statements and PDSs

4 August 2015

AIST Submission

## AIST

The **Australian Institute of Superannuation Trustees** is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public-sector funds.

As the principal advocate and peak representative body for the \$650 billion not-for-profit superannuation sector, AIST plays a key role in policy development and is a leading provider of research.

AIST provides professional training, consulting services and support for trustees and fund staff to help them meet the challenges of managing superannuation funds and advancing the interests of their fund members. Each year, AIST hosts the Conference of Major Superannuation Funds (CMSF), in addition to numerous other industry conferences and events.

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Executive summary **brief:**

AIST welcomes ASIC’s continued consultation and review of RG 97 and Class Order 14/1252. We recommend that RG 97 could be further enhanced through providing greater guidance on calculation methodologies, defining ‘related parties’, treating superannuation and managed investments in the same way, and ensuring greater alignment with APRA reporting requirements. AIST also supports even further disclosure of related party payments, and that a separate review of insurance disclosure takes place.

AIST wishes to thank ASIC for the continued consultation regarding its Review of Regulatory Guide 97 – *Disclosing fees and costs in PDSs and period statements* (“draft RG 97”), together with proposed amendments to Class Order 14/1252 (“the draft CO”). This follows on from the substantial work undertaken in Report 398 *Fee and cost disclosure: Superannuation and managed investment products* July 2014, the review of Class Order 14/1252 in 2014 and also in May 2015, and the review of Draft RG 97 in February 2015.

AIST thanks ASIC for circulating both draft RG 97 and the draft CO together, as it is difficult to fully comment without having both to review. We also appreciate the forthcoming further consultations through the 9 September roundtable meeting.

AIST strongly endorses the fee disclosure work ASIC has been undertaking. Improving disclosure is highly critical both from the member perspective (fees affecting members’ net returns), and from the viewpoint of furthering efficiency of the superannuation system. It is critical that fee disclosure continues to be improved, so that any review of system and fee efficiency will be based on improved data.

Through the interaction of the revised draft RG 97 and the draft CO, AIST **welcomes** the following improvements:

- A clearer definition of ‘interposed vehicle’.
- Clarity that ‘look-through’ to more than a first non-associated entity may be covered by the definition of ‘interposed vehicle’.
- Further examples have been included in draft RG 97.
- The carve-out for listed assets has been removed.
- Performance fees to be disclosed as actual to enhance consistency and transparency.
- On the whole, ‘indirect costs’ must be based on the costs incurred in the previous financial year.
- Clarification of indirect costs relating to OTCs.

AIST believes that (in summary) **further clarification or amendment is needed:**

- **More prescription regarding calculation methodologies.** This is especially important given the requirements of draft RG 97.24-28 and draft RG 97.61. For example:
  - Greater guidance is needed in draft RG 97 regarding how the responsible person for the PDS is to document reasoning underpinning the belief that the entity has more than 70% of its assets by value invested in securities or other financial products. Such guidance should include documenting the timing and methodology of the valuation, and updating the valuation.
  - Greater guidance is needed in draft RG 97.62 regarding best practice content of internal documents.
- **More details in the examples in draft RG 97 in relation to paragraph (4)(b) of the definition of Interposed vehicle.**
- **More prescription regarding documentation of practices,** e.g. calculation methodologies or the formulation of reasonable estimates.
- **Define ‘related party’.**
- **More clarity provided around the use of the new term ‘indirect fees of your investment’,** including how to calculate it and whether any changes need to be made to the periodic statement table itemising transactions and to the PDS fees and costs table.
- **Reinstate the requirement to disclose rebates or revenue-sharing arrangements they may have with related parties** (see former draft RG 97.84 circulated 2014)
- **Why superannuation and managed investment products are treated differently.** AIST notes that the combination of paragraphs in the draft CO clause 101A Indirect Costs still treat the costs differently. This may result in superannuation products appearing more expensive than managed investment products.
- **Inclusion of guidance that bundling of costs is not considered to be good practice.**
- **Insurance disclosure should be the subject of a separate review.**
- **Guidance regarding protections** where, for example, some costs are not reported to the trustee or responsible entity.
- **Extension of the exemption for managed investment schemes to super funds for fees or transaction costs where the OTC derivative is entered into for hedging for consistency in disclosure.**
- **More guidance on the costing of OTC derivatives would also be welcomed to ensure consistency in calculation by investment managers.**
- **Ensure the transitional arrangements for commencement of the changes provide adequate time for industry adoption, taking into account the time required for administration system changes.**

AIST further recommends the following to continue this important work:

- Given the extent and complexity of the proposed changes, AIST recommends that ASIC undertake a post implementation review.
- ASIC's excellent work on fee disclosure needs continual development. AIST has made some recommendations in the last paragraph of this submission.

AIST lastly welcomes the addition of flowcharts to aid in the understanding of concepts such as interposed vehicles. We would support the addition of flowcharts for a better understanding of how these concepts are used in the examples.

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## 1 Principles which should underpin disclosure

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Before examining specific issues with draft RG 97 and the CO, AIST wishes to reiterate the principles which it believes should underpin disclosure.

### 1.1 High level principles

AIST refers to (and obviously supports) the OECD's *G20 High Level Principles on Financial Consumer Protection*<sup>1</sup>. As far as fee disclosure is concerned, these Principles may be summarised as follows:

- Standardisation, comparability, and consumer testing are all desirable.
- A level playing field across financial services is to be encouraged.
- Furthering responsible business conduct is important, e.g. ensuring that remuneration practices and conflicts are not detracting from proper disclosure.
- Remuneration/ conflicts of interests should be disclosed where conflicts cannot be avoided.
- Disclosure should help consumers distinguish between what is essential and what's less important.

### 1.2 Operational principles

AIST also believes that – particularly at Regulatory Guide level – there is are a number of operational principles which underpin best practice fees and cost disclosure:

- Costs and fees should not be obscured through the use of intermediaries.
- Disclose fees arising from the separation of ownership of assets from those who manage the assets.
- Calculation methodologies should be guided/set, eg through regulatory guides, whenever outcomes affecting member benefits need disclosure.
- The whole picture as disclosed should not be misleading through omission even if the component parts comply, e.g. rolling up of group service charges.
- Disclose costing methodologies where they vary across a default investment option.
- Disclose payment and utilisation of contractual benefits e.g. group insurance profit sharing where the benefits are not passed on to members either in the form of retaining the benefit within the fund or as a reduction in fees.
- Key terms in disclosure documents need to be consistently labelled and defined.

We now turn to our specific comments regarding draft RG 97 and the CO.

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<sup>1</sup> Organisation for Economic Co-Operation and Development, (2011), *G20 High-Level Principles on Financial Consumer Protection*, Geneva: Organisation for Economic Co-operation and Development. (Endorsed by G20 Finance Ministers & Central Bank Governors 14-15 Oct 2011)  
Available at: <http://www.oecd.org/daf/fin/financial-markets/48892010.pdf>

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## 2 Specific comments regarding draft RG 97 and the draft Class Order

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### 2.1 Definition of ‘interposed vehicle’

AIST **welcomes** the following, which have been included within the drafts:

- A clearer definition of ‘interposed vehicle’.
- Clarity that ‘look-through’ to more than a first non-associated entity may be covered by the definition of ‘interposed vehicle’. This assists with alignment with APRA forms (eg. SRF703.0) by including a ‘second entity’.
- That further examples have been included in draft RG 97.
- A more detailed narrative is included in the RG 97.59 examples.
- Example 6 details that investment in a named unlisted trust investing in Australian infrastructure where the return is based on the trust investment is an ‘interposed vehicle’.
- The carve-out for listed assets has been removed.
- In draft RG 97, RG97.53 refers to a ‘look through’ test being applied, and includes that the entity may still be treated as an interposed vehicle if it could be reasonably regarded as the means by which an investment is obtained. AIST believes that what is meant by ‘reasonably regarded’ has been clarified within the examples given.

AIST **seeks clarity** regarding the following:

- **70% threshold has pluses and minuses.** The proposed revised definition in the draft CO does provide greater certainty through giving a percentage of greater than 70%. AIST notes that the definition does, however, mean that products with less than a 70% investment which might nonetheless be reasonably viewed as a means of investing in real property or confer control are excluded unless the security or interest held is the means of accessing the end investment (the purpose of the investment).
- **Forming a reasonable belief needs clarity.** Draft RG 97 needs to outline the steps which the responsible person for the PDS needs to take in order to form the reasonable belief that the entity has more than 70% of its assets value invested in securities or other financial products or the purpose of the investment.
- **Drafting in clause 101B(4)(a) and (b).** In the draft CO, the drafting of clause 101B(4)(a) and (b) needs clarification as:
  - Paragraph 101B(4) excludes certain entities from being ‘interposed vehicles’; and
  - Clause 101B(4)(a) and (b) appears to include them.
  - We have made a suggestion below as to how the wording may be improved.
- **Define ‘confer control’.** Draft clause 101B(2)(b) refers to ‘(securities or other financial products) that confer control over another entity’. AIST submits that clarifying what is meant by ‘confer control’ should be the subject of further guidance within draft RG 97.

- **Clarification of whether the reference to ‘control’ in paragraph 101B(4)(b)(ii) is a reference to control by the body, partnership or trust or control by the responsible person for the PDS.** Guidance clarifying the meaning of ‘control’ in this paragraph would also be helpful.
- **Clarify best practice test for listed entities.** AIST believes that draft RG 97.54 – referring to the ‘interposed vehicle’ test being more difficult for listed entities – requires further clarification as to what a best practice test should involve.
- **Better disclosure regarding platform fees.** Regarding the disclosure of platform fees and costs (draft RG 97.56), AIST believes that further guidance is needed to ensure that the PDS includes how ‘additional costs will be charged by the issuers of the products that the investor decided to invest in’, together with information to the investor as to where to find those fees and costs.
- **Examples could show where funds fit.** While AIST appreciates the greater clarity contained in the RG 97.59 examples, even more certainty could be given through each example containing a diagram which depicts where the fund sits within the example.
- **Clarity regarding ‘negatively correlated’ in example 2.** The term ‘negatively correlated’ is used in example two regarding managed investment schemes. AIST believes that this term should be defined.
- **Why are super and managed investment products are treated differently.** Why are superannuation and managed investment products treated differently. AIST notes that the combination of paragraphs in the draft CO clause 101A Indirect Costs still appear to treat the costs of derivatives differently.
- **It would be useful for the examples in paragraph RG97.59** to expand on when it would be apparent from a PDS of a superannuation product that a vehicle is not the end investments but a means by which the benefit of the investment is obtained.
- **It would be useful to clarify in an example in paragraph RG97.59** when a body, partnership or trust carries on as its primary business a business of making investments. Does carrying on a business take on the tax meaning of carrying on a business such that a body, partnership or trust that exists purely to directly hold a single piece of real property may not necessarily be carrying on a business of making investments? In this case the investment in the unlisted body, partnership or trust may not be an interposed entity.

With regards to the wording currently proposed for clause 101B(4), we consider that it is drafted in an overly complex manner and perhaps could be simplified by:

- Having just one test in paragraph (4) – that is, the same test applying to both listed and unlisted investments.
- More simply stating that what is intended to be captured by this purpose test is where the investment of the super fund or managed investment scheme in the body, partnership or trust is the means of accessing the end investment rather than the being the end investment in itself.



On the current drafting, paragraph 101B(4) applies where a body, partnership or trust has 70% or less of its assets invested in securities or financial products (and so would not, on the face of it, be an interposed entity). In this case, an investment in the body, partnership or trust could still be an interposed entity if the securities or interest held in the body, partnership or trust by the managed investment scheme or super fund is a means of accessing the end investment rather than being the end investment itself of the managed investment scheme or super fund.

## 2.2 'Indirect costs' - calculation and documentation

AIST **welcomes** the following, which have been included in the drafts:

- Greater guidance in both the draft CO and draft RG 97 regarding the composition of 'indirect costs'.

AIST **seeks clarity** regarding the following:

- **Guidance on what is meant by 'primary purpose of avoiding or limiting the financial consequences of fluctuations.'** Clause 101A(4) of the draft CO should provide greater guidance about how internal processes can document that the acquisition was not for this primary purpose.
- **Clarification in the draft RG 97 that indirect costs should not include costs charged to members as a buy-sell spread if this would result in double counting.**
- **Guidance on documenting processes.** Draft RG 97 should contain guidance as to the:
  - Steps to identify indirect costs.
  - Content of documented internal calculation methodologies.
  - Nature of indirect cost identification processes.
- For example, draft RG 97.60 states that product issuers need to 'identify indirect costs; and reasonably estimate any indirect costs that are unknown...'. This is particularly important since draft RG 97.61 notes that making low estimates can lead to defective PDSs. Prescriptive guidance is needed to ensure consistency as well as furthering consumer protection and system efficiency. There is insufficient guidance in draft RG 97.62.
- **PDS reissue trigger should be based on material differences.** Even though draft RG 97.60 requires product issuers to reasonably estimate any indirect costs, draft RG 97.61 highlights that a low estimate is more likely to lead to a defective PDS. This implies that a PDS will be defective where the disclosed indirect costs are (as it turns out) lower than the actual indirect costs. AIST recommends that this requirement is unduly onerous and that updating should be required only where the difference is material. Further, it may result in inconsistencies between products where some disclosure is based on indirect costs from the previous year but this may need to be updated to reflect actual indirect costs based on information from the current year. It is noted that obtaining sufficient information from third parties to calculate an estimate of indirect costs can be difficult to obtain. This information may not be available for some time after the issue of the PDS.
- **Guidance on what is included in reduction of management costs, etc.** Draft RG 97.70 now includes that any income or benefits derived from use of the assets in a superannuation fund (etc)

that is retained by the trustee or responsible entity is a fee or indirect cost and must be included in PDS disclosures. AIST seeks guidance on whether such items as (for example) non-passing on of insurance profit sharing rebates, such as not retaining such amount within the fund for the benefit of members or passing it on to members as lower fees, are included.

- **Trustee and responsible entity protections.** AIST believes that guidance is needed regarding protections to be afforded to trustees or responsible entities where, for example, some costs are not reported to the trustee or responsible entity particularly given that third parties are not legally required to provide this information. This issue also underpins the need for greater guidance to be included within draft RG 97 regarding the documentation of processes.

## 2.3 Updating a PDS

AIST **welcomes** the following, which has been included in the drafts:

- Greater detail regarding updating PDSs (draft RG 97.24-28).

AIST **seeks clarity** regarding the following:

- **PDS reissue trigger should be based on material differences.** Even though draft RG 97.60 requires product issuers to reasonably estimate any indirect costs, draft RG 97.61 highlights that a low estimate is more likely to lead to a defective PDS. This implies that a PDS will be defective where the disclosed indirect costs are (as it turns out) lower than the actual indirect costs. AIST recommends that this requirement is unduly onerous and that updating should be required only where the difference is material. AIST notes that the approach of requiring materiality is already reflected in draft RG 97.25. AIST also notes that any difference in the disclosed indirect costs and actual indirect costs does not result in any change to the amount actually paid by investors or the amount deducted from or otherwise reducing the value of the investment.
- **Whether there is any timing limits after the end of the financial year by which updated information on indirect fees and costs must be obtained from third parties.** Getting this information can take some time.

## 2.4 Fees disclosed prospectively

AIST **welcomes** the following, which has been included in the drafts:

- Performance fees to be disclosed as *past actual* to enhance consistency and transparency.

AIST **seeks clarity** regarding the following:

- **Further guidance regarding updating the PDS regarding indirect costs.** Draft RG 97.27 refers to the updating of indirect costs. AIST believes that further guidance is needed, particularly regarding the updating of what were 'reasonably estimated' indirect costs. We believe that a materiality threshold should be applied. See our comments in points 4.2 and 4.3 above.

## 2.5 Advice fees

AIST **welcomes** the following, which has been included in the drafts:

- Clarity that advice fees (other than ‘intra fund advice fees’) are to be separately disclosed in the fees and costs template.

## 2.6 Exit fees

AIST **welcomes** the following, which has been included in the drafts:

- Amending the note to the fee example within the draft CO referring to the buy-sell spread and the exit payable on exit, rather than ‘early exit’.

## 2.7 Performance fees

AIST **welcomes** the following, which have been included in the drafts:

- Performance fees to be disclosed as *past actual* to enhance consistency and transparency.
- Detailed guidance regarding ‘performance fee’.

AIST **seeks clarity** regarding the following:

- **Further guidance regarding ‘typical amounts’.** Draft RG 97.88 refers to the use of ‘typical amounts’ when calculating the investment fees for superannuation products or management costs for managed investment products. AIST believes that further guidance is needed to clarify what is meant by ‘typical amount.’

## 2.8 Reduction, waiver or rebate of fees or costs

AIST **welcomes** the following, which has been included in the drafts:

- The continued inclusion of the requirement to disclose promoter or other related party costs.

AIST **seeks clarity** regarding the following:

- **Include disclosure of rebates or revenue sharing arrangements with related parties.** AIST notes that the previous draft of RG 97 circulated late last year included the proposed requirement to disclose any rebates or revenue-sharing arrangements with related parties who provide services (e.g. banking). This requirement should be included to help ensure that the issuer is meeting its fiduciary obligations.

## 2.9 Fees and costs template for superannuation funds

AIST **seeks clarity** regarding the following:

- **Further guidance regarding fees ‘appropriately apportioned’.** Draft RG 97.145 refers to the need to appropriately apportion fees and costs which are charged in a way that is not limited to a MySuper product or investment option. AIST believes that guidance is needed regarding the content of documented procedures.
- **Whether changes need to be made to the fees and costs table for long form and short form PDS, which in turn flows through to the part of the periodic statement itemising transactions, to include ‘indirect fees of your investment’.** A new sub-clause 301(1) is proposed in the draft CO requiring an explanation of ‘indirect fees of your investment’ to be placed after the part of the periodic statement that itemises transactions during the period. However, this explanation does not appear to have context to any other content in the periodic statement or the PDS. In particular, the PDS may have as an investment fee an amount deducted before the unit price is determined. However, it appears that the periodic statement would not show this as an investment fee as is done in the PDS but instead an indirect fee (with the investment fee shown as zero in the periodic statement). See also section 4.13 below.

## 2.10 Over the counter (OTC) derivatives

AIST **welcomes** the following, which has been included in the drafts:

- The treatment of OTC derivatives as including costs within transaction costs for both superannuation and managed investment funds.

However, AIST would welcome clarification or changes on the following:

- Extension of the exemption for managed investment schemes to super funds for fees or transaction costs where the OTC derivative is entered into for hedging for consistency in disclosure.
- More guidance on the costing of OTC derivatives would also be welcomed to ensure consistency in calculation by investment managers.

## 2.11 Related parties

AIST **welcomes** the following, which has been included in the drafts:

- The continued inclusion of the requirement to disclose promoter or other related party costs.

AIST **seeks clarity** regarding the following:

- A definition of ‘related party’ is required.

## 2.12 Insurance disclosure

AIST **welcomes** the following, which has been included in the drafts:

- Guidance that insurance premiums are to be based on a member's current age, rather than there being some funds disclosing based on current age and others based on age at next birthday.

AIST seeks clarity regarding the following:

- **A separate review of insurance disclosure is required.** AIST notes that insurance disclosure was not a key feature of ASIC's Report 398. AIST acknowledges that disclosure practices for superannuation funds offering insurances varies considerably. There are a considerable number of members covered by insurance, as well as a high premium cost (approximately \$4.6billion per annum), all pointing to the need for a separate review. Any such review should include an impact assessment on behaviours, e.g. payment of commissions for insurance products.

## 2.13 Periodic statements

AIST seeks clarity regarding the following:

- **Guidance regarding how the periodic statement should explain calculation of any income tax transaction amount.** Draft RG97.184 requires a periodic statement to include an explanation as to how the income tax transaction amount is calculated if GST or stamp duty is not disclosed as part of the amount in a transaction. AIST believes that this requires clarification. For example, whether a web address to an explanation may be included in the periodic statement.
- It is unclear how the new term "indirect fee" in subclause 301(1) of Schedule 10 is to be calculated and how it relates to the part of the periodic statement that itemises transactions and whether any changes now need to be made to the short form PDS (Schedule 10) and long-form PDS (Schedule 10) fee table.
  - a) Where a fund charges a percentage based investment fee which is accrued and reflected in an option's unit price (ie, not deducted directly deducted from the member's account) is this an "indirect fee" for the purposes of the periodic statement? If so, does this:
    - b) Result in a reduction of the investment fee in the periodic statement (potentially to zero) and the explanation below the transaction list in the periodic statement containing the dollar amount of the "indirect fee" that would have previously been disclosed as the investment fee in the table? Presumably the fees table in the PDS would need to change so that the investment fee matches that in the periodic statement?
- Result in the investment fee in the periodic statement being the same as that in the PDS (ie, including the "indirect fee") but changes will need to be made to the prescribed table in the periodic statement so that the explanation of indirect fees below the transaction table is a qualification to the investment fee?
- See also section 4.9 above.

## 2.14 Transition period

AIST appreciates and supports the following comments from ASIC:

- That the length of the transition period will be adjusted.
- That's ASIC's proposed approach (as relayed in an email to the FSC from ASIC) is:
  - Once the modifying class order is made, issuers will only be required to comply with CO 14/1252 as modified. They will not need to comply with the current version of the class order then the modified version at a later point in time. Once the amending class order is made by end of September/October, any issuer who is yet to roll their PDS to comply will 14/1252 in its current form will not need to do so. They will need to comply with the modified version of the class order from the end of the extended transition period (but they may adopt it earlier if they choose).
  - The transition period for the class order as modified will be extended beyond 1 January 2016. While a new date has not been set, it's likely to be at least a number of months' extension.
  - Any issuer who has already adopted the current version of class order (or will do so in the next few weeks prior to it being modified) will have at least up to the end of extended transition period to comply with the modified version. As part of the modifications to the class order ASIC will include a provision to ensure that they are not inadvertently non-compliant by adopting the class order early. Again, ASIC can't be more specific on the transition period as no decision has been made.

However, in determining the transition dates for the transition period AIST notes that:

- System changes will be required, particularly in relation to periodic statements. System changes need to be scheduled into system release dates, usually many months in advance of the change taking effect. This could be as long as a nine month lead time. Once a system change has been scheduled, any system changes need to go through a testing period which could be as long as three months.
- Preferably, the transition period would apply so that periodic statements that are annual statements are required to be updated before periodic statements that are exit statements are required to be updated. That way system changes for exit statements can flow off annual statement system changes rather than maintaining two systems until annual statements change over to the new reporting regime.

AIST looks forward to discussing these issues at the 9 September roundtable.

## 2.15 Other issues not raised in this review

While these issues have not been specifically raised in the Review of RG 97, AIST believes the issue of whether transaction costs should be included in indirect costs. Specific issues regarding disclosure of unitholder investment fees within periodic statements have been raised. AIST believes that further guidance is needed.

## 2.16 Future work

While AIST acknowledges that the following is outside the scope of this consultation, AIST recommends that these matters also require review to help aid consistency, comparability and transparency:

- **Standardisation of labelling** (e.g. 'growth', 'defensive').
- **Furthering the objective of having level playing fields across products** and sectors where fees and costs are not fully disclosed. For example, a default investment option is a primary investment vehicle for many consumers. MySuper requires funds to have an investment strategy that is tailored to the membership. The advent of MySuper has seen further development in single default and lifecycle. Lifecycle can be split into 'switch' and 'cohort' styles. This has led to a lessening of comparability and different ways of disclosing fees and costs. For example, some funds with a 'cohort' style approach (also known as 'glidepath') have a common investment fee across all cohorts, which detrimentally impacts on product comparability.

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