



ASIC

Australian Securities & Investments Commission

REPORT 472

Response to submissions on CP 232 Remaking ASIC class orders on superannuation

March 2016

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 232 *Remaking ASIC class orders on superannuation: [CO 04/1574] and [CO 06/636]* (CP 232) 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.

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A Overview/Consultation process

- 1 In Consultation Paper 232 *Remaking ASIC class orders on superannuation: [CO 04/1574] and [CO 06/636]* (CP 232), we consulted on proposals to continue our relief in:
 - (a) Class Order [CO 04/1574] *Application form and cooling-off relief for certain transfers of members between financial products and interests within a superannuation fund*, which is due to expire on 1 April 2016; and
 - (b) Class Order [CO 06/636] *Superannuation: Delivery of product disclosures for investment strategies*, which is due to expire on 1 October 2016.
- 2 We proposed to issue new ASIC instruments to continue the relief in [CO 04/1574] and [CO 06/636] with minor and technical changes only.
- 3 This report highlights the key issues that arose out of the submissions received on CP 232 and our responses to those issues. This report is not meant to be a comprehensive summary of all responses received. We have limited this report to the key issues.
- 4 For a list of the non-confidential respondents to CP 232, see the appendix. Copies of these submissions are currently available on the ASIC website at www.asic.gov.au/cp under CP 232.

Responses to consultation

- 5 We received three non-confidential submissions and one confidential submission to CP 232, all of which were from representative bodies in the superannuation industry. We are grateful to respondents for taking the time to send us their comments.
- 6 For the proposed remaking of [CO 04/1574], the main issues raised were:
 - (a) whether we should remove the condition that the superannuation trustee must hold a registrable superannuation entity (RSE) licence that requires the governing rules of the superannuation fund to include certain types of provisions;
 - (b) whether the scope of the definition of ‘intra-fund transfer’ should be extended to avoid anomalies and to broaden the types of changes of composition to a person’s membership of a superannuation fund that would be covered by the definition and, consequently, the terms of the relief; and

- (c) whether the new ASIC instrument should expressly state that an attribution or transfer of an accrued default amount to a MySuper product is covered by the definition of an intra-fund transfer.

7 For the proposed remaking of [CO 06/636], the main issue raised was whether the relief should be continued in light of the exemption given in Class Order [CO 14/1252] *Technical modifications to Schedule 10 of the Corporations Regulations* from the look-through disclosure requirements for fees and costs for superannuation products that are available through a platform or similar arrangement.

B Remaking [CO 04/1574]

Key points

This section outlines the submissions on our proposal to remake [CO 04/1574] and our response to those submissions, including:

- whether we should require the superannuation trustee to hold an RSE licence that is subject to the governing rules of the superannuation fund, including certain types of provisions;
- whether the scope of the definition of intra-fund transfer should be extended to broaden the types of changes of composition within a superannuation fund that would be caught by the definition; and
- whether an amendment to the definition of intra-fund transfer is necessary for movements of accrued default amounts to a MySuper product.

The second and third points involve the scope of the definition of intra-fund transfer and are examined together.

RSE licence conditions and governing rules requirements

- 8 The application form and cooling-off relief under [CO 04/1574] is subject to various requirements about the conditions of the RSE licence of the trustee: see paragraph (4)(b)(i) of [CO 04/1574]. In CP 232, we proposed to continue these requirements in substantially the same terms: see paragraph 6(2)(a) of draft ASIC Corporations (Application Form and Cooling-off Period Relief—Intra-Fund Transfers) Instrument 2015/XX.

Note: The draft ASIC instrument is available on our website at www.asic.gov.au/cp under CP 232 at Attachment 1.

- 9 The trustee must hold an RSE licence that prohibits intra-fund transfers without the member's consent, unless:
- (a) the transfer is to a section, division or plan of the superannuation fund that confers on the member equivalent rights to the rights that the member had under the original section, division or plan in respect of the benefits; or
 - (b) the transfer could, in the absence of our relief, have lawfully been made without the member's consent.
- 10 Respondents queried whether this requirement was still appropriate because many trustees have had significant changes made to their RSE licence conditions since the introduction of the Stronger Super reforms in 2012.

- 11 Respondents also questioned whether the alternative limb in paragraph (6)(2)(a)(i)(B) of the draft ASIC instrument (i.e. that the transfer could have been lawfully made without the member's consent in the absence of ASIC relief) should be removed. The argument is that an ASIC instrument should not include a condition that reflects what the law already allows and such a condition is duplicative, superfluous and confusing.

ASIC's response

Our view is that the requirement with respect to a superannuation fund's governing rules is still necessary because the Australian Prudential Regulation Authority (APRA) recently notified ASIC that the RSE licence conditions in [CO 04/1574], which we have continued in ASIC Corporations (Superannuation: Accrued Default Amount and Intra-Fund Transfers) Instrument 2016/64, are usually imposed by APRA on a trustee before a proposed intra-fund transfer is made.

This pre-condition of relief is designed to protect superannuation fund members so that the relief will only be available to an intra-fund transfer where the transfer satisfies the equivalent rights test or the transfer is lawful.

Respondents did not identify compelling reasons as to why we should dispense with this safeguard for members.

Scope of the definition of 'intra-fund transfer'

- 12 Respondents queried the scope of the definition of intra-fund transfer in relation to:
- (a) the types of changes of composition within a superannuation fund that would be caught by the definition; and
 - (b) movements of accrued default amounts to a MySuper product.

The types of changes of composition within a fund

- 13 The concept of an 'intra-fund transfer' is central to the application form and cooling-off relief. Two identical definitions of intra-fund transfer are used in [CO 04/1574]: see paragraphs (3)(b) and (5). In CP 232, we proposed to retain the definition of intra-fund transfer in the draft ASIC instrument in substantially the same terms.
- 14 Under both the existing and proposed definitions, an intra-fund transfer means:
- (a) a disposal of an interest in the superannuation fund and the acquisition of an interest in the fund of a different class in substitution for the interest disposed of; or

- (b) any other circumstance where a person's membership of the superannuation fund in relation to a financial product or a sub-plan changes to membership of the fund in relation to another financial product or another sub-plan.
- 15 Some respondents raised a possible gap between the definition of intra-fund transfer and a change in the composition of a member's sub-plan membership under reg 7.9.02(4) of the Corporations Regulations 2001 (Corporations Regulations). In particular, clarification was sought as to whether a change of membership within a superannuation fund that does not clearly involve a change from one sub-plan to another will trigger the application form and cooling-off requirements.
- 16 The concept of a sub-plan is defined in reg 1.0.02 of the Corporations Regulations. It means, in relation to a regulated superannuation fund, a segment of a fund comprising a member or members of the fund that the trustee determines should be made as a sub-plan. Regulation 7.9.02 governs the situation where a trustee proposes to make a determination as to whether a sub-plan should be made. In making a determination, the trustee must have regard to all relevant matters, including the matters set out in reg 7.9.02(2).
- 17 Under reg 7.9.02(4), there is a deemed issue of a new interest in a superannuation fund if a person is a member of a fund in relation to a sub-plan and either:
- (a) the person's membership changes to membership in relation to another sub-plan; or
 - (b) the person holds interests in two or more sub-plans at the same time.
- 18 A deemed issue of a new interest under reg 7.9.02(4) will trigger the Product Disclosure Statement (PDS), application form and cooling-off requirements.
- 19 Respondents sought clarification on whether a change of membership within a superannuation fund that does not clearly involve a change from one sub-plan to another will fall within reg 7.9.02(4) and, therefore, be an issue of a new interest triggering the PDS, application form and cooling-off requirements.
- 20 In particular, clarification was sought on when a trustee will be taken to have created a sub-plan for the purposes of reg 7.9.02 where the trustee has not formally made a determination of a sub-plan under the regulation but recognises different categories of membership, as may be the case for employer plans created by industry superannuation funds and master superannuation funds.
- 21 In addition, respondents sought clarification on whether a member transferring from the main part of the superannuation fund to a sub-plan is a change of membership in relation to a sub-plan for the purposes of

reg 7.9.02(4). Respondents raised the argument that, in these instances, the movement may fall outside both limbs of the definition of intra-fund transfer.

- 22 Some respondents noted that the definition of intra-fund transfer in [CO 04/1574] is broader than the scope of changes of membership within a superannuation fund that are covered by reg 7.9.02(4). The apparent rationale for this position is that it is possible that a change of membership within a fund that does not involve a change of membership between sub-plans under reg 7.9.02(4) may still involve the issue of a new interest in the superannuation fund.
- 23 Relevantly, one respondent noted that where a person is transferred from the main part of a superannuation fund to a sub-plan or to different categories of membership, it is likely that a new interest in the fund will be issued, regardless of whether the transfer is covered by reg 7.9.02(4).

ASIC's response

In our view, the scope of the definition of intra-fund transfer is sufficiently broad to cover the situations raised by respondents.

The second limb of the definition covers the deemed issue under reg 7.9.02(4) that involves changes in the composition of a person's membership of sub-plans. Otherwise, the first limb of the definition of intra-fund transfer should capture any other changes to the composition of a person's membership of a superannuation fund that would be regarded under Pt 7.9 of the *Corporations Act 2001* (Corporations Act) as being the issue of a new interest in the fund.

It is also our view that if a trustee has not formally created a sub-plan but different categories of membership are recognised, it is possible that a change to the composition of a person's membership in the superannuation fund within available categories of membership will be regarded as the issue of a new interest in the fund irrespective of whether reg 7.9.02(4) is triggered.

Where such a change to a person's composition of membership within a superannuation fund occurs, it is arguable that the change will be covered by the first limb of the definition of intra-fund transfer in the new ASIC instrument: see ASIC Corporations (Superannuation: Accrued Default Amount and Intra-Fund Transfers) Instrument 2016/64. Therefore, the application form and cooling-off relief would apply.

In light of the above, we do not consider that the definition of intra-fund transfer should be changed.

Accrued default amount transfers

- 24 Respondents raised concerns that it is unclear whether a transfer of an accrued default amount to a MySuper product would fall within the scope of the definition of intra-fund transfer. If it does, the transfer would not be subject to the application and cooling-off requirements.
- 25 Under s20B of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) an ‘accrued default amount’ is, for a member of a regulated superannuation fund, the amount of a member’s superannuation interests:
- (a) where the member has not given the trustee of the fund any direction about the investment option to be applied; or
 - (b) that is invested in the ‘default’ investment option under the current governing rules of the fund (i.e. the investment option that would apply for a new member if no direction were given).
- 26 Under the Stronger Super reforms, a trustee must transfer all accrued default amounts to a MySuper product by 1 July 2017: s387 of the SIS Act. The MySuper product may be in the same superannuation fund in which the accrued default amount is held, or the MySuper product may be in a different fund.
- 27 If the MySuper product is in a different superannuation fund, the transfer from the accrued default amount to the new MySuper product will usually involve the issue of an interest in a new fund, which will mean that the trustee of the new fund must give the member a PDS for the new fund.

ASIC’s response

The question of whether a particular movement of an accrued default amount to a MySuper product in the same superannuation fund will be an intra-fund transfer will depend on the substantive nature of the change from the default environment to the MySuper product. In practice, such a movement is likely to be caught by one of the two limbs of the definition of intra-fund transfer.

The concept of an intra-fund transfer is limited to a change to the composition of a member’s interest within the same superannuation fund. Therefore, the relief from the application form and cooling-off requirements is currently unavailable where an accrued default amount is transferred to a MySuper product in a different fund. In the normal scenario where a transfer to a MySuper product in a different fund will mean that an interest in the new fund is issued to the member, the application form and cooling-off requirements are likely to apply. No statutory exemptions are available in this scenario.

Our view is that the operation of the application form and cooling-off requirements under these circumstances is not appropriate. It

may also confuse a member when an accrued default amount is transferred to a MySuper product. This is the case irrespective of whether the MySuper product is in a different superannuation fund or whether the transfer would satisfy the definition of an intra-fund transfer.

The operation of the application form and cooling-off requirements is not appropriate for the following reasons:

- the compulsory nature of the transfer means that the application form process serves no useful purpose and cooling-off rights are not relevant; and
- members are adequately protected by transition disclosure regimes that are designed for the movement of an accrued default amount to a MySuper product—in addition, the movement may require a PDS to be given to the member, especially if the MySuper product is in a different superannuation fund.

By way of background, if the movement of an accrued default amount to a MySuper product involves a ‘substantive change’, the trustee must give the member a transition disclosure notice at least 90 days before the proposed movement: reg 9.46 of the Superannuation Industry (Supervision) Regulations 1994 (SIS Regulations).

The types of substantive changes are set out in reg 9.46(2) of the SIS Regulations and include:

- an increase in a fee or charge that applies to the accrued default amount;
- a reduction in an insured benefit that is attributable to the member;
- an increase in an insurance premium that is attributable to the member; and
- a change in the investment strategy that relates to the accrued default amount.

The information that must be included in a transition disclosure notice is set out in reg 9.46(3) of the SIS Regulations (e.g. how the member may opt out of the proposed transfer and how the member may obtain a PDS for the MySuper product).

If the movement of an accrued default amount to a MySuper product does not involve a substantive change, the trustee must give the member a significant event notice under s1017B of the Corporations Act: see s1017B(1A)(c) and reg 7.9.11LB of the Corporations Regulations. The trustee may give the notice up to 12 months after the movement occurs.

However, it is good practice and helpful to members for a trustee to notify members in advance of a transfer to the extent possible: see Information Sheet 169 *Notifying members about superannuation transfers: Accrued default amounts (MySuper transition)* (INFO 169).

Specific content requirements apply to a significant event notice when an accrued default amount is transferred to a MySuper product: see s1017B(4), as inserted by reg 7.9.11LB of the Corporations Regulations. The specific content requirements include how the member may obtain a PDS for the MySuper product and any other information that the member needs to understand the movement.

We consider that the best course of action is to exempt an accrued default amount transfer to a MySuper product from the application form and cooling-off requirements. This will provide the following benefits:

- *certainty*—a trustee will no longer have to evaluate whether a particular movement will trigger the application form and cooling-off requirements;
- *sensibility*—an exemption from the application form and cooling-off requirements is consistent with the position that these requirements should not operate in relation to an accrued default amount transfer to a MySuper product; and
- *simplicity*—the proposed exemption is easy to understand and avoids the complexities associated with examining whether the intra-fund transfer definition is satisfied.

In conclusion, we have decided to expand the relief by taking a two-pronged approach. Firstly, we are expanding the scope of the exemption to cover all transfers of an accrued default amount to a MySuper product. When such a transfer occurs, the exemption applies regardless of whether the MySuper product is in a different fund. The definition of an intra-fund transfer is not relevant for this purpose.

Secondly, where the first limb does not apply, the existing relief for intra-fund transfers will continue with non-substantive changes to the terms of the relief.

C Remaking [CO 06/636]

Key points

This section outlines the submissions on our proposal to remake [CO 06/636] and our response to those submissions.

The main issue raised was whether the relief in [CO 06/636] should be continued in light of the exemption given in [CO 14/1252] from the look-through disclosure requirements for fees and costs for superannuation products that are available through a platform or similar arrangement.

Whether the relief should be continued given the exemption for platforms or similar arrangements

- 28 The purpose of the relief in [CO 06/636] is to provide trustees and issuers of financial products that are available through a custodial arrangement (an accessible financial product) with flexibility in giving PDSs to members. This flexibility should also result in a member being given product information that is better suited to their information needs than would be the case if the member were given a PDS for the superannuation fund by the trustee and a PDS by the issuer of the accessible financial product.
- 29 Respondents expressed concern about the exemption in [CO 14/1252]. In essence, the concern is that the look-through disclosure requirements for fees and costs will not apply to superannuation products held through platforms or similar arrangements. This gap is suggested to stem from the carve-out in paragraph (b) of the definition of ‘interposed vehicle’ in [CO 14/1252] from the fees and costs disclosure requirements. One respondent claimed that this carve-out should be removed and proposed that the relief in [CO 06/636] should not be continued on a permanent basis.
- 30 An alternative suggested by one respondent was that the relief in [CO 06/636] should be rolled over for a short period to afford the government a reasonable opportunity to consider options about fee disclosure for platforms or similar arrangements.

ASIC’s response

Our view is that the merits of look-through fee disclosure for superannuation products held through platforms or similar arrangements is a separate matter from the flexibility provided in [CO 06/636]. The fundamental effects of the new ASIC instrument (see ASIC Corporations (Superannuation: Investment Strategies) Instrument 2016/65) will be that:

- it gives the superannuation fund trustee or the issuer of the accessible financial product options to provide PDSs that are streamlined and it avoids unnecessary duplication; and
- if the relief is relied on, the PDS information must, subject to some technical modifications, satisfy the requirements under the shorter PDS regime and/or the long-form PDS regime, as the case may be.

In other words, the existing requirements for PDSs overlay the alternative options available in the remade ASIC instrument.

Regardless of whether ASIC or the government chooses to change the parameters of fees and costs disclosure in PDSs for superannuation products that are available through a platform or similar arrangement, the policy principles that underpin [CO 06/636] still apply.

As a result, we consider that the relief should be continued in substantially the same form.

Appendix: List of non-confidential respondents

- Association of Superannuation Funds of Australia
 - Financial Services Council Ltd
 - Law Council of Australia
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