

14 August 2015

Mr James Grapsas
Senior Lawyer
Australian Securities and Investments Commission

By email only: james.grapsas@asic.gov.au

Dear Mr Grapsas

FSC Submission – ASIC Consultation Paper 232 *Remaking ASIC class orders on superannuation: [CO 04/1574] and CO [06/636]*

The Financial Services Council (**FSC**) represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, licensed trustee companies and public trustees.

Thank you for the opportunity, and extension of time (noting the FSC Annual Conference was held during the week the submissions were due), to submit to ASIC Consultation Paper 232 *Remaking ASIC class orders on superannuation: [CO 04/1574] and CO [06/636] (CP 232)*.

1. As the review by ASIC of the superannuation class orders is for the purpose of continuing them so that they do not sunset, we have limited our comments and review. We have not undertaken a substantive consideration of the policy aspects of the Class Order and our technical review is limited by the timeframe and complexity of the Instruments.
2. We strongly support continuation of the superannuation Class Orders (now Instruments). Repeal of the Class Orders (or non-replacement with the Instruments) would be extremely disruptive and costly to industry.
3. As a general comment, and in the ideal world, these reliefs should be incorporated in legislation and/or regulation. Absent that, and acknowledging there are difficulties with amending the Act or regulations, then ASIC Instruments are an alternative. (We support the continuation of the ASIC Instruments/Class Orders as a pragmatic approach nonetheless.)
4. **Given the Instruments are important and given the technical nature of the Instruments, our members request the opportunity to see a final draft of the Instruments prior to execution** to allow a (short) period for FSC members to be satisfied the Instrument will not have any unintended impacts. Alternatively, we request the opportunity to inform our Super Platform Operator members prior to execution of the Instruments so that they can respond on any technical matters before the Instrument is executed. (Rectifying matters after execution is

more difficult and time intensive, so we think this last review opportunity is time well invested by ASIC and industry.)

ASIC Corporations (Application Form and Cooling-off Period Relief – Intra-fund Transfers) Instrument 2015/XX (the 2015 Intra-fund Transfer Instrument)

5. The law as modified by the 2015 Intra-fund Transfer Instrument provides a conditional exemption from the application form requirement and cooling-off period. Class Order 04/1574 contained a useful preamble. The 2015 Intra-fund Transfer Instrument does not contain a preamble. We recommend for clarity and assisting user readability that ASIC include a short preamble in the 2015 Intra-fund Transfer Instrument. If this is not feasible, then the Explanatory Statement for the 2015 Intra-fund Transfer Instrument should provide a preamble. Also, the Explanatory Statement should note that there are other means by which a member's interest may under law (unmodified by the Class Order or Instrument) be transferred without member consent, and then the Explanatory Statement should state that the Class Order/Instrument does not affect those other laws.
6. Paragraph 6(2)(a)(i)(B) should be removed, we think. It should not be a condition of the Class Order (or Instrument) that the governing rules *contain a provision* that the transfer could, in the absence of any condition on the RSE's licence, have been lawfully made without the member's consent. This is duplicative and superfluous, and confusing. The governing rules should not have to state what the law allows anyway. Please remove paragraph 6(2)(a)(i)(B) from the 2015 Intra-fund Transfer Class Order or else note in 6(2)(a)(i)(A) "or if the law otherwise permits" or to that effect. Our members were confused with what 6(2)(a)(i) is seeking to achieve. *Part of our confusion is whether if the RSE licence condition does not note (paraphrasing for simplicity) the "transfer could otherwise have been lawfully made without consent" - does that mean that the "otherwise lawful transfers" (i.e. transfers which do not need to rely on the Instrument) are disentitled because the RSE licence doesn't contain those words.* We do not think that the non-inclusion in an RSE licence condition that *lawful transfers may be made*, should disentitle lawful transfers (which do not need to rely on the law as modified by the Instrument). *We think ASIC should re-consider the wording of 6(2)(a)(i)(B) in light of our comments (or confusion) above.*
7. Please change “;” to “:” in paragraph 6(2)(a)(i) in the words “without the member's consent unless;”.

ASIC Superannuation (Product Disclosure for Investment Strategies) Instrument 2015/XX (the 2015 Superannuation Platform Instrument)

8. Proposal B2 in CP 232 notes in paragraph (a) of B2 (page 11 of CP 232) that the only changes proposed are to clarify that the relief does not affect the obligation of a trustee to prepare a PDS for the superannuation product – in particular, where Option 1 in the draft instrument is chosen, the PDS requirements that apply to the superannuation fund will continue to apply in full. This should be amended (or the Explanatory Statement should contain an explanation)

which clarifies that where Option 1 in the draft instrument is chosen, “*the PDS requirements that apply to the superannuation fund will continue to apply in full (except as modified by the 2015 Superannuation Platform Instrument or any other Instrument or Class Order)*”.

9. Paragraph 28 of CP 232 asks for comments on whether our views would differ if super platforms were not excluded from the shorter PDS regime. Super platforms need to be excluded from the shorter PDS regime (as they are under Class Order 12/749) *with the option to offer under the shorter PDS regime the super platform (this option is facilitated by Class Order 12/749)*. We do not entertain a proposition, without further detailed and timely consultation by Treasury (including an industry roundtable) on super platforms being incorporated in the shorter PDS regime as such a proposition is extremely unworkable in a super platform context. Therefore, we do not wish to put any further views and assume continuation of the super platform exclusion from the shorter PDS regime (with the option to offer in the super platform regime – per current Class Order 12/749, although we suspect this option is rarely availed of) absent a holistic re-think of the binary PDS regime (shorter 8 page PDS versus full PDS).
10. Our members also note that it is important to avoid having to produce excessive and unmanageable volumes of Incorporation-By-Reference (“IBR”) materials which duplicate information which is already readily available via other sources, would not further assist members to make an informed investment decision and would significantly increase costs to the superannuation trustee and/or impact upon the operational capability of superannuation wrap trustees to continue to provide extensive investment choice to its members. In addition to producing IBR materials in the first instance, the flow-through impacts of s 1012J ('up to date requirement') and s.1017B ('significant event notifications') would further add to the difficulty of having to maintain IBR material for each of the investment options offered by super wrap platforms.
11. In the limited time available to comment given the technical detail in the Instruments, we have not been able to form a final view on ASIC’s comment in paragraph 30 of CP 232 that ASIC has modified s 1017CA(5)(a) to clarify that it is *directed to “closed” financial products*. We would be grateful if ASIC flag how that result is achieved in the new Instrument. (We accept that while ASIC has had the opportunity and time to draft the Instrument and will therefore be able to explain how the link to “closed” financial products is achieved in the Instrument, we have not been able to, in the limited time, to form a view definitively as to ASIC’s statement. Therefore, we seek ASIC to inform us of the drafting link.)
12. Notional paragraph s 1017CA(9) of the 2015 Superannuation Platform Instrument still refers to s 52(2)(f) of the SIS Act. The relevant section is now s 52(6) of the SIS Act.

Review of drafts of Instruments prior to execution

13. Given the importance, particularly of the 2015 Superannuation Platform Instrument, our members would appreciate the opportunity to see the final draft of the Instruments to ensure

there are no unintended impacts, prior to their execution. FSC requests the opportunity to receive the draft Instruments for that purpose, prior to execution, so as to allow our members a brief opportunity to consider if the Instrument has (or does not appear to have) any unintended consequences. At a minimum, it would be useful to be able to provide the draft Instruments to our superannuation platform members (with a limited time to review) before ASIC executes them.

Please contact Stephen Judge on (02) 9299 3022 if you have any questions on our submission. Thank you for allowing us an extension to lodge our submission.

Yours sincerely



Stephen Judge
General Counsel