



ASIC
Australian Securities &
Investments Commission

CONSULTATION PAPER 318

Remaking ASIC class order on departed former temporary residents' superannuation: [CO 09/437]

July 2019

About this paper

This consultation paper sets out ASIC's proposal to remake, without significant changes, Class Order [CO 09/437] *Departed former temporary residents superannuation—Disclosure relief*. This provides conditional relief to the trustees of superannuation funds from the obligation to provide certain disclosures to former temporary residents when their benefits are compulsorily transferred to the ATO as unclaimed.

Note: The draft ASIC instrument is available on our website at www.asic.gov.au/cp under CP 318.

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.

Document history

This paper was issued on 10 July 2019 and is based on the Corporations Act as at the date of issue.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive, or as other circumstances change.

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The consultation process

Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our privacy policy at www.asic.gov.au/privacy for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by Wednesday 21 August 2019 to:

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What will happen next?

Stage 1	10 July 2019	ASIC consultation paper released
Stage 2	21 August 2019	Comments due on the consultation paper
Stage 3	By 1 October 2019	Commencement of remade instrument(s)

A Background

Key points

Most legislative instruments 'sunset' after 10 years and must be remade if they are to be preserved. However, some classes of instrument are not subject to sunsetting by regulation. These include legislative instruments (other than a regulation) relating to superannuation.

To ensure consistency with other legislative instruments, we remake ASIC instruments relating to superannuation after 10 years. We consult on all legislative instruments that are remade and have more than a minor or machinery regulatory impact.

Legislative instruments relating to superannuation

- 1 Under the *Legislation Act 2003* (Legislation Act), most legislative instruments cease automatically, or 'sunset', after 10 years and action must be taken to exempt or preserve them.
- 2 Some classes of legislative instruments are not subject to sunsetting: see the list in reg 11 of the *Legislation (Exemptions and Other Matters) Regulation 2015*. These include instruments (other than a regulation) relating to superannuation.
- 3 While legislative instruments relating to superannuation are not subject to sunsetting, to ensure they are kept up to date and remain fit for purpose, relevant and necessary, we choose to remake them.

Our approach to remaking legislative instruments

- 4 If we remake a legislative instrument, our focus is on making it clear and user friendly. We will also, where possible, simplify and rationalise its content and conditions. For example, we will remove or reduce an obligation or burden in a legislative instrument if we are able to do so without undermining ASIC's priorities of promoting investor and financial consumer trust and confidence and ensuring markets are fair, orderly and transparent.
- 5 We will consult affected stakeholders on all ASIC legislative instruments that are being remade, and have more than a minor or machinery regulatory impact, to ensure:
 - (a) we carefully consider the continuing regulatory and financial impact of the instrument; and
 - (b) the instrument retains its effectiveness in addressing an identified issue or problem.

B Remaking ASIC class order

Key points

We are proposing to remake Class Order [CO 09/437] *Departed former temporary residents' superannuation—Disclosure relief*.

We have formed the preliminary view that the class order is operating effectively and efficiently and continues to form a necessary and useful part of the legislative framework. However, we consider that, as a condition of relying on the relief, trustees should put their disclosures on the website of the relevant regulated superannuation fund, rather than on the trustee's website. We seek your feedback on this proposal and the conditional relief more broadly.

The class order has been redrafted using ASIC's current style and format, while preserving the current effect of the instrument. The draft ASIC instrument, which reflects the amendments proposed in this paper, is available on our website at www.asic.gov.au/cp under CP 318.

Your feedback

- 6 You are invited to comment on our proposal to remake [CO 09/437], including:
- (a) whether the class order is currently operating effectively and efficiently;
 - (b) our proposal to require trustees to put relevant disclosures on the website of their regulated superannuation fund or funds, rather than the trustee's website; and
 - (c) whether the other conditions of relief (including the requirement for disclosures in the Product Disclosure Statement (PDS) and fund report) should be revised.
- 7 These proposals are only an indication of the approach we may take and are not our final policy.

Class Order [CO 09/437] *Departed former temporary residents' superannuation—Disclosure relief*

Background

- 8 When temporary residents work in Australia, their employer(s) may be required to contribute superannuation to a fund on the resident's behalf. If a temporary resident departs Australia and does not claim their superannuation benefits, the Australian Taxation Office (ATO) will issue the trustee of their superannuation fund with a notice.

- 9 On receiving notice from the ATO, the trustee must pay the benefits of the departed former temporary resident to the ATO: see Pt 3A of the *Superannuation (Unclaimed Moneys and Lost Members) Act 1999* (Unclaimed Money Act).
- 10 The payment of benefits to the ATO causes the departed former temporary resident, as the holder of a superannuation product, to cease to hold that product: see s1017D(2)(d) of the *Corporations Act 2001* (Corporations Act). As a result, the trustee must give the departed former temporary resident a periodic statement known as an 'exit statement'.
- 11 The operation of the Unclaimed Money Act to end the departed former temporary resident's membership of the fund also triggers the requirement for the trustee to notify a member of a significant event or material change: see s1017B of the Corporations Act.
- 12 The superannuation industry is concerned that a trustee will generally not be aware which of its members have been temporary residents until advised by the ATO, and will generally not have overseas addresses for departed former temporary resident members. If the trustee has no address, or only has an Australian address, there will generally be no opportunity to obtain the member's correct address.
- 13 [CO 09/437] provides trustees with relief from the requirement to notify and give exit statements to a departed former temporary resident when the member ceases to hold a superannuation product in the circumstances of Pt 3A of the Unclaimed Money Act. The relief does not affect other unclaimed superannuation money that a trustee must pay to the ATO—for example, inactive low-balance accounts that must be paid to the ATO as a result of amendments in the *Treasury Laws Amendment (Protecting Your Superannuation Package) Act 2019*.
- 14 To access the relief, the trustee must disclose in the product PDS, member fund report and on their website:
- (a) the circumstances in which the benefits of temporary residents will be paid to the ATO; and
 - (b) that the trustee is relying on the relief and will not provide departed former temporary resident members whose benefits are paid to the ATO with notices or exit statements at the time of or after the benefits are paid to the ATO.
- 15 Under the relief, the trustee must also provide the departed former temporary resident with information that will allow them to apply to the ATO to claim their benefit if the trustee is contacted by the resident after the benefits have been paid to the ATO. The trustee must provide this information as soon as practicable and, in any event, must make reasonable efforts to provide the information within one month after being contacted by the former resident.

Proposal

B1 We propose to continue the relief currently given by [CO 09/437] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Superannuation (Departed Temporary Residents' Superannuation—Disclosure Relief) Instrument 2019/XX, attached to this consultation paper. You can access the current instrument at www.legislation.gov.au by clicking on the following direct link: [\[CO 09/437\]](#).

The changes proposed are to:

- (a) amend the conditions of relief to require disclosure on the relevant regulated superannuation fund's website, rather than the trustee's website. We do not propose to amend the content of the website disclosure;
- (b) update the name of the legislative instrument; and
- (c) reflect current drafting practice and update the format of the current document.

Rationale

16 We have reached the preliminary view that [CO 09/437] is operating effectively and efficiently and continues to form a necessary and useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order.

Disclosure on regulated superannuation fund's website

17 Under the current relief, if a trustee has a website, they must ensure that the disclosures required by paragraphs 5(d) and 5(e) of [CO 09/437] are prominently disclosed on the website.

18 We are proposing to amend this requirement to so that the trustee must put this disclosure on the regulated superannuation fund's website, rather than on the trustee's website. We are not proposing to amend the contents of the website disclosure required.

19 We consider it more appropriate that the disclosure be available on the regulated superannuation fund's website, because the fund's website is more likely to be accessed by a temporary resident or departed former temporary resident. Members are also more likely to expect information about their entitlements will be available on the fund's website.

20 We expect that regulated superannuation funds will have a website, given the requirements for funds to provide website disclosures under other legislation (such as s29QB of the *Superannuation Industry (Supervision) Act 1993*).

Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
[CO 09/437] (for example)	An ASIC class order (in this example numbered 09/437) Note: Legislative instruments made from 2015 are referred to as ASIC instruments.
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Legislation Act	<i>Legislation Act 2003</i>
s1017B (for example)	A section of the Corporations Act (in this example numbered 1017B), unless otherwise specified
sunsetting	The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect
Unclaimed Money Act	<i>Superannuation (Unclaimed Moneys and Lost Members) Act 1999</i>