

2 April 2019

Kathy Neilson
Senior Lawyer, Investment Managers & Superannuation
Australian Securities and Investments Commission
Level 5, 100 Market Street, Sydney, 2000

By email: feeandcostdisclosure@asic.gov.au

Re: ASIC Consultation Paper 308 Review of RG 97 Disclosing fees and costs in PDSs and periodic statements

Dear Kathy,

The Australian Investment Council welcomes the opportunity to contribute our feedback in relation to the ASIC Consultation Paper 308 *Review of RG 97: Disclosing fees and costs in PDSs and periodic statements* (the consultation paper) and the draft updated Regulatory Guide 97 *Disclosing fees and costs in PDSs and periodic statements* (draft RG 97).

The Australian Investment Council is the voice of private capital in Australia. Private capital investment has played a central role in the growth and expansion of thousands of businesses, which when combined represents a multi-billion dollar contribution to the Australian economy. Our members are the standard-bearers of professional investment and include: private equity, venture capital and private credit funds, alongside institutional investors such as superannuation and sovereign wealth funds, as well as leading financial, legal and operational advisers.

According to the latest APRA statistics, Australia's major superannuation funds have allocated a combined \$70 billion to the unlisted equity asset class, which includes investments in both domestic and offshore private capital funds. Superannuation funds form an integral part of the private capital industry in Australia, and according to the ABS their investments in Australian-managed private capital funds (defined as venture capital and later stage private equity funds) account for over 30% of all commitments held as at 30 June 2018.

We believe that important progress has been made in developing a fee and cost disclosure regime for super funds that balances the needs of consumers and super fund members, the goals of transparency and simplicity of information provided, and the practicalities and cost of compliance. However, we believe that some proposals outlined in the consultation paper should be reconsidered in order to realise the objectives and policy intent of the regulatory framework for fee and cost disclosure.

Provided below are our comments in response to several proposals raised in the consultation paper. These are:

- **Proposal B1 (a)** to modify the 'Fees and costs template' for superannuation products;
- **Proposal B9 (a)** in relation to changes to the calculation of performance fees;
- **Proposal B10 (c)** in relation to changes to the disclosure of performance fees; and
- **Proposal E3 (d)** to incorporate the ASIC Q&As on the ASIC website into RG 97 where it is believed that the guidance will be helpful, and remove the ASIC Q&As from the ASIC website.

We also provide our views in relation to the below consultation paper questions:

- **C8Q6** What would be a reasonable timeframe for issuers to implement this guidance, in light of the other changes that are proposed in this paper?
- **C8Q7** How could [ASIC] best work with industry to ensure fees and costs information is presented more consistently in the future?



We look forward to seeing the finalisation of Regulatory Guide 97 over the coming months. And as always, we would be pleased to participate in future discussions about any aspect of the key issues we have set out in this submission. If you would like to discuss this further, please do not hesitate to contact either me or Kosta Sinelnikov, the Australian Investment Council's Head of Policy & Research, on 02 8243 7000.

Yours sincerely,

Yasser El-Ansary
Chief Executive



Responses to consultation paper proposals and questions

1. Proposal B1 (a) to modify the 'Fees and costs template' for superannuation products

The Australian Investment Council does not support the proposal to simplify the 'Fees and costs template' by combining certain fee or cost categories into single line items with general groupings. In particular, we have some concerns with the approach of combining investment fees, performance fees and indirect costs that relate to an investment into a single line item.

While we understand the rationale behind the recommendation to combine investment fees (including performance fees) and investment-related indirect costs into a single item, we believe that adopting this approach would reduce transparency and usefulness of the information for fund members and consumers.

It is our view that a balance should be struck between simplicity and transparency regarding the level of data and information on fees and costs that is provided to end users. Importantly, we are concerned that oversimplifying the templates and information provided to consumers would reduce the usefulness of that information, thereby reducing the ability of consumers to be able to properly compare different funds and products. Our concerns, as well as a suggested solution to this issue, are set out in the points below:

- By eliminating the distinction between investment fees, performance fees and the indirect costs of those investments, consumers are not getting a complete picture of the true nature of the fees and costs that they bear as investors or fund members.
- There is an important distinction to be made, for example, between the management fee and the performance fee that a super fund is charged by a fund manager. This distinction would be lost under the proposed 'Fees and costs template'. We believe that consumers should be made aware of such distinctions to make informed decisions about their investments and retirement savings.
- We suggest that ASIC amend the template to include separate line items for performance fees and indirect costs, thereby providing issuers with more flexibility to apportion and disclose investment-related fees and costs in the most appropriate manner.
- A blanket approach of grouping together all investment-related fees or costs (be they direct fees charged for making the investment, performance fees incurred, or the indirect costs of that investment) would not only reduce the transparency of information but also lead to unintended consequences.
- For unlisted asset classes, which tend to have higher investment fees but historically have outperformed lower-fee asset classes such as listed equities (either active or indexed strategies) on a net-of-fees basis, this would be a particularly acute issue.
- Super funds or products with high allocations to unlisted assets would be disadvantaged as they would, under the currently proposed template, report higher investment fees and costs compared to other funds or products.
- This would inevitably deter consumers from choosing those funds or products solely on the basis of comparing a single number (the *investment fees and costs* line item), despite the strong performance delivered by that fund or product due to its exposure to asset classes which tend to have higher performance fees.
- Consumers would therefore lose out on possibly higher net returns due to their overreliance on an oversimplified fee and cost disclosure document. This outcome is entirely inconsistent with the policy and regulatory objectives of the RG 97 framework.



2. Proposal B9 (a) in relation to changes to the calculation of performance fees

We support the proposed changes to the calculation of performance fees. We believe that these changes better reflect the transitory nature of investment-related performance fees compared with the methods for calculation of performance fees proposed in previous versions of the regulations. For consumers, this would mean that performance fee disclosure, whether based on a five-year timeframe (and less if a full five financial years are inapplicable) or the issuer's reasonable estimate, better reflects the performance fees that are likely to be incurred by choosing that particular fund or product.

3. Proposal B10 (c) in relation to changes to the disclosure of performance fees

This proposed change to the disclosure of performance fees requires that the 'Fees and costs details' document set out the calculated average performance fees for each "each product, option, interposed vehicle or part under cl 101C(3)(a) of Sch 10." This could be interpreted to mean that, for a super fund that allocates its capital through a number of interposed vehicles such as private equity funds, venture capital funds or unlisted infrastructure funds, the average performance fee for each of those interposed vehicles would need to be disclosed in the 'Fees and costs details' document. Based on such an interpretation, we do not support the proposed change.

Such a requirement would create an unnecessarily large amount of information which would provide very little benefit to the end users of the information. While we agree that setting out the level of performance fees at the overall fund level is a necessary aspect of disclosing fees and costs incurred by fund members, disclosing the performance fees of every underlying investment made through an interposed vehicle would be unnecessarily onerous and exponentially increase the compliance burden for issuers.

As the super fund industry continues to grow in terms of the assets managed as well as the level of sophistication of investment strategies, investments made through interposed entities such as private capital funds will form a more integral part of the asset allocation mix for super funds. As we have already set out in the first response of this submission above, deterring such investments through unnecessary regulatory barriers can ultimately lead to sub-standard outcomes for fund members.

4. Proposal E3 (d) to incorporate the ASIC Q&As on the ASIC website into RG 97 where it is believed that the guidance will be helpful, and remove the ASIC Q&As from the ASIC website

The Australian Investment Council (in its previous form as the Australian Private Equity and Venture Capital Association Limited) worked closely with its super fund members and ASIC to develop the RG 97 Q&As, particularly as they relate to private equity fund investments held by super funds – namely Question 14 of the Q&As. The fee and cost disclosure regulations being proposed by ASIC create a complex area of legal and regulatory compliance, and as such the information provided in the Q&As is vitally important to the understanding and implementation of the regulations by affected entities. One area where the Q&As have helped the super fund industry in interpreting and complying with the regulations is the treatment of certain costs as they relate to interposed vehicles and the underlying entities of those vehicles.

We agree with the proposal to incorporate the Q&As into the regulatory guide and to remove the ASIC Q&As from the ASIC website. This would enable the use of the regulatory guide as a single source of reference for



practitioners, rather than having to rely on separate sources that may have conflicting information or ambiguity that is open to different interpretations.

However, given the importance of the Q&As to the understanding and implementation of the regulations, we believe that more of the information and examples currently provided in the Q&As should be incorporated into RG 97.

The prevailing view and interpretation of RG 97 as it relates to super fund investments into private capital funds – which we agree with and support – is that a private capital fund is an interposed vehicle for the purposes of RG 97. Any fees or costs borne by the private capital fund need to be included as investment fees or indirect costs of the relevant super product. Furthermore, in the context of an investment into a private capital fund which normally acquires interests in other businesses, costs related to those businesses (e.g. the costs of issuing shares to the private capital fund or the costs of an IPO of one of those businesses) do not need to be considered in the calculation of fees and costs of investors in the fund. Those businesses, or the holding companies through which the private capital fund retains its interests, would not constitute interposed vehicles for the purposes of RG 97. This interpretation and approach is made clear in the Q&As.

In the draft RG 97, the same interpretation would be based specifically on the reading of the below sections:

RG 97.331 If the downstream entity is not an interposed vehicle, then its costs are not included when calculating indirect costs.

RG 97.332 If you have determined that a downstream entity is not an interposed vehicle, further downstream entities in the chain are also not considered to be interposed vehicles.

We believe these sections could be further developed or added to in order to remove any ambiguity about which costs should be included as part of these regulatory requirements. This could be achieved by way of a more substantial incorporation of the Q&As as they relate to interposed vehicles like private capital funds and the entities that those funds invest into.

As pointed out in the consultation paper, “[ASIC] want to ensure that RG 97 is sufficiently clear and comprehensive so that a separate Q&A document is unnecessary.” We support this approach and thus would encourage ASIC to incorporate more of the substance of the Q&As and provide some specific examples of the types of fees and costs that should be included or excluded from investment fee or indirect cost calculations. Ultimately, the Australian Investment Council and its members would be concerned if the broad consultative work that was previously done by ASIC and industry to develop the Q&As isn’t reflected in the final version of RG 97.

5. C8Q6 What would be a reasonable timeframe for issuers to implement this guidance, in light of the other changes that are proposed in this paper?

We believe that implementation of the guidance should begin at least 12 months from the finalisation of the regulations. This would give issuers as well as other entities affected by the guidance (for example, entities that manage interposed vehicles on behalf of super funds) a reasonable timeframe in order to set up the necessary structures and systems of reporting and monitoring to comply with the new regulatory framework.

Ultimately, the timeframe for implementation will depend on the release by ASIC of the updated regulatory guide following the conclusion of this current consultation. We would anticipate that to be in the second half of 2019, and thus would urge that industry implementation of the guidance begin no earlier than 1 July 2020.



6. C8Q7 How could [ASIC] best work with industry to ensure fees and costs information is presented more consistently in the future?

We believe that ASIC should continue to proactively consult with industry throughout the implementation phase of the regulations. This would serve to identify and help address any unforeseen issues that arise as the fee and cost disclosure regulations are implemented across the super and investment management industry. Proactively engaging with industry associations such as the Australian Investment Council and our members – which include super funds and fund managers that they invest with – should be a key priority for ASIC in its future work on how fees and costs information is presented.

Other forums such as the Industry Working Group, formulated by a number of other industry associations to focus on developing RG 97-related industry guidance, would be useful to gathering a range of views on the consistent presentation of fee and cost information. The endorsement by ASIC of industry guidelines developed by member associations or representative bodies may also be necessary, depending on what resources are made available by ASIC to industry through various guidance papers or templates.

Additionally, we encourage ASIC to consult with APRA in order to build consistency in how regulators engage with industry on data collection, presentation and publication. This would help to alleviate the need to provide the same information to both ASIC and APRA for regulatory purposes, thereby reducing the compliance burden for reporting entities.