



Law Council
OF AUSTRALIA

Legal Practice Section

Review of RG 97 Disclosing fees and costs in PDSs and periodic statements

Australian Securities and Investment Commission

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Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12-month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 1 January 2019 are:

- Mr Arthur Moses SC, President
- Mr Konrad de Kerloy, President-elect
- Ms Pauline Wright, Treasurer
- Mr Tass Liveris, Executive Member
- Dr Jacoba Brasch QC, Executive Member
- Mr Tony Rossi, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

About the Section

The Legal Practice Section of the Law Council of Australia was established in March 1980, initially as the 'Legal Practice Management Section', with a focus principally on legal practice management issues. In September 1986 the Section's name was changed to the 'General Practice Section', and its focus broadened to include areas of specialist practices including Superannuation, Property Law, and Consumer Law.

On 7 December 2002 the Section's name was again changed, to 'Legal Practice Section', to reflect the Section's focus on a broad range of areas of specialist legal practices, as well as practice management.

The Section's objectives are to:

- Contribute to the development of the legal profession;
- Maintain high standards in the legal profession;
- Offer assistance in the development of legal and management expertise in its members through training, conferences, publications, meetings, and other activities; and
- Provide policy advice to the Law Council, and prepare submissions on behalf of the Law Council, in the areas relating to its specialist committees.

Members of the Section Executive are:

- Ms Maureen Peatman, Chair
- Mr Michael James, Deputy Chair
- Mr Geoff Provis, Treasurer
- Ms Tanya Berlis
- Mr Dennis Bluth
- Mr Mark Cerche
- Ms Peggy Cheong
- Mr Philip Jackson SC
- Dr Leonie Kelleher OAM
- Ms Christine Smyth

Acknowledgement

This submission has been prepared by the Law Council of Australia's Superannuation Law Committee, which is a committee of the Legal Practice Section of the Law Council of Australia.

1. This submission has been prepared by the Superannuation Committee of the Legal Practice Section of the Law Council of Australia (**the Committee**). The Committee appreciates the opportunity to comment on Australian Securities & Investment Commission (**ASIC's**) Consultation Paper 308 "Review of RG 97 Disclosing fees and costs in Product Disclosure Statements (**PDSs**) and periodic statements" (**CP 308**).
2. CP 308 follows the release of Report 581 (a review of RG 97), which was prepared for ASIC by an external expert, Darren McShane.
3. ASIC has requested comment on the proposals set out in CP 308, in relation to:
 - the likely compliance costs;
 - the likely effect on competition; and
 - other impacts, costs and benefits.
4. Our comments are confined to 'other impacts, costs and benefits', in relation to superannuation products only. Our comments are all intended to relate to the Committee's objective of ensuring that the law relating to superannuation in Australia is sound, equitable and demonstrably clear. Industry bodies are in our view better placed to comment on likely compliance costs and likely effect of competition.
5. We have not commented on all proposals.

Preliminary observations: Impact of PYSP Act and Regulations

6. CP 308 refers to Treasury Laws Amendment (Protecting Your Superannuation Package) Bill 2018 (**PYSP Bill**) that was before Parliament at the time CP 308 was released. The PYSP Bill has been passed (with amendments) (*Treasury Laws Amendment (Protecting Your Superannuation Package) Act 2019* (**PYSP Act**)). An Exposure Draft of *Treasury Laws Amendment (Protecting Your Superannuation Package) Regulations 2019* (**PYSP Regulations**) was released on 22 February 2019 and consultation closed on 1 March 2019.
7. Measures introduced by the PYSP and PYSP Regulations include amendments to the *Superannuation Industry (Supervision) Act 1993* (**SIS Act**), *Superannuation Industry (Supervision) Regulations 1994* (**SIS Regulations**) and the *Corporations Regulations 2001* (**Corporations Regulations**), to introduce a fee cap for superannuation accounts that have a balance of less than \$6,000 as at each 30 June.
8. CP 308 comments that the fee cap provisions, if passed, may have significant impacts on the proposals set out in CP 308, and in particular that it may not be possible to implement:
 - Proposal B1: include indirect costs in administration fees and investment fees instead of as a stand-alone visible figure; and
 - Proposal B4: no longer show indirect costs as a stand-alone visible figure.
9. We agree that these proposals are no longer feasible as a result of the PYSP Act. Assuming that the PYSP Regulations are issued in substantively the same terms as the Exposure Draft (**ED**), we submit that most of the proposals in CP 308 that relate to calculation and disclosure of fees and costs for superannuation funds will need to be re-thought.
10. The amendments to Corporations Regulations proposed in the PYSP Regulations ED require that the fees and costs template include as a footnote a statement describing

the fee cap as a cap on administration fees, investment fees and indirect costs as disclosed in the template. The definition of 'indirect costs' in the SIS Act, for the purposes of determining the level of fees and costs that the cap applies to, refers to the definition in Schedule 10 of the Corporations Regulations. Therefore, we think 'administration fees' and 'investment fees' as defined in the SIS Act, and 'indirect costs' as defined the Schedule 10 of the Corporations Regulations, will need to be the relevant definitions for disclosure in PDSs and periodic statements.

11. We submit that this gives ASIC limited scope to alter the meaning of any of these terms for disclosure purposes. In particular, we do not think ASIC can extend their meanings, to capture costs that are not included in the statutory definitions.
12. As a result, the Committee suggests that, once the PYSP Regulations are issued, the fees and costs disclosure regime for superannuation products is fully reviewed and revised proposals are circulated for consultation.
13. The Committee expects that engagement with Treasury and APRA may be required, to ensure there is a consistent approach.
14. The **attachment** sets out our comments on specific proposals, including where we think a proposal cannot be implemented as a result of the PYSP Act and PYSP Regulations (assuming they are issued in substantively the same terms as the Exposure Draft).

Attachment – Comments on specific proposals

Section B Recommendations that we proposed to adopt that require amendment to Sch 10

B1: Changing the superannuation product 'Fees and costs template'

B1Q1

15. In principle, we support the proposals to simplify the disclosure of fees and costs.
16. However, we agree that the fee cap required under the PYSP Act has the effect that it is not feasible to disclose administration fees and investment fees as inclusive of amounts that are not included in administration fees or investment fees for the purpose of the fee caps.
17. This will mean it will not be possible to present as single line items:
 - administration fees including indirect costs that relate to administration and intra-fund advice costs; or
 - investment fees and costs including indirect costs that relate to investment.
18. This will also mean that the definitions of administration fees, investment fees and advice fees will need to match the definitions in the SIS Act.
19. Indirect costs will therefore need to continue to be disclosed separately.
20. We agree with the proposal to group fees as “ongoing annual fees and costs” or “Member activity related fees and costs”.

B3: Including 'Cost of product information'

B3Q1

21. The Committee acknowledges the difficulty in striking the right balance between providing sufficient information for members to make comparisons, and providing too much data which may make the information less usable by consumers.
22. We have no objection, in principle, to the proposal to include 'Cost of product' for all investment options, and we support the proposed explanatory text. However, the requirement will increase the length of PDSs, or IBR material for 'short' PDSs. The requirement also will not cover costs for balances other than \$50,000, nor address the costs for members who have their balance invested across a number of investment options, and a requirement to include further information will further increase the length of PDSs, or IBR material for 'short' PDSs.
23. On balance the Committee's view is that, for most funds, 'Cost of product' information for all investment options will be of limited value. If additional cost information is to be provided, figures for other account balances may be more useful.
24. The Committee also does not support re-locating the example to IBR material for 'short' PDSs. The Committee's view is that the example is an important disclosure and should be in the document that is given to prospective members.

25. The Committee has the following technical comment on the Example of fees and costs:

The Example also needs to be modified to delete 'regardless of your balance' from the 'PLUS Administration fees' line. This text is not included in the example for managed investment products, and was only meaningful when the format of the example for superannuation funds included a line for the dollar based administration fee, which 'regardless of your balance' applied to, and a separate line for a percentage administration fee: i.e., 'regardless of your balance' applied to the dollar based fee, and is now misleading when applied to a combined dollar and percentage fee. It is simply inaccurate to state that the amount of a fee applies 'regardless of your balance' when the fee includes a percentage of the balance.

B3Q3

26. We do not believe that the requirement to add a \$5,000 contribution is useful or appropriate for superannuation products (whether or not this is specified as paid on the last day of the year, although specifying the date of payment improves clarity).

B4: Simplifying periodic statements

27. Proposal B4 is an amendment to the prescribed disclosure of fees and costs for periodic statements. The proposal is that the fees and costs summary will contain the following three lines and descriptions:

Fees deducted directly from your account

This amount has been deducted directly from your account (reflected in the transactions listed on this statement).

Fees and costs deducted from your investment

This approximate amount has been deducted from your investment and covers amounts that have reduced the return on your investment and that are not reflected as transactions listed on this statement or in the fees and costs details.

Total fees and costs you paid

This approximate amount includes all the fees and costs which affected your investment during the period.

B4Q1:

28. The Committee supports, in principle, the clear distinction between fees that have been deducted from the member's account and appear in the transaction listing, and fees and costs that have not been deducted from the member's account.
29. The disclosure required under Schedule 10D (in the absence of Class Order CO 14/1452) is:

After the list itemising transactions, include:

Indirect costs of your investment

This approximate amount has been deducted from your investment and includes amounts that have reduced the return on your investment but are not charged directly as a fee.

Total fees you paid

This approximate amount includes all the fees and costs which affected your investment during the period.

30. The PYSP Regulations ED require an additional statement after the disclosure of '*Indirect costs of your investment*', disclosing that the fee cap will apply to the total combined amount of administration fees, investment fees and indirect costs.
31. Because of the requirements of the PYSP Regulations ED, the Committee suggests that the summary will need to retain the heading '*Indirect costs of your investment*' and the description.
32. The Committee's view is that the addition of the line item totalling the fees deducted from member's accounts would not be inconsistent with the PYSP Regulations ED. The Committee also agrees that this may assist in reducing the overemphasis on amounts deducted from investments.
33. However, adding the functionality to periodic statements will require a systems build by funds and their administrators. We expect that industry submissions will provide information about anticipated timing and costs.

B4Q7 and B4Q8:

34. The Committee favours the approach that the amount of items in the transaction listing should be disclosed inclusive of GST net of any applicable reduced input tax credits. This is because the actual GST cost component of a transaction is the net amount.
35. We do not express a view on whether stamp duty and / or GST must be included in the transaction or could be listed as a separate transaction.

B4Q9:

36. Where the benefit of a tax deduction has been passed on to the member, the Committee favours the approach of disclosing the net amount that has actually been charged to the member, rather than separately disclosing the full cost and the amount of tax benefit. This is because the relevant information for the member, and the relevant transaction, is the actual amount that was charged to them.

B4Q10:

37. The Committee agrees that, where there is a transaction that has a tax consequence, the transaction and the tax consequence should be separately disclosed. Members need to know the full amount of a transaction such as a contribution, as this needs to be consistent with other information they receive (for example, payslips from their employer) and the full amount of contributions paid for them is required for their own tax planning.
38. The Committee agrees that retaining the guidance at Draft RG 97.127 is useful. However, we suggest that the following sentence should be modified:

Reduction of the member's account balance to reflect income tax you pay for the contribution is another transaction that may occur after the superannuation entity has received its income tax assessment.

39. In practice, we understand that funds typically deduct an amount representing anticipated tax liabilities from members' accounts at the time the contribution is received, not after the fund's income tax assessment is received, and we suggest this practice should also be referenced. We agree with the final sentence in RG 97.127.

B4Q11 and B4Q12

40. The Committee favours the approach that 'Total fees and costs you paid' should be presented net of any tax benefit passed on to the member.
41. This is consistent with the approach that the relevant amounts that represent actual costs to members are net amounts. (For example, this is consistent with the proposed approach to disclosure of transaction costs as net of buy / sell spreads.)

B5 Changing the treatment of transactional and operational costs

42. The Committee supports, in principle, the exclusion of explicit transaction costs and counterparty spreads from administration fees and investment fees, and the disclosure of net transaction costs (i.e. net of buy / sell spread) as a separate line item.
43. However, the PYSP Act and PYSP Regulations ED in our view pose some difficulties for this approach.
44. The relevant definition of indirect costs, for a superannuation product is:
- indirect cost*** of a MySuper product or an investment option offered by a superannuation entity means any amount that:
- a. a trustee of the entity knows, or reasonably ought to know, will directly or indirectly reduce the return on the investment of a member of the entity in the MySuper product or investment option; and
 - b. is not charged to the member as a fee.
45. For managed investment products, transactional and operational costs are expressly excluded from the corresponding definition of 'management costs'.
46. The Committee has long held the view that transactional and operational costs should be excluded from 'indirect costs' for superannuation products, and that the omission of this exclusion was a drafting error at the time the definition was inserted (by *Select Legislative Instrument 155* of 2013).
47. For this reason, the Committee would support ASIC's proposal to exclude net transaction costs from administration and investment fees.
48. However, as the PYSP Regulations ED do not include changes to the definition of 'indirect cost', we suggest that this specific issue may require further engagement with Treasury.

B6: Removing property operating costs, borrowing costs and implicit transaction costs

49. The Committee supports the proposal that property operating costs, borrowing costs and implicit transaction costs are not required to be included in cost disclosure calculations.
50. The Committee's view is that the operation of the PYSP Act and PYSP Regulations ED has the effect that the definition of 'indirect costs' in Schedule 10 cannot be substituted to include costs that do not fall within the definition. The Committee's view is that the definition (in the absence of Class Order CO 14/1252) does not include these costs.
51. We would support including guidance in RG 97 that clarifies these amounts are not included in indirect costs.

B8: Removing the distinction between performance fees and performance-related fees

52. The definition of investment fee in SIS Act section 29V(3) is:

An **investment fee** is a fee that relates to the investment of the assets of a superannuation entity and includes:

- a. fees in payment for the exercise of care and expertise in the investment of those assets (including performance fees); and
- b. costs incurred by the trustee ... of the entity that:
 - i. relate to the investment of the assets of the entity; and
 - ii. are not otherwise charged as an administration fee, a buy-sell spread, a switching fee, and exit fee, an activity fee, an advice fee or an insurance fee.

53. We think the operation of the PYSP Act and PYSP Regulations ED has the following impacts on calculation and disclosure of performance fees:

- The amount of performance fees or performance related costs included for this purpose will need to be an amount that is an 'investment fee' as defined or an 'indirect cost' as defined, and will need to be allocated to those components; and
- The amount of performance fees / costs will need to be determined annually to calculate the application of the fee caps as at each 30 June.

B9: Calculating performance fees

54. See comments in relation to B8 (paragraphs 53 and 54). While the Committee does not disagree that averaging performance fees over a five-year period may provide a more reliable disclosure for consumers, annual calculations will be required for the fee cap.

B10: Disclosing performance fees

55. See our comments in relation to B8.
56. The Committee supports the disclosure of the performance fee percentage in a footnote to the Fees and Costs Summary. If indirect costs also include an amount for performing fees in underlying vehicles, a similar footnote should also be added for the 'indirect costs' line.

B11: Clarifying the treatment of costs paid out of reserves

57. The Committee's view is that the operation of the PYSP Act and PYSP Regulations ED has the effect that the definitions of administration fee and investment fee in SIS Act section 209A cannot be substituted to include costs that do not fall within the definition.
58. The fee cap is in the following terms (under the PYSP Act as modified by the PYSP Regulations ED:¹
- ... the following are **capped fees and costs** charged to the member in relation to the product for the year:
- a. administration fees charged to the member in relation to the product for the year;
 - b. investment fees charged to the member in relation to the product for the year; and
 - c. an amount worked out in accordance with the regulations: ... so much of the indirect cost of the MySuper product or the choice product for the year that is required to be reported to the member under section 1017D of the Corporations Act 2001 as:
 - i. is not charged to the member as a fee; and
 - ii. is incurred by the trustee or the trustees of the fund in relation to the year; and
 - iii. relates to the administration of the fund or investment of the assets of the fund.
59. The relevant definitions of administration fee and investment fee include '*costs incurred by the trustee*' in relation to, respectively, the administration or operation of the fund, or the investment of the assets of the fund.
60. The Committee's view is that it is clear the definitions include amounts paid out of reserves. However, the calculation for the purposes of the fee cap is such of those amounts as are 'charged to the member'. This means that the actual costs to members is the relevant amount (whether the amount is a debited from the member's account or by payment from fund earnings or by payment from a reserve). To the extent that an expense of the fund is met by amounts that were previously deducted

¹ SIS Act section 99G (3) as modified by SIS Regulation 9.50

from members' accounts or fund earnings, in our view the payment of the expense is not an additional cost to the members – as the cost has already been charged to them.

61. In our experience a significant number of funds manage payments for administration expenses by debiting fees from member accounts and / or debiting expense provision amounts from fund earnings or assets, and allocating the debited amounts to a reserve, then paying expenses out of the reserve.
62. We acknowledge there is some uncertainty as to how the definitions work for funds that have this practice.
63. The definition of 'administration fee' refers to a fee that relates to administration and includes costs that relate to administration. We think a sensible interpretation of the reference to costs is that this would capture costs paid from the fund that are not covered by the fees charged to members. For example, for a fund where the trustee's practice is to charge a fee that partially covers administration costs and to pay the balance of these costs from the fund's income, the balance of the costs should be included in administration fees. However, the conclusion should not be the same for funds that have a practice of fully funding all costs from fees charged to members and / or from debiting expense provision from earnings, where the costs are then paid from the expense reserve maintained for that purpose. In any financial year where the expense reserves were insufficient to fully fund all costs, the excess would be an additional cost 'charged to members' as further amounts would need to be deducted from the fund's income (or member accounts) to cover them.
64. The definition in our view does not require an interpretation that the same amounts must be counted twice in calculating the amount of administration fees.² Where the fund records an amount as a fee or cost at the point of allocation to a reserve, then the fund should not be required to also report as additional costs the amounts paid out of the reserve that were funded by the amounts paid in.
65. We therefore suggest some care needs to be taken to avoid giving the impression that funds are required to 'double count' payments out of a reserve, where the relevant costs have already been 'charged to members'.

Section C Recommendations we propose to adopt that do not require amendments to Sch 10

C7: Periodic statement content for defined benefit members

66. We agree with ASIC's proposed guidance (Draft RG 97.139 – RG 97.141) on periodic statements for defined benefit members.

C8: Reducing differences between superannuation product and managed investment product fee disclosure

67. While the Committee supports eliminating differences between fees and costs disclosure for managed investment schemes, our view is that this will not be feasible as a result of the operation of the PYSP Act and PYSP Regulations ED.

² The Explanatory Statement issued on the introduction of CO 14/1252 included a purpose of correcting some provisions that could be interpreted as requiring trustees to double count costs in some circumstances.

Contact

68. The Committee welcomes the opportunity to discuss the submission further. In the first instance, please contact:

- Ms Lisa Butler Beatty, Chair, Superannuation Committee
T: [REDACTED]
- Ms Natalie Cambrell, Deputy Chair, Superannuation Committee
T: [REDACTED]