



ASIC

Australian Securities & Investments Commission

Advice to super fund members

Regulation Impact Statement

July 2009

What this Regulation Impact Statement is about

This Regulation Impact Statement (RIS) addresses the Australian Securities and Investments Commission's (ASIC's) proposal to release regulatory guidance and grant relief to facilitate advice to super fund members. This follows a recommendation of the Financial Services Working Group. The overall aim of this project is to improve Australians' access to simple financial advice about their super.

In developing our final position, we have considered the regulatory and financial impact of our proposals. We are aiming to strike an appropriate balance between:

- allowing flexibility for super funds and financial advisers in how they provide information and general and personal advice to super fund members; and
- ensuring that super fund members are able to make informed decisions about their super.

This RIS sets out our assessment of the regulatory and financial impacts of our proposed policy and our achievement of this balance. It deals with:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Contents

What this Regulation Impact Statement is about.....	2
Introduction.....	4
Executive summary	4
Assessing the problem	6
Objectives	8
Options and impact analysis.....	9
Option 1 – Regulatory guidance and class order relief	9
Option 2 – Status quo	14
Consultation and implementation	15
Consultation	15
Implementation and review.....	16

Introduction

Executive summary

- 1 In February 2008, the then Minister for Superannuation and Corporate Law, Senator the Hon Nick Sherry, and the Minister for Finance and Deregulation, the Hon Lindsay Tanner MP, announced the establishment of the Financial Services Working Group (FSWG).
- 2 The FSWG is comprised of senior officials from the Department of Treasury, ASIC and the Department of Finance and Deregulation. The role of the FSWG is to look at several key issues associated with financial product disclosure and advice. One key issue is access to advice about a member's existing interest in their super fund (intra-fund advice).
- 3 In May 2008, the FSWG, released Consultation Paper 97 *Simple super advice* (CP 97), which discussed issues related to improving access to advice about choices within a member's super fund and set out options for change.
- 4 Responses to CP 97 indicated that there is an unmet demand for intra-fund advice and that a key reason for this is uncertainty about regulatory obligations. This includes uncertainty about the legal requirements when providing intra-fund advice, specifically complying with section 945A.
- 5 During consultation, industry also indicated that the criminal sanctions for breach of section 945A act as a significant deterrent to providing intra-fund advice.
- 6 Following consultation, the FSWG recommended to the Ministers that ASIC should produce regulatory guidance, examples and relief clarifying the regulatory requirements for providing intra-fund super advice. The Ministers supported this approach.
- 7 ASIC proposes to:
 - (a) Release a new regulatory guide, *Advice to Super Fund Members*. The regulatory guide will provide guidance to financial advisers, super fund trustees and their outsourced advice providers about how to comply with the *Corporations Act* when giving members information and advice about their existing interest in a super fund, supplemented by practical examples.
 - (b) Issue conditional class order relief to super fund trustees and their authorised representatives from the requirements in section 945A where they provide intra-fund advice.

- 8 The aim of the proposal is to increase access to intra fund advice and enhance member engagement with their super.

What is financial product advice?

- 9 Financial product advice (**financial advice**) is a recommendation or statement of opinion that is intended to influence a person in making a decision about a financial product or class of products, or could reasonably be regarded as being intended to have such an influence.

- 10 All financial advice is either personal advice or general advice.

- An investor receives **personal advice** where the adviser has (or could reasonably be expected to have) considered one or more of the investor's objectives, financial situation or needs.
- **General advice** is all other advice (that is, advice where the adviser does not consider the investor's personal circumstances).

What obligations attach to giving personal advice?

- 11 Under section 945A of the *Corporations Act*, an adviser must only provide personal advice if:

- (a) they make reasonable inquiries about and determine the investor's relevant personal circumstances;
- (b) having regard to information obtained from the investor about those personal circumstances, the adviser gives such consideration to, and conducts such investigation of, the subject matter of the advice as is reasonable in all of the circumstances; and
- (c) the advice is appropriate to the investor having regard to that consideration and investigation.

- 12 Where personal advice is given, a Statement of Advice (**SOA**) is generally required. The SOA allows the investor to make a considered and informed decision about whether to act on the advice. It also provides a record of the advice, which may be important in case of a dispute or for a compliance review.

What advice does the proposal cover?

- 13 ASIC's proposal only covers personal advice to a member about their existing interest in a super fund, for example:

- choosing an investment option the fund offers;
- increasing voluntary contributions;
- buying life insurance within the fund; and

- accessing super early if the member experiences financial hardship.
- 14 The proposal does not cover advice about super that goes beyond the member's existing interest in a super fund. For example, it does not cover advice about:
- switching super funds;
 - consolidating money held in several funds into one fund;
 - more complex retirement planning issues;
 - insurance a member holds outside their super fund; and
 - allocating money between super and other financial products.

What type of information and advice is currently available?

- 15 Investors can potentially receive three types of assistance with simple questions about intra-fund issues:
- (a) **Factual information** — this is objectively ascertainable information whose truth or accuracy cannot be reasonably questioned e.g. information about how the super system works, tax rates, co-contribution rules and product features. This is widely available from sources such as Product Disclosure Statements, Government and corporate websites such as ASIC's FIDO website, brochures, media publications, financial planners and super fund call centres.
 - (b) **General advice** — this takes no account of the member's specific circumstances. Some general advice is available via brochures and websites.
 - (c) **Personal advice** — this can be simple and confined to one issue, or broader within a wide-ranging financial plan. The former is not widely available, while the latter is likely to incur significant cost.

Assessing the problem

- 16 There is currently an unmet need for intra-fund advice. This has reduced the ability of consumers to make optimal decisions about their super. This, in turn, may reduce the effectiveness of the retirement savings system because super fund members lack the information and advice they need to make decisions about their options within their fund.
- 17 For example, anecdotal evidence suggests that there was an increase in the number of super fund members switching to more conservative investment options in immediate response to the global financial crisis. While this may have been appropriate for some people (e.g. those close to retirement), it is

likely to be a sub-optimal strategy for those who would benefit from taking a longer-term approach to their super investments.

Barriers to the provision of intra-fund super advice

- 18 During consultations, we received feedback from super funds that members frequently ask call centre staff for advice. Many super funds give factual information, not advice. For many members who are unfamiliar with super, the response is: ‘Thanks for the information, but what should I do?’
- 19 This suggests that members look to their super fund as a source of intra-fund advice. Super funds are well placed to provide intra-fund advice for two reasons. First, they have existing relationships with their members. Second, they have the capacity to provide individual advice on specific issues through channels such as call centres on a high-volume basis.
- 20 Our consultations found that other financial services providers were less likely to offer intra-fund advice. For example, traditionally, financial planners have offered holistic financial advice covering the insurance, investment and structuring needs of retail investors. Financial planners also operate under approved product lists that limit the products they are able to advise on. This business model is not easily adaptable to the provision of advice on one or two specific intra-fund issues on a high volume basis through channels such as call centres. Accordingly, there are very few providers of intra-fund super advice in the current market.
- 21 During consultation, financial services providers also indicated that a key reason for the unmet demand for information and general and personal intra-fund advice is uncertainty about regulatory obligations including:
- (a) Uncertainty about how to comply with section 945A e.g. the level of inquiries they need to make and what personal circumstances are relevant to the advice.
 - (b) Uncertainty about the boundaries between factual information, general and personal advice e.g. a fund might like to give more assistance through a general advice model, but might be reluctant due to the perceived risk of providing personal advice.
 - (c) Liability risk if mistakes are made and the law breached. Breaching section 945A is a criminal offence. This is a significant deterrent to providing intra-fund advice.

Why is government action required?

- 22 As the problem involves uncertainty about the regulatory environment, market forces will not be sufficient to resolve it. The level of uncertainty about regulatory obligations and the risk to industry, such as possible

criminal sanctions for breach of section 945A, warrants government intervention.

Objectives

- 23 The objective of this proposal is to improve Australians' access to information and advice about their super. It will better help retail investors engage with their super and make informed decisions about it.
- 24 The proposal is designed to ensure that this objective is achieved without compromising retail investor protection.
- 25 This will enhance the effectiveness of Australia's retirement savings system, because investors will optimise their super over the longer term.

Options and impact analysis

Option 1 – Regulatory guidance and class order relief

- 26 ASIC proposes to:
- (a) Release a new regulatory guide, *Advice to Super Fund Members*, to provide guidance about how to meet existing *Corporations Act* requirements for giving intra-fund advice and information. It will be supplemented by practical examples.
 - (b) Issue conditional class order relief to super fund trustees and their authorised representatives from the requirements in section 945A where they provide intra-fund advice to their members.

What regulatory guidance is proposed?

- 27 The proposed regulatory guidance:
- (a) Provides guidance to financial advisers and super fund trustees and their outsourced advice providers about how to comply with section 945A when giving intra-fund advice. It explains how personal advice can be ‘scaled’ under section 945A.
 - (b) Explains our proposed conditional class order relief from the requirements in section 945A for super fund trustees and their authorised representatives who provide intra fund advice to members.
 - (c) Explains how to give factual information and general and personal intra fund advice about issues like changing investment options, contributions, insurance within the member’s super fund and accessing super early in cases of financial hardship.
 - (d) Provides examples of how to give factual information and general and personal intra-fund advice. The examples illustrate that it is possible to give intra-fund advice over the phone, by email, on the internet, face-to-face or in any combination of these ways.

What is the class order relief proposed?

- 28 The class order proposes relief from the requirements in section 945A for trustees of regulated super funds and their authorised representatives where:
- (a) The trustee has an Australian financial services licence (**AFS licence**) that authorises them to provide personal advice about super.
 - (b) They have informed the member that the advice is limited to the member’s existing interest in the trustee’s super fund.

- (c) The advice relates to the member's existing interest in the super fund and does not also relate to:
 - (i) any other financial product (except eligible insurance in relation to the member's interest in the fund); or
 - (ii) anything mentioned in subsection 765A(1) of the Corporations Act that would be a financial product but for that subsection (except eligible insurance in relation to the member's interest in the fund).
- (d) The fund is not a self-managed super fund.

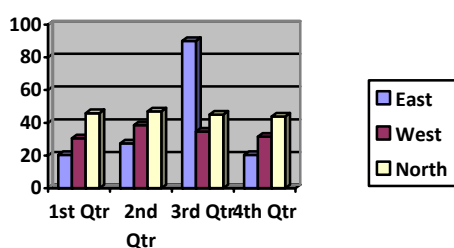
29 There are also a number of other technical carve outs for advice that relates to products to which the disclosure regime in section 1012IA of the *Corporations Act* applies, advice about a member moving from the accumulation phase of super to a pension plan, and advice about a member moving between sub-plans in a fund.

What conditions are attached to the relief in the class order?

- 30 For a trustee to rely on the relief set out in the proposed class order, they must comply with a number of conditions. These are:
- (a) They must inform the member in writing that they have provided the advice in reliance on the instrument of relief and, accordingly, the advice provided is limited to the member's existing interest in the fund.
 - (b) If acting on the advice would result in an increase in any fees, costs, charges, insurance premiums or other remuneration (including commission) or other benefits payable, they must notify the member of this increase in writing and in dollars. This notification could occur in a SOA.

Impact on members

- 31 This option will have a positive impact for members. It will make it easier for members to access intra-fund advice. This will have long-term benefits because it will help members optimise their super.
- 32 This option will also maintain adequate levels of investor protection. Giving super fund trustees relief from section 945A will maintain investor protection mechanisms because super fund trustees are in a special relationship with their members and subject to onerous existing obligations to them under statute and common law.



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For example:

- (a) the *Superannuation Industry (Supervision) Act* ("SIS"). - relevantly, its obligations under this Act include the implied covenants in section 52 of SIS such as:

- the duty to ensure that the trustee's duties are exercised in the best interests of members;
- the duty to exercise the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with the property of another; and
- the duty to act honestly and to segregate the member's assets from its own,

Compliance with SIS is enforced by APRA.

- (b) Corporations Act 2001 – relevantly, its obligations under this Act include the regulatory requirements in Chapter 7 governing licensing, disclosure obligations, the requirement to provide services 'efficiently, honestly and fairly', representative training, management of conflicts of interest, maintenance of a dispute resolution systems, and prohibiting misleading and deceptive conduct,

Compliance with the Corporations Act is enforced by ASIC.

- (c) Contractual obligations – these arise from the trust deed setting out the terms of the trust, the Product Disclosure Statement and any other contractual terms or representations that the trustee is subject to in relation to the member,

Compliance with the contractual obligations is enforced by APRA or ASIC (or both) depending upon the particular obligation.

- (e) the common law obligations – these arise from the duty of care established by case law which include those duties referred to above in paragraph (a) as well as a duty to avoid conflicts of interest, not to make an unauthorised profit and not to profit from its own mistakes (amongst others),

- (f) Licence terms – the trustee must comply with the conditions of its licences, for example the AFSL and RSE licence,

Compliance is enforced by ASIC and APRA respectively.

- (g) Various other related statutes – these include the Australian Securities Investments Commission Act 2001 and applicable Anti-Money Laundering and Counter-Terrorism Financing Act 2006.

Compliance of these acts is enforced by ASIC and AUSTRAC respectively.

Trustees are required to act in accordance with the applicable obligations discussed above. Compliance is mandatory and failure to comply may result in serious sanction. For example, depending upon the particular requirement that is breached and the severity of such non-compliance:

- directors and company secretaries as well as individuals personally involved may be subject to civil or criminal sanctions;
- the trustee may be required to pay compensation;
- the trustee may have its licence(s) revoked or conditions imposed on its licence.

In any event, the trustee is likely to suffer reputational and monetary damage following any failure to comply. Hence, in providing personal intra-fund advice to members under the proposed relief, super fund trustees must act in a manner consistent with these obligations.

These obligations collectively are arguably equivalent to, or higher than, the obligations under section 945A.

Impact on super fund trustees

- 34 This option will facilitate the provision of intra-fund advice by super fund trustees. Super fund trustees have a sound understanding of their existing common law and statutory obligations to their members and could provide personal intra-fund advice in a manner consistent with these obligations.
- 35 The provision of intra-fund advice is not mandatory. Super fund trustees do not need to offer this service and those that choose not to provide intra-fund advice will not incur any compliance costs as a result of this proposal.
- 36 Where super fund trustees choose to provide intra-fund advice in accordance with section 945A, our proposed guidance on how to comply with this provision will assist these entities. Super fund trustees that adopt this approach will incur compliance costs where they do not already hold an AFS licence authorising them to provide personal advice or where they need to establish an intra-fund advice model.
- 37 Super fund trustees that alternatively choose to provide intra-fund advice that relies on our proposed relief will also incur compliance costs. They will need to obtain an AFS licence if they do not already hold one, or vary their existing AFS licence if they do not have such an authorisation, to authorise

them to provide personal advice. Trustees will also need to ensure that their processes and procedures allow them to provide intra-fund advice in a manner consistent with their common law and statutory obligations, and comply with their licensing and disclosure obligations under the *Corporations Act*. These costs are likely to be comparable with the compliance costs that a trustee would incur if providing intra-fund advice under section 945A.

Impact on other providers of financial advice

38 Entities that are not super fund trustees, such as financial advisers or outsourced advice providers of super fund trustees, are not eligible to rely on our proposed relief.

39 This limitation is designed to preserve adequate investor protection. Unlike super fund trustees, these providers are not subject to onerous existing obligations to super fund members under statute and common law comparable to the obligations of super fund trustees.

40 These entities will still be able to provide intra-fund advice that complies with section 945A. Our proposed guidance on how to comply with section 945A and, specifically, how to 'scale' advice under that provision in an intra-fund context, will assist these entities.

41 The provision of intra-fund advice is not mandatory. Entities that choose not to provide intra-fund advice will not incur any compliance costs.

42 Entities that choose to provide intra-fund advice in accordance with section 945A will incur compliance costs. These costs will be the same as the compliance costs that a super fund trustee would incur if it provided intra-fund advice in compliance with section 945A, or these costs are likely to be comparable with the compliance costs that a super fund trustee would incur if it provided intra-fund advice under our proposed relief.

Impact on government

43 This option will have a negligible impact on government.

44 ASIC will incur additional costs in developing the regulatory guide and class order, but these costs are likely to be offset against cost savings from a reduction in applications for individual relief or requests for individual guidance from industry.

45 Clarifying the regulatory regime will also allow ASIC to reallocate resources away from this area following implementation, thus allowing for better regulation in the financial services industry.

Option 2 – Status quo

- 46 This option would mean continuation of the current regulatory uncertainty that is inhibiting the provision of intra-fund advice.

Impact on retail investors

- 47 This option would have a negative impact on retail investors. Lack of access to intra-fund advice means that retail investors would be more likely make sub-optimal choices about their super.

Impact on industry

- 48 This option would have a negative impact on industry.
- 49 Those providing intra-fund advice would continue to be subject to the regulatory uncertainty surrounding how to comply with section 945A.

Impact on government

- 50 This option would have a negligible impact on government.
- 51 ASIC may be required to provide individual guidance to those entities seeking to develop intra-fund advice business models.

Consultation and implementation

Consultation

- 52 In May 2008, the FSWG released a Consultation Paper on improving access to advice about choices within a member's existing super fund.
- 53 A total of 37 submissions were received in response to the paper, many of which indicated that there was uncertainty about how to comply with section 945A when providing 'basic' personal advice about a member's existing super fund. Overall, there was strong support for the government taking action to improve retail investor access to simple financial advice. There was wide consensus that this is a priority area.
- 54 In developing the proposed regulatory guidance and class order relief, we have also consulted with industry stakeholders and the Financial Services Working Group Advisory Panel on a confidential basis. More than 120 individuals have participated in this consultation process.
- 55 There continues to be wide consensus that improving retail investor access to advice on super is an important policy objective to pursue. However, the submissions varied significantly in response to our proposed approach. ASIC has taken those submissions into account in its final consideration of the proposed regulatory guidance and class order relief. For example:
- Some submissions were supportive of the proposed approach, while others suggested that the boundaries between factual information, general and personal advice could only be remedied through law reform. We consider that law reform is not required to allow for the provision of 'scaled' advice under current regulatory settings; this view is consistent with the view put forward by the Financial Services Working Group to the Ministers. There are adequate investor protection mechanisms in place to justify an alternate approach for super fund trustees to provide intra-fund advice.
 - Concerns were raised about an uneven playing field being created by the proposed class order relief. The proposed regulatory guidance on providing 'scaled' advice will be applicable to all advice providers, including super fund trustees if they choose to provide intra-fund advice in accordance with section 945A. Super fund trustees will also be provided with an alternate means of providing intra-fund advice to their members under the proposed class order relief without compromising investor protection mechanisms.

- Practical concerns were raised about how super fund trustees relying on the proposed class order relief would manage potential conflicts of interest between acting in the best interests of fund members collectively and acting in the best interests of an individual fund member when providing intra-fund advice. Super fund trustees who choose to rely on the relief will need to meet all AFS licence obligations, including the obligation to manage conflicts of interest. Current regulatory guidance in *Regulatory Guide 181 – Licensing: Managing conflicts of interest* will continue to apply in such circumstances.

Implementation and review

- 56 ASIC will be responsible for implementing its proposed regulatory guidance and class order relief and, in doing so, will monitor the provision of intra-fund advice and whether there are further regulatory issues arising that need to be addressed.
- 57 ASIC's monitoring of this issue will be incorporated into its day-to-day activities and will not require implementation of any new systems or processes.
- 58 The relief will only be available to super fund trustees and their authorised representatives, and not to those who provide financial advice more generally. Given the preservation of adequate investor protection under our proposal, together with the current Parliamentary Joint Committee on Corporations and Financial Services inquiry into issues associated with recent financial product company collapses, including the role played by financial advisers, we do not think it is appropriate to grant the proposed relief to financial advisers.