



The Voice of Super

File Name: 2008 17

Ms Lisa Rayner
Lawyer, Retail Investor Taskforce
Australian Securities and Investment Commission
GPO Box 9827
MELBOURNE VIC 3001

3 June 2008

Dear Ms Rayner,

ASIC CONSULTATION PAPER 93 “FACILITATING ONLINE FINANCIAL SERVICES DISCLOSURE” AND THE INCORPORATION BY REFERENCE PROVISIONS (7.9.15DA)

The Association of Superannuation Funds of Australia (ASFA) welcomes the opportunity to endorse the broad principles underlying these initiatives and advise that ASFA is equally committed to promoting more meaningful, effective and efficient disclosure.

We attach a submission responding to both to the incorporation by reference provisions and the ASIC consultation paper titled “Facilitating online financial services disclosure”.

ASFA considers that the Consultation Paper and the incorporation by reference provisions need to be considered concurrently if they are to achieve the dual aims of more effective disclosure and the more efficient provision of financial services.

The submission focuses on those aspects of the paper directly affecting superannuation Trustees and fund members, primarily:

- Targeted disclosure
- Materiality
- The definition of “publicly available” documents
- Application of IBR provisions to “accessible financial products”
- Unique identifiers
- Online disclosure

Should you have any queries on the content of the submission please contact Sean Graham on (02) 9264 9300.

Yours sincerely,

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THE ASSOCIATION OF SUPERANNUATION FUNDS OF AUSTRALIA

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The Association of Superannuation Funds of Australia

Submission to ASIC on ASIC consultation paper 93 “facilitating online financial services disclosure” and the incorporation by reference provisions (7.9.15DA).

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1. Introduction

The Association of Superannuation Funds of Australia (ASFA), as the peak body for the Australian superannuation industry, strongly supports the broad principles underlying the incorporation by reference (“IBR”) and online disclosure initiatives.

ASFA considers that the Consultation Paper and the incorporation by reference provisions need to be considered concurrently if they are to achieve the dual aims of more effective disclosure and more efficient provision of financial services.

ASFA notes views in the industry that currently there are obstacles to the practical implementation of IBR and on-line disclosure. However ASFA considers that these obstacles may be overcome by ASIC providing clarification, additional guidance and, in some circumstances, class order relief. Our comments on the Consultation Paper are grouped under the following headings:

- Targeted disclosure
- Materiality
- The definition of “publicly available” documents
- Application of IBR provisions to “accessible financial products”
- Unique identifiers
- Online disclosure

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2. Issues requiring guidance or relief

2.1 TARGETED DISCLOSURE MATERIAL

It is ASFA's view that for "incorporation by reference" to operate effectively, product issuers must be able to provide different disclosure material to different types of clients; incorporating material targeted at clients with different risk profiles, investment experience, literacy levels, and ages. While the basic disclosure requirements should be consistent, the way in which other information is presented could be more tailored to the specific client segment. Specific, tailored client communications, when informed by consumer testing, are often likely to be more meaningful to retail investors. This position is consistent with the recent research report released by the Wallis Group that focused on consumers' views of current disclosure practices and with the results of the consumer testing of disclosure documents previously conducted by ASFA.

Given this, it is not clear exactly how IBR regulation 7.9.15DA interacts with section 1013F to achieve this objective. As you are aware, Section 1013F(1) currently permits targeted disclosure to the extent that, subject to sections 1013D and 1013E, a Product Disclosure Statement (**PDS**) need not contain information that would not be reasonable for a person considering, as a retail client, whether to acquire the product to find in the PDS. In considering whether it would be reasonable for a retail client to expect to find particular information in the PDS, the matters that may be taken into account under section 1013F(2) include:

- the extent to which the product is well understood by the kinds of person who commonly acquire products of that kind as retail clients;
- the kinds of things such persons may be reasonably expected to know; and
- the way in which the product is promoted, sold or distributed.

Regulation 7.9.15DA also provides that a PDS is not required to include information mentioned in Part 7.9 of the Corporations Act in certain circumstances.

There are views in the industry that Fund Trustees are generally reluctant to rely on 1013F or the incorporation by reference because of their concerns about their practical application and interpretation. These views exist notwithstanding that some Trustees have demonstrated how these provisions can be practically implemented to promote efficiencies and more meaningful disclosure. To overcome this reluctance, ASFA suggests that ASIC issues guidance to the industry confirming what information or types of information can, under 1013F, be excluded from a PDS and confirm that "targeted disclosures" are permissible under the incorporation by reference provisions.

In addition, any guidance provided should address how the practical application of the "incorporation by reference" provisions will support, rather than undermine, the statutory requirement for "clear, concise and effective" disclosure. For greater clarity, ASIC might also consider confirming whether "reasonable expectations" under 1013F are determined by reference to an actual retail investor or by reference a hypothetical retail investor.

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2.2 MATERIAL CHANGES

There are views in the industry that unintended consequences may flow from making changes to incorporated documents. In particular, there are concerns about the practicality of incorporation by reference given that it is an offence under section 1015E to give a PDS that has been materially altered unless the date of the PDS is changed to the date the alteration was made.

If incorporated information is updated it is deemed to be included in the PDS under sub regulation 7.9 15DA(3). If the update is material, the date of the PDS would need to be changed to the date of the incorporated information. Given ASIC's view of what is 'material' (see QFS 136), one view is that even minor changes to the PDS would trigger the dating requirement.

Some Trustees are concerned that each time they make a material alteration to any incorporated document, for example one included on their website, they would need to change the date on all hard copy PDSs. This raises profound difficulties.

ASFA considers that if clients are accessing incorporated information online then changing the date of the hard copy PDS is of little value for consumer protection purposes. Of course the product issuer will need to retain records as required by regulation 7.9.15DB.

If incorporation by reference and on-line disclosure is to operate efficiently and effectively, ASIC should provide guidance or class order relief specifying that section 1015E does not apply to a change in information that has been incorporated by reference in compliance with regulation 7.9.15DA.

2.3 THE MEANING OF “PUBLICLY AVAILABLE” INFORMATION

Sub-regulation 7.19.15DA(1)(a) requires the incorporated information to be 'publicly available' in a document other than the PDS. The practical difficulty is that non-public offer funds generally do not provide PDSs to the public or to persons not eligible for membership. They might provide information (including incorporated documents) to both current and potential members via mechanisms such as a restricted access website, a corporate intranet or, in the case of multi employer sponsored funds, only to those members eligible for membership to that particular sub-plan.

There are views in the Industry that these latter approaches may not meet the test of “publicly available” in sub-regulation 7.9.15DA(1). Further, requiring non-public offer funds to make fund documents available to the wider public would appear to impose unwarranted costs on such funds by requiring, in some cases, significant changes to administration processes, communication protocols and IT systems.

To address these concerns, ASFA submits that the term “publicly available” needs to be clarified or broadened. We believe that there is no impact on consumer protection in allowing these funds to restrict access to the incorporated information to current or eligible members, as only certain individuals can actually join the fund. It makes no sense to require a document that is incorporated by reference to be more widely available than the PDS itself. Further, requiring universal publication and provision of these documents could in fact mislead consumers into believing they can join funds for which they do not, and can not, qualify.

This is a critical concern for some participants and one on which regulatory action is necessary to address industry uncertainty. ASFA's preference is for ASIC to provide class order relief, specifying that, in relation to a non-public offer fund, “publicly available” means making it available to all persons who are eligible to become members of the fund and in a manner generally consistent with 1017A.

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2.4 INTERRELATIONSHIP WITH SECTION 1012IA

As you would also be aware, Section 1012IA is triggered where a Trustee offers a choice of investment strategies to members which include other specific financial products (“accessible financial products” or “AFP”). In these circumstances, the Trustee has an obligation to provide a PDS in circumstances where specific financial products comprise all or part of the investment option.

There is an interpretation of the law that some of the information required under section 1012IA for disclosure concerning “accessible financial products” can be incorporated by reference. This argument relies on:

- the use of the expression “information mentioned in Part 7.9” in regulation 7.9.15DA; and
- ASIC’s Class Order 07/386, which inserts a new section 1013FB and a new paragraph 1012IA(5).

For example, a superannuation trustee might use Alternative 2 under ASIC’s relief to prepare an integrated PDS for the superannuation product and related accessible financial products, but seek to use the incorporation by reference facility under regulation 7.9.15DA for the “information reasonably required to understand the investment strategy under which the accessible financial product may be acquired”. This is because this “information is mentioned in Part 7.9” (as modified by ASIC’s class order).

In order to promote certainty within the industry we consider that ASIC should issue guidance to assist product issuers to use the incorporation by reference provisions while complying with their section 1012IA obligations. This guidance should, for example, address what information about accessible financial products can and cannot be incorporated by reference and provide practical information on the scope and applicability of these provisions.

2.5 UNIQUE IDENTIFIERS

Sub-regulation 7.9.15DA(1)(b)(ii)(A) requires the PDS to include sufficient details about incorporated information to enable a person to identify the relevant document (or part of the document) by a ‘unique identifier’.

Industry is concerned that ASIC considers that any alteration of a particular incorporated document creates a new document that requires a new unique identifier. There is a sustainable interpretation of the law to the effect that only the ‘identifier’ must be unique and that the document bearing that identifier can change as long as the identifier remains the same. This interpretation would allow the responsible person to provide updated versions of the document on its website (provided that it did not change the unique identifier associated with that document). Of course under regulation 7.9.15DB, the responsible person would need to retain each version of the document for 7 years.

Funds regularly amend their underlying documents, for example by updating performance figures in an investment document. Often the changes are trivial but in other cases they may be more material.

As PDSs are likely to refer to multiple incorporated documents that are updated at different times, a narrow interpretation of the “unique identifier” would result in funds being required to frequently update their PDSs to specifically identify the correct version of the incorporated document. While this might not be a problem with online versions, constantly updating hard copies to reflect the latest version number is onerous, costly and would limit the scope of the incorporation by reference provisions in practice. In effect, product issuers would only be able to use incorporation by reference for information that is unlikely to change. If a Supplementary PDS were used to identify the correct version of a document, this would require the consumer to piece together information from several sources and could lead to confusion, misunderstanding or disengagement.

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If clients are accessing this information online (rather than printing or saving incorporated documents), then the use of a unique identifier for each document is of little value in consumer protection as there is unlikely to be a clear record as to which version the client read. So, whichever interpretation is adopted, reliance will be placed on the product issuer to retain proper records.

A broader interpretation recognises that, provided the essential nature of the document does not change, the unique title of the document (e.g. the XYZ Fund Insurance Brochure) should be sufficient to identify an incorporated document (or part of a document). Version numbers would neither be mandated nor required, except for the issuer's internal record keeping purposes.

ASFA requests ASIC to confirm whether, under the current law, a broad interpretation is consistent with ASIC policy and can therefore be confidently applied by Superannuation Trustees. In the alternative we consider that ASIC should provide class order relief, specifying that a new unique identifier does not cease to be a unique identifier merely because it includes a version number for the document.

3. Online Disclosure

ASFA supports superannuation funds being able to better use electronic means for distributing member communications.

Sections 1013D(1) and 1013E list the information that a trustee must provide in order to satisfy the Corporations Act in relation to the issuance of a PDS. To that end, we submit that many of the statutory subsections are open ended and require broad outcomes. This includes the requirement imposed by section 1013F that a PDS contain all information that might reasonably be expected to have a material influence on a member's decision to invest in a superannuation product. There are other instances of this, including the requirement that "significant benefits" and "significant characteristics" are included in the documentation. Uncertainty about the practical application of these requirements has contributed to the length of PDSs and undermined participants' efforts to achieve clearer investor communications and more meaningful disclosure. This lack of regulatory certainty has led product issuers to include generic superannuation and investment information with education material and with the fund specific information in the PDS provided to the consumer.

A way of simplifying PDSs would be for the generic information that applies to ALL superannuation products could be provided by the government (ASIC or APRA) or an industry body (jointly by ASFA and IFSA). Common, industry standard documents could be referred to by all superannuation providers who would consequently be able to reduce the length and complexity of their disclosure documents by only providing the product specific information and referring consumers to the relevant documents and websites. It is submitted that what members really need in relation to their investment decision as to what super fund to invest in is the fund specific information and not the generic information.

We would suggest that "generic, common or industry standard" information includes factual, objective and public information on matters including taxation, preservation, co-contribution, Privacy and the principles of investment diversification and asset allocation.

Further, ASFA would support superannuation funds having the option of making relevant documents available electronically to members; either through the active provision of documents as attachments to email or passively as hyperlinks to websites.

While we recognise that incorporation by reference and online disclosure have the potential to significantly reduce costs and deliver more meaningful disclosure, ASFA submits that member periodic statements should only be able to be provided electronically with the express and specific consent of the member. Periodic statements provide

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members with considerable information about their individual situation and are critical to ensuring members' engagement with their superannuation benefits. ASFA would only support the electronic provision of periodic statements where this is done on an opt-in basis by the member.

In respect to other electronic documents, ASFA would further suggest that while consumers should be required to specifically consent to receiving, or accessing documents, electronically only a single consent should be required. Further, the proposed relief requirement to provide additional written notifications to those product holders that have not requested hard copy information of annual superannuation material reduces efficiency without any significant consumer benefit.

Further, ASFA notes ASIC's intention to issue the Regulatory Guide in September 2008. Given this timetable, online provision of annual statements is unlikely to be implemented for the 2008 reporting period.

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