

# SUBMISSION

## Submission to ASIC – Extension of Three Legislative Instruments

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4 September 2024

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Australian Securities and Investments Commission

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Via email: [rri.consultation@asic.gov.au](mailto:rri.consultation@asic.gov.au)

26 August 2024

Dear Sir/Madam

### ASIC proposes to extend the operation of three legislative instruments

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to this ASIC [consultation](#).

#### About ASFA

ASFA, the voice of super, has been operating since 1962 and is the peak policy, research and advocacy body for Australia's superannuation industry. ASFA represents the APRA regulated superannuation industry with over 100 organisations as members from corporate, industry, retail and public sector funds, and service providers.

We develop policy positions through collaboration with our diverse membership base and use our deep technical expertise and research capabilities to assist in advancing outcomes for Australians.

ASFA's strategic objectives include to develop public policy position and advocate for member outcomes and operational effectiveness.

#### Background

On 7 August 2024, ASIC released this consultation on three legislative instruments which are due to expire in October 2024.<sup>1</sup>

The legislative instruments in question are as follows:

- *ASIC Class Order [CO 14/923]* – which has been in effect since [27 October 2016](#) and imposes specific record-keeping requirements when Australian Financial Services Licensees (AFSLs) or their representatives (including advice providers) give personal advice to retail clients.<sup>2</sup>
- *ASIC Corporations and Credit (Breach Reporting—Reportable Situations) Instrument [2021/716](#)* – which has been in effect since [20 October 2023](#). It modifies the Corporations Act to exclude certain forms of non-compliance from being deemed 'significant' breaches of core obligations, about which AFS licensees and credit licensees must lodge breach reports under the Corporations Act. The instrument also extends

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<sup>1</sup> ASIC proposes to extend the operation of three legislative instruments ([7 August 2024](#)).

<sup>2</sup> Ibid.

the period in which AFS licensees and credit licensees may report certain breaches that relate to an earlier reported breach.<sup>3</sup>

- *ASIC Credit (Breach Reporting—Prescribed Commonwealth Legislation) Instrument 2021/801*. This instrument only applies to entities regulated under the *National Consumer Credit Protection Act 2009* (Cth). Therefore, it not relevant for ASFA’s purposes, as our members are not impacted directly.

In relation to the first two instruments, ASFA makes the following recommendations:

1. ASFA supports the existing record-keeping requirements in Class Order 14/923. However, we recommend matters relating to providing advice to retail clients would best be dealt with holistically and in legislation, instead of temporary ASIC instruments, in view of the broader Quality of Advice reforms.<sup>4</sup>
2. ASFA supports broadening the approach taken to relief from [RG 271](#) in the second instrument under consultation. Specifically, we support extending relief to wider classes of situations through adjustments to the range of persons who can be impacted before reporting is mandated and the language regarding financial loss or damage used for such situations.<sup>5</sup> We also suggest the Regulator consider other core obligations that could be dealt with in a similar manner to avoid reporting over-reporting contraventions.

**1. ASFA supports the existing record-keeping requirements in Class Order 14/923. However, we recommend matters relating to providing advice to retail clients would best be dealt with holistically and in legislation, instead of temporary ASIC instruments, in view of the broader Quality of Advice reforms.<sup>6</sup>**

### **1.1 The obligations imposed by Class Order 19/923**

ASFA notes that Class Order 19/923, effective since 2016, modifies the *Corporations Act 2001* (Cth)(the Corporations Act), to insert a new section 912G, imposing certain record-keeping requirements on Australian Financial Services (AFS) licensees or their representatives (including advice providers).<sup>7</sup>

Specifically, section 912G(2) requires that records of the following matters be kept in relation to the provision of ‘personal advice’:<sup>8</sup>

- records showing the information relied on, and the action taken by the provider indicates the provider followed the ‘best interests duty’<sup>9</sup>
- where [section 961B\(2\)](#) of the *Corporations Act* is relied upon to prove the ‘best interests duty’ was met, the provider must record how the information relied on and the actions taken satisfied the steps in that subsection
- records evidencing in light of the advice given, including the reasons why that advice was given, it would be reasonable to conclude the advice is appropriate to the client, given the ‘best interests duty’<sup>10</sup>
- records showing that where the provider ‘knows or reasonably ought to know’ there is a conflict between the interests of the client and the interests of anyone mentioned in [section 961J\(1\)](#) of the

<sup>3</sup> ASIC proposes to extend the operation of three legislative instruments ([7 August 2024](#)).

<sup>4</sup> Effective since [27 October 2016](#).

<sup>5</sup> ASIC, *RG 271 on Internal Dispute Resolution* ([2 September 2021](#)).

<sup>6</sup> Effective since [27 October 2016](#).

<sup>7</sup> ASIC proposes to extend the operation of three legislative instruments ([7 August 2024](#)).

<sup>8</sup> Via section 6 of instrument, ‘personal advice’ has the meaning given to it by [section 766B\(3\)](#) of the *Corporations Act*.

<sup>9</sup> As defined under defined under [section 961B\(1\)](#) of the *Corporations Act*

<sup>10</sup> This section of the instrument references [section 961G](#) of the *Corporations Act’s* requirement that the ‘resulting advice must be appropriate to the client’.

*Corporations Act*, the information relied upon and action taken by the provider show they have ‘given priority to the client’s interests’

Section 912G(2) requires that AFS licensees must ensure the records above are kept for 7 years and maintained in a way that ‘enables the licensee to produce the records’. These obligations continue to apply even if the licensee ceases to be a licensee within the 7-year period.

Section 912G(4) applies the same obligations to authorised representatives who keep the relevant records on behalf of the licensee.

Section 912G(6) excludes from the record-keeping obligations personal advice given in relation to financial product where the provider satisfies the best interests duty in [section 961B\(1\)](#) of the *Corporations Act*, in circumstances where they satisfied the steps in [section 961B\(2\)\(a\)-\(c\)](#), which require respectively that:

- the provider Identified the ‘objects, financial situation and needs of the client’ which were ‘disclosed to the provider by the client through instructions’
- identified the ‘subject matter of the advice’ the client was seeking either ‘explicitly or implicitly’, as well as the ‘objectives, financial situation and needs’ of the client that would ‘reasonably be considered relevant’ in relation to the advice sought on that subject (‘the client’s relevant circumstances’)
- that the provider would make ‘reasonable inquiries’ to obtain ‘complete and accurate information’ where it is ‘reasonably apparent’ that the information provided by the client on their ‘relevant circumstances’ was ‘incomplete or inaccurate’.

Section 912G(7) excludes from the record-keeping obligations in this instrument:

- all forms of personal advice for which a ‘Statement of Advice is not required to be given to the client’
- personal advice where a record of the advice is kept in accordance with [section 946B\(3A\)](#) of the *Corporations Act*.

## **1.2 ASFA’s recommendations**

ASFA supports the continuation of the existing record-keeping requirements outlined in Class Order 19/423.

ASFA particularly supports the tailored exclusions contained in sections 912G(6)-(7), outlined above.

However, ASFA recommends consideration should be given to whether it is appropriate that such essential matters as record-keeping requirements for personal advice in the *Corporations Act* should continue to be dealt with via temporary ASIC instruments.

We note these record-keeping requirements have already been in place for almost 8 years, since 2016. Indeed, this consultation was only they necessitated because they were due to expire in October 2024, as they are contained in a temporary instrument.<sup>11</sup>

ASFA recommends it would be more appropriate for Parliament to amend the *Corporations Act* directly, to make the requirements contained in section 912G permanent rather than temporary.

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<sup>11</sup> ASIC proposes to extend the operation of three legislative instruments ([7 August 2024](#)).

This approach would also reduce complexity and increase compliance by ensuring all obligations were contained in one Act, without the need to review additional complex instruments outside the primary legislation.

Simplifying the obligations that apply in relation to personal advice and the *Corporations Act* itself, are consistent with numerous recommendations of:

1. The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2019) ('the Hayne Royal Commission')<sup>12</sup>
2. Michelle Levy's Quality of Advice Review (2022)<sup>13</sup>
3. The Australian Law Reform Commission's (ALRC) Inquiry into the simplification of corporations and financial services law.<sup>14</sup>

For these reasons, ASFA recommends the record-keeping obligations currently contained in Class Order 19/423 should be moved into the *Corporations Act* itself, removing the need for this additional instrument and making the obligations permanent in a way that provides greater certainty for regulated entities and their customers.

**2. ASFA supports broadening the approach taken to relief from RG 271 in ASIC Instrument 2021/716. Specifically, we support applying relief to wider classes of situations through adjustments to the range of clients who can be affected before reporting and the language describing financial loss or damage.<sup>15</sup>**

### **2.1 The obligations imposed by RG 271 and relief provided by ASIC Instrument 2021/716**

For ASFA's purposes, the key section of *ASIC Instrument 2021/716* which we would like to address is section 7, titled: 'insignificant contraventions of core obligations.' In essence, this section is designed to avoid over-reporting of certain obligations under [RG 271](#), where such over-reporting would be unduly onerous on regulated entities without commensurate consumer benefits.

*ASIC Instrument 2021/716* inserts section 912D(4A) into the Corporations Act.

This section addresses breaches of provisions relating to conduct which is 'misleading or deceptive' or 'likely to mislead or deceive'.<sup>16</sup>

The legislative instrument relevantly provides that certain breaches these provisions are 'taken not to be significant' in certain circumstances.<sup>17</sup>

Where a breach is not 'taken to be significant', it would not need to be reported to ASIC under the Reportable Situations Regime under *RG 78 on Breach Reporting by AFS Licensees and Credit Licensees* ([RG 78](#)).

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<sup>12</sup> *The Hayne Royal Commission – Final Report* ([1 February 2019](#)) at 43 and 172.

<sup>13</sup> Michelle Levy, *Quality of Advice Review – Final Report* ([16 December 2022](#)) at 4, 19 and 187.

<sup>14</sup> ALRC, *Confronting Complexity: Reforming Corporations and Financial Services Legislation* (ALRC Report 141) ([18 January 2024](#)) at 110 and 140.

<sup>15</sup> ASIC, *RG 271 on Internal Dispute Resolution* ([2 September 2021](#)).

<sup>16</sup> Specifically sections 1041H(1), 12DA(1) or 12DB(1) of the *Corporations Act*.

<sup>17</sup> Section 912D(4A) of [ASIC Instrument 2021/716](#).

Specifically, *ASIC Instrument 2021/716* excludes from reporting, situations which:

- ‘would only be likely to give rise’ to a single reportable situation, and<sup>18</sup>
- where only one client is likely to be impacted by the contravention, whether a single individual or multiple individuals holding a financial product jointly, and<sup>19</sup>
- the contravention:<sup>20</sup>

*[H]as not resulted in, and is unlikely to result in, any financial loss or damage to any person (for the purposes of this paragraph, financial loss or damage is to be taken into account regardless of whether it is, or will or may be, remediated).*

For regulated entities to receive the relief from RG 78 offered by *ASIC Instrument 2021/716*, **all three** of the conditions above must be met.

## **2.2 ASFA’s recommendations**

ASFA supports the intention of section 912D(4A), which is to reduce over-reporting of contraventions where a small number of people are likely to be affected and there is minimal financial loss to those persons who are affected.

This relief is appropriate to ensure that compliance activities within regulated entities are focused on efforts with maximal consumer benefits for the greatest number of clients.

However, ASFA recommends the current language should be amended so that:

- it stipulates a broader class of people can be affected than just ‘one client’. For example, the instrument would be more closely aligned with its intention to avoid over-reporting if it was amended so that the relevant breach must not impact ‘more than two’ clients.
- The current language relating to financial loss should also be replaced. Currently, the section reads:<sup>21</sup>
  - *The relevant breach must not result in, and be unlikely to result in, any financial loss or damage to any person (regardless of whether that loss or damage has been, or will or may be, remediated).*
  - This language should be replaced with the following, to more effectively achieve the objective of the instrument:
  - *The relevant breach has not resulted in any known financial loss or damage to the client, and it is reasonable to conclude it is unlikely to result in any financial loss or damage to the client.*

ASFA recommends that stipulating both a broader range of affected clients and adjusting the for financial loss would better help to achieve the objective of the instrument, which is to ensure complaints activities are focus on delivering the broadest consumer benefits to the widest range of clients.

ASFA also asks that the Regulator consider other core obligations that could be dealt with in a similar manner to avoid reporting insignificant contraventions.

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<sup>18</sup> Section 912D(4A)(a)(i) of [ASIC Instrument 2021/716](#).

<sup>19</sup> Section 912D(4A)(b) of [ASIC Instrument 2021/716](#).

<sup>20</sup> Section 912D(4A)(c) of [ASIC Instrument 2021/716](#).

<sup>21</sup> Sections 50A(4A)(c) and 912D(4A)(c) of [ASIC Instrument 2021/716](#).

Consistent with our earlier recommendations on Class Order 19/423, we also recommend these obligations should be simplified and moved into primary legislation wherever possible.

If you have any queries or comments in relation to the content of our submission, please contact Sebastian Reinehr on (02) 9264 9300 or by email at [sreinehr@superannuation.asn.au](mailto:sreinehr@superannuation.asn.au).

Yours sincerely

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