



**Response to Question on Notice concerning a superannuation trustee's obligation to retain records relating to member complaints**

**Parliamentary Joint Committee on Corporations and Financial Services inquiry into the Superannuation Legislation Amendment (Service Providers and Other Governance Measures) Bill 2012 (the Bill)**

**24 January 2013**

**AIST Response**

## The question

**Senator BOYCE:** *Okay. Perhaps this is one question which I should have asked you rather than asking the previous witness: there have also been some submissions around the fact that you have to give written reasons within 28 days for complaints on superannuation funds, particularly around death benefits and so forth. Is this a concern for your members? And leading up to that: are there currently any statutory requirements around how long you must hold records for?*

**Mr Haynes:** *I must admit that I have been trying to find an answer to this question since you asked it of Mr Watts! The people at the other end of my texts are still investigating this, so I, too, will take this as a question on notice.*

*However, there is a general requirement on super funds to maintain certain records for periods of between seven to 10 years. It may be that details of complaints fall within that category, but I cannot say that with certainty.*

## AIST's response

AIST notes that there are statutory and common law requirements for trustees to retain certain records relating to the operation and management of a Fund. While these requirements are broadly about transactions, record-keeping and tax, they may also impact on a trustee's obligation to retain records relating to member complaints.

To the best of our knowledge, there are not separate and specific requirements for record-keeping of complaints.

Listed below is an overview of a Trustee's requirements to retain information and documents that may impact on the record-keeping of complaints.

While the overview is not exhaustive, we believe that it will be of assistance to the Committee, and supports the view that there are extensive specific and implied record-keeping requirements on superannuation trustees.

## Statutory requirements

Section 103 of the **Superannuation Industry (Supervision) Act 1994** (SIS Act) requires trustees (whether individual or corporate) to retain copies of all minutes or decision (if an individual trustee) at which matters affecting the entity were considered for at least 10 years. This provision has been in effect since 1994 with only minor amendment.

Section 105 of the SIS Act requires each trustee of a regulated superannuation fund or approved deposit fund retain:

- (a) Copies of all member or beneficiary reports...for as long as they are relevant and in any event for at least 10 years

There are liability provisions which apply to a trustee's obligation to retain records, in particular under Part 26 of the SIS Act.

The **Corporations Act 2001**(and associated regulations and ASIC guides) contains a variety of requirements concerning financial documentation requirements for corporate entities financial product advice Conflicts of interest

Section 286 requires a company, registered scheme or disclosing entity keep financial records that:

- (a) Correctly record and explain its transactions and financial position and performance; and
- (b) Would enable true and fair financial statements to be prepared and audited.

The obligation to keep financial records of transactions extends to transactions undertaken as trustee. ASIC Information Sheet INFO 76 (available at: <http://is.gd/xcOmSG> ) contains all requirements for corporate entities in terms of what records must be retained as part of this data set.

In relation to financial product advice (which may be offered by a superannuation trustee under its Australian Financial Services Licence), ASIC requires licensees to retain records of the steps that an advice provider took when providing advice. ASIC considers client correspondence to form part of this set of records. (ASIC Regulatory Guide **RG 175 Licensing: Financial product advisers – conduct and disclosure**).

These documents may be relied upon when complying with the best interests duty. Under section 961M of the Corporations Act, an action may be commenced up to 6 years after the contravention, implying a 6 year document retention period.

Records must also be kept by licensees of any documents relating to conflicts of interest and action taken, as well as any reports provided to management or licensee about conflicts of interest for at least seven (7) years (ASIC Regulatory Guide **RG 181: Licensing: Managing conflicts of interest**).

Section 262A of the **Income Tax Assessment Act 1936** (ITAA 36) requires the retention of records for a period of 5 years from the date a business record is prepared or when the transaction is completed, whichever comes later.

The **Anti-Money Laundering and Counter-Terrorism Financing Act 2006** contains a requirement that in Part 10 for reporting entities (and members of their extended business reporting group) governed by the Act to retain documents for seven (7) years that relate to the provision of a designated service under the Act.

Section 48 of the **Superannuation (Unclaimed Money and Lost Members) Act 1999** (SUMLM Act) requires a superannuation provider retain records which explain all transactions and other acts engaged in under the SUMLM Act. Those records must be retained for 5 years from the date of the preparation of those documents or the completion of the transaction or acts to which the records relate.

Subsection 22(3)(a) of the **Superannuation (Resolution of Complaints) Act 1993** states that the Superannuation Complaints Tribunal may treat a complaint as withdrawn if more than 12 months elapses between the decision or conduct that is being complained about, and the date that the complaint is made to the Superannuation Complaints Tribunal.

Primarily, complaints are made to the Tribunal about decisions that relate to complaints received by trustees. An exemption applies which relates to the decision of a trustee relating to the payment of a disability benefit because of TPD, where the time limit specified in the Bill will apply.

By implication, a trustee should maintain records of complaints (other than in relation to TPD matters) for at least 12 months from the date of the trustee's decision or conduct that is being complained about.

### Common law requirements

Under the common law a trustee has a duty to account to the beneficiaries for the dealings undertaken in relation to trust property. As a result of this obligation and because the trustee has control of the trust property, the trustee is obliged to keep proper records, allow inspection of the records by beneficiaries and, on demand, give a beneficiary information and explanations as to the dealings with the trust property . (**Blackwell v Bray (1992) 35 FCR 584; 108 ALR 375 at 379-380; Yates v Halliday [2006] NSWSC 1346 [49]**).

The general proposition applying to trusts is that accounts kept by trustees (in relation to the dealings with trust property) should not be destroyed at the termination of the trust, even though beneficiaries may have given the trustee a release. They may be needed at some later date if some question arises, or if an allegation is made against a trustee (Yates v Halliday).

A trustee unable to account for the dealings of trust property may be in breach of its fiduciary duty (Yates v Halliday).