



ASIC

Australian Securities & Investments Commission

25 May 2018

Mr Mark Fitt
Committee Secretary
Senate Economics Legislation Committee
Department of the Senate
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Dear Mr Fitt

Inquiry into the Treasury Laws Amendment (2018 Measures No. 4) Bill 2018 (Bill)

I refer to your invitation of 11 May 2018 to the Chairman of the Australian Securities and Investments Commission (ASIC) to make a submission to the above inquiry.

ASIC's role

ASIC is the regulator of conduct and disclosure in financial services. Promoting confident and informed investors and financial consumers, and fair and efficient markets in the financial system, are strategic priorities of ASIC.

In light of the focus of the inquiry, we wish to draw your attention to some recent work streams that involve the role of employers in the superannuation system:

1. Employer choice of default fund

During 2017/2018, ASIC has been undertaking project work looking at influences on employers choosing superannuation default funds for employees. ASIC does not regulate employers as such but their decisions are important for the superannuation system, and can have a significant impact on disengaged consumers. Information on ASIC's MoneySmart website helps employers make this choice.

As part of our work, we have considered advice and disclosure provided to employers by trustees and others in the financial services industry. We have also considered benefits and incentives provided to employers by trustees and others. Advice, disclosure, benefits and incentives can all influence an employer's decision about the default fund they select for their employees who do not exercise choice.

We anticipate releasing a public report about the project in mid-2018.

2. Superannuation Guarantee (SG) non-payment – insolvency and phoenixing

ASIC has been involved in initiatives to address superannuation guarantee (SG) gap issues. We interact with, and receive referrals from, the ATO about company insolvency, which includes issues about SG non-payment.

We do significant amounts of work on illegal phoenix activity, which helps address SG non-payment. This includes surveillance work focusing on advisors and directors who may be involved in illegal phoenix activity.

We interact with the ATO to align communications on the ATO and ASIC's MoneySmart website to help consumers. We have updated our MoneySmart website to include more information about SG non-payment.

Assisting member superannuation choice

Proposed amendments to the *Taxation Administration Act 1953* in Part 3 of Schedule 6 of the Bill would permit the ATO, at an employee's request, to disclose 'protected information' to an individual's employer (including the individual's existing superannuation membership accounts) for the purpose of the individual making an informed superannuation choice, ie to assist the individual to choose whether to maintain or create a superannuation interest. The draft Explanatory Memorandum (EM) to the Bill, at paragraph 6.17, notes the aim of the changes is to reduce the proliferation of superannuation member accounts for individuals. ASIC supports this aim.

We note that an interest in a superannuation fund is a financial product for the purposes of the Financial Services regime in the *Corporations Act 2001* (Corporations Act). Advice in relation to superannuation is considered financial product advice¹ under the Corporations Act. Generally, financial product advice covers a recommendation or a statement of opinion that could reasonably be regarded as being intended to influence a person in making a decision in relation to a particular financial product.² A person carrying on a *business* of providing financial advice needs to be licensed, which will depend on whether the financial advice is provided with system, repetition and continuity.

We also note that the information that would appear on a pre-filled form given by an employer about the relevant existing or potential future superannuation funds would, just of itself, appear to be factual information, and so not constitute financial product advice for the purposes of the Corporations Act.³

However, we suggest that the EM to the Bill note this and also note that recommendations by an employer in relation to choice of superannuation funds might give rise to concerns under the Corporations Act in relation to the provision of unlicensed financial advice.

¹ Corporations Act 2001, s 764A(1)(g)

² Corporations Act 2001, s 766B(1)

³ See generally ASIC Regulatory Guide 36 *Licensing: Financial product advice and dealing*

Contact

Thank you once again for the opportunity to make a submission to the Committee. If you have any queries, please contact Ms Alex Purvis, Senior Manager, Investment Managers and Superannuation on [REDACTED]

Yours faithfully

[REDACTED]

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