

Senate Economics Legislation Committee
ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

2014 - 2015

Department/Agency: Australian Securities and Investment Commission

Question: BET 294 - 303

Topic: Bank Bundling

Reference: written - 15 June 2015

Senator: Dastyari, Sam

Question:

There are reports of systematic breaches of s68A of the Superannuation Industry (Supervision) Act, prohibiting offering of inducements to win default fund business. It has been reported that ASIC and APRA are investigating reports major banks of offering inducements to employers who choose bank funds as a default fund.

294. What type of inducements are banks offering employers?
295. How widespread do you consider the problem to be?
296. Is the practice confined to major banks?
297. What are the penalties for employers who engage in Bank Bundling?
298. Are court proceedings expected as a result of the investigation?
299. What other repercussions could banks face as a result of this conduct, if it is proven to have taken place?
300. Is there any room to improve the working relationship with APRA on this matter?
301. Could you provide an update on your investigation?
302. Could you please (clearly) outline the consumer detriment that is (possibly) occurring as a result of the conduct?
303. Is there a potential for conflict of interest in a bank-owned super fund providing default super services where it is also the provider of business banking services to the employer?

Answer:

Background

ASIC received information from Industry Super Australia (ISA) about inducements being offered by banks if employers switch to using a bank-affiliated superannuation fund as their default super fund. ISA had commissioned research by UMR regarding employer inducements in which UMR surveyed a number of employers. However, the research did not identify particular instances of misconduct and considered benefits broader than what the legislation would necessarily prohibit in terms of inducements.

This UMR research was also reported widely in the newspapers.

Section 68A of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) prohibits the trustee of a superannuation fund, or an associate of the trustee, from providing or withholding a good or a service to a person on the condition that one or more of their employees becomes a member of the superannuation fund.

This provision came into effect in July 2005 as part of the Choice of Fund reforms (note that it had existed in previous forms before this date). It aims to ensure that employers, in

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selecting a default fund for their employees, are not induced into selecting a fund that may cause financial disadvantage to employees when, but for the inducement, they may not otherwise select that fund.

Their obligation is to select a fund into which they can make superannuation guarantee contributions in order to avoid the superannuation guarantee charge. From 1 January 2014, only a fund containing a MySuper product can be selected for this purpose. To be available for selection, MySuper products must meet minimum standards and prohibitions, including a requirement to have a single diversified investment strategy and only charge permitted fees

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294. The research in this area commissioned by ISA suggested that banks were offering employers a range of benefits including cheaper premiums on insurance products for their businesses, free tickets to sporting events or corporate hospitality, access to free financial advice for employees and discounts on fees within superannuation products.

In terms of work undertaken by ASIC, access to educational materials for employers also featured as a benefit offered by trustees or their associates, as well as benefits such as access to clearing house facilities.

295-296. ASIC has undertaken further review work following these issues being brought to our attention by ISA. We are working closely with APRA on this. Our review extends beyond the banks identified in the initial ISA complaint as we do not think the practice of trustees and others offering benefits to employers is necessarily limited to bank-affiliated trustees. It does not appear to be uncommon for employers to be offered benefits across retail and industry funds' sectors.

We note that many of the "inducements" that may be offered, particularly those offered directly to members (such as fee reductions or better insurance benefits for members) are not inducements for the purposes of s68A of the SIS Act. Similarly, there are exemptions to allow certain "inducements" to be offered – such as loans to employers by banks on a commercial arms-length basis and clearing house facilities: see regulation 13.18A of the SIS Regulations.

297. Subsection 68A(5) confers a statutory right upon a 'victim' to take civil action against a person ('the offender') who has contravened either the inducements prohibition in s68A. It is of note that a breach of s. 68A does not result in the commission of an offence (and the subsequent imposition of a penalty) but rather only gives rise to the creation of a statutory right for an aggrieved individual to commence a civil proceeding for the recovery of losses.

Based on our work to date and analysis of s68A, we are aware that proving that a benefit was provided "on condition" that an employee join the fund could be difficult. That is, the inducement is not simply linked to the employer's selection of the fund as a default fund. But also upon the employer's employee(s) joining the fund.

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We are also aware, from our work to date, that trustees are aware of s68A and appear to arrange their affairs, including promotions and offers, in a way as to minimise the risk of a breach of s68A. For example we are aware that in some instances, trustees are taking the step of asking an employer to attest to the fact that an inducement was not offered before the employer is accepted as a sponsor of the fund.

298 and 301. ASIC's enquiries are ongoing in relation to these matters. We have received information under formal notice from a number of trustees and we are considering whether further information is required before we form conclusions about trustee conduct. It is too early at this stage to state whether any regulatory action will be taken. If we do form the view that there has been a breach of this provision, we may consider taking some regulatory action, including commencing court proceedings.

However, many of the instances where benefits have been provided by trustees or their associates may not constitute a breach of s68A and we may not have sufficient evidence to prove a breach.

299. In terms of repercussions for any trustee engaging in this conduct, ASIC may also consider the conduct in the broader framework of compliance with licensing requirements –such as the obligation to act efficiently, honestly and fairly.

300. We have worked closely with APRA since this matter was raised with us and we continue to do so. The working relationship has been very positive.

301. As noted, our enquiries regarding s68A are ongoing. However, we hope to be in a position to provide further information before the end of the year.

302. The consumer detriment that we think the section was designed to address is the detriment that consumers are placed in a superannuation product that is more expensive and/or underperforming when compared with other super funds and the fund was chosen by the employer as a default fund because the employer received an inducement to join employees to that fund.

This area is very complicated as a member may in fact be better off with a fund that an employer received a benefit from. Alternatively, it may be difficult to judge whether a member is worse off as superannuation offerings can be complex – for example, one fund may offer cheaper fees, but a competitor fund may have higher fees but with better insurance cover.

There is currently no obligation on employers to pick the most suitable or appropriate default fund for their employees who do not exercise choice.

It should be noted most employees do have the ability to select their super fund, and they have portability rights that enable them to move their existing superannuation balances to another fund if they wish to.

Further, the requirement to select a MySuper product as a default fund also means that the difference between the available default funds may be narrowing.

303. There is a potential for a conflict of interest where a trustee has affiliations with other businesses, and this could include banks. There are requirements imposed on trustees

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by both regulators that conflicts be appropriately managed. In some instances, disclosure will help in managing the conflict whereas in other cases a conflict may need to be avoided altogether.

However, we note that cross selling is common in financial services more generally. There is no blanket ban on cross selling. The exemptions to s68A (see regulation 13.18A) recognise the fact that employers may be doing business with a financial institution that also offers them superannuation in addition to other products or services.