



File Number: 200730

Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Department of the Senate
Parliament House
Canberra ACT 2600
corporations.joint@aph.gov.au

6 June 2007

Dear Committee Secretary,

ASFA SUBMISSION ON THE CORPORATIONS LEGISLATION AMENDMENT (SIMPLER REGULATORY SYSTEM) BILL 2007

The Association of Superannuation Funds of Australia Ltd (ASFA) is pleased to make this submission to the Parliamentary Joint Committee on Corporations and Financial Services on the *Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007* ("the Bill"), introduced into Parliament on 24 May 2007. This Bill seeks to implement a number of proposals first made in the Corporate and Financial Services Regulation Review Proposals Paper ("Proposals Paper"), released in November 2006.

ASFA is a non-profit, non-political national organisation whose mission is to protect, promote and advance the interests of Australia's superannuation funds, their trustees and their members. Our members, which include corporate, public sector, industry and retail superannuation funds, account for more than 5.7 million member accounts and over 80% of superannuation savings.

ASFA has been broadly supportive of the attempts by the Government to reduce the regulatory burden on the financial service industry, while maintaining the necessary consumer protections. This Bill advances a number of concerns previously raised by ASFA.

ASFA's comments below follow the "proposal numbers" used in the November 2006 Proposals Paper.

PROPOSAL 1.1 - SCOPE OF FINANCIAL SERVICES ADVICE - SALES RECOMMENDATION

ASFA believes that any reconfiguration of the financial product advice regime needs to be appropriately targeted. Any reform should better permit superannuation funds wishing to communicate with existing members about additional contributions, investment or insurance choices, while continuing to protect consumers when acquiring a new fund or moving monies between funds. Funds should be able to provide this "within product" advice without unnecessary interference by Corporations Act requirements.

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ASFA is supportive of the decision of Government to not proceed at this time with Proposal 1.1 for “sales recommendations” but rather consult further with industry.

As part of the Inquiry into the Structure of the Superannuation Industry, ASFA has previously made a suggestion in our letter of 22 November 2006 to this Committee about redefining “financial product advice”.

We would strongly encourage the Government to compare and consumer test these, and potentially other, alternatives.

Recommendation One: ASFA recommends that the Government consider reforms to the definition of “financial product advice”.

PROPOSAL 1.2 - SCOPE OF FINANCIAL SERVICES ADVICE - STATEMENT OF ADVICE EXEMPTION - NO PRODUCT RECOMMENDATION AND NO REMUNERATION

ASFA strongly believes that any changes to the Statement of Advice (SoA) requirement must be carefully done. Extending relief too far is hazardous, particularly if it involves a person acquiring a new product or moving monies between funds. The decision of an individual to join a new fund, acquire a new product or transfer or rollover significant amounts of money from one fund to another should require investigation of the member's current benefits and costs, and should ordinarily require the provision of an SoA.

Proposed section 946B of the *Corporations Act 2001* (Schedule 1, Part 1, Item 118 of the Bill) sets forth that a Record of Advice (RoA) be required where there is no product recommendation and no remuneration. The definitions of “product recommendation” and “remuneration” appear to have been broadly drawn to ensure the relief is targeted. The adviser must record the advice in a RoA (which includes SoA information on remuneration, interests and commissions) and the RoA is provided to the client on request.

The relief in proposed section 946B does not apply if the advice recommends or states an opinion in respect of a modification to the investment strategy or a contribution level in relation to a financial product held by the client. This does not appear to assist superannuation fund trustees that are seeking to provide broad strategic advice to members about their existing fund.

On initial reading, the proposed subsection 946B appears to be relatively benign. We would suggest any proposals advanced should also include consideration of “within product” advice, such as advice on investment or insurance options within a fund. Appropriately crafted provisions could provide some immediate and meaningful relief to superannuation funds in addressing the advice needs of their membership. If these changes are to be about improving cost and access to advice for income earners, then any such changes would be a step in the right direction. As is the case in Proposal 1.3 below, we would also suggest that ordinarily the RoA should always be given to the client. As well, to address concerns as to

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when the exemption could apply, there could be consideration of a reasonable person test to determine whether advice is being given or not.

As noted above, consideration should also be given to redefining “financial product advice” to expressly exclude from the definition of advice (or at least reduce the related information requirements) strategic communications with an existing member/client. The current consumer protection mechanisms would be maintained by restricting any exemption to strategic communications i.e. where there is no recommendation to select, retain or realise a particular financial product. “Within product” advice such as advice about investment or insurance options within a particular product would fall within the realm of strategic advice, and so would be excluded from the personal advice regime.

As noted above, ASFA has already put forward a similar suggestion to the Parliamentary Joint Committee on Corporations and Financial Services.

Recommendation Two: ASFA recommends that the Government consider reforms to the definition of “financial product advice”.

PROPOSAL 1.3 - THRESHOLD FOR REQUIRING A STATEMENT OF ADVICE

Proposed amendments to section 946AA of the *Corporations Act 2001* (Schedule 1, Part 1, Item 117) would relieve an adviser of having to provide an SoA where the total value of all financial investments in relation to which the advice is provided does not exceed a threshold amount. The threshold amount would be prescribed by regulations, with an amount of \$15,000 suggested in the Explanatory Memorandum.

The exception would not apply to advice relating to any superannuation product unless the client already has an interest in the product.

The adviser must provide the client with a Record of Advice (RoA), which must include certain information that would be contained in a SoA, specifically the information required by paragraphs 947B(2)(d) and (e), or 947C(2)(e) and (f) (i.e. information about remuneration or other interests that might influence the advice).

The Explanatory Memorandum states that the RoA must include the additional information required by subsection 947D when the advice includes a recommendation to transfer from one financial product to another. This additional information covers costs (including lost benefits) and any other significant consequences of moving from the original product. Although this information serves an essential consumer protection function, it has not been included in the Bill.

Although our previous submission supported the exclusion of superannuation from the \$10,000 ‘no SoA’ threshold, ASFA supports the current proposal in principle. ASFA’s support is based on the limited exclusion for advice relating to superannuation (i.e. where the client

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already has an interest in the product that is the subject of the advice) and on the requirement to provide the client with an RoA containing prescribed information.

However ASFA believes the following concerns need to be addressed:

1. The requirement to include the 'from fund' information detailed in subsection 947D(2) should be specifically included in the Bill.
2. Further clarity is required on whether or not the threshold amount applies to future investments. In a superannuation context, a single piece of advice could result in contributions that continue for up to forty years, where the initial investment may be small but the total contributions could significantly exceed the threshold amount.

The Explanatory Memorandum suggests that the threshold amount would apply to the initial investment and any future amounts anticipated to be reached during the next 12 months. A mechanism such as this would provide greater certainty as to when the exemption would apply.

3. An anti-avoidance mechanism is required to prevent advice being broken up into parcels of less than the threshold amount in order to avoid the requirement to produce an SoA. The Explanatory Memorandum raises this as a possibility, which ASFA believes should be pursued.

Recommendation Three: ASFA supports the proposal that an RoA, containing certain essential material, is an appropriate form of advice where the value of financial investments is less than a threshold amount. This is would also require that the RoA obligation apply to superannuation products where the client already has an interest in the product.

ASFA believes that the following are essential requirements:

- where applicable, the RoA be specifically required to include the 'from fund' information detailed in subsection 947D(2);
- greater clarity is provided on whether the threshold amount applies to future investments covered by the advice;
- appropriate anti-avoidance mechanisms are inserted into the Bill.

PROPOSAL 1.4 - FSG EXEMPTION - PUBLIC FORUM

Proposed amendments to section 941C of the Corporations Act 2001 (Schedule 1, Part 3, Item 219) would omit reference to "in a public forum" and substitute "to the public, or a section of the public, in a manner prescribed by regulations made for the purposes of this subsection."

This appears to have been proposed to facilitate Proposal 1.4 from the Corporations and Financial Services Regulation Review Proposals Paper that would remove the requirement to

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provide a Financial Services Guide (FSG) at a seminar of 10 or more retail clients regardless as to whether the forum is open to the public or not.

The specific changes will be done through regulations. It remains unclear from the Bill and the Explanatory Memorandum the specific nature of any exemption.

The requirement to provide an FSG in a seminar setting potentially “doubles up” on the more general obligation to provide an FSG prior to providing a financial service. In a situation where financial product advice is being provided, the individual should receive the FSG, regardless as to whether the advice is provided on a one-on-one basis or in a seminar setting. However where no specific product advice is being provided, an FSG should not be required in a seminar setting, regardless of the composition of the seminar group. For example, the exemption should apply to groups consisting of members of the public, employees of a particular employer or members of a particular superannuation fund.

Recommendation Four: ASFA recommends removal of the requirement to provide an FSG when general advice, but not specific product advice, is provided in a seminar setting.

PROPOSAL 1.6 - SOPHISTICATED INVESTORS

Proposed new section 761GA of the *Corporations Act 2001* (Schedule 1, Part 1, Item 100) inserts a new definition of “sophisticated investors”. This definition expressly precludes determining an investor is a “sophisticated investor”, where the financial product involved is a general insurance product, superannuation product or RSA product.

ASFA continues to support dealings in superannuation products remaining exempted from the sophisticated investor provisions, given the compulsory nature of superannuation, its role in our retirement income system and the financially unsophisticated nature of many superannuation fund members.

Recommendation Five: ASFA recommends dealings in superannuation products remain exempted from the sophisticated investor provisions in Chapter 7 of the *Corporations Act*.

PROPOSAL 1.9 - PRODUCT ACTIVITY AND DATA COLLECTION

Proposed subsection 1015D(2) of the *Corporations Act 2001* (Schedule 1, Part 4, Item 223; Schedule 1, Part 5, Items 224, 225 and 226) would alter the requirements when PDS notification needs to be provided to ASIC.

Effective 1 July 2008, notices will be required for:

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- the first time a PDS is given to someone in a recommendation, issue or sale situation (not including a supplementary PDS);
- a change is made to fees and charges set out in the PDS;
- the financial Product ceases to be available to new clients.

From 1 July 2008 there would be an ability for ASIC to receive the notices electronically and from 1 July 2009 the notices would have to be lodged electronically.

This appears to implement Proposal 1.9. This proposal was for the current PDS in-use notice regime to be replaced with an on-line reporting mechanism. ASFA strongly supports this proposal.

Ideally the on-line form would only require new or changed information to be entered, particularly given the proposed obligation to report when fees and charges change. Much of the frustration with the current approach is that the entire form needs to be completed, rather than merely updating new or changed information. Questions, such as those relating to the complaints mechanism, contact person and so forth, must be completed each time a form is lodged even when there has been no change.

Lastly, unless the lodgement fee of \$33 exists for a good policy reason, it should also be dropped.

Recommendation Six: ASFA supports a shorter, electronic version of the PDS in-use requirements and recommends dropping the \$33 lodgement fee.

PROPOSAL 1.11 - POOLED SUPERANNUATION TRUSTS AND PRODUCT DISCLOSURE

New paragraph 761G(6)(aa) of the *Corporations Act 2001* (Schedule 1, Part 1, Item 98) adjusts the existing tests on Pooled Superannuation Trusts (PST). A superannuation fund trustee is no longer a "retail client", for the purposes of investing in a PST, when it has more than \$10 million in assets.

This change implements Proposal 1.11 to remove the requirement for PSTs to prepare and provide Product Disclosure Statements where the investing superannuation fund trustee has at least \$10 million in assets. ASFA is supportive of this Proposal.

In our previous submission on the Proposals Paper, though supportive of Proposal 1.11, ASFA also expressed some concerns where self-managed superannuation fund trustees and Small APRA Funds (SAFs) are also able to invest in PSTs. There may be an argument that these require the retail investor protection afforded by provision of a PDS. Currently, these funds rarely invest in these vehicles, yet this situation should be monitored to ensure any regulatory change does not expose these investors to unacceptable risks.

Recommendation Seven: ASFA would support the proposal to remove the requirement for Pooled Superannuation Trusts (PSTs) to prepare and provide Product Disclosure

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Statements. However, Treasury and ASIC should monitor closely to ensure that self-managed fund trustees and SAFs are not exposed to unnecessary risks as a result of any change.

PROPOSALS 2.3 AND 2.4 - NOTIFICATION OF CHANGES TO OFFICE HOLDERS AND USE OF CONTACT ADDRESSES

The Bill streamlines the requirements to notify changes to office holders to ASIC and provides for the use of contact addresses. ASFA supports both these simplification measures.

However the requirement to use different forms for notifying changes also needs to be addressed. The use of different forms can easily lead to inadvertent oversights, which give rise to penalties. ASFA would support further changes removing duplicative and unnecessary notifications to ASIC.

Recommendation Eight: ASFA supports more streamlined notification of office holder and address changes to ASIC.

PROPOSAL 2.8 - ELECTRONIC DISTRIBUTION OF ANNUAL REPORTS

Proposed amendments to section 314 of the Corporations Act 2001 (Schedule 1, Part 1, Item 38) permits companies, registered schemes and disclosing entities to make their annual reports available on their websites and require hard copies only be sent to members who request them. This implements Proposal 2.8 from the Proposals Paper.

The proposed amendments do not extend the ability to distribute annual reports electronically to superannuation funds, that are also required under the Corporations Act 2001 to provide an annual report to all members.

ASFA supports the ability of superannuation funds being able to better use electronic means for distributing member communications. Currently, periodic ("member") statements and annual reports can be given electronically as long as certain obligations are met (such as Corporations Regulation 7.9.75B which requires the electronic communication to be provided so it can be kept for future access by the recipient).

ASFA believes that superannuation funds must provide their members with relevant information, so that the member is made aware, and remains aware, of their benefits and rights as members. This information needs to be provided in a way that is relevant and useful to members, so that members can make informed decisions.

We would support superannuation funds having the option to make their annual reports available electronically with members then having the right to request, at no cost to

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themselves, a hard copy of the annual report. Annual reports have evolved into important communication tools for a number of superannuation funds, however they often present considerable costs including printing and postage. Having the option to make annual reports available electronically has the potential to reduce costs. This option would be well received by superannuation funds.

Other disclosure documents provided to the member have taken on a more important role in recent years, often reiterating the important information required to be provided in annual reports. The periodic statement, with its expanded information, provides the member with considerable information about their individual situation. The Product Disclosure Statement, provided to all new members, also contains information about the trustee, the product and the member's rights.

Though the option of electronic provision of annual reports is worth serious consideration, it is ASFA's view that permitting members to access periodic statements electronically is a different matter. Periodic statements are a critical communication that helps ensure the member is aware of their benefit. If there is any move to permit superannuation funds to provide periodic statements electronically, it must only be done on an opt-in basis for the member.

Recommendation Nine: ASFA recommends consideration of legislative provisions to enable greater electronic availability of annual report / fund information to members by superannuation funds.

If you have any questions or comments on this submission, please feel free to contact Dr Brad Pragnell, Director, Policy and Best Practice or Sue Willems, Senior Policy Adviser at the ASFA Secretariat on 02 9264 9300.

Yours sincerely,

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