

Consultation Paper 232 – Remaking ASIC class orders on superannuation [CO 04/1574] and [CO 06/636]

Australian Securities and Investments Commission

21 August 2015

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Acknowledgement

This submission has been prepared for the Law Council of Australia by the Legal Practice Section's Superannuation Committee. The Committee's objectives are to ensure that the law relating to superannuation in Australia is sound, equitable and demonstrably clear.

The Committee makes submissions and provides comments on the legal aspects of virtually all proposed legislation, circulars, policy papers and other regulatory instruments which affect superannuation funds.

The Law Council of Australia is the peak national representative body of the Australian legal profession; it represents some 60,000 legal practitioners nationwide. Attachment A outlines further details in this regard.

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Executive Summary

The Law Council is pleased to provide this submission to ASIC about Consultation Paper 232 on the remaking ASIC class orders on superannuation [CO 04/1574] and [CO 06/636].

CO 04/1574 concerns *Application form and cooling-off relief for certain transfers of members between financial products and interest within a superannuation fund* (which sunsets on 1 April 2016).

CO 06/636 concerns *Superannuation: Delivery of product disclosures or investment strategies* (which sunsets on 1 October 2016).

Consultation Paper 232 sets out ASIC's proposals to remake these class orders on superannuation prior to their expiry in order to preserve their effect. ASIC has sought feedback from the Australian superannuation industry on ASIC's proposals to remake those class orders.

The Law Council's primary position is that it supports the remaking of the class orders and considers they remain necessary and relevant for the continuity of relief to the superannuation industry.

The Law Council recommends that consideration be given to addressing some additional matters in each of the proposed new class orders as set out below.

Class Order CO 04/1574

Definition of 'intra-fund transfer'

1. The Law Council supports ASIC continuing the relief currently given by CO 04/1574 in a new legislative instrument without any significant changes.
2. For clarity we recommend that further guidance be provided around when ASIC considers there will be an 'intra-fund transfer' for the purposes of regulation 7.9.02(4) of the Corporations Regulations. There is a level of confusion in the superannuation industry about when a trustee might have been taken to have created a 'sub-plan'. It is likely that many trustees would not have formally made a 'sub-plan' determination under regulation 7.9.02, but will have acted in a manner that recognises various categories of membership and treats those various groups of members as a distinct plan. Many funds will have governing rules that recognise separate segments or groups of members pursuant to which trustees are then required to recognise those groups and treat them differently to members of other parts of the fund.
3. The Law Council also notes that regulation 7.9.02(4) is unclear as to whether a member transferring from the main part of the fund to a 'sub-plan' constitutes an 'intra-fund transfer'. Regulation 7.9.02(4) refers to a person being a member of a 'sub-plan' as the first condition for the provision to apply. It is possible that a member is not a member of a 'sub-plan' and is then transferred from the main part of a fund to a 'sub-plan' which would not appear to be caught under the concept of 'intra-fund transfer'.
4. It is also noted that employer plans created under industry funds and master funds would not necessarily fall within the definition of 'sub-plan' under regulation 7.9.02 because a determination is not formally made by a trustee under sub-regulation 7.9.02(1) to create a 'sub-plan'.
5. Further, the heading to regulation 7.9.02(4) makes reference to a 'change of membership', which was a concept that previously derived from the former Superannuation Industry (Supervision) legislation disclosure provisions prior to financial service reform in 2004. However, regulation 7.9.02(4) does not necessarily capture a 'change of membership' where a member may move between different categories of membership, unless that change also results in a transfer from one sub-plan to one or more other sub-plans.
6. Furthermore it may be worthwhile for the class order to clarify that application and cooling off requirements do not apply to intra-fund transfers required and performed in respect of "Accrued Default Amounts" under the Superannuation Industry Supervision legislation (SIS) that are transferred to a MySuper product within the fund. We note that special purpose 90 day plus notice requirements apply to such transfers in any case.
7. Finally, we note that the definition of 'intra-fund transfer' in the proposed new replacement instrument is generally broader than the concept of 'intra-fund transfer' under regulation 7.9.02(4), where the class order would pick up a 'change of membership' that may not be a transfer to a different sub-plan within the fund. The class order relief will not necessarily be required or be applicable where there is not, in the first instance under regulation 7.9.02(4) an 'intra-fund transfer' between 'sub-plans', so it is curious why the relief then uses a broader definition.

Recommendation:

- **Further consideration be given to providing guidance and clarification on the operation and scope of the ‘sub-plan’ provisions under regulation 7.9.02 of the Corporations Regulations.**

Class Order CO 04/1574

RSE licence condition

8. The class order relief is also subject to the trustee’s RSE licence containing certain conditions to the effect that the governing rules of the fund contain a provision about ensuring ‘equivalent rights’ or obtaining member consent. Many trustees have had significant changes to their RSE licence conditions since the introduction of the Stronger Super reforms.
9. We expect that some RSE licensees will no longer have this condition imposed on their licence and as a result will not be eligible for the relief under CO 04/1574. Accordingly, we query why paragraph 6(2)(a) could not be removed from the proposed instrument and paragraph 6(2)(b) be amended accordingly to ensure that the relevant provisions regarding equivalency and member consent would continue to apply. Paragraph 6(2)(d)(i) would also require modification.

Recommendation:

- **Review the requirement for paragraph 6(2)(a) to still apply as a condition for relief which may have the effect of limiting the availability of the relief to RSE licensees.**

Class Order CO 04/1574

Requirement that it apply to closed categories or sub-plan

10. The Law Council notes that the relief operate on the basis that the category of membership or sub-plan from which the members are to be transferred will not, after the transfer time, be permitted to have any new member admitted or products issued and all existing interests or products in that category or sub-plan will have been transferred or re-issued such that there is no longer any interest referable to the transferor category or sub-plan.
11. As a consequence of this requirement the relief is quite restrictive in that it only applies to situations in which a sub-plan or category of membership is to be closed or terminated.
12. The Law Council questions why the relief must apply in such a restrictive way, as there may be circumstances in which remaining members of the category cannot be transferred – due to insurance or legacy defined benefit arrangements, but the bulk of members are able to be transferred.

Recommendation:

- **Consideration be given as to why effective termination of the transferring category or sub-plan is a condition of the relief.**

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents its constituent bodies consisting of 16 Australian State and Territory law societies and bar associations and the Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2015 Executive as at 1 July 2015 are:

- Mr Duncan McConnel, President
- Mr Stuart Clark, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Mr Morry Bailes, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.