



ASIC

Australian Securities & Investments Commission

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Superannuation
Productivity Commission
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Dear Sir/Madam

**Superannuation Efficiency and Competitiveness - Issues paper
Superannuation: Alternative Default Models**

I refer to the above issues paper released by the Productivity Commission (the Commission) in September 2016 (Issues paper).

The Australian Securities and Investments Commission (ASIC) made a broad initial submission in relation to the review as a whole in May 2016. ASIC appreciates the opportunity to provide a submission to the Commission in relation to Alternative Default models.

As noted in our previous submission, as the conduct and disclosure regulator, ASIC's role primarily concerns the relationship between trustees and individual consumers. Promoting confident and informed investors and financial consumers, and fair and efficient markets in the financial system, are strategic priorities of ASIC.

This submission will focus primarily on those allocative mechanisms raised in the Issues paper where persons in the superannuation system face *making a decision* in relation to a superannuation product. This includes employers. We have not considered the possible costs/benefits or advantages/disadvantages of the centralised models or the administrative filters or market based process outlined in the Issues paper.

Decision making and comparability

We have previously noted the role of behavioural biases in the superannuation system in our earlier submission in May this year. Biases and decision-making shortcuts affect everyone – including past and new members, as well as employers. Some of the key biases that may affect decision-making about choice of funds include:

present bias: this is our tendency to overweight current costs and benefits and place less emphasis on those to be incurred in the future (with superannuation, this could be the very distant future for some people).

anchoring: is our propensity to rely heavily or 'anchor' on one trait or piece of information when making a decision. In a particularly complex decision making context such as superannuation fund choice where there are a large number of funds and multiple features which need to be considered, people can anchor to just one piece of information to simplify their decision.

choice overload: providing people with too many choices can inhibit decision-making. For both employers and employees, the huge number of funds to choose from can contribute a significant decision-making burden which may lower the quality of choices people make. In response to this, being able to provide the right information which enables effective comparability of funds is of critical importance.

Being able to effectively compare superannuation funds will be essential in any allocative model.

Government and ASIC work in relation to transparency and developing the means to compare superannuation products is ongoing in several areas:

- the regime for fees and costs disclosure in Product Disclosure Statements for superannuation products and fund member's periodic statements the *Corporations Regulations 2001* has recently been improved through ASIC Class Order following extensive consultation. ASIC work will continue over 2017 in bedding down these improvements into industry practice;
- Product dashboards are intended to be published on a fund's website to assist members and other users such as employers, review agencies and the media to more easily compare the risk, return and fee features of MySuper products and choice investment options.
- s 29QC of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) intends to improve the comparability of superannuation products through a requirement, broadly, that a superannuation fund trustee to give information about its superannuation products that is calculated in the same way as required under a reporting standard made by APRA.
- portfolio holdings disclosure provides fund members and other stakeholders information about the investment of fund assets. The extent of the operation of this transparency related obligation was also under consideration prior to the 2016 Federal election and similarly the Minister has confirmed that these amendments will be progressed.

However, relying heavily on disclosure documents and product dashboards, to inform and protect consumers needs to be approached with caution. Some of the research identifying some of the limitations of these tools, and the issues presented by behavioural biases, was discussed in our earlier submission in May this year.

Duties and incentive

Although employers currently have the legal responsibility to make a decision in relation to the default superannuation product, employers are required to neither select a fund that is in the best interests of their employees nor to put their employees' interests ahead of their own in selecting the fund. Although it is possible that there may be an implied term of "good

faith" in all contracts, including employment contracts¹, it does not appear that employers would be accountable to their employees for the decision in relation to the default superannuation product.

Employers may also have an incentive to make a single broad decision as to default fund and to not attempt to select different defaults for different employees based on their relevant personal circumstances. Employers would not be likely to be informed about all relevant personal circumstances of each default employee.

We note that if employees were required to choose a superannuation fund for themselves they would have more information about their circumstances than any other decision maker. They may lack the knowledge or expertise to identify and assess the information they possess to make a decision that is their best interest. An employer attempting to make individual choices would also likely involve administrative and time costs. Seeking expert advice to assist them in making the decision could add to these costs.

Expertise and diligence

"Employers" for superannuation purposes will cover a very wide spectrum of organisations and individuals with differing level of financial literacy. While large employers may have dedicated staff, others may be time poor or unaware of the types of issues that can arise in relation to the choice of a default superannuation fund. Some employees may take false comfort about the employer's decision-making ability. Employees may also generally perceive the employer to be more knowledgeable about superannuation than themselves and interpret the employer's choice as an implied recommendation.

As noted, the ability to meaningfully compare superannuation funds will also be an issue. ASIC has published guidance encouraging employers to consider a range of factors when deciding about a default super fund for employees, including fees, investment options offered, fund performance and insurance.² However, the lack of any duty to employees in relation to this decision making may also influence the diligence in seeking to obtain information to support making a decision.

Inducements

Section 68A of the 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 the person's employees becomes a member of the superannuation fund, with some exceptions³. A contravention 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. In the event of a breach, the main remedy available would be for a person who has suffered loss or damage to take civil action in the courts to pursue damages.

¹ *Commonwealth Bank of Australia v Barker* [2014] HCA 32

² ASIC Media Release 16-038MR ASIC guidance to employers about super and <https://www.moneysmart.gov.au/superannuation-and-retirement/super-for-employers>

³ These include in relation to arms-length arrangements and superannuation contribution clearing house services – see regulation 13.18A of the *Superannuation Industry (Supervision) Regulations 1994*

ASIC has also published guidance for employers that illegal inducements from superannuation funds may take any form, and include corporate hospitality, holidays, or discounted rates on products or services. We have also advised employers to make sure any incentives do not distract them from making an informed decision, and to focus on what's best for their employees.⁴

However, the real prospect remains of employers selecting a fund as a result of inducement, including lawful inducements and on the basis of competition directed to the employer rather than to the quality of the product for retirement income purposes of the employees.

Further, there is no equivalent of s 68A of the SIS Act in relation to employee choice – it is not illegal for a superannuation fund or its associates to give benefits to an employee as an incentive for them to choose their fund. ASIC has encouraged fund trustees to be cautious that the use of these incentives does not distract a member from making an informed financial decision about their products and services.⁵

ASIC Project Work

In the current financial year, ASIC has a number of key projects that it is undertaking which may be of interest to the Productivity Commission. These include projects relating to:

- employers in super, looking at advice, disclosure and benefits given to employers in the superannuation context; and
- insurance in super, looking at disclosure, complaints handling, as well as aspects of culture and conflicts as well.

We also have reports due for release shortly relating to our Effective Disclosure Project and Member Experience Project.

Contact

Thank you once again for the opportunity to make a submission to the Commission. We would be happy to meet with the Commission to discuss any of the issues noted in this letter. If you have any queries, please contact Ms Alex Purvis, Senior Manager, Investment Managers and Superannuation.

Yours faithfully

Gerard Fitzpatrick
Senior Executive Leader
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⁴ ASIC Media Release 16-038MR *ASIC guidance to employers about super* and <https://www.moneysmart.gov.au/superannuation-and-retirement/super-for-employers>

⁵ ASIC Media Release 12-311MR *ASIC focuses on disclosure requirements for trustees* and the Attachment *ASIC letter to trustees*