

ASIC CLASS ORDER [CO 09/210]

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (ASIC) makes Class Order [CO 09/210] under section 951B(1)(a) of the *Corporations Act 2001* (the Act).

Section 951B(1)(a) provides that ASIC may exempt a person or class of persons from all or specified provisions of Pt 7.7 of the Act.

1. Background

In February 2008, the Minister for Superannuation and Corporate Law, Senator the Hon Nick Sherry, and the Minister for Finance and Deregulation, the Hon Lindsay Tanner MP, announced the establishment of the Financial Services Working Group (FSWG). One role of the FSWG is to improve access to advice about choices within a member's existing superannuation fund.

In May 2008, the FSWG, consisting of the Treasury, ASIC and the Department of Finance and Deregulation, released a Consultation Paper on improving access to simple advice about choices within a member's existing superannuation fund.

During consultations with the FSWG, financial services providers indicated that one reason for the unmet demand for advice about choices within a member's existing superannuation fund is uncertainty about regulatory obligations.

In particular, the consultation established that there was uncertainty about the legal requirements when giving personal advice, specifically complying with section 945A of the Act. Section 945A of the Act requires that where personal advice is given, the providing entity must only provide the advice to the client if:

- (a) the providing entity determines the relevant personal circumstances in relation to giving the advice and makes reasonable inquiries in relation to those personal circumstances;
- (b) having regard to information obtained from the client in relation to those personal circumstances, the providing entity has given such consideration to, and conducted such investigation of, the subject matter of the advice as is reasonable in all of the circumstances; and
- (c) the advice is appropriate to the client, having regard to that consideration and investigation.

During consultation, industry also indicated that the criminal sanctions attached to section 945A of the Act were causing industry to take an overly cautious approach.

Class Order [CO 09/210] is issued in conjunction with ASIC policy stated in Regulatory Guide 200 *Advice to super fund members*.

2. Purpose of the class order

The purpose of Class Order [CO 09/210] is to provide relief from section 945A of the Act to superannuation fund trustees (and their authorised representatives) who provide personal advice to fund members about their existing super fund. We are providing this relief because super fund trustees are already in a special relationship with their members and subject to existing obligations to them under statute and at common law.

This relief aims to facilitate super fund trustees (and their authorised representatives) providing personal advice to their super fund members and improve their access to advice about their interest in an existing super fund. This relief also aims to encourage member engagement with their super. This is particularly important in light of the current market volatility, which has resulted in many fund members being concerned about the reduction in the value of their super that has occurred over the last 12-18 months.

3. Operation of the class order

Relief from the requirements in s945A

A trustee (the *adviser*) of a regulated superannuation fund (the *fund*) or an authorised representative (the *adviser*) of the trustee does not have to comply with section 945A of the Act for the provision of personal advice (the *advice*) to a member of the fund where all of the following apply:

- (a) the trustee holds an Australian financial services licence that covers the provision of personal advice in relation to superannuation products;
- (b) the advice relates to the member's interest in the fund and does not also relate to:
 - (i) any other financial product (except eligible insurance in relation to the member's interest in the fund);
 - (ii) anything mentioned in subsection 765A(1) of the Act that would be a financial product but for that subsection (except eligible insurance in relation to the member's interest in the fund);
- (c) the advice does not relate to any of the following matters:
 - (i) an investment strategy in relation to which the member may give a direction under regulation 4.02 of the *Superannuation Industry*

(Supervision) Regulations 1994 that involves a financial product in relation to which the trustee is required to give disclosure under section 1012IA of the Act or under Part 7.9 of the Act as notionally modified or varied by ASIC Class Order [CO 06/636];

- (ii) an election by the member of the kind described in subregulation 7.1.04E(1) of the Corporations Regulations 2001;
 - (iii) the issue of a new interest in the fund which is taken to occur because of a change to which subregulation 7.9.02(4) of the Corporations Regulations 2001 applies where under the governing rules of the fund the member has any option, choice or election in relation to the change;
- (d) the fund is not a self managed superannuation fund.

Eligible insurance, as referred to in paragraph (b) above, is insurance maintained by the fund trustee to finance and enhance benefit payments from the fund. This is specifically saved from exclusion to ensure fund trustees can provide advice to fund members on insurance options in the fund.

The exclusions in paragraph (c) above recognise the specific approach taken to certain aspects of fund membership by the Financial Services regime and that these aspects are akin to or involve advising on financial products separate to a member's interest in the fund. The exclusion in paragraph (d) above recognises that in self-managed superannuation funds the fund members will usually also be the trustees of the fund, and do not need to hold an Australian financial services licence for any financial services they may provide in that capacity.

Conditions

The relief in [CO 09/210] is subject to the following conditions:

- (a) The adviser must inform the member:
 - (i) before or at the same time as the advice is provided, that the advice is limited to the member's interest in the fund; and
 - (ii) in writing when, or as soon as practicable after, the advice is provided, that the adviser has provided the advice in reliance on this instrument and the advice provided is limited to the member's interest in the fund.
- (b) If acting on the advice would result in an increase in any:
 - (i) fees, costs or charges incurred in relation to the member's interest in the fund;
 - (ii) amounts payable by the member as premiums in respect of eligible insurance; or

- (iii) remuneration (including commission) or other benefits payable in relation to the member's interest in the fund,

the adviser must notify the member in writing of the increase (as an amount in dollars) when, or as soon as practicable after, the advice is provided. The adviser need only notify the member of the increase to the extent that the adviser knows or could reasonably be expected to find out about the relevant fees, costs, charges, amounts payable as premiums, remuneration (including commission) or other benefits.

These conditions can be satisfied if the relevant information is included in the Statement of Advice given in accordance with subsection 946C(1) of the Act, or a record of the advice made under subsection 946AA(4) of the Act and given in accordance with subsection 946AA(5) of the Act.

4. Consultation

As noted in the background section above, in May 2008, the FSWG released the *Simple advice on choices within an existing superannuation account: Consultation Paper*. In response to this paper, the FSWG received 37 submissions, many of which indicated that there was uncertainty surrounding how to comply with section 945A of the Act when providing personal advice about a member's existing superannuation fund.

In developing this relief, we have also consulted with industry associations, licensees that provide intra-fund advice, licensees that are planning to provide this service and the Financial Services Working Group Advisory Panel.