



**ASIC**

Australian Securities & Investments Commission

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## **ASIC Corporations (Amendment and Repeal) Instrument 2015/876**

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I, Grant Moodie, delegate of the Australian Securities and Investments Commission, make the following legislative instrument.

Date                    16 November 2015

Grant Moodie

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## Contents

<b>Part 1—Preliminary</b>	<b>3</b>
1 Name of legislative instrument .....	3
2 Commencement .....	3
3 Authority .....	3
4 Schedules .....	3
<b>Schedule 1—Amendments</b>	<b>4</b>
ASIC Class Order [CO 14/1252] .....	4
<b>Schedule 2—Transitional</b>	<b>18</b>
Transitional application of amendments made by Schedule 1 .....	18
<b>Schedule 3—Repeal</b>	<b>19</b>
ASIC Class Order [CO 07/337] .....	19

## **Part 1—Preliminary**

### **1 Name of legislative instrument**

This instrument is *ASIC Corporations (Amendment and Repeal) Instrument 2015/876*.

### **2 Commencement**

This instrument commences on the day after it is registered on the Federal Register of Legislative Instruments.

Note: The register may be accessed at [www.comlaw.gov.au](http://www.comlaw.gov.au).

### **3 Authority**

This instrument is made under subsection 1020F(1) of the *Corporations Act 2001*.

### **4 Schedules**

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

## Schedule 1—Amendments

### ASIC Class Order [CO 14/1252]

#### 1 Paragraph 5

Omit, substitute:

5. In section 1011B of the Act, insert in the following definition in the appropriate alphabetical order:

“**investment option**, in relation to a managed investment scheme or superannuation entity, includes the managed investment scheme or superannuation entity where there is no choice of investment options within the managed investment scheme or superannuation entity.”.
- 5A. In subsection 1013C(2) of the Act, omit “The”, substitute “Unless otherwise provided in the regulations, the”.
- 5B. In subsection 1017B(5) of the Act, after “charges” (wherever occurring), insert “other than an increase in a fee for a superannuation product that results from an increase in costs relating to that superannuation product”.
- 5C. In subsection 1017B(6) of the Act, after “charges,”, insert “other than an increase in a fee for a superannuation product that results from an increase in costs relating to that superannuation product,”.

#### 2 Before paragraph 6

Insert:

- 5D. After subparagraph 7.9.16J(a)(iv) of the *Corporations Regulations 2001* (the **Regulations**) insert:

“(v) pensions provided under the rules of a superannuation fund that meet the standards of subregulations 1.06(2), 1.06(6) or 1.06(7) of the SIS Regulations; and”.

#### 3 Paragraph 6

Omit “the *Corporations Regulations 2001* (the **Regulations**):”, substitute “the Regulations:”

#### 4 Before sub-subparagraph 6(a)(i)

Insert:

- (ia) omit the definition of **administration fee**, substitute:

“**administration fee** has the meaning given by clause 209A.”;

(ib) after the definition of *exit fee*, insert:

*“financial year* means:

- (a) in relation to a managed investment product—a financial year of the registered scheme to which the managed investment product relates; and
- (b) in relation to a superannuation product—a period of 12 months ending at the end of a fund reporting period determined under regulation 7.9.32 for holders of the superannuation product.”;

**5 Sub-subparagraph 6(a)(ii) (notional definition of *interposed vehicle*)**

Omit, substitute:

*“interposed vehicle* has the meaning given by clause 101B.”;

**6 Before sub-subparagraph 6(a)(iii)**

Insert:

(ia) omit the definition of *investment fee*, substitute:

*“investment fee* has the meaning given by clause 209A.”;

**7 Sub-subparagraph 6(a)(iv) (notional paragraph 101A(1)(a))**

Omit “a trustee of the entity or responsible entity knows, or reasonably ought to know or, where this is not the case, may reasonably estimate, will directly or indirectly reduce”, substitute “a responsible person knows, or reasonably ought to know or, where this is not the case, may reasonably estimate has reduced or will reduce (as applicable) whether directly or indirectly”

**8 Sub-subparagraph 6(a)(iv) (notional paragraph 101A(1)(c))**

Omit “under section 29V of the SIS Act.”, substitute “as defined in clause 209A or an insurance fee.”

**9 Sub-subparagraph 6(a)(iv) (notional subclause 101A(3))**

Omit, substitute:

(3) Without limiting subclause (1), the indirect costs of a product or investment option referred to in subclause (1) include:

- (a) the following amounts where the responsible person knows, or reasonably ought to know or, where this is not the case, may reasonably estimate those amounts:

- (i) in relation to a derivative financial product that is not an option to acquire or dispose of a financial product—the amount that is the difference between the underlying return and the actual return for the derivative financial product, where the actual return on the product or option is less than the underlying return on the derivative financial product over the relevant financial year; or
  - (ii) in relation to a derivative financial product that is an option to acquire or dispose of a financial product—any amount by which the cost incurred to acquire the derivative financial product exceeds the amount that would be obtained on its disposal at that time; or
- (b) where the responsible person does not know, does not believe they reasonably ought to know, and is not able to reasonably estimate without taking steps that the responsible person considers unreasonable, the amount in paragraph (a) (as applicable) in relation to a derivative financial product—the following amounts in relation to the derivative financial product:
- (i) in relation to a derivative financial product that is not an option to acquire or dispose of a financial product—the greater of:
    - (A) the amount calculated using the following formula:  
$$\text{relevant percentage} \times \text{value} \times (n/365)$$
where:  
**n** means the number of days that the derivative financial product was held by the responsible person or interposed vehicle during the relevant financial year.  
**relevant percentage** means 0.1%.  
**value**, in relation to a derivative financial product, means the value of the ultimate reference assets, in each case taking into account any leverage, offsets or similar adjustments applied to or between the ultimate reference assets under the terms of the derivative financial product; and
    - (B) the minimum amount that the responsible person believes or has reasonable grounds to believe would apply under paragraph (a);
  - (ii) in relation to a derivative financial product that is an option to acquire or dispose of a financial product—the lesser of:

- (A) the amount that would apply under subparagraph (i) if the exclusion from that subparagraph (i) of options did not apply; and
- (B) the premium paid by the responsible person or interposed vehicle for the option,

where the amount referred to in paragraph (a) or (b) is attributable to:

- (c) the product or investment option; or
- (d) an interposed vehicle through which the property attributable to the product or investment option is invested.

(3A) In subclause (3):

**actual return** means the return that has been or would be received (as applicable), or loss that would be payable, by the responsible entity, trustee or interposed vehicle in relation to the derivative financial product over the relevant financial year if the derivative financial product was:

- (a) acquired at the time the derivative financial product was acquired, or, if the derivative financial product was not acquired during the relevant financial year, acquired at the commencement of the relevant financial year for the same price at which it would have been disposed at the end of the preceding financial year; and
- (b) disposed of at the time the derivative financial product was disposed of, or, if the derivative financial product was not disposed of during the relevant financial year, disposed of at the end of the relevant financial year for the price at which it would have been disposed of at that time.

**derivative financial product** means a financial product that:

- (a) is:
  - (i) a derivative; or
  - (ii) either:
    - (A) a security other than a share in a body or a debenture of a body; or
    - (B) a managed investment product or financial product referred to in paragraph 764A(1)(ba) of the Act other than an interest in a managed investment scheme,

under which:

- (C) financial products (***delivery products***) will be delivered or an amount paid at a specified time (***maturity***) in the future; and
- (D) the value of the delivery products to be delivered at maturity or the amount to be paid is ultimately determined, derived from or varies by reference to the value or amount of one or more of the following (each, a ***reference asset***):
  - (I) financial products other than the delivery products;
  - (II) an asset other than a financial product;
  - (III) a rate (including an interest rate or exchange rate);
  - (IV) an index;provided that the reference asset is not related to the value of:
  - (V) a share in a body or debenture of a body to which the delivery products relate; or
  - (VI) the assets of the managed investment scheme to which the delivery products relate; or
  - (VII) the assets attributable to a class of interests in the managed investment scheme to which the delivery products relate; and

- (b) is not able to be traded on a financial market at the time it is acquired.

***reference asset:***

- (a) in relation to a derivative financial product that is a derivative—means the something else that the amount of the consideration, or the value of the arrangement, is ultimately determined, derived from, or varies by reference to and, if the something else is a rate of interest or inflation, the amount on which that rate is applied under the derivative financial product in determining the amount to be paid or received;
- (b) in relation to a derivative financial product that is a security, managed investment product or financial product referred to in paragraph 764A(1)(ba) of the Act other than an interest in a managed investment scheme—has the meaning given by clause 101A(3A)(a)(ii)(D).

***relevant financial year*** means the financial year for which responsible person is calculating indirect costs.



***ultimate reference asset***, in relation to a derivative financial product and each reference asset for the derivative financial product, means:

- (a) to the extent that the reference asset is:
  - (i) a derivative financial product; or
  - (ii) rights in an entity that would be an interposed vehicle if it were held by the superannuation entity or scheme; or
  - (iii) an index that includes a derivative financial product referred to in sub-paragraph (i) or rights in an entity referred to in sub-paragraph (ii),

the asset or assets from which the returns from the derivative financial product or rights in the entity are determined, or any asset or assets that are held in or through any other derivative financial products or entities that would be an interposed vehicle if they were held as part of the superannuation entity or scheme;

- (b) to the extent that the reference asset is not covered by any of the subparagraphs in paragraph (a)—the reference asset.

***underlying return***, in relation to a derivative financial product, means the return that has been or would be received (as applicable), or loss that would be payable, because of the change in the value of the ultimate reference assets taking into account any leverage, offsets or similar adjustments applied to or between the ultimate reference assets under the terms of each relevant derivative financial product or interest in an interposed vehicle over the relevant financial year for which the derivative financial product was held.

#### **10 Sub-subparagraph 6(a)(iv) (notional subclause 101A(4))**

Omit (excluding the note), substitute:

- (4) Despite subclause (1) and (3), indirect costs of a managed investment product or an investment option of a managed investment scheme do not include amounts referred to in subclause (3):
  - (a) where the derivative financial product referred to in subclause (3) is acquired or disposed of for the primary purpose of avoiding or limiting the financial consequences of fluctuations in, or in the value of, receipts or costs of the managed investment scheme whether or not the receipts or costs arise in or through an interposed vehicle; and
  - (b) where the indirect costs were calculated under paragraph (3)(a), to the extent that the difference would result from the incurring of transactional or operational costs in relation to the ultimate reference assets.

**11 After sub-subparagraph 6(a)(iv)**

Insert:

- (v) by inserting after the notional clause 101A (as inserted by this instrument):

**“101B Interposed vehicle**

- (1) A body, partnership or trust (each an *entity*) is an *interposed vehicle* in relation to a product or investment option if both of the following are satisfied:
- (a) property attributable to the product or investment option to which the Product Disclosure Statement relates is invested in or through the entity;
- (b) the responsible person for the Product Disclosure Statement believes or has reasonable grounds to believe that the entity has more than 70% of its assets by value invested in securities or other financial products.
- (2) For the purposes of subclause (1) and subject to subclause (3), in determining whether an entity (the *first entity*) has more than 70% of its assets by value invested in securities or other financial products, disregard for the numerator, securities or other financial products that:
- (a) are traded on a financial market on which the entity to which the financial products relates is listed and that are reasonably regarded as a means by which the first entity makes an investment in real property or an infrastructure entity; or
- (b) confer on the first entity control of another entity (the *second entity*), unless the responsible person for the Product Disclosure Statement has reasonable grounds to believe that the second entity has more than 70% of its assets by value invested in securities or other financial products.
- (3) For the purposes of paragraph (2)(b), in determining whether the second entity has more than 70% of its assets by value invested in securities or other financial products, apply subclause (2) to the second entity as if the second entity was the first entity referred to in that subclause.
- (4) An entity is also an *interposed vehicle* in relation to a product or investment option if, having regard to the Product Disclosure Statement for the product or investment option, a security or interest in the entity could be reasonably regarded, by retail

clients who may be expected to be given the Product Disclosure Statement, as the means by which the benefit of investments by or through the entity is obtained, rather than the investment of the superannuation entity or registered scheme to which the product or investment option relates.

(5) Despite anything in subclauses (1) to (4), an entity will not be an *interposed vehicle* in relation to a product or investment option if all of the following apply:

- (a) the Product Disclosure Statement for the product or an investment option states that a holder of the product may give instructions, directions or requests for financial products to be acquired;
- (b) the responsible person for the Product Disclosure Statement has published a list of financial products in relation to which the instructions, directions or requests may be given that includes a security or interest in the entity;
- (c) the arrangement under which the instructions would be acted on is a custodial arrangement as defined in subsection 1012IA(1) of the Act.

(6) In this clause:

*infrastructure entity* means an entity that provides a return to its shareholders or members mainly from owning or operating any of the following:

- (a) airports;
- (b) electricity generation, transmission or distribution facilities;
- (c) gas transmission or distribution facilities;
- (d) hospitals;
- (e) ports;
- (f) railways;
- (g) roads;
- (h) sewerage facilities;
- (i) telecommunication facilities;
- (j) water supply facilities; or

(k) other physical infrastructure.

**listed:** an entity is **listed** if it is included in the official list of:

- (a) a prescribed financial market; or
- (b) a financial market operated outside of this jurisdiction that is regulated by a foreign government or an agency of a foreign government.”

## 12 Sub-subparagraph 6(b)(iii)

Omit, substitute:

(iii) omit paragraph (2)(h), substitute:

“(h) costs (related to a specific asset (other than a security, interest in an interposed vehicle or derivative financial product within the meaning of subclause 101A(3A)) or activity to produce income) that an investor would incur if he or she invested directly in the asset;”;

## 13 After subparagraph 6(b)

Insert:

(ba) omit the note under subclause 104(1), substitute:

“Note: A fee deducted from a member’s account or paid out of the superannuation entity is not an indirect cost.”;

(bb) omit subclause 104(2), substitute:

“(2) Despite clause 214, the ICR for a Product Disclosure Statement that is available during a particular financial year is to be determined for the previous financial year except that if the product or investment option was not offered from at least 11 months before the end of the previous financial year, the ICR for the Statement is to be determined based on the responsible person’s reasonable estimate at the time the Statement is prepared of the ICR that will apply for the current financial year and if the product or investment option was first offered in the current financial year, since the time the product or investment option was first offered, adjusted to reflect a 12 month period.”;

(bc) after subclause 104(2) insert:

“(2A) Despite clause 214, the part of a fee for a MySuper product or an investment option offered by a superannuation entity disclosed in a Product Disclosure Statement that is available during a particular financial year that relates to the costs incurred by the trustee of the superannuation entity or in an interposed vehicle or derivative

financial product, is to be determined for the previous financial year except that if the product or investment option was not offered from at least 11 months before the end of the previous financial year, the costs are to be determined based on the responsible person's reasonable estimate at the time the Statement is prepared of those costs that will apply for the current financial year and if the product or investment option was first offered in the current financial year, since the time the product or investment option was first offered, adjusted to reflect a 12 month period.”;

(bd) after clause 104 insert:

**“104A Costs in management costs**

Despite clause 214, the part of the management costs for an investment option offered by a managed investment scheme disclosed in a Product Disclosure Statement that is available during a particular financial year that is not a fee payable to the responsible entity, other than a performance fee, is to be determined for the previous financial year except that if the investment option was not offered from at least 11 months before the end of the previous financial year, that part of the management costs is to be determined based on the responsible person's reasonable estimate at the time the Statement is prepared of those costs that will apply for the current financial year and if the product or investment option was first offered in the current financial year, since the time the product or investment option was first offered, adjusted to reflect a 12 month period.”;

**14 After subparagraph 6(e)**

Insert:

(ea) after clause 209 insert:

**“209AA Calculating transactional and operational costs**

For subclause 209(j), information about transactional and operational costs for a product or investment option disclosed in a Product Disclosure Statement that is available during a particular financial year is to be determined for the previous financial year except that if product or investment option was not offered from at least 11 months before the end of the previous financial year, the transactional and operational costs are to be determined based on the responsible person's reasonable estimate at the time the Statement is prepared of those costs that will apply for the current financial year, and if the product or investment option was first offered in the current financial year, since the time the product or investment option was first offered, adjusted to reflect a 12 month period.”;

**15 After sub-subparagraph 6(f)(i)**

Insert:

- (ia) omit the definition of *administration fee*, substitute:

“An *administration fee* is a fee that relates to the administration or operation of the superannuation entity and includes costs, other than indirect costs that are not paid out of the superannuation entity that the trustee has elected in writing will be treated as indirect costs and not fees, incurred by the trustee [OR the trustees] of the entity or in an interposed vehicle or derivative financial product that:

- (a) relate to the administration or operation of the entity; and
- (b) are not otherwise charged as an investment fee, a buy-sell spread, a switching fee, an exit fee, an activity fee, an advice fee or an insurance fee.”;

- (ib) omit the definition of *investment fee*, substitute:

“An *investment fee* is a fee that relates to the investment of the assets of a superannuation entity and includes:

- (a) fees in payment for the exercise of care and expertise in the investment of those assets (including performance fees); and
- (b) costs, other than indirect costs that are not paid out of the superannuation entity that the trustee has elected in writing will be treated as indirect costs and not fees, incurred by the trustee [OR the trustees] of the entity or in an interposed vehicle or derivative financial product that:
  - (i) relate to the investment of assets of the entity; and
  - (ii) are not otherwise charged as an administration fee, a buy-sell spread, a switching fee, an exit fee, an activity fee, an advice fee or an insurance fee.”;

## 16 After subparagraph 6(f)

Insert:

- (fa) in subclause 211:

- (i) in the heading omit “**for a MySuper product**”;
- (ii) omit “generic MySuper product”, substitute “[insert name of generic MySuper product or other investment option as required by subclause 220(1)]”;
- (iii) in the heading to the table omit “—MySuper product”, substitute “[insert name of generic MySuper product or other investment option as required by subclause 220(1)]”;

- (iv) omit “MySuper” (wherever else occurring), substitute “superannuation”;
- (v) omit the note below the table, substitute:

“Note: \* Additional fees may apply. **And**, if you leave the superannuation entity, you may be charged an **exit fee** of **\$x** and a **buy/sell spread** which also applies whenever you make a contribution, exit, rollover or investment switch. The **buy/sell spread** for exiting is **y%** (this will equal to **\$z** for every \$50,000 you withdraw).

Note: Substitute the relevant exit fee, buy/sell spread and total amount payable you charge for \$x, y% and \$z.”;

- (fb) in subclause 212:
  - (i) in both the heading and the sub-heading omit “**balanced investment option**”, substitute “**balanced investment option or other investment option**”;
  - (ii) in the heading to the table omit “—the Balanced Investment Option”, substitute “[insert name of balanced investment option or other investment option required by subclause 220(2)].”;
  - (iii) omit “balanced investment option” (wherever else occurring), substitute “[insert name of balanced investment option or other investment option required by subclause 220(2)].”;

## 17 Subparagraph 6(g) (notional subclause 221(1))

Omit, substitute:

(1) *Superannuation products*

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### DID YOU KNOW?

**Small differences in both investment performance and fees and costs can have a substantial impact on your long term returns.**

**For example, total annual fees and costs of 2% of your account balance rather than 1% could reduce your final return by up to 20% over a 30 year period (for example reduce it from \$100 000 to \$80 000).**

**You should consider whether features such as superior investment performance or the provision of better member services justify higher fees and costs.**

**You or your employer, as applicable, may be able to negotiate to pay lower fees. Ask the fund or your financial adviser.**

### TO FIND OUT MORE

If you would like to find out more, or see the impact of the fees based on your own circumstances, the **Australian Securities and Investments Commission (ASIC)** website ([www.moneysmart.gov.au](http://www.moneysmart.gov.au)) has a superannuation calculator to help you check out different fee options.

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## 18 Subparagraph 6(h)

Omit the full stop at the end of the subparagraph, insert a semi-colon

**19 After subparagraph 6(h)**

Insert:

- (i) omit subclause 301(1), substitute:

“(1) For a MySuper product or an investment option offered by a superannuation entity, the following text and the appropriate amounts, in dollars, must be inserted after the part of the periodic statement that itemises transactions during the period.

**Indirect costs of your investment**

This approximate amount has been deducted from your investment and covers amounts that have reduced the return on your investment but are not charged as a fee.

**Other fees of your investment**

This approximate amount or amounts have been deducted from your investment and covers fees that are not reflected as transactions on this statement.

Note: Other fees may be reported by the type of fees charged.

- (1A) For an offer of a managed investment product, the following text and the appropriate amount, in dollars, must be inserted after the part of the periodic statement that itemises transactions during the period.

**Indirect costs of your investment**

This approximate amount has been deducted from your investment and covers amounts that have reduced the return on your investment but are not charged to you directly as a fee.”.

**20 After paragraph 6**

Insert:

- 6A. In subclause 8(6A) of Schedule 10D to the Regulations omit “section 29V of the SIS Act.”, substitute “clause 209A of Schedule 10, and for an insurance fee as mentioned in subsection 29V(9) of the SIS Act.”

**21 Paragraph 8 (excluding the heading)**

Omit, substitute:

8. Subject to paragraphs 8A and 8B, paragraphs 4 to 7 (except paragraphs 5 and 5D) apply in relation to a Product Disclosure Statement:
- (a) from 1 February 2017 (regardless of when it was first given); or



- (b) if the responsible person for the Statement has included in the Statement itself or published on a website of the responsible person from which the Statement can be accessed, a notice stating that this instrument applies to the Statement.
- 8A. The provisions of subparagraphs 6(bb), (c), (d), (e), (f)(i), (fa), (fb), (g) and (h) and paragraph 7 apply in relation to a Product Disclosure Statement:
  - (a) from 1 February 2017 (regardless of when it was first given); or
  - (b) if the Statement applies the provision.
- 8B. Paragraphs 5 and 5D apply from the day of the commencement of *ASIC Corporations (Amendment and Repeal) Instrument 2015/876*.

**22 Subparagraph 9(a)**

Omit “1 January 2017;”, substitute “1 January 2018;”

**23 Paragraph 9 (note)**

Omit “Part 11 of Schedule 10A”, substitute “Part 12 of Schedule 10A,”.

## **Schedule 2—Transitional**

### **Transitional application of amendments made by Schedule 1**

#### **1 Product Disclosure Statements**

Despite the amendments made by Schedule 1, ASIC Class Order [CO 14/1252] as in force immediately before the commencement of this instrument continues to apply in relation to a Product Disclosure Statement that included a statement made before the commencement of this instrument that ASIC Class Order [CO 14/1252] applies to the Statement until the earlier of:

- (a) the date from which the Statement is required to apply the equivalent provision of ASIC Class Order [CO 14/1252] as in force immediately after the commencement of this instrument; and
- (b) the date from which the Statement applies the equivalent provision of ASIC Class Order [CO 14/1252] as in force immediately after the commencement of this instrument.

#### **2 Periodic statements**

Despite the amendments made by Schedule 1, ASIC Class Order [CO 14/1252] as in force immediately before the commencement of this instrument continues to apply in relation to a periodic statement that is required to be given in accordance with section 1017D of the Act until the earlier of:

- (a) the date from which the periodic statement is required to apply the equivalent provision of ASIC Class Order [CO 14/1252] as in force immediately after the commencement of this instrument; and
- (b) the date from which the periodic statement applies the equivalent provision of ASIC Class Order [CO 14/1252] as in force immediately after the commencement of this instrument.

## **Schedule 3—Repeal**

### **ASIC Class Order [CO 07/337]**

#### **1 The whole of the instrument**

Repeal the instrument.