

EXPLANATORY STATEMENT for
ASIC Superannuation (RSE Websites) Instrument 2017/570
and
ASIC Superannuation (Repeal) Instrument 2017/573

Prepared by the Australian Securities and Investments Commission

Superannuation Industry (Supervision) Act 1993

The Australian Securities and Investments Commission (**ASIC**) makes the following legislative instruments under subsection 328(1) and subsection 335 of the *Superannuation Industry (Supervision) Act 1993* (the **Act**):

- (a) *ASIC Superannuation (RSE Websites) Instrument 2017/570* (the **principal instrument**); and
- (b) *ASIC Superannuation (Repeal) Instrument 2017/573* (the **repeal instrument**).

The principal instrument exempts persons from complying with section 29QB of the Act if certain conditions are met; and supersedes ASIC Class Order [CO 14/509]. Section 328(1) of the Act provides that the Regulator (ASIC in this case) may, among other things, exempt a class of persons from complying with any or all of the modifiable provisions and that such an exemption is a legislative instrument. Under section 327, a modifiable provision includes a provision of Part 2A including section 29QB of the Act (and regulations made for the purposes of Part 2A).

Section 335 of the Act provides that the Regulator (ASIC in this case) may revoke an exemption or declaration under Part 29 of the Act. The repeal instrument repeals ASIC Class Order [CO 14/509], a declaration under section 332 in Part 29 of the Act.

1. Background

Section 29QB of the Act requires the licensee of a registrable superannuation entity (**RSE**) to make specified information and documents publicly available on the RSE's website and keep them up to date at all times.

The specified information is set out in regulations 2.37 and 2.38 of the *Superannuation Industry (Supervision) Regulations 1994* (the **Regulations**) (regulations 2.37 and 2.38) and includes remuneration information for executive officers of the RSE licensee and information and documents related to the RSE's governance.

Timing safe harbour

ASIC Class Order [CO 14/509], operative from 1 July 2014 provided a safe harbour for RSE licensees so that if they made available or updated information or documents required under section 29QB within specified times they were taken to have kept the RSE website up to date at all times (**timing safe harbour**). (The specified times were generally 20 business days after some events and 4 months after the end of the financial year for other events.)

Personal information

ASIC Class Order [CO 14/509] also permitted RSE licensees to redact personal information in relation to a beneficiary or former beneficiary of the RSE from documents listed in Table 1 below.

Table 1: Sub-plan information that can be redacted or not published

Document	Otherwise required by subregulation 2.38(2) paragraph
Current trust deed and material not incorporated in the current trust deed	(a)(i) & (ii)
Governing rules	(b)
Most recent actuarial report for each defined benefit fund	(d)
Most recent PDS for each superannuation product offered by the RSE	(e)
RSE's Annual report for the previous year	(f)
Summary of each significant event notice made to RSE members in the previous 2 years	(h)

Transitional sub-plan relief

On a transitional basis up to 30 June 2017, ASIC Class Order [CO 14/509] also permitted RSE licensees to not make available or update a document listed in Table 1 (above) where that document related solely to a standard employer-sponsored sub-plan of the RSE; or to redact information from a document listed in Table 1, where that information only related to a standard employer-sponsored sub-plan of the RSE (**transitional sub-plan relief**).

Financial year clarification

ASIC Class Order [CO 14/509] clarified the meaning of 'financial year' when used in regulation 2.37 to be:

- the RSE licensee's financial year in relation to a relevant executive officer; and
- a period of 12 months ending on 30 June in relation to an individual trustee.

It also clarified the meaning of 'financial year' when used in regulation 2.38 to be:

- the RSE's financial year when used in paragraphs 2.38(2)(f) and (o) of the Regulations; and
- the RSE licensee's financial year when used in paragraphs 2.38(2)(k) and (3)(b) of the Regulations.

Relief previously provided by way of modification

ASIC Class Order [CO 14/509] provided relief by way of modifications made under section 332 of the Act to section 29QB of the Act and regulations 2.37 and 2.38 of the Regulations.

Read literally, section 332 empowers ASIC to make such modifications: see paragraph 6(1)(c)(ia), the definition of *Regulator* in section 10 and the definition of *modifiable provision* in section 327 of the Act. However, uncertainty as to the scope of the modification power potentially arises from subsections 6(2) and (2B) of the Act.

Out of an abundance of caution, ASIC is repealing ASIC Class Order [CO 14/509] and remaking the relief using its exemption powers under section 328 of the Act.

Extending transitional sub-plan relief by 12 months

In light of recent stakeholder feedback, the Government is considering the practical implications of applying section 29QB of the Act to standard employer-sponsored sub-plans. In the circumstances ASIC is extending the transitional sub-plan relief which otherwise would end on 30 June 2017 by 12 months.

The principal instrument extends transitional sub-plan relief to 30 June 2018.

2. Purpose of the legislative instruments

The purpose of the principal instrument is to use ASIC's exemption powers to continue the relief formerly available under ASIC Class Order [CO 14/509] and to extend transitional sub-plan relief (expiring on 1 July 2017) to 30 June 2018.

The repeal instrument repeals ASIC Class Order [CO 14/509], which will be superseded by the principal instrument.

3. Operation of the legislative instruments

The repeal instrument repeals ASIC Class Order [CO 14/509]. RSE licensees can now rely on the principal instrument.

Timing safe harbour

Section 5 of the principal instrument exempts RSE licensees from complying with section 29QB of the Act to the extent that it requires them to provide or update information on the RSE's website earlier than certain times (generally 20 business days or 4 months) after specified events. (In this context 'information' is being used generally to include 'details, documents and information'.)

Under subsection 8(1) of the principal instrument, an RSE licensee relying on this exemption must provide or update the information within the timeframe set out in section 5.

Section 5 and subsection 8(1) of the principal instrument replicate the timing safe harbour relief under ASIC Class Order [CO 14/509].

Under paragraph 8(1)(b) of the principal instrument, an RSE licensee relying on Section 5 must also comply with other applicable provisions of regulations 2.37 and 2.38 of the Regulations, such as subregulations 2.37(2) to (5) and 2.38(4).

Financial year clarification

The principal instrument replicates the financial year clarification of ASIC Class Order [CO 14/509] as illustrated in the Example below.

Example

An executive officer is terminated during the current financial year. Under Item 8 of the table in subregulation 2.37(1) of the Regulations, the executive officer's termination benefits must be made publicly available on the RSE's website.

Paragraph 5(1)(d) of the principal instrument exempts the RSE licensee from this requirement, but in order to rely on this exemption the licensee must comply with subsection 8(1) of the principal instrument which requires the termination benefits to be published within 4 months of the end of the 'financial year' referred to in item 8 of subregulation 2.37(1).

Subregulation 2.37(1) does not identify what period the 'financial year' in item 8 refers to. The principal instrument clarifies that the 'financial year' referred to is the financial year of the RSE licensee, as follows.

If the ordinary meaning of the 'financial year' referred to in item 8 is the financial year of the RSE licensee, no relief is required and section 6 and subsection 8(2) of the principal instrument will not apply.

If the 'financial year' referred to in item 8 is not the financial year of the RSE licensee (but is some other period), section 6 exempts the RSE licensee from disclosing the termination benefits on the RSE's website in relation to that other period. In order to rely on this exemption the licensee must comply with the condition in subsection 8(2). This requires the licensee to disclose the information as if the financial year referred to in item 8 were the financial year of the RSE licensee.

Personal information

The principal instrument continues the relief available under ASIC Class Order [CO 14/509] in relation to personal information. Unlike transitional sub-plan relief this relief has no expiry date.

Paragraph 7(2)(b) and subsection 7(3) of the principal instrument exempt RSE licensees from complying with section 29QB of the Act to the extent that it requires them to provide or update a document listed in Table 1 (above) if the document contains personal information in relation to a beneficiary or former beneficiary of the RSE.

Under paragraph 8(3)(a) of the principal instrument, in order to rely on this exemption, the RSE licensee must provide or update a version of the document and may redact the document to exclude personal information in relation to a beneficiary or former beneficiary of the RSE.

Transitional sub-plan relief

The principal instrument replicates the transitional sub-plan relief of ASIC Class Order [CO 14/509] and extends it by 12 months to 30 June 2018.

Until 30 June 2018, subsection 7(1) of the principal instrument exempts an RSE licensee from making publicly available or updating any document listed in Table 1 (above) that only relates to the RSE, because it relates to a standard employer sub-plan. If this exemption is relied on, there is no disclosure obligation.

Until 30 June 2018, paragraph 7(2)(a) of the principal instrument exempts an RSE licensee from making publicly available or updating any document listed in Table 1 (above) which *contains* information that only relates to the RSE, because it relates to a standard employer sub-plan. Under subsection 8(3) of the principal instrument, in order to rely on this exemption, the RSE licensee must publish the document in accordance with subsection 8(1) or (2), as applicable, and may redact from the document any or all of the information that only relates to the RSE because it relates to an employer sub-plan.

4. Consultation

The relief given in ASIC Class Order [CO 14/509], which the principal instrument continues was the subject of Consultation Paper 219 *Keeping superannuation websites up to date* (CP 219), published in June 2014.

In light of industry feedback, ASIC modified its proposals to reduce the burden on industry. The Office of Best Practice Regulation advised that a Regulatory Impact Statement was not required in order to make Class Order [CO 14/509] and has recently advised that a Regulatory Impact Statement is not required to make the principal instrument.

ASIC consulted with Treasury in relation to extending the existing relief.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

ASIC Superannuation (RSE Websites) Instrument 2017/570 **ASIC Superannuation (Repeal) Instrument 2017/573**

The following legislative instruments are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*:

- *ASIC Superannuation (RSE Websites) Instrument 2017/570 (the **principal instrument**); and*
- *ASIC Superannuation (Repeal) Instrument 2017/573 (the **repeal instrument**).*

Overview

The principal instrument continues relief formerly available under ASIC Class Order [CO 14/509] and is made under ASIC's powers of exemption under the *Superannuation Industry (Supervision) Act 1993* (the Act).

The principal instrument relates to regulations 2.37 and 2.38 of the Superannuation Industry (Supervision) Regulations 1994 (the Regulations), made for the purposes of section 29QB of the Act, which require the licensee of a registrable superannuation entity (RSE) to make publicly available, and to keep up to date at all times, on the registrable superannuation entity's website:

- a) details of executive officers and individual trustees, including their remuneration (regulation 2.37); and
- b) specified information relating to the relevant RSE, such as trust deeds and summaries of significant event notices given to members of the RSE (regulation 2.38).

The principal instrument provides RSE licensees with a 'safe harbour' so that if they update the RSE's website within the time frames prescribed by the principal instrument they will be taken to comply with the updating obligations under section 29QB.

The principal instrument also defers the start date until 1 July 2018 for certain disclosures required under section 29QB of the Act in relation to standard employer-sponsored sub-plans. This deferral will allow the Government time to consider the practical implications of applying section 29QB of the Act to standard employer-sponsored sub-plans.

Finally, for documents that may contain personal information of beneficiaries, the principal instrument enable an RSE licensee to make available and update a version of a document that has been redacted to exclude such personal information.

The repeal instrument revokes ASIC Class Order [CO 14/509], which is superseded by the principal instrument.

Human rights implications

Class Order [CO 14/592] is protective of the human right to privacy under Article 17 of the International Covenant on Civil and Political Rights (Article 17). Article 17 prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence.

Section 29QB of the SIS Act and regulation 2.38 of the SIS Regulations require an RSE licensee to publish certain documents on the RSE's website. Some of these documents may contain personal

information about beneficiaries of the relevant superannuation fund. As mentioned above, the principal instrument allows the RSE licensee to redact personal information about beneficiaries from documents published on the RSE's website.

Conclusion

The legislative instruments are compatible with human rights as they are protective of the right to privacy under Article 17 and do not otherwise raise any human rights issues.

Australian Securities and Investments Commission