

CORPORATE SUPER ASSOCIATION

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Mr Ian Johnston
Executive Director
Australian Securities and Investments Commission
Level 20
485 La Trobe Street
Melbourne VIC 3000

Dear Mr Johnston

LICENSING OF TRUSTEES

I refer to our meeting with David Knott on Tuesday 13 August 2002.

In response to your request for more information, I have provided below information from our members about their dealings with Australian Securities and Investments Commission (*ASIC*) officials and field officers regarding the definition of "advice" and the need to obtain a licence.

In general, our members were willing to discuss the messages and impressions they received from ASIC staff but did not want to be named in relation to specific meetings and dates because they did not wish to prejudice relationships with field officers and others with whom they wish to maintain productive working relationships.

In broad terms, the message being conveyed to our members by ASIC staff and some law firms (see the attached article as an example) is that they cannot perform their functions as trustees without a licence. This is because there is a strong view being presented that the provision of any information to members (outside the Product Disclosure Statement) would amount to financial product advice. The one ASIC staff member actually named in these reports is Ms Pauline Vamos.

Under the Superannuation Industry (Supervision) Act and their fiduciary duties, trustees are required to provide information and to respond to inquiries and complaints from members.

One of our members has summarised the types of questions regularly posed to fund trustees and administrators:

- “Is it a good idea to consolidate my super by rolling it over to one account?”
- “Should I contribute?”
- “Should I participate in salary sacrifice?”
- “Can I leave my money in the company fund when I leave?”
- “How much will I get when I retire?”

The member has concluded: “It is for the above (mainly) that we thought we would need to be licensed.” However, we would question whether the intent behind the Financial Services Reform legislation was to inhibit the flow of information between members and their superannuation funds on matters of basic concern such as those outlined above, the responses to which would not ordinarily amount to inducement to acquire a financial product. Yet despite these facts, the exemption which was available in the FS Regulations for general advice has been removed.

We note that on the topic of advice, the ASIC web site provides access to Policy Statements and answers to frequently asked questions. The response to the frequently asked question regarding licensing obligations for corporate superannuation funds “**How will the FSRA apply to corporate superannuation funds?**” suggests that prima facie all providers need a licence. As regards exemptions, the response indicates merely that funds which are not public offer funds are exempt under Regulation 7.6.01(1)(a)-(d) from the obligation to hold a licence for issuing interests in the fund.

Several members have commented that the Policy Statements provide no comfort or certainty to funds on the matter of “advice”, and that at ASIC liaison meetings with compliance professionals the ASIC officers present are unable to provide any guidance on this matter. The ASIC officers indicated in February 2002 that a project was under way to define “advice”, but there is no sign of a conclusion. Members have commented that the assumption made by ASIC officers at liaison meetings is that everybody is simply going to have to obtain a licence.

Hence our funds are in an awkward situation. If they accept that it is not the intention that general provision of information and response to routine enquiries from members should be interpreted as advice, they will not apply for an ASIC licence. However, if they take this position and then at a later stage there is further clarification which suggests that the type of information they provide to members is “advice”, they may be unable to obtain a licence by the date required and hence be unable to operate. If, on the other hand, they take a conservative view and decide that they must apply for a licence, they will be involved in application fees, licensing fees, and the whole process of licence application, which is generally time consuming and hence expensive – and we might add, not greatly assisted by ASIC process whereby applications containing mistakes are apparently rejected, often without explanation or guidance, and the fund must re-apply from scratch. The costs incurred in this process will either increase costs for the employer, or reduce the return available to members, so trustees are not eager to incur them unnecessarily.

Another member has cited the case of a Not For Profit, non-public offer fund whose trustee had made the decision to apply for a licence. The experience of this trustee was that for licensees ASIC takes a highly prescriptive approach to communications material.

The trustee was requested to remove anything in publications that could lead to members being "enticed" into a Super Product. Our member's concern was that the material was outlining different options within the corporate superannuation fund itself, not setting out competitive features with other "products" on the market.

We trust that this outline will assist in making you aware of the problems and dilemmas confronting our funds. Our members would be much assisted by:

- clarification of what is meant by "financial product advice", preferably by the reinstatement of an exemption for Not For Profit trustees and employers who provide information on the characteristics of their own fund for members which must necessarily be in the Product Disclosure Statement; and
- the provision of clear guidance to ASIC field officers and others liaising with the public, as to how the requirements and exemptions work.

We would be happy to discuss the above further with you.

Yours sincerely

Nicholas D J Brookes
Chief Executive Officer

CC: Mr David Knott, Australian Securities and Investments Commission