

SUBMISSION TO
AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
ON

ASIC POLICY PROPOSAL:
Licensing: Financial product advisers – conduct and disclosure

February 2003

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TABLE OF CONTENTS

<u>1</u>	<u>BACKGROUND</u>	3
<u>1.1</u>	<u>The Corporate Super Association</u>	3
<u>1.2</u>	<u>Abbreviations used in this submission</u>	3
<u>1.3</u>	<u>Other terms used in this submission</u>	3
<u>1.3</u>	<u>Context of submission</u>	4
<u>2</u>	<u>SUMMARY</u>	5
<u>3</u>	<u>DETAILS OF OUR CONCERNS</u>	6
<u>3.1</u>	<u>General: application of Corporations Act</u>	6
<u>3.1.1</u>	<u>Context contemplated by FSR regime</u>	6
<u>3.1.2</u>	<u>Context in which our funds operate</u>	6
<u>3.2</u>	<u>Providing and preparing an FSG</u>	7
<u>3.2.1</u>	<u>The relevance of the FSG</u>	7
<u>3.2.2</u>	<u>“Advice” and “information”</u>	7
<u>3.2.3</u>	<u>Specific issues regarding FSG in the Policy Proposal</u>	8
<u>3.2.4</u>	<u>Combining a PDS and an FSG</u>	8
<u>4</u>	<u>RECOMMENDATIONS</u>	9

1 BACKGROUND

1.1 The Corporate Super Association

The Corporate Super Association is Australia's representative body for major Not For Profit corporate superannuation funds and their corporate sponsors.

The assets of Association members amount to approximately \$60 billion, representing about 85% of total corporate superannuation sector assets in Australia and some 750,000 individual employee fund members.

1.2 Abbreviations used in this submission

The Association	The Corporate Super Association
ASIC	Australian Securities and Investments Commission
The Policy Proposal	ASIC policy proposal paper: <i>Licensing: Financial product advisers – Conduct and disclosure</i> , December 2002
Corporations Act, Corporations Regulations	Corporations Act 2001 and related regulations
FSR Act, FSR regulations, FSR regime	Financial Services Reform Act 2001 and related regulations
SIS Act, SIS legislation	Superannuation Industry (Supervision) Act 1993, and related legislation
FSG	Financial Services Guide
PDS	Product Disclosure Statement

1.3 Other terms used in this submission

In this submission reference is made to:

- *Not For Profit employer sponsored superannuation funds.* In Not For Profit funds, the trustee body does not obtain profit, nor is there a dividend payable to shareholders of the trustee bodies. The main reason for the existence of the funds is a concern on the part of the employer sponsor to provide for the welfare of employees and their dependants through appropriate incentive and benefit structures. There is no profit motive or commercial interest in bringing funds under management. The governing trustee bodies represent the interests of members and sponsoring employers. Consumer protection in these entities is, to a major extent “built in” through the extensive cooperative involvement of employers and members in the governance of the funds.
- *For Profit entities.* In the superannuation context, these may be:
 - superannuation funds, master trusts, pooled superannuation trusts or unit trusts;
 - fund administrators, investment managers, or professional trustees;
 - any combination of the above.

The prime characteristic is the offering and issuing of financial products in order primarily to realise profit for the issuer's shareholders. These service providers and their agents have a financial interest in drawing additional funds under management. They have no connection, other than commercial, with either the sponsor or the members.

1.3 Context of submission

The submission has been prepared in response to the invitation to comment contained in the Policy Proposal.

2 SUMMARY

- The Association is concerned that there remains confusion between two radically different situations:
 - offering and issuing of financial products in a commercial environment; and
 - admitting employees to membership of, and supporting members in, employer sponsored not-for-profit superannuation funds.

In not-for-profit funds, neither the fund nor the employer nor any of their representatives has any motive of obtaining profit from the entry of the individual to the fund or his or her continuing membership. The principal driver is a concern to provide for employee welfare through appropriate incentive and benefit structures. Further, consumer protection in these entities is, to a major extent “built in” through the extensive cooperative involvement of employers and members in the governance of the funds.

- The above distinction affects the relevance of certain requirements of the Corporations Act as they are proposed to apply to Not For Profit funds. In this submission, we are particularly concerned with the relevance and usefulness of any Financial Services Guide required to be provided to members.
- We recognise the value of the FSG as a means of providing potential investors with information about the financial interest their advisor has in their transaction, and the relationships between the advisor and the issuer of the product. However, we are concerned about the relevance of such information to members of Not For Profit funds when the person providing the “advice” is an employee of the fund or a representative of the sponsoring employer and there is no commission or reward as incentive to make a sale of the product.
- We remain concerned with the ambiguity of the meaning of the word “advice” as used in the Corporations Act and as interpreted in the Policy Proposal. We believe that a distinction should be drawn between the following:
 - communications between an adviser and an intending investor, where the investor is considering the advantages of purchasing one or a range of financial products; and
 - communication between an employee and the employer-sponsored fund to which his or her superannuation support is directed. Many of the questions involved will be routine and should not be classified as advice.

- We are concerned that the requirement for Not For Profit funds to provide a formal FSG in the above circumstances will have adverse effects on the quality of the information received and digested by fund members, with the result that they will in fact be worse informed. This is because they will receive a large amount of information which is irrelevant to their situation and hence will be unable to distinguish the important and informative material from the irrelevant.
- We are also concerned about the impact on costs for funds – which will not bring any benefits to members and may, as argued above, disadvantage them.
- Accordingly, we urge that relief from provision of an FSG be granted to Not For Profit funds; alternatively, that Not For Profit funds be permitted to issue a joint document comprising both PDS and FSG, with the FSG information attached preferably as an appendix.

3 DETAILS OF OUR CONCERNS

3.1 General: application of Corporations Act

3.1.1 Context contemplated by FSR regime

The reforms to the Corporations Act under the FSR legislation were introduced with the declared objective of achieving a harmonised regulatory regime for financial products and to facilitate consumer comparisons between products available in the market.^{1[1]} The legislation and regulations, as they have evolved, have remained focused on facilitation of comparisons between consumer products and on the regulation of those advising and dealing with consumers.

The FSR changes to the Corporations Act are adapted to a marketplace in which organisations offer products of various types, including retail superannuation interests, and where financial intermediaries explain and promote the products to the consumer. The provisions focus on the provision of full information about the product to the consumer with attention to disclosure of the interests which the issuer and any intermediaries have in the transaction. This is appropriate in the context where the issuer stands to make a profit from the product and where the financial intermediary has a remunerated or other commercial relationship with the issuer. A typical situation contemplated would be where an individual investor receives advice from a financial intermediary regarding the suitability of one or more products to meet the investor's particular needs. The investor needs to be informed about the characteristics of the products as well as about the vested interests the adviser has in any transaction.

^{1[1]} Explanatory material to draft Financial Services Reform Bill, released 11 February 2000

3.1.2 Context in which corporate Not For Profit funds operate

The Association represents the interests of a group of funds whose situation differs from the above, and membership of which is entered into under different circumstances from those contemplated above. The funds we represent are not operated for profit to the issuer. By and large they have arisen as a result of the employer's desire to fulfil certain employment obligations. The issuer does not promote entry to the fund as a commercial activity. Those who inform the employees about the fund and assist with entry to membership and with ongoing enquiries are representatives of the employer or the fund and do not receive commission or other remuneration related to the success of their negotiations with the employee about membership. Their role is a genuine service role as representatives of the relationship and undertaking between the employer and the fund.

Similarly, the role of the trustee differs in the Not For Profit fund context from that of the trustees and managers of For Profit funds. The relationship between the members of the Not For Profit fund and the trustee is significantly closer than that which exists in a For Profit fund, with interests closely aligned. Not For Profit trustee bodies are composed of employer representatives and of member representatives. Given the alignment of interests, the situation is more closely analogous to that of self managed funds than to that between the trustees and members of retail and other For Profit funds. Where self managed funds are concerned, this alignment of interests is recognised in exemptions from the need to provide FSG.

The result is that the practical requirements for informing the consumer/member differ in the Not For Profit superannuation fund context from those which prevail in the For Profit marketplace.

3.2 Providing and preparing an FSG

3.2.1 The relevance of the FSG

We question the suitability of the Financial Services Guide as a document to be provided as a preliminary to communication between an employer and employee, or between fund representative and the fund member. The focus of the FSG is on the commercial interests of the adviser in the transaction.^{2[2]} Where there are no commercial interests, (and where no-one would expect there to be) the provision of an FSG is at best redundant and a waste of resources. More seriously, however, the provision of such a document risks distracting the employee or member from paying attention to important information. If the employee/ member is provided with an entire document which is irrelevant, there is a serious risk that he or she will discount and ignore other information which is of value and relevance.

3.2.2 “Advice” and “information”

We note that the requirement to provide an FSG is contingent on the provision of “financial product advice” as defined at section 766B of the Corporations Act, the essence being a communication intended to induce a person to make a decision about (investing in) a financial product. Because of the nature of the relationship between corporate Not For Profit funds and their members, the nature of most communications

^{2[2]} See Policy Proposal B9, B10

between members and the fund's representatives, or between sponsor employer and employees, is not advice but the provision of information: there is no intention to induce an employee/ member to make a decision and further, the person providing the information is providing a service and not trying to induce a sale. However, the approach in the legislation has been to draw the definition very broadly with the result that almost any communication between the employer and an employee about the fund, or between the fund's representative and a member, could be construed as advice. As a result, exemptions become very important and have to be the avenue used where there is a good policy for providing relief.

3.2.3 Specific issues regarding FSG in the Policy Proposal

We note that the Policy Proposal supports a general exemption to product issuers (in the Association's context, these would be the funds) when:

- they provide general advice only; and
- the advice is not provided during a phone call or a meeting.^{3[3]}

Thus it appears that an FSG is required:

- in every situation, where the advice is personal;
- even if the advice is general, but it is provided in a phone call by the fund; and
- in all circumstances, when the employer rather than the fund is involved.

For the reasons outlined at 3.2.1 above, we have practical concerns with these detailed proposals. We note also that at B1 in the Policy Proposal it is recognised that there will be some practical difficulties with the proposed approach, particularly where telephone information is provided.

In our view, where the party dealing with the member has no commercial interest in the transaction, it would be productive to exempt the communication from the definition of "financial product advice". It is undesirable that employer sponsors be left in a situation where they feel uncomfortable about providing even basic information about the fund they sponsor. Similarly, the trustees of Not For Profit funds should feel able to discuss features of the fund with members without an obligation to obscure the discussion with irrelevant information about non-existent commissions and relationships. Where the purpose of the requirements in legislation is primarily to protect individuals in relation to advice from third parties who have a profit motive in providing advice, these requirements should not apply where there is no party with a profit motive involved in the discussions.

We therefore support clear and unambiguous statements regarding exemption of employer sponsors and trustees from providing an FSG, where they are providing information to employees or members about a fund supported by the employer sponsor and where neither the employer sponsor nor the trustee obtains commission or reward from the admission of employee members – i.e. where the superannuation arrangement involved is a Not For Profit fund.

^{3[3]} Policy Proposal page 17, B3

3.2.4 Combining a PDS and an FSG

The Policy Proposal states at page 20, B8 that ASIC does not consider that the Corporations Act would permit combination of a PDS and an FSG and that no relief is currently contemplated. We suggest that the combination of the two could be an alternative solution to the practical problems of providing an FSG in the Not For Profit fund context, should it be decided that an exemption of the type discussed at 3.2.3 cannot be achieved. The provision of an FSG as, say, an appendix to a PDS would enable information to be provided but without giving undue prominence to “null” information about such matters as commissions and relationships between fund, employer and individual representatives of fund and employer.

4 RECOMMENDATIONS

In summary we would support:

- Statements clearly indicating that, in the Not For Profit superannuation context, communication between employees and representatives of the employer, and / or between representatives of the fund’s trustee and members are either recognised not to be advice or are subject to specific exemptions from FSG requirements; or
- Failing the above, a practical recognition that in the Not For Profit superannuation context it is reasonable for FSG information to be incorporated into the PDS by way of an appendix or other presentation method which does not accord undue prominence to information which could confuse the member and distract him or her from focusing on important information.