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Law Council  
OF AUSTRALIA

Office of the President

Mr Lincoln Rogers  
Lawyer, Superannuation Team  
Australian Securities and Investments Commission  
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By email: [remakinginstrumentsconsultation@asic.gov.au](mailto:remakinginstrumentsconsultation@asic.gov.au)

Dear Mr Rogers

**ASIC CONSULTATION PAPER 358 REMAKING ASIC RELIEF ON PRODUCT DISCLOSURE STATEMENTS, SUPERANNUATION DASHBOARDS AND FINANCIAL SERVICES GUIDES (CP 358)**

1. The Law Council welcomes the opportunity to provide this submission to the Australian Securities and Investments Commission (**ASIC**) in response to CP 358, which was issued on 18 February 2022.
2. CP 358 proposes to remake a number of existing ASIC instruments which impact the application of financial product and financial services disclosure laws to product issuers and other providers of financial services in certain prescribed circumstances.
3. This submission has been prepared by members of the Financial Services Committee (with input from the Corporations Committee) of the Business Law Section and the Superannuation Committee of the Legal Practice Section (collectively, the **Committees**).

**Product disclosure statements (PDSs) for employer-sponsored superannuation and product dashboard disclosure**

4. ASIC is proposing to remake the following instruments into a single legislative instrument with an expiry date of 1 October 2027:
  - (a) Class Order [CO 12/415] *In-use notices for employer-sponsored superannuation (Class Order 12/415)*, which is due to sunset on 1 October 2022;
  - (b) Class Order [CO 13/1534] *Deferral of Stronger Super amendments in relation to PDS and periodic statement disclosure (Class Order 13/1534)*, which is due to expire on 1 July 2023; and
  - (c) Class Order [CO 14/443] *Deferral of choice product dashboard and portfolio holdings disclosure regimes (Class Order 14/443)*, which is due to expire on 1 July 2023.

*Proposal B1 – continue the Class Order 12/415 relief in a new legislative instrument that reflects ASIC’s current drafting practice*

5. Subject to the comments that follow, the Committees welcome in principle ASIC’s proposal to amend the requirement in notional section 1015DA(4) of the *Corporations Act 2001* (Cth) (**Corporations Act**) so that the obligation to notify ASIC as soon as practicable and within five business days of the end of each month becomes an obligation to notify ASIC as soon as practicable and within five business days of the end of each financial year, as this will reduce the associated regulatory compliance burden.
6. However, the Committees have a query about the substance of the underlying issue regarding PDSs for these sorts of products (being PDSs for an accumulation product that is an interest in a public offer superannuation fund that is a standard employer-sponsored fund). That is, we query whether the provisions notionally inserted into the Corporations Act by Class Order 12/415 could be largely redundant in practice since regulation 7.9.11K of the *Corporations Regulations 2001* (Cth) now *requires* that the Shorter PDS rules apply to all superannuation fund trustees which are required to prepare a PDS for a product, other than defined benefit products, solely pension products, or risk-only products with no investment component.
7. Accordingly, the common/variable choice part references that are the subject of the existing relief in Class Order 12/415 are perhaps rarely used as they would not seem relevant to most employer-sponsored funds. Put another way, the option presented in the notional section 1015DA to provide a common part and a variable part to a PDS may not be available given that a Shorter PDS is required to be given. If a superannuation trustee is required to prepare a Shorter PDS, then the PDS will not consist of separate parts, and consequently relief to lodge in-use notices relating to separate parts at different points in time would not seem necessary.
8. It appears that Class Order 12/415 replaced ASIC Class Order [CO 04/1030] *In-use notices for employer-sponsored superannuation* (**Class Order 04/1030**) and has effect from 1 October 2006. Class Order 04/1030 was made before the Shorter PDS regime commenced in 2010. The Committees therefore query whether this relief has practical relevance post the commencement of the Shorter PDS regime.
9. Perhaps ASIC may hold or alternatively seek data to validate whether Class Order 12/415 is still utilised in practice. In conclusion, the Committees query the following statement at paragraph 21 of CP 358: “We have reached the preliminary view that [CO 12/415] continues to form a necessary and useful part of the legislative framework.”

*Proposal B2 – continue the non-redundant relief in Class Orders 13/1534 and 14/443 in a new legislative instrument that reflects ASIC’s current drafting practice*

10. The Committees support the removal of those parts of each respective class order which have become redundant (first exemption in Class Order 13/1534 and paragraph 5 of Class Order 14/443).

## Shorter PDSs and PDS obligations and platforms

11. ASIC is proposing to remake the following class orders and instruments as a single legislative instrument with an expiry date of 1 October 2027:
  - (a) Class Order [CO 12/749] *Relief from the Shorter PDS regime (Class Order 12/749)*, which is due to expire on 30 June 2022;
  - (b) Class Order [CO 13/979] *Platform operators and trustees of superannuation entities using an agent to deliver a PDS (Class Order 13/979)*, which is due to sunset on 1 April 2026; and
  - (c) *ASIC Corporations (Superannuation: Investment Strategies) Instrument 2016/65 (Instrument 2016/65)*, which is due to sunset on 1 April 2026.

*Proposal C1 – continue the relief given by Class Order 12/749 in a new legislative instrument that reflects ASIC’s current drafting practice*

12. The Committees support ASIC’s proposal to continue this relief as they consider that the affected financial products (in particular, superannuation platforms and hedge funds) are not well suited to the Shorter PDS regime due to their more complex nature (as it may not be possible to provide meaningful disclosure within the limitations of the Shorter PDS format).
13. The Committees are of the view that allowing multiple funds with a number of common characteristics to be offered under a single PDS can be more cost-efficient than offering each respective fund under a separate Shorter PDS.
14. The Committees note that Class Order 12/749 is discussed in ASIC Information Sheet 155 *Shorter PDSs – Complying with requirements for superannuation products and simple managed investment schemes (INFO 155)*. The Committees assume that when ASIC next updates INFO 155, the references within it to Class Order 12/749 will be replaced with references to the appropriate part of the replacement instrument.

*Proposal C2 – continue the relief given by Class Order 13/797 in a new legislative instrument that reflects ASIC’s current drafting practice*

15. The Committees support ASIC’s proposal to continue this relief as it facilitates existing industry practice under which financial advisers provide the PDSs for accessible financial products which can be indirectly held by investors through a platform to their clients.
16. The Committees note that in paragraph 7 of the draft legislative instrument provided by ASIC as an attachment to CP 358, notional subsection 1015C(3C) cross refers to the following ASIC class orders:
  - (a) ASIC Class Order [CO 13/762] *Investor directed portfolio services provided through a registered managed investment scheme* – for the definition of “IDPS-like scheme”; and
  - (b) ASIC Class Order [CO 13/763] *Investor directed portfolio services* – for the definitions of “IDPS” and “operator”.

17. The Committees note that these class orders are due to sunset on 1 July 2023 (as each of them was made on 1 July 2013) and from that time or their repeal date (whichever occurs earlier) they, and the definitions they contain, will cease to exist.
18. Therefore, when these class orders are replaced by new legislative instruments, a consequential change will need to be made to this part of the relevant legislative instrument to incorporate the then current sources of the definitions of “IDPS-like scheme”, “IDPS” and “operator”.

*Proposal C3 – continue the relief given by Instrument 2016/65 in a new legislative instrument*

19. The Committees support ASIC’s proposal to continue this relief.
20. The Committees note that this instrument is currently discussed in ASIC Regulatory Guide 184 *Superannuation: Delivery of product disclosure for investment strategies (RG 184)* and assume that, when ASIC next updates RG 184, references to Instrument 2016/65 will be replaced with the name of the legislative instrument that ASIC issues to replace it.

**Financial Services Guides (FSGs) in time critical situations**

21. ASIC Class Order [CO 12/417] *Information in a Financial Services Guide given in a time-critical situation (Class Order 12/417)* is due to sunset on 1 October 2022.
22. The Committees support ASIC’s Proposal D1 in CP 358 to continue this relief in a new legislative instrument that reflects ASIC’s current drafting practice because it delivers an appropriate regulatory outcome in ensuring that the client ultimately receives information that was relevant and up to date as at the time the relevant financial service was provided to them, while reducing the compliance that would otherwise be imposed on the financial service provider.
23. The Committees note that this class order relief is currently discussed in ASIC Regulatory Guide 175 *Licensing: Financial product advisers – Conduct and disclosure (RG 175)* and assume that, when ASIC next updates RG 175, references to Class Order 12/417 will be replaced with the name of the legislative instrument that ASIC issues to replace it.

**General observations**

*Length of consultation period*

24. The Committees consider that the length of the consultation period allowed by ASIC is appropriate and thank ASIC for providing a reasonable timeframe within which to respond.

*Consequential changes to other ASIC class orders and legislative instruments*

25. If there are any other ASIC class orders or legislative instruments which cross-refer to any of the instruments which ASIC is proposing to replace, then consequential amendments should be made at the appropriate time to cross-refer to the relevant replacement legislative instrument.

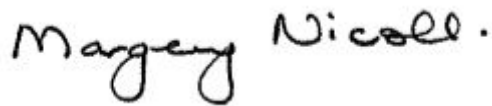
*Duration of each respective new legislative instrument*

26. The Committees would prefer that each respective legislative instrument automatically sunset after ten years rather than on the earlier proposed date of 1 October 2027. As ASIC has noted, there is no indication as to how long it will take the Government to settle a policy position.
27. Past experience suggests that it may not necessarily be reasonable to expect the Government to enact permanent legislation dealing with these issues within the next five years, as historically these types of issues appear not to have been prioritised in the legislative agenda. The Committees would prefer to have the relief apply for the usual ten year period rather than (if nothing changes in the ensuing five years) have this consultation process repeated in five years' time.
28. If and when there is a more permanent legislative solution introduced while the instruments are in operation (whether within the next five years or five to 10 years), the instruments can be repealed or amended as appropriate if and when that occurs.

### **Contact**

29. Please contact Pip Bell, Chair of the Financial Services Committee or Natalie Cambrell, Chair of the Consultation and Submissions Committee of the Superannuation Committee in the first instance, if you require further information or clarification.

Yours sincerely

A handwritten signature in black ink that reads "Margery Nicoll." The signature is written in a cursive, slightly slanted style.

**Ms Margery Nicoll**  
**Acting Chief Executive Officer**