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All that glistens...

The Federal Government's new intra-fund advice regime not be as beneficial to superannuation fund trustees as some commentators suggest, according to Jenny Willcocks.

The Australian Securities and Investments Commission (ASIC) has released Class Order 09/210 to give conditional relief from the requirements of section 945A of the Corporations Act 2001 to trustees of superannuation funds who give personal advice to members about their existing interest in a fund.

ASIC has also released Regulatory Guide 200 – Advice to super fund members, which provides guidance on how the class order will apply. It also discusses the boundaries between factual information and general and personal advice about an existing superannuation interest.

The guide also describes the different methods trustees can use to provide information and advice.

The relief offered relates only to obligations under section 945A. This section is sometimes referred to as the 'suitability rule' as it requires personal advice to be suitable for the member. This means the person giving the advice must have a reasonable basis for it having obtained details of the member's circumstances. Therefore, the class order removes this requirement.

It is important for trustees to carefully consider the risks inherent in giving personal advice without proper enquiry given their obligations under Superannuation Industry (Supervision) Act 1993 (SIS) section 52 covenants and their fiduciary duty to members under the common law.

While this much awaited relief has been heralded with some fanfare, it does not relieve trustees of the main barrier to providing intra-fund advice. To take advantage of the relief, trustees must hold an Australian Financial Services (AFS) licence that allows them to offer personal advice to members about superannuation products.

Therefore, the class order relief falls far short of what some parts of the superannuation industry have been hoping for. It disappoints the industry expectations of obtaining the right to give basic financial advice to their members about superannuation without the need to hold such a licence.

The relief from the requirements of section 945A is also limited to trustees of regulated superannuation funds and their authorised representatives and does not extend to an external administrator or financial planning organisation used by the trustee to provide services to members.

However, the class order does allow trustees to avoid having to determine, consider and investigate the relevant personal circumstances of the member being offered the advice to avoid making reasonable enquiries about those personal circumstances.

Nevertheless, the trustee's duty of care still applies, as the following statement in part 2 of the class order makes clear. "We are providing this relief because super fund trustees are already in a special relationship with their members and are subject to existing obligations to them under statute and common law".

Trustees have obligations under the SIS and at common law to act in the best interests of the fund's members. The class order relief does not protect trustees from actions taken under SIS or at common law if they decide to provide personal advice while relying on this relief.

Trustees must also consider whether it is in the best interests of members to give personal advice without making the enquiries that would otherwise be required by section 945A.

Failure to enquire about a person's circumstances and to consider what advice is appropriate may not be in the member's interests. Therefore, these actions will need to be undertaken sometimes to fulfil the trustee's duties even though relief is being given under the act.

Any increased or additional risks being assumed by a trustee taking advantage of class order relief will need to be considered in the context of its risk management strategy and insurance arrangements.

In order to rely on this class order relief, trustees must satisfy a range of conditions.

The trustee must hold an AFS licence that covers the provision of personal advice about superannuation products.

The advice given must be confirmed to the member's interest in the superannuation fund and must not relate to any other financial product or any of the things that are specifically treated as not being financial product or any of the things that are specifically treated as not being financial products under section 765A(1) of the Act. The exception is eligible insurance covering the member's interest in the fund.

Further, the advice must not relate to an investment strategy where the member may exercise member investment choice and the option involves a financial product where the trustee is required to give disclosure under section 10121A of the Act.

Also, the advice must not relate to the issue of a new interest in the superannuation fund where:

- the superannuation interest is in the growth phase and the member elects to receive a pension concerning that interest or part of that interest; or

- a member changes from one sub-plan to another, or holds interests in two or more sub-plans at the same time, and under the governing rules of the fund the member has an option, choice or election concerning that change.

Another condition is that advice about a self-managed superannuation fund is excluded from the class order relief.

Trustees must also meet two timing conditions if they wish to claim the class order relief.

Before or while giving advice, the trustee must inform the member that the advice is limited to his or her interest in the fund.

At the same time, or as soon as practicable after the advice is given, the trustee must inform the member that it is taking advantage of class order relief and, therefore, the advice is limited to the member's interest in the fund. This information, which must be given in writing, can be incorporated into the Statement of Advice (SOA). The guide provides examples of how this wording can be used in SOA.

Higher fees and charges can be another issue for trustees. If the trustee's advice could cause a member's interest in the fund to incur higher fees, costs, charges, insurance premiums, remuneration, including commission, or other expenses, the trustee must notify the member in writing of an increase when, or as soon as practicable after, providing advice.

The amount of the increase must be expressed in dollars. Notice of the increase need only be to the extent that the trustee knows, or could reasonably be expected to find out, about possible increases.

The trustee can include information about possible increases in fees and charges in the SOA.