



5 March 2010

Attn: Dr Richard Sandlant

Financial Services Working Group

C/- Department of Treasury

Canberra ACT 2610

Via email: richard.sandlant@treasury.gov.au

Dear Richard

The Consumer Action Law Centre welcomes the opportunity to make submission to the Financial Services Working Group (FSWG) regarding the *Corporations Amendment Regulations 2009* relating to product disclosure statements for superannuation funds and managed investments schemes that invest mainly in financial assets (the draft Regulations).

About the Consumer Action Law Centre

Consumer Action Law Centre (**Consumer Action**) is an independent campaign-focused consumer casework and policy organisation, dedicated to advancing the interests of low-income and vulnerable consumers, and of consumers in general. Based in Melbourne, it was formed in 2006 by the merger of the Consumer Law Centre Victoria and the Consumer Credit Legal Service and is funded jointly by Victoria Legal Aid and Consumer Affairs Victoria.

Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

To find out more about Consumer Action, visit www.consumeraction.org.au

General Comments

Consumer Action is a strong supporter of the objectives of the Financial Services Working Group in endeavouring to make financial services product disclosure simpler and more meaningful for consumers, and therefore better able to assist them to make informed choices in relevant markets.

Early in the process we made a number of comments regarding the principles to bear in mind as the FSWG seeks to apply this objective in particular contexts. Below we summarise those principles and provide our assessment of how the package of draft regulations compare with the principles:

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- **Disclosure must be effective:** *Effective* disclosure must properly be the touchstone for this work – of course costs to business must also be a strong consideration however if it becomes the primary consideration we consider there is a risk of repeating past mistakes – that is going for the ostensibly ‘light touch’ low cost’ option – but with the result that the disclosure is ineffective and thus all cost with little to no benefit.

We therefore consider it unfortunate that the commentary attaching to the draft regulation and the regulations themselves focus primarily on the *length* of PDSs, as distinct from *complexity* or the extent to which they *aid consumer decision making*

We consider that this emphasis is reflected in the fact that whilst significant steps have been taken to achieve the goal of shorter PDSs, and simplification may be achieved in some areas, there remain real concerns about complexity, particularly in relation to fees information. This is discussed in more detail below.

- **A PDS ought to assist consumers to make decisions:** Again at the inception of the process the FSWG canvassed a range of possible roles of a PDS, including education, aiding decision-making and a range of others. At the time we suggested that ‘original decision-making document’ and ‘comparison with similar products’ ought to take primacy. We remain of that view.

We also expressed the view that trying to make a PDS serve too many objectives is likely to add to complexity and the need to over-rely on incorporation by reference.

Acknowledging the complexity of the task, we are nevertheless of the view that the balance of content for the short form PDS document does not get this balance right. In particular, we suggest that there is an over emphasis of general educative information at the expense of specific information relating to particular products that will aid comparability and shopping around.

- **Presentation and content must optimise comparability:** This broad principle suggests in turn a number of sub principles regarding the content and presentation of PDSs. Whilst presenting a PDS in short form is clearly an essential element of improving accessibility for consumers, there are a number of additional factors that must also be addressed.
 - format (attractive presentation, guidance tools if there are decisions within the product that need to be made)
 - simplicity of content (note Financial Services Authority (UK) and Office of Best Practice Regulation/NCC work which advocates designing for all – that is designing for users with low levels of financial literacy, thereby producing a product that all users can understand.
 - context (for different products, effective disclosure will be about the above factors but also the broader context within which the disclosure is made – and regulatory settings may need to be adjusted)
- **Use of incorporation by reference:** We acknowledge this is a difficult issue. It can be simplified somewhat however, by a focus on the objectives of the FSWG and what we know of consumer behaviour in this area. Instinctively we tend to the view that many consumers are unlikely to go the extra step of viewing information that is incorporated by reference.

For this reason, it is our view that an approach that allows IBR and deems provision of the IBR information, must come with a regulatory proviso that (a) the other documents must not be inconsistent with the information in the PDS and (b) the PDS prevails to the extent of any identified inconsistency. The failure to include such a balance to IBR and deeming, risks placing consumers in a worse or no better position in that they are deemed to have received information which they have not in fact received or taken into account in decision making.

The risk is compounded in our view by the fact that existing misleading and deceptive conduct provisions tend to be interpreted with reference to particular stages in a transaction rather than the transaction as a whole – this focus tends to be on whether an advertisement was misleading, or a PDS is misleading, rather than whether say, an advertisement is misleading when compared to the PDS.

Therefore the failure of the draft Regulations to balance the deeming of provision of IBR information with a requirement that the IBR information is ‘not inconsistent’ with the information in the PDS is the most significant failing.

Comments on the Draft Regulations

Approach to fee disclosure

The impact of a range of fees and charges on long-term investments is well documented. Consumer difficulty in understanding fees generally and in accessing simple, timely and comprehensive information about which fees apply and in what circumstances is similarly well documented. For these reasons, the approach to fees and charges disclosure is clearly one of the key elements in the success or otherwise of simplified disclosure.

It is acknowledged that the task is a complex one, however it must also be acknowledged that this complexity is driven not least by the proliferation of a vast range of fees and charges that apply in different circumstances to different types of products in the relevant industries. We note also that subjects’ understanding the fees sections of the simplified PDSs was a clear area of concern emerging from consumer testing.

We are concerned that the draft Regulations, as they stand, do not do enough to address these problems. In evaluating the success of this (and indeed all aspects of simplified disclosure) we bear in mind the comments of the UK’s Better Regulation Taskforce report:

If a consumer does not react in the way government or business intended then the failure lies with the information’s design or method of communication not the consumer” (NCC & Better Regulation Executive Interim Report July 2007)

- **Schedule 1 [1] Definition of a minor fee** – We are concerned that despite the exclusions in [1](b)(i) and (ii), the setting of the monetary limit of less than \$10 for a minor fee still allows scope for fees that are not insignificant. It would not for example necessarily exclude a fee of \$10 that was levied annually or even monthly or per type of transaction. Institutions have historically proven that they can be innovative around the imposition of a range of types of fees and charges. We therefore suggest that the provision be amended to provide that in order to

qualify as ‘minor’ the total amount of fee levied over the life of the account must be less than \$10.

- **Schedule 10D Section 8 Content of section 6 (fees and costs)** – We have concerns about both the complexity of the information to be conveyed in this section and also the limited scope of that information. As in other key sections of the regulations relating to disclosure of risk and investment objectives, we are concerned that there is not sufficient disclosure to allow consumers to compare products offered by the provider in question. For this reason, in this section, and those relating to the disclosure of risk and investment objectives, we consider that there must be disclosure that relates to at least two (2) options offered by the provider. Unless not offered, we consider that there should be disclosure relating to a minimum of two (2) of the three (3) following categories:
 - Default option
 - Balanced option
 - Option with the majority of funds under management

Further we note that the draft Regulations do not require that information that is incorporated by reference is in the same format as the information in the PDS. This is a significant failing and will fundamentally undermine comprehensibility for those consumers who take the step to view the IBR information.

Conversely however, we are concerned that the detail of the disclosure required is too complex. It should be borne in mind that the complexity of the task in presenting the information gives insight into the complexity of the task we are asking consumers to undertake in digesting and applying the information – in an environment where a typical consumer will have significantly less expertise and dedicated time and resources available to them than the FSWG.

Some important steps are included in the draft Regulations, in particular the proposal to break fees up into categories relating to at contribution, during the life of the fund and moving out of the fund is useful. However for the reasons outlined below we consider this is insufficient to address the complexity of information in this area, and without further steps, could in fact confuse those consumers that have some understanding of existing fees and charges.

The ideal approach to resolving the complexity problem is to reduce the complexity of the information that is sought to be conveyed. Our preferred method of doing this is to confine by regulation the categories (we emphasise not the amount) of fee it is permissible for entities to levy to a maximum of four. We recommend that the FSWG examine the approach of the UK Financial Services Authority in this regard (see for example FSA Policy Statement 08/7 *Simplifying Disclosure: Information about services and costs*).

If this approach is not taken, then we suggest, as a distinctly second-best option, that the following steps are taken:

- A government commitment to ongoing evaluation, including consumer testing, of consumer understanding in this area;

- A review of relevant aspects of the regulation base don that evaluation, including consideration of the UK FSA approach outlined above;
- Amendment to the draft Regulations (in particular sub-paragraph (6)) to include a requirement to include a third (middle) column that matches the broad categories proposed for the first column with terminology applied currently to various types of fees and charges. This will mean that any consumer understanding that exists in relation to existing fees and charges can be transferred to the new broader categories outlined in the first column.

Approach to incorporation by reference

As noted above, it is our view that an approach that allows IBR and deems provision of the IBR information, must come with a regulatory proviso that (a) the other documents must not be inconsistent with the information in the PDS and (b) the PDS prevails to the extent of any identified inconsistency.

We consider there are two key amendments to the draft Regulations to ensure that the use of the IBR approach does not at worst disadvantage consumers and at best fail to fulfil the objectives of the simplified PDS project.

- **Schedule 1 [4] Section 7.9.11P:** Amend sub-section (4) to include the words “provided the test set out in (5) is satisfied,” after the words “For the avoidance of doubt” and before the words “the giving of a Product Disclosure Statement...”.
- **Schedule 1 [4] Section 7.9.11P:** Insert a new sub-section (5) that states “(i) A matter that is applied, adopted or incorporated must be consistent with the Product Disclosure Statement; and (ii) To the extent of any inconsistency, the content of the Product Disclosure Statement will prevail.”
- **Schedule 1 [4] Section 7.9.11P:** Insert a new sub-section (3)(a)(iv) to the effect that if a statement applies, adopts or incorporates a matter the matter must be “(iv) clear, prominent and legible.” We note that this is the standard that has been adopted in relation to other consumer focused disclosure initiatives such as unit pricing, and is an important companion to more specific requirements such as font size.

Other matters

- **Schedule 1 [4] Section 7.9.11R:** We are concerned that the provision, whilst clearly directed to ensuring that hard copy documents are available to consumers without ready internet access, may not ensure that occurs. For example, we are concerned that use of the words “give the person” leaves open the possibility of information being provided by email.
- **Schedule 10D Section 4(2):** It is important that the information conveyed in section 4 balances the need to provide some general information and information that is specific to the provider. We suggest that the majority (though not all) of the information should be directed at the particular approach a fund will take to these issues (eg ‘if the person does not make an investment choice, fund contributions will be directed to default fund [name and number]’ as

distinct from ‘if the person does not make an investment choice, fund contribution will be directed to our default option’).

- **Schedule 10D Sections 5 to 7:** These sections provide a further example of the imbalance we perceive between general and specific information. This for example, whilst the general information in 5(1)(a)(b)(c) and (d) is generally important to consumers, focusing on objective that allows comparability and choice, emphasis must properly be placed on information of the sort set out in (2) and (3). Similarly, whilst a very small amount of generic risk information is useful, the emphasis should be on outlining specific risks as required by 7(3)(f).
- **Schedule 10D Section 7 how we invest your money:** As noted above, in relation to disclosure of fees and charges, we are strongly of the view that disclosures required by section 7 must relate to at least two products to inform consumers. Consumer research consistently shows that consumers prefer to make a choice between two comparable objects that try to contextualise information that relates to one product only. Thus as with fees, we suggest that *at a minimum* disclosure under Section 7 should relate to a minimum of two (2) of the three (3) following categories:
 - Default option
 - Balanced option
 - Option with the majority of funds under management.

Further, as with fees, the Regulations must require that any information that is incorporated by reference is in the same format as the information in the PDS.

We thank the FSWG for the opportunity to make this submission and note that we have focused on our key concerns rather than each individual provision of the draft Regulations. Please do not hesitate to contact Catriona Lowe on (03) 9670 5088 or ceo@consumeraction.org.au should you have any queries or require further information.

Yours sincerely

A handwritten signature in black ink, appearing to be 'C. Lowe', with a small dot at the end.

Catriona Lowe
Co-CEO