

[PS 123]
Policy Statement 123
**Investment advisory services: superannuation
advice**

Chapter 7 — Securities

Issued 3/3/1997

Purpose

[PS 123.1] This Policy Statement indicates how ASIC will apply the licensing provisions of the Corporations Law to persons providing superannuation advice (such as trustees of superannuation schemes and accountants).

[PS 123.2] This Policy Statement forms part of ASIC's investment advisory services series of Policy Statements.

[PS 123.3] This Policy Statement is structured as follows:

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| Part I | Definitions [PS 123.4] |
| Part II | Recent regulatory history [PS 123.5–123.10] |
| Part III | Superannuation trustees [PS 123.11–123.25] |
| Part IV | ASIC's policy on non-public offer SIS funds
[PS 123.26–123.32] |

Part I: Definitions

[PS 123.4] In this Policy Statement:

- (a) “advice” means personal securities recommendations or general securities advice (details in Policy Statement 122);
- (b) “adviser” means a natural person who provides advice relating to securities and includes both a licensee and a representative of a licensee;
- (c) “ASG” means an Advisory Services Guide;
- (d) “Conduct of Business Rules” means the obligations under s849 (ie the disclosure of conflict of interests obligation) and s851 (ie the know-your-client obligation (see Policy Statement 122));
- (e) “investment advisory services” means advice on securities whether provided with another service (eg dealing or discretionary portfolio services) or on its own. It is used interchangeably with the terms “advisory services” and “securities advice”;
- (f) “investment products” mean securities (eg shares, bonds and unit trusts) and superannuation products;
- (g) “ISC” means the Insurance and Superannuation Commission;
- (h) “Law” means the Corporations Law;
- (i) “licensee” means a holder of a dealers or an investment advisers licence under the Law;
- (j) “licensing provisions” mean the requirements in Parts 7.3 to 7.7 of the Law and the relevant Corporations Law regulations;
- (k) “person operating under a licence” means both a licensee and a representative of a licensee; and
- (l) “principal” means a “licensee” under the Law.
- (m) “representative” means a “securities representative” as defined in s94 of the Law;
- (n) “SIS Act” means the Superannuation Industry (Supervision) Act 1993;
- (o) “SIS intermediary” means a person who deals in or advises on SIS interests and includes dealers and investment advisers, SIS trustees and accountants;
- (p) “SIS product” means interests in superannuation schemes which are regulated under the SIS Act; and
- (q) “SIS trustee” means a trustee of a superannuation scheme regulated under the SIS Act.

Part II: Recent regulatory history

[PS 123.5] Investment in superannuation has increased because the Commonwealth Government is promoting the policy that we need to provide for our own retirement incomes. Superannuation advisers play an important role in effectively implementing the Government's superannuation goals. Therefore, it is important that persons dealing in or advising on superannuation interests (superannuation intermediaries) operate with appropriate competency and conduct standards to protect retail investors who rely on their services.

[PS 123.6] In July 1994, the full regulatory responsibility for superannuation schemes was transferred from ASIC to the ISC. However, the Superannuation Industry (Supervision) Act 1993 (Cth) (the SIS Act), under which the ISC regulates superannuation schemes, focuses on the regulation of schemes and product issuer activities of trustees. It does not have any regulatory provisions comparable to the licensing provisions in the Law that apply to other intermediary activities relating to superannuation schemes (such as dealing in, or advising on, superannuation interests).

[PS 123.7] The possible regulatory gap that could have arisen in this context was addressed by Corporations Regulation 7.12.4(d). This regulation applies to any person who conducts dealing activities or provides investment advice on an interest in a regulated superannuation fund, an approved deposit fund or a pooled superannuation trust within the meaning of the SIS Act. Under the regulation these persons must comply with the licensing provisions in Pt 7.3–7.6 of the Law.

[PS 123.8] Further, to fully regulate superannuation intermediaries through the licensing provisions of the Law (as was intended by reg 7.12.4(d)), an amendment was made to reg 7.3.11. Without the amendment, this regulation would have excluded the application of a substantial part of the licensing provisions (ie Div 1 and 3 of Pt 7.3, Pt 7.5, Pt 7.6 and s842) to superannuation intermediaries. They would have been excluded on the basis that superannuation schemes no longer needed an approved deed under the Law. Regulation 7.3.11(1A) removed the unintended effect of reg 7.3.11(1) in November 1995.

[PS 123.9] As a result of the above changes, superannuation intermediaries are now fully regulated under the licensing provisions in the Law. Superannuation intermediaries include trustees of superannuation schemes, licensed dealers and investment advisers, life insurance advisers and accountants.

[PS 123.10] Not all these superannuation intermediaries are subject to the licensing provisions of the Law in the same way. For example, superannuation trustees have a limited exception and accountants can provide superannuation advice that is merely incidental to accounting or tax advice they give (see Policy Statement 119). As a result, these persons do

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not have to operate under a licence. However, other intermediaries need a licence to deal in or provide superannuation advice.

Part III: Superannuation trustees

[PS 123.11] Regulation 7.3.13(1) gives superannuation trustees a partial exemption from the licensing provisions of the Law. The issue is whether a superannuation trustee can give investment advice in relation to the scheme (fund) under this exemption.

[PS 123.12] A superannuation trustee of a “complying superannuation” scheme is entitled to this partial exemption from the Law (see reg 1.02(1) definition). A complying scheme is a superannuation scheme which has elected to be regulated under the SIS Act and which has not received a notice of non-compliance from the ISC. A superannuation trustee which has the benefit of this exemption is referred to as a “SIS trustee” in this Policy Statement.

[PS 123.13] How ASIC will interpret this partial exemption is set out in answers to the following questions:

- When can a SIS trustee get the benefit of the partial exemption?
- When will a SIS trustee not get the benefit of the partial exemption?

When can a SIS trustee get the benefit of the partial exemption?

[PS 123.14] The partial exemption in reg 7.3.13(1) applies when a SIS trustee “... deals in securities only in relation to the *management and administration of the superannuation scheme.*” SIS trustees are exempt from:

- (a) Div 1 and 3 of Pt 7.3 of the Law (which include the requirement to be licensed and hold proper authorities); and
- (b) Pt 7.5, 7.6 and 7.7 of the Law.

However, SIS Trustees must still comply with Pt 7.4 of the Law. Pt 7.4 includes provisions on issuing contract notes, dealings on own account, short selling and the Conduct of Business Rules (ie disclosing conflict of interests [s849] and the know-your-client obligation [s851] see Policy Statement 122 for details).

[PS 123.15] The partial exemption refers to “dealing” activities. Any securities advice provided to induce a person to enter into securities transactions falls within the scope of “dealing” rather than “investment advice” activities (see Policy Statement 116 [PS 116.30–116.36]). In the case of a SIS trustee providing investment advice on its own scheme interests, such advice would, in most cases, be “inducing”. This is because the SIS trustee is likely to be inducing persons to invest in the scheme interests.

[PS 123.16] There are two possible interpretations of what activities are dealing activities for the purposes of the “*management and administration of the superannuation scheme*”:

- (a) a wide interpretation that includes all dealing activities, ie dealings in the interests of the superannuation scheme (including inducing persons to invest in the securities of the scheme through investment advice) as well as dealings in other securities when managing the investments of the scheme; and
- (b) a narrow interpretation that includes all dealing activities noted above *except* inducing persons to invest in scheme interests.

[PS 123.17] ASIC supports the narrow interpretation. This means that the partial exemption from the licensing provisions does not apply to any investment advice by a SIS trustee which induces persons to invest in the scheme. This view takes into account the underlying purpose of the partial exemption (see s109H) based upon the considerations set out in the following paragraphs.

Avoiding dual regulation

[PS 123.18] There is a need to avoid dual regulation. The internal managing and administering and product issuer activities of a SIS Trustee are adequately regulated under the ISC regime. However, there is no regulation of the advisory activities of SIS Trustees under the ISC regime. Therefore, there is a need to regulate their advisory activities under the licensing provisions in the Law. (*Note:* The ISC regime has the Life Insurance Code of Conduct (the Life Code).) The Life Code contains requirements which are similar to the Law provisions to regulate persons providing investment advice on life and risk insurance products. However, SIS trustees who induce clients to invest in the scheme are not subject to the Life Code unless the transactions are in life company superannuation schemes.

Different capacities

[PS 123.19] A SIS trustee acts in two capacities when:

- (a) undertaking dealing activities as part of managing and administering the scheme; and
- (b) providing investment advisory services to induce persons to invest in the scheme.

[PS 123.20] When undertaking dealing activities, a SIS trustee’s obligations are to the scheme. When providing investment advisory services, a SIS trustee’s primary duties are to its clients (the investors). This primary obligation to clients is clearly reflected in the licensing provisions in the Law such as the requirements to disclose conflict of interests and provide advice which is appropriate to the individual circumstances and needs of a client (s849 and s851).

[PS 123.21] It is possible for the duties of a SIS trustee under the two roles to become mutually inconsistent. For example, any recommendation made to a client must be suitable to that client's individual financial circumstances and investment needs. Such a recommendation may not necessarily be in the best interest of the scheme and its existing interest holders (for example, if the recommendation is that the client should not invest in the scheme). Because an adviser is obliged under the Law to provide recommendations which are appropriate to the client, a SIS trustee may breach its trustee obligation when complying with its adviser obligations.

Exclusion of investment advice

[PS 123.22] The partial exemption does not include investment advice. Therefore, a legislative intention to exclude investment advisory activities from the partial exemption can be inferred from the provision (although technically dealing activities to which the partial exemption applies include inducing persons to invest in the scheme through investment advice).

[PS 123.23] In view of the above considerations, ASIC considers that the partial exemption from the licensing provisions of the Law only applies to a SIS trustee when it is dealing in securities for managing and administering its scheme (which excludes its application to investment advisory activities, see [PS 123.24–123.25]). Part 7.4 of the Law, however, still applies to the dealing activities of a SIS trustee (see [PS 123.14]).

When will a SIS trustee not get the benefit of the partial exemption?

[PS 123.24] ASIC considers that a SIS trustee conducting a business of providing investment advice on its own scheme interests must operate under a dealers licence or use the services of a licensed dealer. A SIS trustee will need to do this because if it is inducing persons to invest in its own scheme, it is acting as a dealer.

[PS 123.25] ASIC's view is consistent with the SIS Act which prohibits a SIS trustee from paying commissions to unlicensed persons. The standards of conduct applicable when providing advisory services (see Policy Statement 122) will continue to apply to advice given on superannuation interests (see Part IV on applying the licensing provisions of the Law to trustees of non-public offer SIS funds).

Part IV: ASIC's policy in relation to non-public offer SIS funds

[PS 123.26] Not all superannuation schemes regulated under the SIS Act are public offer superannuation funds. Only those superannuation schemes which have trustees approved by the ISC can offer interests in their fund to the public. The non-public offer funds include employer sponsored superannuation schemes and small superannuation schemes with less than five members.

[PS 123.27] In addition to trustees, there are other persons who advise on SIS interests in non-public offer superannuation funds. For example, accountants provide investment advice on setting up personal superannuation schemes and developing an investment plan/strategy.

[PS 123.28] The ISC has asked ASIC not to regulate trustees and other advisers of non-public offer superannuation schemes under the licensing provisions of the Law at this stage.

[PS 123.29] The Law does not draw a distinction between public offer and non-public offer superannuation schemes when applying the licensing provisions. ASIC cannot formally exempt non-public offer superannuation intermediaries from the licensing provisions of the Law at this stage. (Note ASIC has made a law reform request to obtain such a power, see Policy Statement 122 [PS 122.151–122.152] for details of the Law reform proposals.)

[PS 123.30] However, ASIC has adopted a policy of not enforcing the licensing provisions of the Law to non-public offer superannuation intermediaries. This non-enforcement approach is consistent with the policy reflected in regulation 7.3.11(1) on persons dealing in interests in prescribed interest schemes which do not need an approved deed (ie excluded schemes). (I: SIS schemes are not within the licensing exclusion applicable to excluded prescribed interest schemes because of the operation of reg 7.3.11(1A) and reg 7.12.04(d).)

[PS 123.31] Therefore, ASIC will not actively enforce, on SIS intermediaries of non-public offer superannuation funds (such as trustees of such SIS schemes, and their agents and employees, and other advisers such as accountants) the requirement to operate under a dealers or an investment advisers licence.

[PS 123.32] However, these intermediaries must be aware that the non-enforcement policy of ASIC will not exempt them fully from their legal obligations under the licensing provisions of the Law. A client can, in a civil action, enforce the obligations under the Law of an adviser despite ASIC's non-enforcement policy. For example, a client of an accountant who has provided advice on a non-public offer superannuation fund could bring a civil action to recover losses resulting from a breach of the s851

obligation. (Section 851 contains the know-your-client obligation, see Policy Statement 122 for details.)