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Competition Policy Review Secretariat
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Anti-competitive arrangements in default superannuation market

The Financial Services Council (FSC) writes to correct a submission by Industry Super Australia (ISA) advocating for ongoing protection from competition for industry superannuation funds in the default superannuation market.

The FSC represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, private and public trustees. The FSC has over 130 members who are responsible for investing over $2.4 trillion on behalf of more than 11 million Australians.

The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the fourth largest pool of managed funds in the world. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

The ISA's submission should be considered in light of the Government's review of the current process by which default superannuation funds are selected in modern awards. Any potential reforms which may deregulate the legislation applying in this area, opening it up to greater competition, could pose a threat to the strong incumbent position held by the superannuation funds which ISA represents. Whilst this correspondence is primarily focused on highlighting inaccuracies in the ISA submission, the competition aspects of the discussion surrounding this policy issue provide a necessary backdrop.

Current Government reviews and policy options

Competition in the default superannuation market is currently under consideration by the Government through the Treasury's *Better regulation and governance, enhanced transparency and improved competition in superannuation* Discussion Paper, as well as the Financial System Inquiry. The FSC has made detailed submissions to both of these reviews on this issue.

The Cooper review of superannuation, which was implemented by the previous Government, prescribed that all default members must have their contributions paid into a MySuper product. The Cooper review envisaged that all MySuper providers would be entitled to compete for default contributions.

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The FSC supports any APRA authorised MySuper product, with their legislated consumer protections, to have the freedom to compete to be the default superannuation fund for any workplace.

Competition is facilitated by the requirement that APRA publish quarterly MySuper performance and fee data. The most recent publication demonstrated that in many instances industry funds' MySuper products underperformed, compared with the rest of the industry, highlighting the dangers of pre-selecting a limited set of superannuation funds from which an employer can choose their default.

Below we aim to address and correct a number of assertions advanced by ISA in its submission.

Inaccuracies in the ISA submission

1. ISA claim: *Inducements – "it is not a breach of section 68A of the SIS Act for banks to offer special arrangements including fee discounts to employers who have an existing relationship with a related superannuation entity."*

Section 68A of the *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) specifically prohibits a related party, including a bank, from offering inducements to a person or an employer in return for choosing one superannuation fund over another.

Under subsection 68A(1), the trustee of a regulated superannuation fund, or an associate of the trustee, must not:

a) supply, or offer to supply, goods or services to a person;
b) supply, or offer to supply, goods or services to a person at a particular price; or
c) give or allow, or offer to give or allow, a discount, allowance, rebate or credit in relation to the supply, or the proposed supply, of goods or services to a person,

on the condition that one or more of the employees of the person will be, or will apply or agree to be, members of the fund.

In a situation where an authorised deposit-taking institution (such as a bank) and the trustee of a superannuation fund are in the same corporate group and are related bodies corporate, the bank will be an associate of the trustee for the purposes of s68A.

Accordingly, s68A(1) prohibits the trustee of a superannuation fund or an associated bank from supplying or offering goods or service to an employer on the condition that its employees become members of the fund.

If there were examples of the behaviour claimed by ISA it would be illegal and a breach of the SIS Act. The breach would leave the superannuation fund open to civil action.

ISA claims that "incentivised banks are now targeting employers to link their choice of default superannuation product with their banking arrangements." The ISA calls for "a

targeted investigation into banks offering incentives to employers in return for providing default fund access for employee's superannuation entitlements." [1]

This is not correct. There is no evidence that superannuation funds are behaving in this way and the FSC notes that ISA did not provide any evidence to support their claims.

It appears the only basis for ISA's claims that superannuation funds are breaking the law is an almost 5 year old Colmar Brunton survey of individual employers' perceptions. The survey is both subjective and unscientific. ISA's conclusions on this evidentiary basis do not withstand scrutiny and nor do ISA's policy recommendations.

The FSC submits that the ISA position is incorrect at law. There is also no evidence to support the claim of non-compliance with the law. In particular, ASIC has over many years had a regulatory focus on compliance with s68A and we are not aware of any industry systemic issues reported by ASIC of material non-compliance by super trustees with s 68A. On this basis ISA submissions should be disregarded.

2. ISA claim: Third Line forcing *- there is a suggestion that "the dominant role of the four large banks…raises the prospect of their market power influencing product choice in the superannuation industry. This could occur when a bank only agrees to enter into a contract with an employer on the condition that the employer enters into a contract with a superannuation entity associated with the bank. Or conversely, the superannuation provider will only enter into a contract or offer discount rates with an employer where the employer agrees to enter into business banking arrangements or enter into another acceptable contract with an associated bank."*

Again, ISA provides no evidence that this is occurring in the market. Of course, to the extent that this behaviour existed it would be illegal and a breach of the SIS Act as already outlined earlier. A superannuation fund would be open to legal action on such a matter. FSC believes it is irresponsible for ISA to make submissions on the basis of unsubstantiated hypotheses.

3. ISA claim: Third line forcing *- after highlighting the exemptions from section 68A of the SIS Act the submission notes: "Of particular concern are the potential for third line forcing arrangements surrounding the interplay between businesses and banks regarding contractual arrangements regarding loans and separate contractual arrangements regarding the provision of superannuation services offered by a related party to the bank."*

SIS Regulation 13.18A permits exceptions to the prohibition outlined in section 68A of the SIS Act. Notably, these exceptions include: the supply (by a superannuation fund trustee or related entity) of a business loan on a commercial arm's length basis and the supply of a clearing house service for the forwarding of contributions to other super funds (for those employees who have chosen those funds).

The ISA submission appears to offer the view that the legislation and the associated regulation is deficient in this regard. However, to the extent that a loan is conducted

[1] ISA Submission to Competition Policy Review at 1

on an arm's length basis it complies with these provisions. This means market rates and terms must be applied. It is therefore difficult to see the concern ISA has with such transactions. Any objective legal analysis would conclude the provision is robust and appropriate. FSC suggests this claim should be disregarded.

On the subject of the provision of clearing house services to employers and their employees, FSC views this (as no doubt did policymakers) as an extremely valuable service that superannuation funds are uniquely placed to offer.

The FSC notes that all superannuation funds provide these services to employers and employees on a commercial basis. It is therefore disingenuous for ISA to suggest that this is an advantage enjoyed by retail superannuation funds.

For example, the FSC notes advertising of services provided by Australian Super to employers:

> **"Free clearing house service**
>
> For eligible employers, we offer a free clearing house service (conditions apply). The clearing house allows you to make one payment for multiple super funds. The rest of the work of distributing the money and details to the correct super fund is done by the clearing house, saving you time and money."[2]

The FSC does not, however, criticise these practices. The FSC cites this an example of the difficulty with ISA's assertions that retail funds are engaged in activity that is somehow not consistent with standard member and client servicing practices across the industry.

ISA's members are also common shareholders in ME Bank and actively promote ME Bank's products and services to their members. This demonstrates that related party arrangements occur between the industry funds and their holding companies, as with other financial conglomerates. It is therefore problematic for the ISA to submit that their related party arrangements are somehow distinct from others in the financial services industry.

The FSC submits that innovations which simplify compliance for employers with regards to superannuation contributions is, in fact, a productivity enhancing result for competition, business and consumers. Retail superannuation funds do not fear competitive forces and simply want the opportunity to compete in an open market for the right to be a default superannuation fund for Australian workplaces in any industry.

Please feel free to contact me on 02 8235 2566 if you have any further questions.

Yours sincerely

BLAKE BRIGGS
SENIOR POLICY MANAGER

[2] http://www.australiansuper.com/employers/what-we-offer.aspx