



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Unclaimed Superannuation – Former Temporary Residents) Instrument 2019/873

And

ASIC Corporations (Repeal) Instrument 2019/874

This is the Explanatory Statement for *ASIC Corporations (Unclaimed Superannuation – Former Temporary Residents) Instrument 2019/873 (Legislative Instrument)* and *ASIC Corporations (Repeal) Instrument 2019/874 (Repeal Instrument)*.

The Explanatory Statement is approved by the Australian Securities and Investments Commission (**ASIC**).

Summary

1. The Legislative Instrument remakes relief previously given by ASIC Class Order [CO 09/437] *Departed former temporary residents superannuation – Disclosure relief* with a minor amendment to change the location for website disclosure from the trustee website to fund website.
2. The Repeal Instrument repeals ASIC Class Order [CO 09/437] *Departed former temporary residents superannuation – Disclosure relief* and ASIC Class Order [CO 09/210] *Intra-fund superannuation advice* which have become redundant and/ or are no longer necessary.
3. The superannuation industry has expressed concern that trustees will generally not be aware which of their members have been temporary residents until advised by the Australian Taxation Office (ATO). Trustees will also generally not have overseas addresses for departed former temporary resident members. If the trustee has no address, or only has an Australian address, there will generally be no opportunity for them to obtain the member's correct address.
4. The relief in [CO 09/437] provided trustees with relief from the requirement to notify and give exit statements to a departed former temporary resident when a member ceases to hold a superannuation product in the circumstances of Part 3A of the *Superannuation (Unclaimed Money and Lost Members) Act 1999* (Unclaimed Money Act).

Purpose of the instrument

5. The purpose of the Legislative Instrument is to continue the relief given by [CO 09/437] with a minor policy change.
6. If a temporary resident departs Australia and does not claim their superannuation benefits, the ATO will issue the trustee of their superannuation fund with a notice. On receiving notice from the ATO, the trustee must pay the benefits of the departed former temporary resident to the ATO: see Pt 3A of the Unclaimed Money Act.
7. The payment of benefits to the ATO causes the departed former temporary resident to cease to hold that product. As a consequence, the trustee must give the resident a periodic statement known as an 'exit statement': see s1017D(2)(d) of the *Corporations Act 2001* (Corporations Act). The payment of benefits to the ATO also triggers the requirement for the trustee to notify a member of a significant event or material change: see s1017B of the Corporations Act.
8. The Legislative Instrument provides relief from the requirements to notify and give exit statements. To access the relief, trustees must disclose in any product disclosure document (PDS) for the relevant superannuation product, and the fund website, the circumstances in which the benefits of temporary residents will be paid to the ATO and that the trustee is relying on the relief.
9. The minor policy change is to shift the location for the website disclosure from the trustee website to the fund website. It was considered the fund website was a more appropriate location for disclosure because it was more likely to be accessed by temporary residents or departed former temporary residents. Members were also more likely to expect information about their entitlements to be available on the fund website.
10. The purpose of the Repeal Instrument is to repeal [CO 09/210] and [CO 09/437]. [CO 09/210] was made in 2009 and its relief has been redundant since the repeal of section 945A of the Corporations Act.

Consultation

11. ASIC sought feedback on the proposal to remake, with a minor policy change, the relief given by [CO 09/437] in Consultation Paper 318 *Remaking ASIC class order on departed former temporary residents' superannuation: [CO 09/437]* (CP 318).
12. No submissions were made in response to CP 318.

Operation of the instrument

13. Section 5 of the Legislative Instrument provides an ongoing exemption for superannuation fund trustees from the requirement to give notice under section 1017B of the Corporations Act and exit statements under section 1017D of the

Corporations Act where a fund member ceases to hold a superannuation product in the circumstances of Part 3A of the Unclaimed Moneys Act.

14. Section 6 of the Legislative Instrument provides the exemption is conditional on the trustee disclosing in the PDS and on the fund website:
 - a. the circumstances in which the benefits of temporary residents will be paid to the ATO; and
 - b. that the trustee is relying on the relief and will not provide departed former temporary resident members whose benefits are paid to the ATO with notices or exit statements at the time of or after the benefits are paid to the ATO.
15. There is a further condition that the trustee must as soon as practicable (and in any event within 1 month) provide the departed former temporary resident with information about their unclaimed superannuation money rights, and any other information or documents reasonably requested in relation to those rights, if the resident asks about their interest after the benefits have been paid to the ATO.
16. Schedule 1 of the Repeals Instrument repeals the whole of [CO 09/210] and [CO 09/437].

Legislative authority

17. ASIC makes the Legislative Instrument under subsection 1020F(1) of the Corporations Act. Subsection 1020F(1) provides that ASIC may:
 - (a) exempt a person or financial product or a class of persons or financial products from all or specified provisions of Part 7.9 of the Act; or
 - (b) declare that Part 7.9 of the Act applies in relation to a person or financial product, or a class of persons or financial products, as if specified provisions were omitted, modified or varied as specified in the declaration.

Under subsection 33(3) of the Acts Interpretation Act 1901, where an Act confers a power to make, grant or issue any instrument, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

18. ASIC makes the Repeal Instrument under subsection 951B(1) and subsection 1020F(1) of the Corporations Act. Subsection 951B(1) provides that ASIC may:
 - (a) exempt a person or a class of persons from all or specified provisions of this Part; or
 - (b) exempt a financial product or class of financial products from all or specified provisions of this Part; or
 - (c) declare that this Part applies in relation to a person or a financial product, or a class of persons or financial products, as if specified provisions of this Part were omitted, modified or varied as specified in the declaration.

Statement of Compatibility with Human Rights

19. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. Instruments (not being regulations) relating to superannuation are not disallowable legislative instruments: see regulation 9 of the *Legislation (Exemptions and Other Matters) Regulation 2015*. ASIC considers there is a reasonable basis for the view that the instruments to which this Explanatory Statement relates are properly described as instruments relating to superannuation. Nonetheless, ASIC has decided to prepare a Statement of Compatibility with Human Rights, which is in the Attachment.

Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

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and

ASIC Corporations (Repeal) Instrument 2019/874 (Repeal Instrument)

Overview

1. The Legislative Instrument continues the effect of ASIC Class Order [CO 09/437] with a minor change to require website disclosure on the fund website and not the trustee website. [CO 09/437] provided conditional relief to trustees from having to notify and provide an exit statement to departed former temporary resident members when they ceased to hold a superannuation product in the circumstances of Part 3A of the Unclaimed Money Act.
2. The Relief Instrument repeals [CO 09/437] on the basis that its effect is continued in the Legislative Instrument. The Relief Instrument repeals [CO 09/210] on the basis the relief is redundant following the repeal of related Corporations Act provisions.

Assessment of human rights implications

3. The Legislative and Repeal Instruments do not engage any of the applicable rights or freedoms.

Conclusion

4. The Legislative and Repeal Instruments are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.