

## Shifting Geer

### Newsletter – attached to website and sent out to client list

*Welcome to Shifting Geer, Herbert Geer's superannuation and funds management newsletter.*

*There have been a lot of changes in the last quarter of 2009 and the first quarter of 2010 with more to come with the release of stages of the Cooper and Henry Review.*

*With so much happening in the financial services area, this is a good time to note some of the main changes, proposals, guidelines, policies and cases that have emerged since the end of 2009.*

#### **Short form product disclosure statement (PDS) for superannuation funds and managed investment schemes**

On 21 December 2009 the Minister for Financial Services, Superannuation and Corporate Law released commentary on simplified disclosure together with draft regulations to amend the current disclosure requirements and examples of the new PDSs for both super and managed investment products for public consultation.

Submissions to Treasury's Financial Services Working Group on the new proposals closed on 26 February 2010 so it seems appropriate to take a quick overview of the proposed short form PDS as a handy reference against which the final document that Treasury comes up with may be measured.

#### **Objectives**

The proposed disclosure regime for superannuation and managed funds is driven by the Government's view that existing superannuation and managed fund PDSs are too long and not well suited to the needs of retail investors in those products. Consequently, the primary objective of the new rules is to achieve a substantially shorter disclosure document.

The resulting draft regulations and sample PDS envisage a standardised format that all super funds must use.

#### **Form and Content**

The new short form PDS requirements are reminiscent of the Key Features Statement (KFS) regime that existed before 2002. However, the new

regime, if adopted, will not only be highly prescriptive, it will offer little or no scope for individual tailoring (see below). Notably, unlike the existing disclosure rules that prescribe content only, the new rules prescribe form as well as content.

#### **The New Rules**

Under the draft regulations, the pre-eminent rule is that size matters. The emphasis is to limit the PDS to a six page A4 sized document (12 pages if A5 and 18 pages if DL).

This is achieved through prescribed font sizes as well as mandated structure and content. In particular:

- an 8 point font size will apply for the issuer's name, address, ABN/ACN and AFS licence number while all other text must be 9 point
- specific information must be included under the following nine compulsory headings that must be numbered and titled as specified in draft Schedule 10D:
  1. About [name of superannuation entity]
  2. How super works
  3. Benefits of super
  4. Risks of investing in super
  5. How we invest your money
  6. Fees and costs
  7. How super is taxed
  8. Insurance in your super
  9. How to open an account

Note: if insurance is not offered, section 9 may be numbered as section 8

- additional information may be provided outside the PDS itself via what is essentially the incorporation by reference method

A PDS may refer to other material located outside the PDS document itself. This information may be either:

- Incorporated by reference which will be deemed to be part of the PDS and the full range of PDS liability and enforcement provisions of the Corporations Act will apply; or
- Otherwise referred to, in which case the referred material does not form part of the PDS and will not be subject to the PDS enforcement regime but subject to other provisions such as those relating to misleading and deceptive conduct in both the Corporations Act and the *Australian Securities and Investment Act 2001* (ASIC Act).

Information that must or may be incorporated by reference is prescribed in the draft Regulations.

### Why does this matter?

In our view the proposed regime will be problematic for both Superannuation Trustees and Responsible Entities (Res) in that they will be constantly be forced to update their websites to comply with the incorporation by reference requirements to keep information up to date and timely. We also see the possibility of increased cost due to more significant event letters or notifications being required if major changes requiring individual notification arise.

The current rules will still apply in relation to PDSs except to the extent of any modification under the new regulations when they are enacted. This means that the existing rules:

- that say who is responsible for preparing a PDS;
- on the timing and the manner of giving a PDS;
- on who is responsible for giving the document; and
- that create liability for defective PDSs, as well as misleading and deceptive conduct in relation to PDS,

will continue to apply.

### Approach to PDS is prescriptive

As in the KFS regime, and now appears the government has adopted a prescriptive regime with the maximum length of the PDS to be prescribed (although allowed to be shorter), as a result certain existing general PDS requirements will be carved out to accommodate this approach.

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### Risk Data requirements for Hedge Funds

The International Organisation of Security Commissions (IOSCO) has published details of an agreed template for the global collection of Hedge Fund information which will assist in accessing possible systemic risks arising from the Hedge Fund sector. The media release from IOSCO states that:

“the purpose of the template is to enable the collection and exchange of consistent and comparable data amongst regulators for the purpose of facilitating international supervisory co-operation in relation to the possible systemic risks.”

It also recognised that as a result of the GFC that legislative processes were no ongoing in many jurisdictions and their outcomes could further influence the information needed to monitor systemic risk in this sector as well as who collects the data.

There are 11 proposed categories of information that will form the template these are:

1. General Manager and Adviser information;
2. Performance and investor information related to covered funds;
3. Assets under management;
4. Gross and net product exposure and asset class concentration;
5. Gross and net geographic exposure;
6. Trading and turnover issues;
7. Assets/liability issues;
8. Borrowing;
9. Risk issues;
10. Credit counterparty exposure; and
11. Other issues.

The template guidelines were released in Madrid on 25 February 2010.

### Superannuation Statistics

The Australian Prudential Regulation Authority on 11 March 2010 released its December 2009 quarterly superannuation performance publication. This shows that the total estimated superannuation assets grew over the quarter by \$39 billion or 3.3% to a total of \$1.3 trillion.

### Cooper Review update

The Cooper Review now known as MySuper has different impacts for different segments of the market.

In phase 3 of the super system review preliminary report was released on 29 April 2010 specifically focused in relation to self managed superannuation funds (SMSFs).

Review Chair Jeremy Cooper has said *“whichever way we look at it, SMSFs are here to stay, but we want them to focus on investing for retirement savings, rather than related party transactions, collectables and leverage”*.

Key preliminary recommendations include:

- Prohibiting investment in collectables and personal - use assets such as artworks, wine collections, exotic cars and yachts;
- Strengthening the competence and independence of approved auditors;
- On-line SMSF resource centre to help SMSF trustees build skills and make better decisions;
- Making the ATO’s penalty regime more flexible to enable effective and equitable regulation;
- Tightening the SMSF registration process, including the introduction of member identity requirements, to reduce incidents of fraud and illegal early release schemes (which Herbert Geer notes which will have a positive impact upon large industry fund and multiple employer and government schemes); and
- Reducing the potential to benefit illegally from related party transactions by prohibiting the acquisition of in-house assets and imposing restrictions on the way in which an SMSF can transact with related parties.

Herbert Geer’s comment in relation to in-house assets is that we hope the law does not, when drafted and enacted, does not impact on the ability

of large superannuation funds in relation to their in-house subsidiary companies or trusts which are usually used for either self administration or investment vehicles.

### Financial advice reform

On 26 April 2010, Financial Services Minister, Chris Bowen has released the document entitled *“The Future of Financial Advice: Information Pack”* which outlines a series of the Governments planned reforms to the financial planning sector. The proposed reforms are the Government’s response to the Parliamentary Joint Committee on corporations and financial services enquiry into financial products and services in Australia.

The reforms will include:

- A ban on “conflicted remuneration structures” such as commissions and volume - based payments on retail investment products (including managed investments, superannuation and margin loans), but not initially applying to risk insurance;
- Introduction of a statutory fiduciary duty requiring financial advisers to act in the best interest of their clients;
- The introduction of “adviser charging”, including requiring that investor opting to advice annually;
- The expansion of the availability of “low-cost simple advice”; and
- The strengthening of the powers of the Australian Securities and Investments Commission to act against unscrupulous operators.

It is noted that the majority of these reforms will commence on 1 July 2012.

### Government Response to the Henry Review

We detail this in our separate special update. Please visit our website for details found under the Superannuation Team page.

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This publication is aimed at providing some general guidance on the changes to the Code. If you require detailed advice on the changes you should contact us on the numbers set out below.

This article was produced by Herbert Geer.  
It is intended to provide general information in summary form on legal issues.  
The contents do not constitute legal advice and should not be relied upon as such.

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