



Free Super Software Pty Ltd

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11 November 2016

Adjudication
Australian Competition and Consumer Commission
By email: adjudication@acc.gov.au

Subject: A91548 & A91549 – The Association of Superannuation Funds of Australia – submission

I am writing on behalf of Free Super Software Pty Ltd to oppose the ACCC approval of clause 6.2 – “rights to use the STN to exchange messages”, of the GNGB proposed MOU. I note that the ACCC has made a draft determination to approve the agreement including this clause.

However, the ACCC seems to have made an error when stating in the draft determination:
“Gateway Operators may exchange Messages with a person who is not a Gateway Operator given that a superannuation entity on whose behalf that Gateway Operator is acting remains in compliance with the Superannuation Industry (Supervision) Act 1993 (Cth), and any associated regulations or standards made under it or other applicable legislation. ...”

Clause 6.2 however, limits the Gateway to only providing a service to the Super fund to the minimum extent necessary so as to keep the super fund in compliance with relevant laws:

6.2 (b) “(i) with a person who is not also a Gateway Operator under this MoU, but solely to the extent such exchange is required to be made with that person, in a particular format, ...”

The ACCC seems to have interpreted this clause as, they can do it as long as it's legal. However, the actual clause is, they can only do it if there is a legal obligation and even then to the minimum legal obligation. If the ACCC's interpretation of the clause was correct it would not need ACCC approval.

Clause 6.2 goes on to state that the Gateway Operator assumes all risk in relation to the exchange and therefore imposes additional potential costs on the Gateway Operator. Making it an unattractive option for the Gateway Operator to provide this service.

It should be noted that the legal obligations for a super fund to accept SuperStream compliant messages are on the super fund and not the Gateway Operator. The Gateway Operator does not have any obligation to help the super fund accept these messages. This clause would restrict the Gateway Operator in what they can do for the super fund and make the Gateway Operator reluctant to do anything because of the additional risk assumed.

This clause actually has nothing to do with the Gateway to Gateway communications that the GNGB is supposed to be governing. It's about restricting the services a Gateway Operator can provide to a super fund or employer in relation to direct messages between employers and super funds and super funds and other super funds.

It is therefore not required and there is no public benefit. There is a public detriment as it restricts the number of organisations an employer or super fund can engage to assist with direct SuperStream messages and restricts what those organisations can do for the super fund.

It's not just about a super fund deciding that they don't want to accept or send direct messages. It is through this clause that a super fund or Gateway Operator can prevent another super fund from providing anything but the minimum direct messaging solution. By doing this the Gateway Operators are ensuring that their services, which are not restricted to the minimum legal requirement, can have more features than direct messages between employers and super funds.

What public benefit arises from making it more difficult for a super fund to implement direct messages and what public benefit arises from restricting a super fund to the minimum legal requirements. e.g. not allowing the super fund to send an optional error message? There is no public benefit.

It should also be noted that there may well be no super funds that are currently accepting SuperStream compliant messages directly from employers.

Director
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In April 2016 some of the largest super funds were contacted to arrange direct messages. All of them refused. This was referred to APRA as the super funds have a legal obligation to accept these messages. APRA referred the matter to the ATO to work on a solution. After 6 months the ATO has been unable to identify even one super fund that will accept these messages.

The ACCC should investigate whether the following section of the COMPETITION AND CONSUMER ACT 2010 applies:

“COMPETITION AND CONSUMER ACT 2010 - SECT 44ZZRF

Making a contract etc. containing a cartel provision

Offence

- (1) A corporation commits an offence if:
 - (a) the corporation makes a contract or arrangement, or arrives at an understanding; and
 - (b) the contract, arrangement or understanding contains a cartel provision.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

- (2) The fault element for paragraph (1)(b) is knowledge or belief.

Penalty

(3) An offence against subsection (1) is punishable on conviction by a fine not exceeding the greater of the following:

- (a) \$10,000,000;
- (b) if the court can determine the total value of the benefits that:
 - (i) have been obtained by one or more persons; and
 - (ii) are reasonably attributable to the commission of the offence;3 times that total value;

(c) if the court cannot determine the total value of those benefits--10% of the corporation's annual turnover during the 12-month period ending at the end of the month in which the corporation committed, or began committing, the offence.

Indictable offence

- (4) An offence against subsection (1) is an indictable offence.”

Two Gateway Operators are in fact super funds and these super funds would be unable to accept or send a direct message from an employer or another super fund other than the minimum that the super fund is legally required to accept or send.

Super funds should not only be meeting their legal obligations to accept direct messages from employers, they should be competing for this business by:

* Providing the service including optional features, not the minimum legal requirements.

* Providing the service at a competitive rate. Currently super funds do not charge employers for making contributions by other methods.

Not only are super funds not competing they have proposed a clause, 6.2 which will make it more difficult for any super fund that does want to compete.

Yours sincerely,

Glen Hasselman
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