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General Manager
Financial Systems Division
The Treasury
Langton Crescent
Parkes ACT 2600

Email: FSLAbill@treasury.gov.au

**RE: Exposure draft Financial Sector Legislation Amendment
(Prudential Refinements and Other Measures) Bill 2010 and
Explanatory Material.**

Dear General Manager,

The Association of Superannuation Funds of Australia (ASFA) would like to lodge this submission with respect to the following parts of the above exposure draft legislation:

Schedule 4 Amendments to other acts:
Superannuation Industry (Supervision) Act 1993

Schedule 5 – Amendments relating to levies:
Superannuation Supervisory Levy Imposition Act 1998

ASFA is a non-profit, non-political national organisation whose mission is to protect, promote and advance the interests of Australia's superannuation funds, their trustees and their members. Our members include corporate, public sector, industry and retail superannuation funds plus service providers who provide professional services to SMSFs, account for more than 5.7 million member accounts and over 80% of superannuation savings.

SCHEDULE 4

Amendments to Other Acts: *Superannuation Industry (Supervision) Act 1993* Items 27 & 28 - where accounting records may be kept

The intention of this amendment is to amend the requirement that accounting records must be kept in Australia so as to enable the regulator to grant written approval for records to be kept in another specified country. The approval may be granted subject to specified conditions.

As regulated superannuation entities are required to be resident in Australia, and the majority of members must be Australian resident, the primary purpose for seeking to keep records offshore would be to reduce operational costs. Such a reduction could be to the benefit of members, or to the benefit of the trustee, depending on the structure of the fund.

First and foremost, ASFA considers that this issue is about security of member's monies. The more remote the records are from management and prudential supervision, the greater the risk of loss or destruction, fraud and other inappropriate outcomes.

The preparation of financial statements and their audit requires the financial records, including supporting documentation, to be accessed and examined. Additionally, an audit of a regulated superannuation entity requires the auditor to form a view as to the compliance of the entity with prescribed provisions of the Superannuation Industry (Supervision) Act.

Prudential supervision relies on the ability of the regulator to access an entity and to test its ability to comply and cope with risks through an examination of policies and procedures and the examination of relevant records. ASFA notes that the complexity of superannuation rules applying to the acceptance of contributions and the making of benefit payments generally means that a broader range of records is captured under the concept of 'accounting records.

ASFA is concerned that should regulator approval be granted for an entity to keep its accounting records outside of Australia this may have the potential to increase both the time taken for and the cost of the preparation of financial statements and their auditing. The same would also apply should the regulator require access to the records. ASFA is concerned of the impact of any additional costs as these costs are ultimately recouped from the member through administration fees and industry levies.

ASFA is concerned that any benefit flowing to members from having records kept outside of Australia (e.g. reduced record keeping costs) may be outweighed by the increased financial and prudential risk, increased costs of access to the records by all parties and, potentially, a decrease in the quality of record keeping.

It would also appear that permitting accounting records to be kept outside of Australia is not consistent with the requirement in section 35A(1)(d) that "the accounting records of the entity are kept in a way that enables those accounts, statements and returns to be conveniently and properly audited in accordance with this Act."

ASFA recommends that regulated superannuation funds should not be permitted to keep their accounting records other than in Australia.

Item 28 – Location of accounting records

This item requires a registrable regulated superannuation entity to advise the regulator of the address where the entity's accounting records are kept.

This appears to be reasonable. Given that the regulator may require access to those records in carrying out its prudential supervision role.

However, there is considerable uncertainty within the superannuation industry as to exactly what constitutes an ‘accounting record’.

Section 35A requires a superannuation entity to ensure that accounting records “that correctly record and explain the transactions and financial position of the entity are kept.”

The question that arises from the requirement to be able to ‘explain an accounting transaction, in the superannuation context, is whether the term ‘accounting record’ applies just to the financial transaction, or to ancillary information that is required to process the transaction. For example, where a personal contribution is received and it is not accompanied by the member’s TFN the fund must refer to other records to determine whether the contribution can be accepted or must be returned. As the action taken with respect to the accounting transaction can only be ‘explained’ by reference to record or the member’s TFN and its status, does that capture those records as ‘accounting records’? Similarly, where a member applies to access their benefits as unrestricted non-preserved due to the member being aged 65 or more, does that mean that the fund’s record of the member’s date of birth comes within the definition of ‘accounting records’?

While having no fundamental objection to the proposed requirement, ASFA recommends that consideration be given to the inclusion of information that identifies what constitutes an ‘accounting record’.

Items 29 and 30 – Privilege against exposure to penalty – disqualification under section 126A or 126H

Sections 126A and 126H currently provide for the disqualification of an individual by APRA (126A) or the Federal Court (126H) for contraventions of the *Superannuation Industry (Supervision) Act* and the *Financial Sector (Collection of Data) Act*. They also provide for the disqualification of an individual if APRA or the Federal Court is satisfied the individual is otherwise not a fit and proper person to be a trustee, investment manager or custodian.

The SIS Act currently contains various provisions for dealing with self incrimination. In general the requirement is that the person must comply with the request to provide information etc, but may, by claiming privilege against self incrimination, prevent the information given from being used against them in criminal or penalty proceedings. These provisions are found in sections 130B, 287, 290 and 360 of the SIS Act.

Prior to the High Court’s decision in *Rich v Australian Securities and Investments Commission* (‘Rich’), there was a view that disqualification proceedings were protective and not penal in nature. As such, any information a person gave when complying with a request by the regulator under the SIS Act could be used in considering whether a person should be disqualified under section 126A by the regulator or under section 126H by the Federal Court.

Proposed new section 126L seeks to overcome the potential impact of the High Court’s decision in Rich. Subsection 126L(4) states that, for the purposes of using information for the imposition of a penalty of disqualification under section 126A or 126H, the provisions against self incrimination contained in subsections 130B(2), 287(3), 290(2) and 336F(2) do not apply.

ASFA notes there are concerns about the potential reduction in personal liberties such as would occur under proposed new section 126L. However, in this instance, ASFA considers that there are competing consumer and other important matters that must be taken into account.

Superannuation fund trustees, investment managers and custodians, operating under the auspices of the SIS Act are in a position of considerable responsibility with respect to the monies of members of superannuation funds. The superannuation balances of Australians amounts to more than one trillion dollars. It is managed under a licensing regime that requires key personnel to be fit and proper persons to look after this money that is held on trust for members of superannuation funds. Fund members rightfully have an expectation that Australian superannuation entities are managed and otherwise controlled by persons who are fit and proper for the purpose.

Superannuation fund members would rightly be disappointed if the situation arose whereby an examination of a person revealed they had been responsible for serious contraventions of SIS or were otherwise not a fit and proper person to be a trustee, investment manager, custodian or responsible officer but they were able to retain their position through the application of the self incrimination exception.

Should such a situation arise it would potentially undermine public confidence in the superannuation system. Given the compulsory nature of superannuation, the restriction on persons withdrawing money from the system and the importance of superannuation to the Australian economy, ASFA considers that it is important that persons in positions of trust within the superannuation industry be fit and proper to perform the duties they are required to undertake.

ASFA notes that a disqualification decision is a reviewable decision. ASFA also notes the proposed section 126L only curtails provisions against self incrimination to the extent that the information obtained from the individual may be used for the purpose of determining their fitness to be the trustee, custodian, investment manager or public officer of a superannuation entity. The information remains inadmissible for the purpose of criminal proceedings and the imposition of other penalties.

ASFA considers that, in this specific circumstance, the slight reduction in personal rights that is encompassed in new section 126L is more than outweighed by the rights of superannuation members to have confidence in the trustees, investment managers, custodians and responsible officers entrusted with looking after their superannuation interests.

Item 31- Auditors

ASFA is supportive of proposed new section 130BA which requires an auditor of a superannuation entity to notify the Regulator of any attempt by a person to unduly influence, coerce, manipulate or mislead the auditor or a member of the audit team conducting an audit of a superannuation entity.

Accompanying section 130BA is proposed new section 130BB which creates two new offences:

- Knowingly providing misleading information to the auditor, and
- Being reckless as to whether the information provided to an auditor is false or

misleading.

ASFA has two concerns with proposed section 130BB:

- The narrow class of persons that can be penalised, and
- The broadness of the term 'reasonable steps'

Narrow class of persons who can be penalised

The offence of knowingly providing false or misleading information to an auditor is restricted to the trustee, a responsible officer of a trustee or an employee of the trustee of a superannuation entity. ASFA's concern is that parties beyond those listed may, without risk of penalty, provide false or misleading information to a listed person for the sole purpose of covering up a breach by that other person. The person involved may be, for example, the accountant, administrator or other service provider to a superannuation fund. ASFA would argue that, unless the offence is widened to capture a broader range of persons, an auditor may be required to report interference under new section 130BA by a person in respect of whom the Regulator would be powerless to take action under section 130BB.

ASFA recommends that the offence be expanded to include other persons who provide the trustee, a responsible officer of a trustee or an employee of the trustee of a superannuation entity with information knowing that:

- the information is false or misleading in a material particular or is missing something that makes the information misleading in a material respect, and
- the information is to be or is likely to be given to an auditor of a superannuation entity

Broadness of the term 'reasonable steps'

To avoid penalty under proposed subsection 130BB(2), the relevant person is required to demonstrate that they took 'reasonable steps' to ensure that information provided to the auditor was not false or misleading in a material particular or missing something that makes the information misleading in a material respect.

ASFA's concern is that the legislation uses the term 'reasonable steps' while the explanatory material and the heading to the provision uses the term recklessness. ASFA is concerned that a person who considers that they have taken reasonable steps in ensuring the accuracy of the information provided could, in the regulator's opinion, be found to not have taken reasonable steps.

ASFA recommends that the higher threshold test of recklessness should be applied.

Item 32 - Wound up, dissolved or terminated entities

This item extends SIS section 263 to ensure that an investigation into a superannuation entity cannot be frustrated by the entity being wound up, dissolved or terminated or the trustee becoming an externally administered body corporate or insolvent under administration.

ASFA supports the extension of the provisions of section 263 as trustees of such entities should not be excused from providing information during an investigation. However, equally importantly, such trustees should not be required to provide information that they

do not have, or do not reasonably have access to, or be required to assert to the correctness of information where they do not have access to supporting documentation..

ASFA recommends that, for the purpose of proposed section 130BB(2), where the trustee is an externally administered body corporate or an insolvent under administration the reasonableness test should have due regard to the ability of the trustee to reasonably access information that would enable them to substantiate the accuracy of the information provided.

SCHEDULE 5

Amendments relating to levies: *Superannuation Supervisory Levy Imposition Act 1998*

Items 29 to 33

The Explanatory Material notes that the purpose of the amendment is to enable the Minister to specify that the asset value of a 'new starter' be worked out as at the day that the 'new starter' becomes a superannuation entity for the purpose of calculating the restricted levy component. It does this by amending various references to 'asset value' with the term 'levy base' and by amending subsection 7(3) of the act to provide for the Minister to determine by legislative instrument how an entity's levy base is to be worked out.

ASFA has no concerns with the proposed new arrangements.

Should you have any questions please contact our Principal Policy Adviser, Robert Hodge, on 02 8079 0806

Yours sincerely



David Graus
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