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Manager
Benefit and Regulations Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: superamendments@treasury.gov.au

Dear Manager

RE: Portability of superannuation between Australia and New Zealand – Regulations

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to the request for comments on proposed *Superannuation Industry (Supervision) Amendment Regulation 2013 (No. C)* (“the draft Regulations”).

While recognising the economic benefits and the benefits to individuals of the permitted movement of superannuation monies between Australia and New Zealand, we note that, all funds will face increased costs in implementing this measure. All funds, in order to process outbound transfers, will need to amend their benefit payment processes and update their benefit claim forms. For those funds that accept inbound Trans-Tasman Transfers, significant changes will need to be made to their superannuation administration systems. The costs involved may result in funds delaying implementation of the measure which would impact on the number of members in both countries that are able to access this measure in the short term.

ABOUT ASFA

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. We focus on the issues that affect the entire superannuation system. Our membership, which includes corporate, public sector, industry and retail superannuation funds, plus self-managed superannuation funds and small APRA funds through its service provider membership, represent over 90% of the 12 million Australians with superannuation.

EXECUTIVE SUMMARY

ASFA has three high level concerns with the regulations:

1. The structure – inserting a new Part rather than integrating the requirements into the existing framework;
2. A complete lack of visibility to fund trustees as to the actual implementation date to which they are working; and
3. The lack of clarity as to whether a fund trustee must transfer a member's benefit to a KiwiSaver fund or whether a trustee could implement a fund rule prohibiting the payment of a member's benefit to a KiwiSaver Scheme in circumstances where a rollover to an Australian regulated fund by the member would be permitted.

ASFA also has a number of specific concerns with the proposed Regulations and the Explanatory memorandum including:

1. The complexity of administration of the provisions;
2. The apparent contradiction between the application of paragraphs 12A.08(1) and (3) regarding when additional information must be sought;
3. The unnecessary complexity of the requirements of paragraph 12A regarding the degree to which the trustee must be satisfied before processing a request to transfer a benefit to a KiwiSaver fund; and
4. The lack of clarity on the applicability of the data standards to the rollover over a member benefit which contains a New Zealand-sourced component.

These and other matters are set out more fully below.

1. **General comments:**

We have reviewed the draft Regulations to the *Superannuation Industry (Supervision) Act (1993)* (SIS Act) and explanatory material and consider that generally they will achieve the policy objective as stated and facilitate the movement of superannuation savings between the two countries.

However, we have three high level concerns with the regulations: the structure of the regulations, uncertainty as to the commencement date and uncertainty as to whether, and if so in which circumstances, transfers to KiwiSaver Schemes are compulsory. The lack of clarity creates the potential for confusion among trustees, members and administrators.

1.1 **Structure of the regulations**

Of primary concern is that the proposal is to insert a new standalone part (Part 12A) into the SIS Regulations which state that the various existing parts of the Regulations to the SIS Act (including Parts 1, 5, 6 & 7) are "modified to the extent necessary" to allow or ensure compliance with the new Part 12A. ASFA considers this drafting style may create significant risk for trustees as it requires a fund trustee to determine for itself the 'extent' of modification necessary and it also fragments the law. The effect is, for example, that in considering whether a transfer from a KiwiSaver account can be accepted a trustee will need to refer to Part 7 (contributions standards) plus Part 12A (trans-Tasman retirement savings portability). However, there is nothing within Part 7 to indicate that in certain circumstances that its operation is modified by Part 12A.

Recommendation 1

ASFA strongly recommends that, as a minimum, each Part of the SIS Regulations whose operation may be amended by Part 12A is amended to include a note or paragraph to that effect.

1.2 Commencement date

A second concern is the uncertainty surrounding the commencement date. The regulations state that commencement is:

“...the day the Arrangement between the Government of Australia and the Government of New Zealand on Trans-Tasman Retirement Savings Portability, signed at Brisbane on 16 July 2009, comes into force for Australia”.

The Arrangement itself specifies that:

“This Arrangement will come into effect on the first day of the second month following the month in which the two Governments have exchanged notes informing each other that their respective constitutional or legislative matters necessary to give effect to the Arrangement have been fulfilled”.

The lack of clarity in commencement date leaves trustees uncertain of the date from which they can expect members to seek to make these transfers and therefore the date from which their new processes and procedures must be in place.

Recommendation 2

ASFA recommends that at the earliest opportunity a ministerial statement is made as to the anticipated date on which the regulations will commence.

1.3 Whether or not mandatory

The third concern is the lack of clarity over whether or not it is mandatory for the trustee of an Australian fund to transfer an amount out to a KiwiSaver scheme.

To determine the precise operation of the rules with respect to a transfer of an amount to a KiwiSaver scheme requires reference to proposed regulations 12A.03 (payments to which the part applies), 12A.07(5) (condition of release) and proposed regulations 12A.09 and 12A.10 in Division 3 (payment of amount to KiwiSaver scheme).

The complex structure of the regulations has the potential to result in the payment of benefits to a KiwiSaver in contravention of the regulations. The situation is compounded by the lack of specific reference to a payment to a KiwiSaver scheme within Schedule 1 to the SIS Regulations which lists the permitted conditions of release of superannuation benefits. A further clouding of the situation arises from the statement on page 6 of the explanatory memorandum, with respect to the accumulation interest of a member of a defined benefit fund, that a trustee is not required to make the transfer if the fund rules do not permit such a payment.

Recommendation 3:

ASFA recommends that strong consideration be given to amending Schedule 1 by inserting either:

- **a new condition of release: payment to KiwiSaver Scheme, referencing Part 12A, or**
- **a note to the Schedule referencing Part 12A, Division 1 and 3**

Recommendation 4:

ASFA recommends that the explanatory memorandum be amended to contain a clear statement as to the circumstances in which a trustee must comply with a member's request to transfer their benefits to a KiwiSaver Scheme.

Recommendation 5:

ASFA recommends that a clear statement be made as to whether it is permissible for a trustee to make a fund rule prohibiting the payment of a member's benefit to a KiwiSaver Scheme in circumstances where a rollover to an Australian regulated fund by the member would be permitted.

2. Specific comments

2.1 Regulations

2.1.1 Regulations 2A.06(2) and 12A.07(7)

ASFA has concerns about the complexity of administration of this provision. Whilst recognising that the complexity is driven by the differing natures of the Australian and New Zealand retirement savings systems, the superannuation changes in the 2007 reforms introduced the simplicity of applied proportional treatment of amounts received into the fund, and this simplicity is being eroded over time by an increasing need to "track" certain amounts through the system.

2.1.2 Paragraph 12A.07(3) – no obligation to receive a New Zealand sourced

This paragraph states that a fund is not required to receive, under any circumstances, a rollover that contains a New Zealand sourced amount.

The explanatory memorandum, at page 14, notes that if the destination Australian fund will not accept a transfer including a New Zealand sourced amount from their current Australian fund, the member could leave the New Zealand sourced amount in their current fund and transfer all non-New Zealand sourced monies to the destination Australian fund.

ASFA has the following concerns with this practice:

- Given that the New Zealand sourced amount is regarded as a member (non-concessional) contribution (paragraph 12A.08(5)), the capacity to leave the component behind is a breach of the proportioning rule whereby every rollover must contain a proportional amount of the member's taxed (concessional contributions plus fund earnings) and tax free (non-concessional contributions) components held within the fund.
- Should few funds decide to receive New Zealand sourced amounts, those who do may ultimately be left holding only the New Zealand sourced amounts, while the member maintains a separate fund for their Australian sourced superannuation monies. This would defeat the policy purpose of assisting members to combine their New Zealand and Australian sourced savings into a single account. It would also be counter to the current account consolidation rules and may result in the New Zealand sourced component being transferred to the Australian Taxation office as unclaimed superannuation monies (through the operation of the 'lost member account' rules).

Recommendation 6:

ASFA recommends that consideration be given to addressing this issue by preventing a member from rolling over only the non-New Zealand Sourced amount of a benefit.

2.1.3 .Paragraph 12A.08(2) Additional Information

Paragraph 12A.08(1) states that paragraphs (2) and (3) apply in relation to an **amount received** by a complying superannuation fund from a KiwiSaver scheme.

Paragraph 12A.08(2) modifies the application of Part 7 (contribution standards) to the extent necessary to ensure that, if a request is made to a complying fund to receive an amount from a KiwiSaver.... (c) any information requested under paragraph (a) or provided by the KiwiSaver scheme provider or the member under paragraph (b) is given to the trustee before the trustee **decides whether to receive** the amount from the KiwiSaver scheme.

These two provisions are contradictory as paragraph (1) refers to amounts received and paragraph (2) refers to a request made to receive an amount.

It would appear that the regulation is attempting to establish the circumstances under which a trustee may seek additional information about a transfer and may refuse to accept a transferred amount from a KiwiSaver scheme because insufficient information has been received in respect of the amount transferred. That is, the provision is attempting to mirror the operation of existing regulation 7.04(4).

Under general principles an amount is received when it is applied to a bank account held in the name of the trustee. ASFA considers that the action of 'receiving' an amount is distinguishable to the action of applying the received amount to the benefit of the member.

Recommendation 7:

ASFA recommends that the provisions be reworded to take account of the practicalities of the transfer process by:

- **including in paragraph 12A.08(1) a reference to a request to receive an amount, and**
- **including a new paragraph referring to applying a received amount for the benefit of the member**

An additional issue with this provision is that where required information is missing, the information may be provided by either the member or the KiwiSaver scheme. ASFA is concerned of the potential for fraud through the provision of misinformation by the member.

The explanatory memorandum states that:

“The information may be obtained from the statement originally provided to the KiwiSaver scheme provider and the member when the Australian sourced amount or the New Zealand sourced amount was previously paid to the KiwiSaver scheme provider. The statement would have been provided under section 390-12 of the ITAA 1997.”

This poses a significant fraud risk to the fund. For example, the information includes tax components of the benefit, including any tax free component of the Australian sourced amount. Allowing this information to come from the member opens up the possibility of an individual providing false information regarding the composition of the Australian sourced component of the payment. ASFA has been advise by a member fund that their experience of fraud in superannuation is that the most common occurrence is the amendment of Rollover Benefits Statements. This has been partly addressed in the industry by many funds only accepting (and sending) paperwork from the fund rather than the member. The introduction of mandatory data standards and electronic transaction will further mitigate this risk.

However, introducing circumstances where, once again, the information on tax components, preservation etc can come directly from the member may open funds to significant fraud risk.

Recommendation 8:

ASFA recommends that the regulations be amended such that information can only be accepted from the KiwiSaver scheme.

2.1.4. Paragraph 12A.10(2) Payment of whole of withdrawal benefit

Paragraph 12A.10(2) prohibits a trustee from paying only a part of a member's withdrawal benefit to a KiwiSaver scheme.

It is a regular occurrence within the superannuation industry that a fund receives additional contributions following the transfer of a member's benefit to another fund. We note that the Regulations already recognise and provide for the receipt of 'late' receipts in relation to Departing Australia Superannuation Payments ("DASP"). Condition of release item 103A in Schedule 1 requires payment of a member's DASP as a single lump sum or, "if the fund receives any combination of contributions, transfers and rollovers after cashing the benefits - in a way that ensures that the amount is cashed".

Recommendation 9:

ASFA recommends that a new provision be included that mirrors the DASP provisions allowing the fund to pay any 'late' receipts to the KiwiSaver under the member's earlier instructions. The wording of the cashing restriction for condition of release 103A in Schedule 1 could be used as a model.

2.1.5. Paragraph 12A.10(3) Information before payment can be made

Paragraph 12A.10(3) requires trustees to "be satisfied" about various matters before paying an amount to a KiwiSaver scheme. ASFA is concerned at the level of obligation placed on the trustee to confirm the accuracy of the information provided:

- Paragraph 12.A.10(3)(b) requires the trustee to be satisfied that the member has given it a statutory declaration stating that they have emigrated permanently to New Zealand. However, paragraph 12.A.10(3)(a) also requires the trustee to be satisfied that the member has emigrated permanently to New Zealand. This could be taken as implying that the trustee has to be satisfied about the emigration independently of the member's statutory declaration.
- Paragraph 12.A.10(3)(f) requires that the trustee is satisfied that they have been given details of the KiwiSaver scheme and the account number to which the amount is to be paid. However, paragraph 12.A.10(3)(e) separately requires the trustee to be satisfied that the member has opened a KiwiSaver account. Again this could be taken as suggesting the trustee needs to be independently satisfied of this, which is unnecessary and inappropriate.
- Paragraph 12.A.10(3)(g) requires the trustee to be satisfied that the KiwiSaver provider will accept the amount. Again, it is inappropriate to place the obligation to confirm this on the trustee. The more appropriate approach would be for the member to provide confirmation that the KiwiSaver provider will accept the amount. This would be similar to the requirement for an employee exercising choice of fund to provide their employer with evidence that their chosen fund will accept their amount, under section 32FA of the *Superannuation Guarantee (Administration) Act 1993*.

Recommendation 10:

ASFA recommends that paragraph 12A.10(3) be amended such that the onus is placed on the member to provide the required information and the trustee may rely on that information.

This could be achieved by:

- **Removing paragraphs 12.A.10(3)(a), (e) and (g), and**
- **Providing a capacity for a trustee to not make a payment in circumstances where there are reasonable doubts as to the veracity of the information provided. E.g. the trustee may have concerns as to the execution of the statutory declaration.**

2.1.6. Paragraph 12A.12 Conditions of release

Paragraph 12A.12(2)(b) refers to Item 106 Schedule 1 (age 65 condition of release) applying to the New Zealand sourced amount as if the reference to a person's age (which in the item is age 65) were the age specified in section 7(1) of the *New Zealand Superannuation and Retirement Income Act 2001*. The age under that provision is currently age 65. It would appear that the intent is to recognise the possibility that either or both the age 65 condition of release for Australians and the New Zealand preservation age may change over time.

Recommendation 11:

ASFA recommends that consideration be given to amending Schedule 1 to include a specific condition of release in relation to New Zealand sourced amounts, making reference to the New Zealand statutory provision and specifically mentioning age 65 (the current age).

2.2 Explanatory Memorandum

2.2.1. Page 1 (the Minute), third paragraph

Typographic error: 'rans-Tasman' should be amended to 'Trans-Tasman'.

2.2.2. Page 14 Application of data and payment regulations

This section makes the following statement:

"The data and payment matters do, however, apply to member requests to roll over or transfer benefits that include a New Zealand sourced amount between complying superannuation funds. If the rollover or transfer of benefits that include a New Zealand sourced amount cannot be made in the standard timeframe of three days, the trustee of the transferring fund must rollover or transfer the amount within 30 business days under paragraph 6.34A(3)."

Whilst this statement is technically correct, it bears no resemblance to the actuality of the situation. The message implementation guide (MIG) for the rollover standard, which was finalised in December 2012, does not provide for the inclusion of a New Zealand sourced amount. Therefore, until such time as the data standard and the (MIG) are amended to include these amounts it will not be possible for a trustee to comply with the three day timeframe and the 30 business days rule will apply. This should be explicitly recognised by the explanatory memorandum.

Recommendation 12:

ASFA recommends that the explanatory memorandum be amended to explicitly set out the condition precedent that would require a trustee to transfer a member benefit containing a New Zealand sourced component within 3 days.

2.3 Other matters

2.3.1 Family Law

Clarification as to the treatment of New Zealand sourced amounts under the Family Law splitting rules is required. We note that while Part 7A is not one of the existing parts of the Regulations that

is 'modified to the extent necessary' for new Part 12A, paragraph 12A.07(8) states that a New Zealand sourced amount "is treated as preserved benefits in the same way as other amounts in the fund would be treated as preserved benefits". Part 6, which deals with the treatment of preserved benefits, is 'modified to the extent necessary' for new Part 12A.

This suggests that a New Zealand sourced amount is simply a preserved amount for family law splitting purposes, and would retain its New Zealand sourced amount status on transfer to the non-member spouse. The combined effect of section 90MZ of the *Family Law Act 1975* and paragraph 12A.12 would appear to apply the restricted conditions of release applicable to the New Zealand sourced amount to the non-member spouse. ASFA sees this as an equity issue should the entire New Zealand sourced amount be transferred to the spouse and questions whether this is the intended outcome.

If an amount transferred to a non-member spouse does retain its New Zealand sourced amount status, there may be a need for funds to amend the information they currently provide to a non-member spouse in relation to a family law split. This arises from the Family Law (Superannuation) Regulations which require a trustee to provide certain information about the tax components and preservation status of the member's benefits (e.g. regulation 63 regarding accumulation interests). ASFA considers that the existing wording of *the Family Law (Superannuation) Regulations* is wide enough to pick up these new New Zealand related attributes automatically. It is essential that trustees have clarity about whether these attributes flow through to the non-member spouse and are made aware of that fact.

In addition, the ability of the non-member spouse to transfer their entitlement under the family law split into another Australian fund will be limited by the need to find a receiving fund that will accept New Zealand sourced amounts. If a suitable fund cannot be located, the non-member spouse would only be able to leave their entitlement in the fund which performed the split if permitted by the governing rules of that fund. If not permitted under the governing rules, the fund which performed the split would be required to transfer the non-member spouse's entitlement to an Eligible Rollover Fund – again assuming one can be located that will accept New Zealand sourced amounts.

Recommendation 13:

ASFA recommends that, given the complexity of the family law splitting rules, the regulations and the explanatory memorandum should specifically address how a New Zealand sourced amount is to be treated for family law purposes.

2.4 ATO matters

ASFA notes, without further expanding, that the following matters remain outstanding with respect to the transfer of New Zealand sourced amounts:

1. The content of the approved form to be provided when an Australian fund transfers an amount to a KiwiSaver provider (*Taxation Administration Act 1953*, section 390-12).
2. The amending of the data standard and MIG with respect to rollovers to include the necessary data items to reflect that a member's benefit may contain a New Zealand sourced amount.
3. Changes to the ATO electronic reporting specification for unclaimed money statements to allow for future reporting of New Zealand sourced amounts.

* * * *

I trust that the information contained in this submission is of value. We would be pleased to meet with you to discuss our submission.

If you have any queries or comments regarding the contents of our submission, please contact our principal policy adviser, Robert Hodge on (02) 8079 0806 or via e-mail to rhodge@superannuation.asn.au, or senior policy adviser Julia Stannard on (03) 9925 4027 or via e-mail to jstannard@superannuation.asn.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Fiona Galbraith', is positioned above the typed name.

Fiona Galbraith
Director, Policy