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The Manager
Contributions and Accumulations Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: intrafundconsolidation@treasury.gov.au

Dear Manager,

INTRA FUND CONSOLIDATION OF SUPERANNAUTION INTERESTS

The Association of Superannuation Funds of Australia (ASFA) would like to provide this submission with respect to the revised exposure draft legislation and explanatory material on the intra-fund consolidation of superannuation interests.

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 industry. 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.

General comments

We have reviewed the revised exposure draft and are pleased to note the significant changes made. ASFA considers that the change to a higher level trustee obligation will result in a better administrative process and provide trustees with sufficient flexibility to result in a significant lessening of the likelihood that a member will be adversely affected by this new requirement on trustees.

Specific comments

Duty to identify multiple interests

Section 108A refers to situations where a member has 'more than one superannuation interest' in the fund.

The industry understands that the policy intent that this only apply to accumulation interests and is to exclude defined benefit interests and pension interests. An exclusion for defined benefit interests can be inferred from the bracketed reference in sub paragraph 108A((1)(c) and pension accounts could be excluded through the operation of subsection 108A(1A). ASFA considers that

the legislation would benefit by the inclusion of a specific reference that the provisions do not apply to a defined benefit interest and a pension interest.

Duty to act in the best interest of the member

Paragraph 108A(c) of the exposure draft legislation requires the trustee to 'merge the interests if it is the best interests of the member to do so'. We are unsure as to what level of protection is provided in the legislation for trustees who act in good faith in accordance with the legislation.

The examples in paragraphs 1.24 – 1.29 of the explanatory statement highlight some of the difficult judgments that a trustee may need to make as to what is and is not in the best interests of the member. To overcome this and to avoid the possibility of legal action by a disaffected member, trustees may consider that they need the protection of a process which requires the member to 'opt-in' before accounts are consolidated. Such an outcome would be a costly exercise and reduce the likelihood that unnecessary accounts would be consolidated.

ASFA requests that the level of protection provided by the legislation to trustees be reviewed and that consideration be given to amending paragraph s108A (1)(c) so that the test for whether interests should be consolidated is subjective, not objective.

ASFA suggests that the requirement should be to:

....merge the interests if the trustee reasonably believes it is in the best interest of the member to do so

Commencement date

The application provisions state that the amendments made apply from 1 January 2013. Given this, the requirement set out in paragraph 108A(1)(a) must be met by 1 January 2013. That requirement is to have established rules which set out a procedure for identifying when a member of the superannuation entity has more than one superannuation interest in the superannuation entity.

Given that this is exposure draft legislation and therefore subject to change, ASFA has concerns about the ability of funds to meet this requirement in the limited time between knowing the exact requirement (ostensibly when the bill is introduced to parliament) and 1 January 2013. Given that a breach of this provision is a strict liability offence, ASFA requests that this issue be given immediate attention by the Regulator once the requirement is legislated with a view to providing relief.

Explanatory statement

The intra-fund consolidation requirement is now set as a higher level trustee obligation to merge a member's interest within a fund where it is in the member's best interest to do so. This necessarily results in less detail in the legislation leaving more matters more open to interpretation. Where uncertainty lies in the legislation it is accepted practice to turn to explanatory material for additional guidance. In such circumstances the wording in the Explanatory Statement (ES) takes on extra significance.

Our experience is that trustees and their advisers lean heavily on explanatory material for guidance where uncertainty exists in the law.

In this context, ASFA has identified the following parts of the ES where consideration should be given to amending the wording:

Paragraph 1.12

This paragraph gives an example of where two separate interests are merged by creating a single account for the member with a single fee whilst retaining the separate investment options. ASFA supports such an arrangement where those existing interests were within the same product. However we would be concerned if such an arrangement was permitted across separate products in a fund and it resulted in the single fixed fee being subsidised by other members of the fund.

On the topic of examples more generally, ASFA request that the examples mention other matters that need to be considered beyond fees and charges. For example, consideration of the member's age, potential future contributions, account balance etc. may also be relevant to the decision of what is in the member's best interest.

Paragraph 1.13

This paragraph deals with the ability of trustees to develop their own procedures for dealing with multiple interests. It states that:

The fact that a MySuper interest may offer less investment choice is not in itself evidence that it is in the member's interest to retain a choice interest.

We are concerned at the specific reference to a MySuper interest. The reference would tend to suggest a bias towards consolidating to a MySuper interest or that a MySuper interest should be given separate consideration. Additionally, a MySuper interest by definition, does not offer investment choice but rather must offer a single diversified investment portfolio. Importantly, MySuper interest commence on 1 July 2013, post the completion date of the first intra fund consolidation process. Given all of the above, ASFA considers that a better wording may be:

The fact that one interest may offer less investment choice than another interest is not in itself evidence that it is in the members interest to retain the interest with the greater choice of investments.

Successive dot points in this paragraph state:

The fact that a MySuper interest may offer less investment choice is not in itself evidence that it is in the member's interest to retain a choice interest.

And

Similarly, the fact that two interests have different investment strategies is not in itself evidence that it is in the member's interest to retain separate interests.

While the ES goes on to give examples of when this might be the case, our concern is that a trustee may interpret this as an expectation that they should attempt to second-guess a member's deliberate decision to have money in two investment options or split between two products in a fund. ASFA considers that very few trustees will have sufficient information to make such decisions without reference to the member.

This raises the question as to whether the trustee capacity to consolidate interests without reference to the member should be disclosed on the application form or in the PDS for all

products and the flow on implication for this. ASFA seeks clarification on this matter. (See comments above regarding our concerns with the legislation around the trustee liability issue.)

The example in the third dot point in this paragraph seems based on the premise that the fees are charged on a flat dollar-per-week basis. ASFA would like to see a further, counter, example given that is based on the premise of asset based fees such as:

Conversely, where the fees charged are asset based fees, there may be no difference in fees between the member having multiple accounts or a single account and there would be no monetary gain to the member by the interests being consolidated.

Paragraph 1.14

Paragraph 14 deals with the restriction on charging fees for these consolidations.

In explaining why no fees will be permitted to be charged for these consolidations, the ES notes that

In respect of existing assets, these consolidations are mostly a record keeping change.

It would assist if the ES stated explicitly that it is possible for a trustee to recover costs associated with the sale and purchase of assets required to be undertaken as part of any account consolidation process.

If that is not possible, trustees could decide to not consolidate large account balances because those costs will be borne by other members of the fund.

Paragraph 1.15

This paragraph deals with the circumstances where the trustee does not need the consent of the member

The ES notes, that “trustees do not require the consent of the member” to consolidate their interests and then goes on to provide an example of where a trustee could consider adopting an opt-out (i.e. implied consent) model and also to state that the trustee needs to consider any significant event requirements set out by ASIC). The presence of this statement creates uncertainty as to whether consent is or isn’t necessary or whether the issue merely needs to be considered in the context of developing the policy on intra fund auto consolidation.

Does the trustee’s power to consolidate interests and override the member’s explicit investment choices or their explicit decision to have part of their money in a choice product arise from the new subsection 29E(6B) license condition impose on RSE licensees?

This raises the question: Would the trustee be in breach of section 108A if it established rules which:

- Did not require member consent prior to consolidation and
- Only provided a notice to the member after the consolidation had been completed?

In our view, the benefit of the ES would be enhanced if paragraph 1.15 gave a more expansive explanation of the consent issue, particularly so with respect to new subsection 29E(6B), and including examples on when it might be appropriate to use of opt-in, opt-out and post consolidation notification arrangements.

Consideration should also be given as to whether there is a need to more clearly set this out in new section 108A. ASFA considers it necessary to provide an appropriate level of legal protection for fund trustees complying with their legal obligations.

Finally, ASFA considers it would be of assistance if the ES provided clarification of the acceptable ways of notifying members about the fund's consolidation process.

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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.

Yours sincerely
Margaret Stewart



General Manager, Policy and Industry Practice