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File Name: 2012/73

5 November 2012

The Senior Adviser
Superannuation Unit
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: strongersuper@treasury.gov.au

Dear Sir \ Madam,

EXPOSURE DRAFT – SUPERANNUATION LEGISLATION AMENDMENT (FURTHER MEASURES) BILL 2012

Thank you for the opportunity to prove comment in relation to the Exposure Draft of the *Superannuation Legislation Amendment (Further Measures) Bill 2012* (the "Bill").

About ASFA

ASFA is a non-profit, non-politically aligned 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 comprises all sectors of the superannuation industry. As such, we do not represent any one sector, and form policy that aims to be in the best interest of fund members.

About this submission

We are taking this opportunity to restate some concerns we have with the Stronger Super legislation, in particular with respect to MySuper.

Our main concerns with the Stronger Super legislation include:

- the whole paradigm in which MySuper has been constructed, including the definition of accrued default amounts and amendments to section 29WA;
- the timing of the implementation;
- the need for APRA to have, and exercise, an exemptions and modifications power;
- the undue restrictiveness of the administration fee provisions;
- the inappropriate use of offences of strict liability; and
- an aspect of a defence available to trustees \ directors.

Comments which relate specifically to aspects of the Bill have been enclosed in **Annexure B**.

1. MySuper Definitions

1.1 Paradigm in which MySuper has been constructed

Recommendation 1.1: - We submit that MySuper should be thought of, and legislated to be, a type of category \ division of membership whereby:-

- a person who joins a fund as a standard employer sponsored member and doesn't participate in investment choice – member is placed into the "MySuper" category with money invested in the "default" option and insurance\fees which pertain to that category of membership;
- a person who joins as a public offer member or a standard employer sponsored member begins to participates in investment choice – member is placed into a "Choice" category with investment options and insurance\fees which pertain to that "Choice" category.

As first raised in our submission to Treasury on 18 October 2011, we have serious reservations about the paradigm in which MySuper has been constructed. The whole approach of focussing on the underlying investment options and not on the member is flawed.

The Super System Review strongly recommended that the superannuation system should be member centric and advocated a member "choice architecture" model.

The current paradigm reflected in the legislation is focussed on MySuper money and choice money, leading to outcomes where a member's status as a MySuper member and \ or a choice member can fluctuate daily, or even more frequently, in line with their investment choices. By virtue of investment switches a member could be a MySuper member one day, both a choice and MySuper member the next, a choice member only the next day and back to being a choice and MySuper member the following day.

The current interpretation effectively denies choices that members have made with respect to their fund and \ or their investment options \ strategies.

Ideally MySuper should have been created as a type of category \ division of membership as follows:-

- a person who joins a fund as a standard employer sponsored member and doesn't participate in investment choice – placed into the "MySuper" category with money invested in the "default" option and insurance\fees which pertain to that category of membership;
- a person who joins as a public offer member or a standard employer sponsored member begins to participates in investment choice – placed into a "Choice" category with investment options and insurance\fees which pertain to that "Choice" category.

This "category" paradigm would allow those funds who want to "re-badge" their investment option to do so - insurance and fees across the"categories" would simply be the same.

The current "investment choice" paradigm creates a number of difficulties, with such important matters as insurance and administration fees attaching to the investment options in which a member's money is invested as opposed to attaching to the member and their account.

This appears to be based on a policy position that, simply because a member has chosen to have part or all of their money invested in the default investment option, then that money must be treated as "MySuper money" and, accordingly, the member as a MySuper member.

From a policy perspective this does not appear to be what the Super System Review intended as it made a distinction based on disengaged\MySuper members and engaged\Choice members, as

opposed to MySuper and Choice money. Making a distinction between “MySuper money” and “Choice money” makes no sense.

We believe the purpose of MySuper is to protect the interests of disengaged member who have not made any choices. Accordingly, we see MySuper as having a valid role to play with respect to: -

- “default” members - who have not made any choices; and
- those members who choose to invest in MySuper.

For those members who have chosen to participate in a particular fund or in investment choice, however, it is appropriate to treat them as a choice member – they have made choices as to their fund and \ or as to the investment of their money. This is not to say they could not choose to place money in a MySuper product but this would be by their active choice.

The Super System Review clearly makes reference in a number of places to members being free to “actively choose” or “select” to have their money in a MySuper product. The Bill does not reflect this - in fact quite the opposite.

The Super System Review final report makes a number of statements about MySuper and choice members and how members would come to have an interest in a MySuper product. These have been extracted into Annexure A.

As can be seen from the extracts in Annexure A, the Super System Review repeatedly referred to members “actively choosing” to have their money in MySuper, not opting out of having it transferred there.

While implementation \ placement strategies does refer to members invested in default being placed into MySuper we note that: -

- this is the only reference to this in over 500 pages of the final report;
- given there was only one paragraph \ two sentences with respect to this it may be appropriate to characterise this more along the lines of preliminary thinking than a fully fleshed out final position; and
- the use in this context of the word “could” - not “should” or “would” but “could”.

Accordingly, we suggest that members who have chosen to have an amount invested in the default option should be treated as a choice member and not have any amounts moved into MySuper.

1.2 Definition of "accrued default amount" - three amendments required

Recommendation 1.2: -We submit that the current definition of "accrued default amount" should be replaced by the following definition:-

"(1) Subject to this section, an amount is an accrued default amount for a member of a regulated superannuation fund if:

(a) the amount is attributed by the trustee or the trustees of the fund to the member of the fund; and

(b) both of the following applies:

(i) the member joined the fund, or a previous fund prior to the transfer of benefits to the fund, as a standard employer sponsored member of the fund ; and

(ii) the member has not given the trustee or the trustees of the fund, or of a previous fund, any direction on an investment option under which an asset (or assets) of the fund, or of a previous fund, is or was to be invested; or

(c) the trustee has determined in its absolute discretion that the amount shall be an accrued default amount."

We also suggest new sub-sections at the end of section 20B as follows:-

"(5) A determination under paragraph 20B(1)(c) has effect despite anything contained in the governing rules and a trustee of a regulated superannuation fund is not subject to any liability to a member by virtue of making such a determination."

"(6) For the purposes of sub-paragraph 20B(1)(b)(i) a reference to a standard employer sponsored member includes a member who was a standard employer sponsored member of a previous fund, as a result of an application to join the fund made by the member's employer on the member's behalf, whose benefits have been transferred to the fund as the result of a successor fund transfer."

"(7) For the purposes of sub-paragraph 20B(1)(b)(ii) a reference to a member giving a direction with respect to the investment option under which an asset (or assets) of the fund are to be invested includes a direction which was given to the trustee of a previous fund, where the member's benefits have been transferred to the fund as a result of a successor fund transfer."

There are three main issues with the current definition of "accrued default amount" as follows:-

a) it does not recognise directions given to trustees of previous funds, where the member has been transferred as a result of a successor fund transfer;
b) it includes members who chose the fund and joined as a public offer member;
c) it includes members who have given investment choice directions.

a) Direction to trustee of previous fund where successor fund transfer has occurred

The legislation currently refers to directions given to the trustee. In circumstances where a successor fund transfer has occurred, frequently directions as to investment choice options will have been given to the trustee of the previous fund, not the trustee of the current successor fund.

As such, the legislation should recognise the validity of a direction given to the trustee of a previous fund, where the member has been transferred into the current fund as the result of a successor fund transfer.

b) members who chose the fund and joined as a public offer member
c) members who have given directions as to investment choice

Validating and recognising member choices – the Stronger Super Review's Choice Architecture Model

As per the Stronger Super review and the discussion above, there should only be two ways in which a person can become a MySuper member: -

- they have made no decision about their fund \ investment option and therefore have been defaulted into a fund's MySuper product; or
- they have actively chosen the MySuper product, either because they do not want to participate in investment choice or for some other reason, such as lower fees.

Considerable concern has been expressed by our members about the definition of "accrued default amount", which includes amounts

- where the member has chosen to invest in the fund (pubic offer members); or
- has given the trustee a direction as to where to invest their account balance and some, or possibly all, of their account balance has been invested in the "default" investment option.

We query why – in circumstances where a fund has been chosen or a direction as to the investment option has been given – an amount is to be treated as an "accrued default amount". This amounts to the government interfering with, and effectively overriding, valid financial decisions made by the member.

The explanatory memorandum's rationale with respect to members who have chosen the "default option" - that the member has "explicitly chosen to delegate responsibility for investment decisions to the trustee" – reveals a fundamental misunderstanding of the principles underpinning member investment choice (other than member directed products). When a member exercises investment choice they are choosing between various investment options, in respect of ALL of which the trustee is ultimately responsible, and the member is delegating responsibility to the trustee with respect to ALL of those investment options.

There is nothing inherently special about the "default" investment option per se other than – as the name implies - it is the one into which members who have not made a choice have their contributions "defaulted". For members who have chosen to have part or all of their account balance invested in this option it is just like any other investment option – part of their diversified investment portfolio.

Furthermore, there is the matter with respect to the fair allocation of costs between MySuper and choice products and the charging of administration fees. It is likely that choice products will offer enhanced product features, such as member investment choice, more complex insurance and more interactive web access and as such will be more expensive.

Under the Bill, with the current definition of "accrued default amounts", a member who is participating in member investment choice could have part of their benefit in one or more investment options offered by a choice product and part in the MySuper product. It is unclear as to the position of the trustee with respect to charging administration fees to that member.

MySuper and Choice products are to have separate (cost recovery) administration fees but it is not at all apparent how this will work in practice. In particular, it would appear that a member who had money in both MySuper and Choice products may need to be charged two administration fees, one with respect to each product.

Furthermore, there are considerable practical difficulties with respect to funds which currently have, or will adopt for MySuper, "lifecycle" investing, as they will have a number of different default options depending on the age of the member and the cohort to which they belong. It is not clear how the definition of "accrued default amounts" is to be applied in these funds.

1.3 Amendment to paragraph 29WA(1)(c)

Recommendation 1.3:- We submit that paragraph 29WA(1)(c) should be amended as follows:-

"(c) either:

(i) the person has not given the trustee, or the trustees, of the fund, or of a previous fund, a direction in writing that the contribution is to be invested under one or more specified choice products or investment options; or

(ii) the person has given the trustee, or the trustees, of the fund, or of a previous fund, a direction in writing that some of the contribution is to be invested in one or more choice products or under one or more specified investment options, but no such direction has been made in relation to the remainder of the contribution."

The tranche 1 bill introduced section 29WA which required that, where no election is made that contributions are to be paid into a choice product, contributions must be paid into a MySuper product.

The Bill amends paragraph 29WA(1)(c) and now refers to a direction that the contributions are to be invested in one or more investment options.

Rather than referring to either choice product or investment option, ASFA submits that paragraph 29WA(1)(c) should refer to both choice of product and choice of investment.

Accordingly, we submit that paragraph 29WA(1)(c) should be amended to make reference to both choice products and investment options.

2. Timing of obligation to pay default contributions into MySuper

Recommendation 2: – The period from which default contributions must be made to a MySuper offering should not commence until 1 July 2014.

ASFA supports the commencement date of 1 July 2013.

ASFA was pleased to see the amendment of the first tranche bill to extend the date from 1 October 2013 to 1 January 2014 by which employers making "default" contributions, in compliance with the Superannuation Guarantee ("SG") legislation, will pay those contributions to a fund with a MySuper offering.

Having said that, ASFA strongly believes that the employer's compliance date must be extended to 1 July 2014.

The Super System Review envisioned that implementation would involve **at least a two-year** transition period **from passage of legislation** to establish the new regime.

At this point in time – in the first week of November, with only one week of Parliamentary sittings scheduled for the remainder of this calendar year - we have: -

- one bill passed
- one bill in the Senate
- one bill in the House of Representatives
- one bill which is only an exposure draft
- no regulations (not even draft)
- only draft prudential standards
- no guidance as to the draft prudential standards (not even draft guidance) other than the transition standard

and yet we have APRA expecting final, board approved, applications, accompanied by policies, processes and procedures which comply with the **final** prudential standards (once made), and board certification to that effect, to be submitted to them early in the new year in order to be able to meet the (somewhat ambitious) regulatory timetable.

Compliance with these reforms will necessitate considerable changes being made to a mature and complex superannuation system. The Future of Financial Advice (FoFA), SuperStream and APRA reporting reforms also have a significant impact on a number of superannuation funds.

Trustees need a degree of certainty to make the threshold decision whether to provide a MySuper offering, as well as the many consequent strategic and implementation decisions necessary to produce a MySuper offering.

At this time only the first three tranches of the MySuper legislation have been introduced into Parliament and only one has been passed. The exposure draft of this Bill was only released on 18 October 2012 and we are yet to see any draft regulations, which will prescribe a number of critical matters.

Accordingly, we are unlikely to see final legislation until the first or second quarter of 2013. There is little remaining time to make all of the necessary decisions and to implement the required changes. This is during a time when trustees also have to implement considerable changes in order to comply with FOFA, SuperStream and APRA data reporting.

Implementation of the legislative requirements will involve the identification of, and agreement upon the approach to, considerable and extensive alterations to IT systems; processes and procedures and fund documentation such as governing rules and product disclosure statements. Business requirement documents, let alone functional and technical specifications, cannot be agreed upon and signed off, nor most IT systems work commenced, until such time as there is a high degree of legislative certainty.

In order to meet the current statutory and APRA deadlines trustees need to perform analysis and make decision as to significant systems and other changes - for example to provide business requirements to software providers – based on the details currently available, yet there are requirements which will be contained in the regulations which could be incompatible with such decisions. Obviously minor adjustments could be accommodated, however, major changes from what was anticipated would present a significant difficulty to trustee and service providers.

Change management of this magnitude and with a high degree of interrelatedness is not only expensive but, more importantly, making significant alterations to member databases and IT systems poses the risk of lost or corrupted data or functionality, which can result in inaccurate or incomplete member records. The most effective means by which such a risk is mitigated is by utilising robust project management methodologies to determine timelines; identifying

interdependencies; producing a staged project plan; including sufficient time for regression and user acceptance testing, and then executing in accordance with the plan.

All of this takes time and resources.

Often there are capacity constraints, interdependencies and unintended consequences, especially when it comes to implementing system changes. Rushing to meet deadlines materially increases the risks to a project and will increase costs, which are ultimately borne by the members.

There is also considerable concern that MySuper applications to APRA in early 2013 necessitate Board certification as to demonstrate compliance with the APRA Prudential Standards which will not be finalised until late 2012. Further, the APRA MySuper application form requires a detailed business plan, which is nigh on impossible given the amount of information which is still draft or unknown.

It should be noted that the Regulation Impact Statement with respect to the MySuper bill stated as follows (emphasis added): -

- "[t]he requirement that employers have to make default contributions to funds offering a MySuper product from **1 July 2014**" (Page 15);
- "It is expected most trustees will offer a MySuper product so they are able to accept default contributions from **1 July 2014**" (Page 17);
- " ... some MySuper products may not be licensed until close to **1 July 2014**" (Page 20)

To the extent that the time-frame is contracted, costs are driven up and the quality of outcome is potentially compromised. This is exacerbated by the fact that the entire industry is implementing the same reforms, with the available pool of resources, and is constrained to the same (shortened) timetable of needing to have MySuper in place for 1 January 2014, as opposed to 1 July 2014.

We submit that – in order to mitigate the risks outline above – the six months from 1 July 2013 to 1 January 2014 is not an appropriate transitional period. While funds should be able to have MySuper offerings from 1 July 2013, the period from which default contributions must be made to a MySuper offering should not commence until 1 July 2014.

Should a fund, for whatever reason, not be in a position to have a MySuper offering in place by 1 January 2014 all employers who have nominated that fund as a default fund will be forced to go through the process of nominating another fund, advising their employees of this and then making default contributions to that other fund. This will have the effect of having to create a new account for all of the affected employees in the second fund to accept default contributions, possibly for a limited time, while their account balances remain in the first fund, thus subjecting these employees to multiple fees.

3. Need for exemptions and modifications power

Recommendation 3: – That the definition of "modifiable provision" in section 327 of the SIS Act be amended to include Part 5C and any other provisions which may be considered relevant.

Part 29 of the *Superannuation Industry (Supervision) Act 1993* ("SIS" Act) empowers APRA to grant exemptions and make modifications to specified provisions of the SIS Act.

Given the diversity and complexity of superannuation funds, forcing trustees to adhere strictly to "one size fits all" legislation may, on occasions, cause a number of members to be detrimentally affected. One of the fundamental duties of a superannuation trustee is to act in the best interests of members, and as such it is a sub-optimal outcome if complying with the legislation leads to outcomes where members are worse off.

In addition, strict compliance may cause a trustee to incur costs which are considerably in excess of those which would be necessitated by complying with slightly modified provisions, while still achieving substantially similar outcomes.

There are already precedents in the legislation where a trustee does not have to comply with particular provision if the trustee considers that it is not in the best interests of members to do so. One such example of this is the provision with respect to performance fees (section 29VD).

Accordingly, we consider it important that the exemptions and modification power be extended to Part 5C of the SIS Act to empower APRA to exempt classes of trustees, or individual trustees, from full compliance with a particular provisions or to modify how the law applies, subject to any conditions which APRA may impose. This would have the protection of being administered by APRA, while having the flexibility to accommodate specific circumstances.

4. Prohibition on caps on fee scales

Recommendation 4: -The provision which states that all members should be charged the same percentage **amount** should be replaced with a requirement that all MySuper members must be charged a fee in accordance with the same percentage **scale**.

Under amendments proposed to be made under the tranche 1 bill, MySuper members must all be charged the same flat fee or percentage **amount** or combination of the above. To the extent that the fees being charges are percentage fees then those fees are limited to each member being charged the same percentage of their account balance.

We first raised our concern with respect to the application of this provision to administration fees in our submission on the tranche 1 bill dated 18 October 2011.

Where the trustee has adopted a percentage based fee with respect to administration fees, in whole or in part, they are limited to charging each member the same percentage of their account balance. It is not readily apparent why a ban on the use of fee scales, and the capping of administration fees, is being imposed.

Administration costs are not directly proportional to the size of the account and, as such, administration fee scales have been developed. It does not cost 100 times as much to administer an account of $100,000 as it does an account of $1,000 and fee scales have been developed to reflect this.

Trustees, in exercising their fiduciary duties, have often developed a reducing fee scale as they have considered that this is in the best interests of members and that it produces a more equitable outcome.

It is quite common for funds to either use administration fee scales and \ or capping the maximum amount of administration fee which is charged. This is done, for example, by charging:-

- a fixed percentage of assets on, say, the first $100,000 of the account balance;
- a lower percentage on, say, the next $100,000 of the account balance; and
- no fee with respect to the balance of the account.

This should be allowed to continue.

It is important to note in this context that all members are charged the same percentage by reference to the same fee scale; however, the actual percentage charged to each member will be a function of where their account balance falls along the scale.

Inappropriate use of offences of strict liability

Recommendation 5: – That the strict liability provisions be replaced with fault provisions to the effect that "A person who intentionally or recklessly contravenes [relevant provision] is guilty of an offence punishable on conviction by a fine not exceeding [X] penalty units".

There are a number of the obligations in the legislation which are capable of one-off instances of technical non compliance or which can be rectified easily with no harm to members, as the member can be placed back in the position they would have been in had the non-compliance not occurred. Accordingly, considerable concern has been expressed that the imposition of strict liability offences is inappropriate in these circumstances.

We submit that the strict liability provisions should be amended to "at fault" provisions. This recognises the need for there to be an offence with respect to deliberate or systemic failures, however, it also reflects that liability will be a function of undesirable behaviour or conduct, as opposed to arising through inadvertent administrative or operational errors or omissions.

Failing that, consideration should be given to introducing explicit reasonable steps, or safe harbour, defences.

5. Director's liability

Recommendation 6 - The phrase "in relation to the loss or damage suffered" should be inserted before "in relation to the investment" in sub-section 55(5) and "in relation to the management of the reserves" in sub-section 55(6).

ASFA welcomes the proposed changes to sections 29VP and paragraph 323(1)(b) and the introduction of section 29VPA and sub-section 55(4A).

We do, however, have one concern remaining with respect to sub-section 55(5), which provides a defence if the director \ trustee complies with the covenants.

Proposed new sub-section 55(5) states as follows:-

> *"(5) It is a defence to an action for loss or damage suffered by a person as a result of the making of an investment by or on behalf of a trustee of a superannuation entity if the defendant establishes that the defendant has complied with* ***all of the covenants*** *referred to in sections 52 to 53 and prescribed under section 54A, and all of the obligations referred to in sections 29VN and 29VO, that apply to the defendant* ***in relation to the investment****" (emphasis added).*

Proposed new sub-section 55(6) is in similar terms with respect to the management of reserves.

While the phrases "in relation to the investment" and "in relation to the management of the reserve" qualify the phrase "all of the covenants", nevertheless it appears as though the trustee must have complied with all of the covenants irrespective of whether they are relevant, or could have contributed to the loss or damaged incurred.

Accordingly, ASFA submits that the phrase "in relation to the loss or damage suffered" should be inserted before "in relation to the investment" in sub-section 55(5) and "in relation to the management of the reserves" in sub-section 55(6).

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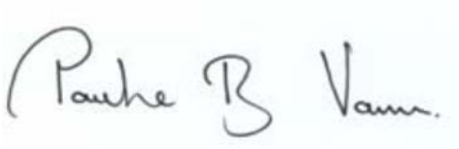
Should you have any queries or comments regarding the contents of our submission, please contact me on (02) 8079 - 0805 or 0433 169 342 or pvamos@superannuation.asn.au or Fiona Galbraith on (03) 9225 - 4021 or 0431 490 240 or fgalbraith@superannuation.asn.au.

Yours sincerely



Pauline Vamos
Chief Executive Officer

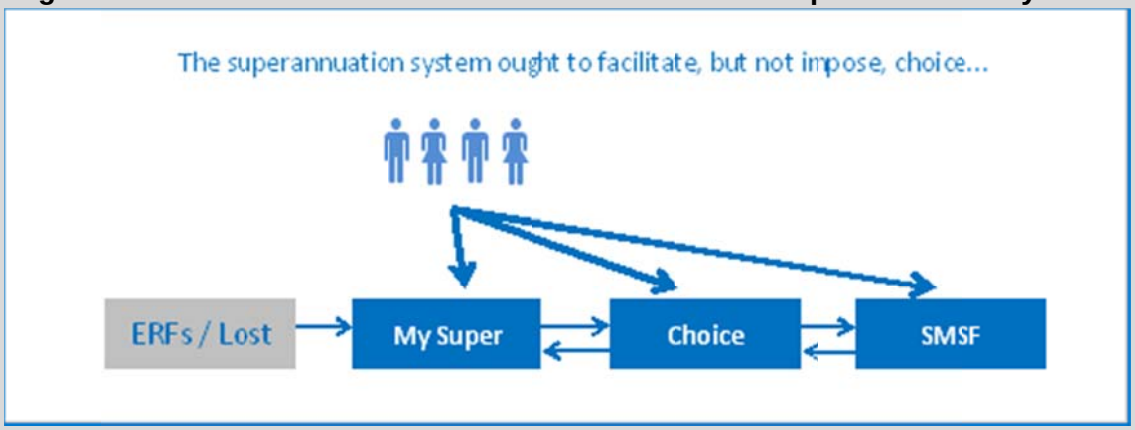
ANNEXURE A

The Super System Review final report makes a number of statements about MySuper and choice members and how members would come to have an interest in a MySuper product (references are to Part 2 unless otherwise indicated, emphasis has been added): -

A New Architecture for Super

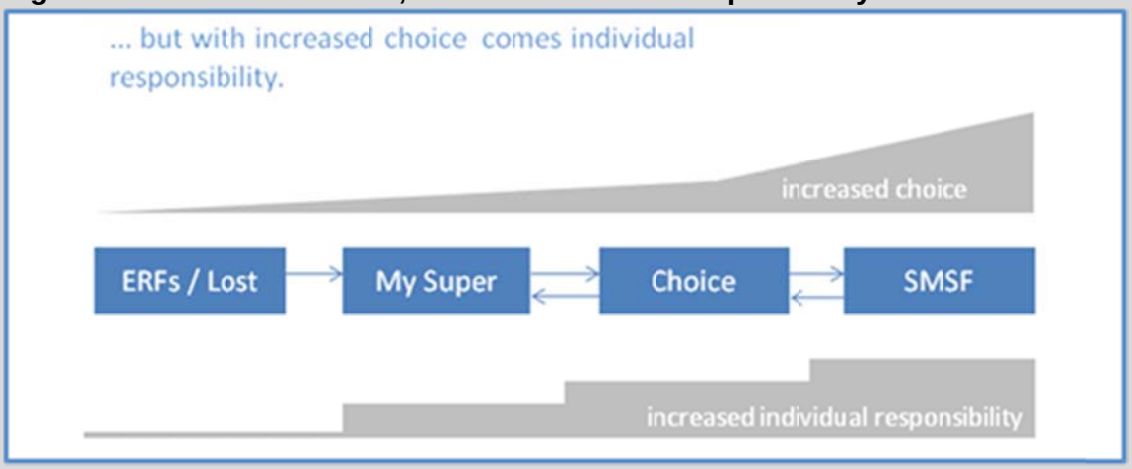
- The Panel believes that there has to be room in a system, where there are compulsory contributions, for a governance model that addresses **not only the disengaged member**, **but also the member who exercises choice** about the **fund** (or **investment option** in the fund) to which they belong.
- Figure 1.1 below sets out an approach which starts from a member, rather than a product or industry sector, perspective. In behavioural economics terms, this is a 'choice architecture' mode

Figure 1.1: A choice architecture model for Australia's superannuation system



- The model **classifies members into three main types** — MySuper, choice and SMSFs — **on the basis of whether or not they have made a choice about their superannuation** and the nature of the choice made. A number of submissions indicated a desire to see differentiation along these lines (Page 6);

Figure 1.2: Increased choice, increased member responsibility



- **MySuper** would be **available to those who actively choose to be there** and the **choice sector caters for those who wish to tailor their super** (Page 7);
- People could have interests in both MySuper and choice products at the same time, **though this would be by active choice (Page 7)**
- the model uses the **conscious choices and choice - related outcomes of individuals** to calibrate the levels of governance, regulation and member protection applicable (Page 8)

- the model accommodates **movement of members between the sectors**, albeit with some regulation. The potential for moral hazard and the removal of layers of protection mean that **movement towards sectors offering increasing choice** (that is, **to the right in the choice architecture model** in Figure 1.2) cannot be allowed to be inadvertent. Participants moving in that direction must **signal their intention expressly and unambiguously**. Having done so, they should **be allowed to move** with minimal friction and cost. On the other hand, no special restrictions need to be placed on **member movement in the other direction** (for example, a move from an SMSF to MySuper) (Page 8)

Purpose of MySuper

- MySuper does not just cater for disengaged members — it is also designed for members who **choose actively to participate in this product** (Page 9).
- the Australian superannuation system should be able to ensure that there is a **value for money, simple and effective product** for members to rely on - whether that reliance is **preferred by the member or** is **due to an inability or disinclination to choose** (Page 9)
- With the lower costs and traditional trustee obligations, the Panel believes that many engaged investors will **actively choose** to have **their superannuation** in MySuper (Page 9)
- Also, as noted, MySuper is not just for people who are disengaged. With the lower costs and traditional trustee obligations, the Panel believes that many **engaged investors will actively choose** to have their superannuation in MySuper (Page 10).
- MySuper is also for members who **choose** to **rely on an investment strategy** developed, in their interests, by a fund trustee. Employees would therefore also be able to **select MySuper products as a 'choice of fund'** for SG Act purposes (Page 10).
- There are some members who want to exercise choice over the investment strategies applied to their superannuation balances, but want to have their accounts administered for them. These members can elect to be in the choice segment, though they might decide that a MySuper product meets their needs and **elect** to have their money invested there (or in a combination if MySuper and choice products (Part 1, Page 10).

Implementation

- Although new employees would be in a MySuper product unless they made an active choice in favour of a choice product, trustees would need placement strategies for existing fund members until otherwise directed by the member. These would include:

(a) members with benefits wholly in the default investment option could be placed into the MySuper product;

(b) members with benefits spread over a default option and other investment options **could** be placed in both the MySuper product and the choice product, with the trustee obliged to give effect to any existing arrangement to split future employer SG contributions between the products; and

(c) members with no benefits in the default investment option could be placed into a choice product based on their selected investment option (Page 29).

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ANNEXURE B

SPECIFIC ISSUES WITH THE BILL

1) Item 39 - paragraph 29TC(1)(g)

There are two issues with this proposed paragraph: -

A) Obligation to retain members in tailored MySuper product unless consent to transfer

It is important to note that, prior to the introduction of MySuper, when an employee ceased employment there were no regulatory requirements with respect to the product into which the trustee could transfer that member's interest.

One of the major underlying policy rationales for MySuper was to create a legislatively regulated "default" product into which the balances of members who did not make an election with respect to their superannuation, such as employees who had ceased employment and were no longer eligible to remain in a corporate fund, could be placed.

This was enshrined in the **original** paragraph 29TC(1)(g) of the Bill which imposed a new obligation on trustees that

> "a [MySuper] interest cannot be replaced with a beneficial interest of another class in the fund unless:
>
> (i) **the replacement is with an interest in another MySuper product** within the fund; **or**
>
> (ii) **the person** who holds the interest **consents in writing** to that replacement" (emphasis added).

It should be borne in mind that generally (with the exception of tailored large employer products) RSEs are only able to offer one MySuper product. Competitive pressure will ensure that each RSE will endeavour to ensure that its generic MySuper product fees are as low as possible, while striving to maximise returns.

The justification for introducing MySuper is that it will be an appropriate product into which to place the superannuation interests of members who do not make an election with respect to their superannuation. If this is not the case then what is the point of the industry incurring the considerable costs to develop and licence MySuper products? The requirement for consent serves to imply that regulation around MySuper products will be insufficient to protect members.

ASFA submits that transfer to a MySuper product should offer sufficient protection.

If this is not considered to be the case then this should be a matter about with respect to which APRA should be able to exempt trustees from compliance, if they are satisfied that the proposed MySuper product into which the trustee proposes to transfer the benefit provided adequate protection for the member.

(b) Consent no more than 30 days before the replacement occurs

While supportive of transfers \ roll-overs occurring within 30 day, consent is not the only thing which must be received by the trustee prior to a transfer taking place. Division 6.5 of the SIS regulations explicitly recognises, and address, the fact that the trustee need to receive certain information before they can transfer \ roll-over the benefit. ASFA submits that the Bill should recognise this.

Furthermore, rather than creating a positive obligation on the trustee to roll-over within 30 days, the Bill states what should be a positive obligation as a passive requirement - that consent must be received "no more than 30 days before [the replacement] occurs". This has the result that, if the trustee is not in a position to be able to transfer \ roll-over the benefit within 30 days (say, for example, that the member has not provided certain necessary information), then the nature of the passive legislative obligation is such that the trustee must obtain the member's consent again – this is clearly nonsensical.

As such, ASFA submits that the Bill be amended to insert a positive obligation to roll-over \ transfer within 30 days of receiving consent and all of the necessary information.

Alternatively, given that Division 6.5 of the SIS regulations would apply in any case, consideration could be given to deleting the reference to consent "no more than 30 days before it occurs" altogether.

2) Item 109 – new Part 22 – Infringement Notices

ASFA submits that decisions with respect to infringement notices, including a decision to issue a notice, grant or deny an extension of time to pay and to withdraw a notice, should be reviewable decisions for the purposes of the SIS Act.

Accordingly, ASFA submits that the definition of "reviewable decision" in section 10 of the SIS Act should be amended to include the above decisions.

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