FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

Further MySuper & Transparency Measurers Bill

FPA SUBMISSION TO PARLIAMENTARY JOINT COMMITTEE (PJC) | DATE: 03.10.2012

Superannuation Legislation Amendment (Further MySuper and Transparency) Bill 2012

A Bill for an Act to amend the law relating to superannuation, and for related purposes

FPA submission to:
The Secretary
Parliamentary Joint Committee (PJC) on
Corporations and Financial Services

03 October 2012

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INTRODUCTION

The FPA supports the intention of the MySuper objectives, which is to provide a simple and cost-effective superannuation product including a simple set of product features, irrespective of who provides them. The purpose is to enable super fund members (and potential members), employers and market analysts to compare funds more easily based on a few key differences.

The FPA also understands that MySuper is intended to ensure super fund members do not pay for any unnecessary 'bells and whistles' they do not need or use, especially were they do not require or generally do not request these additional services.

The FPA supports the intention and concept of Intra-fund advice. However, the FPA submits that all forms of personal financial advice should be subject to the same set of rules, irrespective of the provider or subject matter. A workable scalable advice framework is critical to enable greater access to affordable financial advice for more Australians. Intra-fund advice is a subset of scalable advice.

It is critical that the FOFA reforms such as the best interest duty and specific related remuneration provisions allow for scalable advice and are not undermined by the current battle between large superannuation funds/institutions, that MySuper will create, over the number of members they can ‘retain’ from their competitors.

The FPA wants to be very clear that the two main concerns with the current MySuper legislation is the unintended consequences that the transition to MySuper may create with the definition of an ‘accrued default amount’ and the dangers of reduced protections for members as a result of the Intra-fund advice concept, as currently drafted.

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Intra–fund advice – schedule 1

The FPA is concerned that the cost of *Intra-fund (personal) advice* is allowed to be hidden and bundled in as an administration fee, effectively removing protections for clients that transparency, disclosure and choice provides when dealing with a financial planner.

Paragraph 1.46-1.50 of the EM states that collective charging extends to advice on related pension options, related insurance products and cash management facilities.

The FPA has no objection or concern with the provision of providing and collective charging for factual information and general advice. The FPA's primary concern is the provision of **personal advice**, specifically relating to pension options and cash management facilities.

Within the Scaled Advice consultation paper, ASIC (CP183, para 66(b), p26) make the point that:

> *The same rules apply to all personal advice on the same topic, regardless of the scope of the advice. Scaled advice does not equate to lesser quality advice for clients or lower training standards for advice providers.*

The FPA submits that without a full understanding of the client's circumstances, the *Intra-fund adviser* will not be able to clearly identify the client's needs and objectives, and thus cannot act in the client's best interests as required by the Future of Financial Advice Act.

ASIC has also outlined this issue in its recent report on Shadow Shopping Study of Retirement Advice (REP 279, August 2012) that it would be difficult for advice providers to provide advice on retirement planning without some understanding of the client's cash flow and other financial commitments.

The best interest obligations as required under Div 2 of Pt 7.7A for those providing personal advice include:

(a) to act in the best interests of the client when providing them with personal advice (s961B);
(b) to provide the client with appropriate advice (s961G);
(c) to warn the client if the advice is based on incomplete or inaccurate information (s961H); and
(d) to prioritise the interests of the client (s961J).

The FPA is concerned that the provision of *Intra-fund (personal) advice* on related pension options does not match the requirements under the new FOFA legislation. Paragraph 1.48 of the EM indicates that collective charging is allowed for *Intra-fund advice* in moving a member from a superannuation (accumulation) fund to a pension fund, but **excludes specific product advice** on where the member's superannuation should be invested. This does not make sense. To provide *Intra-fund advice* to a member to 'move' (ie. make a recommendation) to move to a pension fund, without providing specific product advice is a contradiction.

> *s766B states that if a communication is a recommendation or a statement of opinion, or a report or either of these things, that is intended to, or can reasonably be regarded as being intended to, influence*

> *a client in making a decision about a particular financial product or class of financial product (or an interest in either of these), it is financial product advice.*

Therefore, an *Intra-fund advice provider* making a recommendation to a member to 'move', transfer, switch or rollover their superannuation fund to a pension fund (even if they are related) is a personal financial product recommendation.

Further, the nature of *Intra-fund (personal) advice* would not allow advice providers to complete reasonable inquiries into the client's relevant circumstances, as required under the ASIC guidelines for the best interests duty (ASIC CP182). This makes it difficult for the client's needs and objectives to be identified. In addition, the nature of *Intra-fund (personal) advice* means the advice provider will not be conducting a reasonable investigation into other financial products apart from that which the fund offers as required under the FOFA Act s961B(2). It is thus difficult to see how the advice can be in the best interests of the client, or place the client in a better position, if a limited number of products are considered against a limited amount of information about the client's relevant circumstances.

The provision of *Intra-fund (personal) advice* on related pension funds also raises concerns on conflicts of interests or more accurately 'prioritising the interests of the client' as required under the FOFA Act. No consideration is given to other products in the market and the only product recommended is related to the fund. The FPA believes that it will be difficult for the advice provider to give priority to the client's interests as required under the FOFA Act and ASIC guidelines, when the individual is only instructed to 'keep the member' in the fund.

ASIC have stated that:

> *…the advice provider should not act to further their interests, or those of any of their related parties, over the client's interests when giving the client personal advice…(CP182 para 51, p21).*

Related parties are defined by ASIC (CP182 para 50, p20) to include:

(a) the advice provider;
(b) an associate of the advice provider;
(c) an AFS licensee of whom the advice provider is a representative;
(d) an associate of an AFS licensee of whom the advice provider is a representative;
(e) an authorised representative who has authorised the advice provider to provide financial services (or a financial service) on behalf of an AFS licensee; or
(f) an associate of an authorised representative who has authorised the advice provider to provide financial services (or a financial service) on behalf of an AFS licensee.

The FPA also submits that the inclusion of cash management facilities in the provision of *Intra-fund (personal) advice* renders the advice no longer "Intra-fund", as these cash management facilities are not necessarily within the fund but may be provided by third parties. Further we question that advice on a cash management facility would not meet the sole purpose test, The advice on cash management facilities therefore should not be

collectively charged.

Accordance to ASIC's current position Intra-fund advice[2] is defined as:

> *Superannuation fund trustees (and their authorised representatives) who provide personal advice to fund members about their* ***existing super fund****.*

Opening *Intra-fund advice* to include cash management facilities is puzzling to say the least and does not align to ASIC's definition as stated above. Therefore, why has this occurred and what is the rationale behind this. More importantly does this meet the sole purpose test and why is this in the best interests of the member?

The position presented in the legislation means that neither disclosure obligations nor Future of Financial Advice requirements are likely to apply to *Intra-fund (personal) advice*. As a consequence, there will be members paying for personal financial advice they are not receiving without the ability to opt-out, other than to leave the MySuper product altogether.

This will create a significant distortion in the advice market and is contrary to the reform principles the Government has espoused in unbundling product and advice fees and in addressing conflicts of interest.

Finally the issue of communicating the services provided needs to be emphasized in the Intra-fund advice space. ASIC have found from the Shadow Shopper Report (REP 279, August 2012) that sometimes the limited scope of the personal advice was not explained at all to the client – that is when the advice was quiet limited (which is exactly what Intra-fund advice is) the client thought they were getting much more comprehensive advice.

The FPA recommends that intra-fund (personal) advice fees/costs should be a separately disclosed and be fully transparent to all members of the super fund.

The FPA recommends that all trustees providing Intra-fund (personal) advice must communicate very clearly to all members of their superannuation fund that the advice available is NOT comprehensive advice and in some cases not personal advice at all. The trustee must also communicate clearly that the advice provider is limited in their expertise and qualifications and in the scope of advice that they can provide.

The *Intra-fund advice provider* must be required to decline the advice when they are unable to meet their best interest duty obligations.

[2] *ASIC Class Order [CO 09/210]*

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Replacing Default Superannuation Funds

The FPA supports the principle intent of MySuper that is a new, simple and cost effective superannuation product that will replace existing default products.

> *"Default superannuation funds are those funds to which employers make compulsory superannuation contributions for employees who do not choose a fund to receive those contributions.*
>
> *For these employees, a default fund is selected by their employer, or nominated through an industrial award or enterprise agreement. Of almost 12 million Australians who currently hold a superannuation account, approximately 80 per cent have their compulsory superannuation contributions paid into a default superannuation fund.*
>
> *The Super System Review found that many consumers do not have the interest, information or expertise required to make informed choices about their superannuation. Therefore, access to a safe, low cost and simple default superannuation product is essential to help many Australians' retirement savings go further.*
>
> *Superannuation funds will be allowed to provide MySuper products from 1 July 2013. When fully implemented, any employee will be able to elect to have their superannuation paid into a MySuper product. However, it will not be compulsory for an employee to use a MySuper product."*[3]

MySuper Transition – schedule 6 (s20B)

Amendments to the SIS Act will introduce a new concept of an 'accrued default amount'. This concept defines those parts of a member's interest in a fund, which must be moved to a MySuper product. In essence, these are amounts where a member has not exercised an investment choice or amounts held in a default investment option of the fund.

The Explanatory Memorandum Chapter 6 explains the requirements for certain existing member balances to be moved to MySuper products and the transitional rules applying to these requirements

Definition of Accrued default amounts

EM 6.12 The definition of accrued default amounts also includes **all** [emphasis added] amounts of members that are invested in the investment option that would have been the default option for the member at the time the assets attributable to the member were invested. The term therefore captures amounts where the member has either **explicitly or implicitly** [emphasis added] directed that the amount be invested in the default investment option for that member.

[3] http://strongersuper.treasury.gov.au/content/Content.aspx?doc=publications/government_response/key_points.htm

The definition 'accrued default amounts' extends beyond the original intention, replacing default superannuation funds as outlined by Treasury above, to include all members who explicitly or implicitly directed their superannuation assets in the default investment option.

Table 1 outlines how under different scenarios individuals may be impacted by the transition to MySuper.

At one end of the spectrum there are the many employees who are completely disengaged with superannuation and have deferred decision-making. Their superannuation guarantee contribution has been directed to their Employer's chosen default fund and invested in the default investment option. Today these members are referred to as default fund members. Scenario one reflects this situation and whilst some employees may have actively selected the Employer fund and the default option, it is reasonable to assume that a high percentage are not active or engaged with their superannuation. Prior to the introduction of MySuper employers would have been making SG contributions into these default arrangements. The introduction of MySuper product replaces these existing default fund arrangements and ensures these members do not pay for any unnecessary 'bells and whistles' they do not need or use".

At the other end of the spectrum (excluding Self Managed Fund Investors) are individuals who have selected their own superannuation fund either directly or through financial advice. These individuals may be impacted by MySuper transition if the superannuation vehicle has a default investment option and some or all of their assets are invested in that option. They are not in the Employer default fund today nor will be at the time MySuper is introduced. Employer contributions would be made at the explicit direction of the member.

The FPA's understanding is that under the transitional arrangements, many superannuation members who previously made an active choice to invest part or some of their superannuation funds in the same investment option as the trustee default investment option will be required to restate this decision by opting out within the 90 day notice period.

An individual who has proactively sought and has been provided superannuation advice could have their current arrangements disrupted by the MySuper transition, simply because part or all of the superannuation assets have been invested in the same investment option as that selected by the trustee for default fund members, and they failed to take additional action required.

Whilst the FPA acknowledges the member will have the opportunity to opt out, the onus is placed entirely on the member, with failure to take action (responding in writing) on their part resulting in the part or all of their account balance being transferred to a MySuper product.

The FPA is concerned that the transfer may not be in the best interests of the member. The MySuper product may not align with their needs. For example a member may find that they have lost valued insurance benefits or are invested in assets that do not align to their chosen investment objectives and risk tolerance, without their explicit consent. Returning the members to their original position is likely to result in additional costs and inefficiencies.

We believe that these 'choice' superannuation members to be outside of the original scope as these arrangements could not be described as 'Default superannuation funds to which employers make compulsory superannuation contributions for employees who do not choose a fund to receive those contributions'.

The FPA recommends an amendment to s20B and the definition of 'accrued default amounts' to reflect the policy intention of capturing 'default superannuation funds' as defined above.

Table 1 - Alternate scenarios:

Scenario	Transition to MySuper
1. An employee makes no selection with respect to their superannuation contributions. The current employer directs SG contributions into the employer selected default fund and default investment option.	Existing Account Balance is defined 'accrued default fund' and will be transferred under transition to MySuper unless written notice is received.
2. An employee joins the Employer chosen default fund and selects an investment choice (non default investment option) within the chosen Employer Superannuation Fund.	Existing Account Balance is not defined 'accrued default fund' and will not be transferred under transition to MySuper.
3. A superannuation member is transferred to a personal superannuation fund and remains invested in the default investment option. No Employer SG contributions are received into this fund.	Existing Account Balance is defined 'accrued default fund' and will be transferred under transition to MySuper unless written notice is received.
4. An employee completes a choice form and directs Employers SG contributions to the chosen fund. Employee selects the default investment option for receipt of SG contributions.	Existing Account Balance is defined 'accrued default fund' and will be transferred under transition to MySuper unless written notice is received.
5. An employee completes a choice form and directs Employers SG contributions into an alternative investment option.	Existing Account Balance not defined 'accrued default fund' and will not be transferred under transition to MySuper.
6. An individual selects a superannuation product or platform for their existing assets and/or future contributions where there is no trustee default investment option.	Existing Account Balance not defined 'accrued default fund' and will not be transferred under transition to MySuper.
7. An individual selects a superannuation product or platform (directly or in conjunction with a financial adviser) for their existing assets and/or future contributions. There is a default investment option available in the product/platform. The individual invests some or all of their assets in this investment option.	Some or all of the existing Account Balance is defined 'accrued default fund' and will be transferred under transition to MySuper unless written notification is received.