3 October 2012

Dr Richard Grant
Secretary
Joint Parliamentary Committee on Corporations and Financial Services
Parliament House
Canberra ACT 2600.

By email: corporations.joint@aph.gov.au

Dear Dr Grant,

Inquiry into the Further MySuper and Transparency Measures Bill

AMP welcomes the opportunity to make a submission into the Parliamentary Joint Committee (PJC) on Corporations and Financial Services' Inquiry into the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012 (the "Bill").

AMP is one of the largest financial services companies in Australia providing a diverse range of products and services including life insurance, banking, superannuation, asset management and financial advice. Indeed, AMP has over 4,100 aligned and employed, a number of which specialise in corporate financial advice and who will be deleteriously impacted by this legislation.

AMP wishes to reiterate that it strongly supports the principles underpinning the MySuper reforms contained in this Bill. AMP has consistently argued that consumer interest is best served by a public policy regime which encourages a low cost default superannuation scheme where simple low cost products are offered in a competitive environment. The MySuper proposals aim to ensure this public policy outcome.

That having been said, there are a number of elements in this Bill which are causing great concern to financial advisers, in particular those that provide corporate financial advice services. Corporate financial advice specialists generally provide services to small to medium business owners/operators in relation to superannuation solutions for their employees, regularly assisting in negotiating better fee/insurance outcomes for their employees' superannuation arrangements, as well as providing advice and other services (eg superannuation-related financial education) directly to the employees.

Many of these financial advisers have contacted AMP recently in relation to the Bill, arguing that parts of the Bill put their livelihood in jeopardy and urging us to make representations on their behalf.

It should be emphasised that these financial advisers are not employed by AMP. Rather they are all either self-employed or operate a small business, contributing to jobs and employment in their local communities.

From our discussions, we believe there are three broad concerns in relation to the Bill as follows:

1. that parts of the legislation are retrospective in nature and inconsistent with the government's policy on grandfathering;

2. that the Bill effectively legislates away existing pre-existing contracts;

3. that there is a possible breach of section 51(xxxi) of the constitution and that the Parliament should not be passing legislation that is constitutionally problematic.

These problems are easily solved by making the legislation prospective (ie only applying to future contributions) by deleting Schedule 6 of the Bill.

AMP has examined the financial advisers' concerns above and considers that these concerns have merit.

The issues arise from the requirements that when a trustee applies for a MySuper authorisation the trustee is required to make the following elections (and to give effect to them):

- an election not to charge MySuper members for payment of conflicted remuneration; and

- an election to move members' "accrued default amounts[1]" (ADA) to a MySuper product by 1 July 2017[2].

Policy Consistency and Grandfathering

A number of advisers have flagged that the government is not adopting a consistent policy with regard to grandfathering and retrospectivity across the financial services sector.

The proposals contained in the Bill effectively impose a retrospective application of the legislation, under the guise of a transition period. The Bill requires that no commissions are able to be deducted from a MySuper offer from the date of commencement. However, the requirement to transfer all ADA within the superannuation system to a MySuper offer by 1 July 2017 effectively prevents future commission payments to an adviser on the ADA, even though the adviser holds a contractual right to receive those payments prior to the introduction of the legislation.

The government has in their recent development of the Future of Financial Advice (FoFA) legislation recognised the existence of legitimate contractual arrangements across the financial services industry. Minister Shorten in his second reading speech on the FoFA legislative reforms acknowledged that measures around remuneration were significant and represented a "large change to the industry and individual businesses. It is for this reason that existing trail

[1] As defined in section 20B - Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012.

[2] Section 387 - Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012.

commission books will be "grandfathered". This means that commissions from business entered into prior to the reforms can continue."[3]

Further, our financial advisers have also drawn to our attention the Government's 2010 Election policy "Fairer, Simpler Superannuation", which specifically states that "The Gillard Labor Government will consult closely with industry and consumer groups on detailed implementation and transition arrangements including to ensure that existing contractual arrangements can be complied with".

This Bill stands in stark contrast to the government's policy statements on superannuation. In light of the need for policy consistency and the government's commitments during the 2010 election campaign, the financial advisers are of the view that their existing entitlements to the commissioned-based remuneration from their clients' ADA should be grandfathered as intended by the government and not subject to an enforced sunset clause.

The Bill legislates away existing contracts

As previously discussed, corporate financial advisers specialise in providing ongoing financial advice services to the employers and employees of small and medium businesses. They have done so for many years, particularly in relation to the provision of superannuation. Typically the advisers have a negotiated contract with a small business, including an on-going service fee (which is deducted from the superannuation account balance) and the adviser in return visits the workplace on a regular basis and provides group seminar sessions or specific assistance to individual employees.

It is important to note that these are firm written contractual arrangements.

However, the Bill also impacts upon individually advised clients who hold a default superannuation interest in a superannuation product. Due to the definition of an "accrued default amount", any member who has a superannuation interest invested in a default investment option will have that investment forcibly moved to a MySuper offer.

Traditionally, many superannuation members that have been individually advised on their superannuation needs choose to remunerate their adviser by way of commission arrangements deducted from their superannuation balance. These arrangements are explicit contractual agreements that will also be effectively overturned by the provisions contained with this Bill.

As discussed above, the Bill requires that by 1 July 2017 a Registrable Superannuation Entity (RSE) licensee must elect to transfer all accrued default superannuation account balances to a MySuper product[4]. An RSE will be required to make this election in order to receive authorisation from APRA to offer a MySuper product; therefore, it is not a voluntary election – it is a requirement for the trustee to continue to participate in the employer-sponsored superannuation market. Indeed, even if the trustee does not make the election (and therefore is

[3] Second reading speech on the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011, 24 November 2011.
[4] Refer footnote 2.

no longer eligible to receive future default superannuation guarantee contributions), the Bill provides for prudential standards to be made forcing the transfer of ADA.

Essentially, this means that from no later than 1 July 2017 all default superannuation accounts, from which the adviser's commissions were previously deducted in accordance with their legitimate contractual arrangements, become MySuper accounts. Therefore, the Bill has the practical effect of legislating these contracts away.

In other words the financial adviser's pre-existing contract will be broken, resulting in a loss of income to the advisers.

There are many financial advisers in the community whose business is predominantly or solely corporate superannuation. Their view is that the effect of these provisions, which have a retrospective impact, will force them out of their advice business.

AMP considers that it is quite unconscionable for the Parliament to deliberately effectively legislate away an individual's income and livelihood when that livelihood is based upon a legal contract.

The inappropriateness of these provisions is further emphasised by the fact that the government has seen it necessary to include in the Bill a legislated protection for the trustees who make the election to transfer accrued default amounts from any action by members (presumably this is an acknowledgement by the government that members may be disadvantaged by this compulsory transfer).

Constitutional issues

A number of the financial advisers have raised the issue of whether the proposed legislation is a breach of section 51(xxxi) of the Constitution, the section that deals with the acquisition of property on just terms.

AMP has obtained a preliminary assessment of the Constitutional issues in relation to this issue. Our assessment indicates that:

1. There is doubt as to whether the election process that a trustee must comply with in order to receive their MySuper authorisation is effective to prevent the breach of the Constitution.

2. There is also doubt about the constitutionally of the compulsory transfer of the ADA required by the Bill.

3. The effect of the compulsory transfer of the ADA by 1 July 2017 would be that trustees (and advisers) would be deprived of their entitlement to fee income in respect of the ADA or they will have their entitlement to the fee income reduced.

4. The requirement to transfer ADA by 1 July 2017 does not really provide a transition at all and, on the contrary, it is an overt taking away of the existing entitlement to the remuneration that the advisers currently receives through existing contractual arrangements.

Remediation

As indicted earlier, the concerns in relation to this Bill stem from its retrospective components.

Following careful consideration of the provisions of the Bill, and recognising the actual on-the-ground realities, AMP considers that government policy would not be significantly diluted should the retrospective elements of the Bill be deleted.

In this regard it is important to note that the government is seeking to introduce a range of complementary measures that will also encourage or force superannuation members to reduce the number of superannuation accounts they maintain. Over the short to medium term, we would expect there to be a significant amount of movement of superannuation balances as a result of the following initiatives:

- auto-consolidation of low-value accounts;
- the ability of superannuation providers to track accounts through the use of tax file numbers; and
- changes to the ATO register of superannuation accounts and back office processing of accounts to make it easier for members to consolidate or transport their balances.

Given that for members who do not specifically elect otherwise, the active superannuation account will be a MySuper product, it is expected that a significant proportion of existing accounts will migrate to a MySuper product in the short to medium term without any heavy-handed retrospective legislation. In these circumstances, removal of the retrospective clauses of the Bill will have a relatively small impact on the government's policy in the short to medium term, while protecting existing contracts and avoiding potential constitutional problems.

In order to address these problems, AMP suggests the deletion of schedule 6 of the Bill.

These changes will have no impact on the underlying principles of MySuper, maintain policy integrity, and ensure that over time all employees become MySuper compliant, but at the same time ensure that existing contracts are not broken and that the Constitution issues are resolved

Recommendation

AMP recommends that in order to remove the retrospective elements of the Bill, ensure grandfathering of existing arrangements, and remove Constitutional doubts about this Bill, that Schedule 6 of the Bill be deleted.

Yours sincerely,

Alastair Kinloch