File Name: 2018/13

25 May 2018

Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Via email to: economics.sen@aph.gov.au

Dear Committee Secretary

Treasury Laws Amendment (2018 Measures No. 4) Bill 2018

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this response to the Committee's inquiry into the *Treasury Laws Amendment (2018 Measures No. 4) Bill 2018* (the Bill).

ASFA is a non-profit, non-political national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system and its $2.6 trillion in retirement savings. Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing over 90 per cent of the 14.8 million Australians with superannuation.

ASFA continues to be strongly committed to measures and policies that reflect and support the core role of the superannuation system in providing adequate retirement outcomes for all Australians.

Compulsory superannuation plays an integral role in this and accordingly we strongly welcome the measures in Schedules 1 – 5 directed at improving compliance with the Superannuation Guarantee (SG) regime. These measures will strengthen the options available to the Commissioner of Taxation to secure compliance with employers' SG obligations and improve the timeliness and granularity of the information received by the Australian Taxation Office (ATO) from employers and funds about the making and receipt of superannuation contributions.

ASFA considers that proposed measures in Schedule 6 relating to employee commencement should be tightened so the legislation – not merely the explanatory material – explicitly requires an employee's consent to each pre-filling of information by the Commissioner.

The Association of Superannuation Funds of Australia | ABN 29 002 786 290
Level 11, 77 Castlereagh Street, Sydney NSW 2000
t 02 9264 9300 f 1300 926 484
www.superannuation.asn.au

ASFA supports the amendments proposed in Parts 1, 6 and 7 of Schedule 8 in relation to MySuper, the taxation treatment of deferred annuities and reversionary transition to retirement income streams, and the disclosure of information by the Superannuation Complaints Tribunal (SCT) to the Australian Financial Complaints Authority (AFCA). We note that some of these amendments are substantive in nature and their need had been identified by industry to address inadvertent consequences or omissions from earlier reforms.

Our comments in relation to particular aspects of the Bill are set out in the Attachment to this letter.

If you have any queries or comments in relation to our submission, please contact me on [redacted] or Julia Stannard, Senior Policy Advisor, on [redacted]

Yours sincerely

[redacted]

Glen McCrea
Chief Policy Officer

Treasury Laws Amendment (2018 Measures No. 4) Bill 2018 **(the Bill)**

Attachment to ASFA submission

1. **Schedule 1: directions and penalties in relation to SG charge**
   Schedule 2: disclosure of information about non-compliance
   Schedule 5: compliance measures

ASFA supports amendments contained in Schedule 1 to provide the Commissioner with the power to issue directions to employers who fail to comply with their SG obligations.

We consider the education directions power, in proposed new Division 384 in Schedule 1 of the *Taxation Administration Act 1953* (TAA 1953), to be appropriately targeted at those in a management decision-making position within an employer. However, the Bill does not stipulate any minimum requirements that must be met before an education course may be approved for the purpose of an education direction. In ASFA's view, this is an oversight. Specification of the minimum requirements will enable educators to appropriately formulate courses and provide transparency and reassurance to stakeholders as to the effectiveness of education directions as an integrity measure.

We note that proposed new subdivision 265-C of the TAA 1953, which gives the Commissioner the power to issue a direction in respect of unpaid SG, involves the potential application of criminal sanctions to a non-compliant employer. While this is a significant expansion of the penalty regime for SG non-compliance, it is, in effect, a 'last resort' measure.

Proposed subsection 265-90(2) provides the Commissioner with scope to determine that a direction should not be issued for a minor and/or inadvertent breach. The Commissioner is not *required* to issue a direction and in fact before deciding to do so the Commissioner must have regard to a number of matters, such as the employer's history of compliance with their SG and other tax obligations. Further, the intent of the power, clearly expressed in the Explanatory Memorandum (EM), is to "address **recalcitrant employers** who **intentionally and repeatedly** disregard their obligations and **continuously** fail to pay their superannuation liabilities"[1] and it is intended that directions would be issued "to employers with a **history of serious non-compliance**, rather than those that inadvertently breach their obligations to pay the amounts that are relevant to the direction or have minor or isolated breaches"[2] (our emphasis).

We further note that the directions framework incorporates important checks and balances, including an employer's right to object to the making of a direction[3], and a defence where the employer had taken all reasonable steps to comply with their underlying SG obligations and with the direction[4].

[1] Explanatory Memorandum, *Treasury Laws Amendment (2018 Measures No 4) Bill 2018* ('Explanatory Memorandum'), paragraph 1.2
[2] Ibid., paragraph 1.42
[3] *Treasury Laws Amendment (2018 Measures No 4) Bill 2018* ('2018 Measures No 4 Bill'), Schedule 1, Part 1 – proposed section 265-110
[4] Ibid., Schedule 1, Part 1 – proposed subsection 265-95(2)

As a result of these safeguards, a criminal offence will ***only*** be triggered if an employer fails, without reasonable grounds, to comply with the direction to pay SG. As such, the criminal offence will apply where the employer has failed to avail themselves of their 'last chance' to comply, not for an initial and inadvertent breach. The EM indicates that the directions power framework has been adopted as an alternative to applying criminal sanctions directly to the failure to pay SG liabilities, thereby narrowing the scope of employers that are potentially subject to criminal sanctions[5].

The liability under new subdivision 265-C of the TAA 1953 is imposed on the party responsible for the payment of an amount of SG charge – that is, it is imposed on the 'employer', rather than an individual (as is the case for new Division 384). While the *Superannuation Guarantee Administration Act 1992* (SGA Act) provides that the public officer of a company "is answerable for doing all acts required to be done by the company under this Act, and in case of default is liable to the same penalties"[6], this does not have the same effect as the imposition of *personal* liability. Accordingly, where the employer is a corporate entity, we consider it may be necessary for the Commissioner to use the directions power in tandem with its enhanced director penalty notice powers (under Schedule 5), to ensure personal liability in relation to the underlying non-compliance attaches to the directors.

ASFA also supports amendments in Schedule 5 to strengthen the integrity of the existing Director Penalty Notice regime and allow the Commissioner to apply for a Court order to compel an employer to comply with security deposit requirement in relation to an existing or future tax-related liability. These amendments represent, in ASFA's view, a reasonable enhancement to the Commissioner's toolkit for ensuring employers comply with their SG obligations.

ASFA welcomes amendments proposed by Schedule 2, enabling the Commissioner to disclose information relating to:

- a failure (or suspected failure) by an individual's employer or former employer to comply with their obligations under the SGA Act; and
- the Commissioner's response to an employer's failure or suspected failure to comply with SG obligations.

The proposed amendments are consistent with recommendations by the Cross-Agency Working Group[7] and should assist the ATO's efforts to determine the extent of – and therefore more comprehensively address – an employer's non-compliance. Importantly, the amendments will also improve overall confidence in the ATO's SG investigation and enforcement activities by allowing the ATO to keep impacted individuals appraised of efforts to resolve the non-compliance.

Clarity around the mechanism to be adopted for the disclosure would be welcomed. While MyGov would appear to be an appropriate, efficient and low-cost method to inform affected members, this would in our view need to be supplemented with direct written communication where an individual does not have a MyGov account or their MyGov account has been inactive for more than 12 months.

[5] Explanatory Memorandum, paragraph 1.38
[6] *Superannuation Guarantee Administration Act 1992* ('SGA Act'), subsection 57(3)
[7] Cross Agency Superannuation Guarantee Working Group, *Superannuation Guarantee Non-compliance: A report to the Minister for Revenue and Financial Services*, 31 March 2017, recommendation 3

It is also critical that the ATO communication provides clear information regarding any actions that are being (or will be) undertaken by the ATO as well as any actions that the individual may or should undertake themselves.

ASFA supports the proposed amendments to strengthen the director penalty notice regime and allow the Commissioner to issue education directions and directions in respect of unpaid SG. We consider that the Commissioner should be required to specify minimum requirements for approval of an educational course for the purpose of an education direction.

ASFA supports proposed amendments allowing the ATO to disclose information about SG non-compliance by an individual's employer or former employer. This should be achieved through messaging on MyGov accounts, supplemented with direct communication where an individual does not have a MyGov account or their MyGov account has been inactive for more than 12 months.

2. Schedule 3: single touch payroll reporting

ASFA agrees that applying Single Touch Payroll (STP) reporting rules to all employers from 1 July 2019, regardless of the number of employees, will give the Commissioner increased visibility over the payment of employee entitlements and enhance the ATO's ability to monitor compliance with the payment of SG liabilities. By including employers with less than 20 employees from this date, one year later than entities with 20 or more employees, the significant proportion of superannuation payment non-compliance that is attributable to small business should reduce.

The requirement that employers provide the Commissioner with separately identifiable information relating to any salary sacrificed contributions being made on behalf of employees will provide a further layer of protection of employee entitlements. This information will enable the Commissioner to more closely monitor employers' compliance with their SG obligations and will support compliance activities in relation to separately proposed amendments to prevent employers taking advantage of employees' salary sacrificed contributions to reduce their SG obligations.

ASFA supports the extension of Single Touch Payroll reporting to cover employers with less than 20 employees from 1 July 2019 and require reporting about salary sacrificed contributions.

3. Schedule 4: fund reporting

ASFA supports amendments in Schedule 4 allowing the Commissioner to determine a 'grace period' within which superannuation providers may correct false or misleading statements in relation to member information statements without incurring penalties. Given the increasing volume of information required to be reported to the ATO, providers may at times face a tension in meeting their twin obligations to lodge reports that are both accurate and timely. In ASFA's view, the potential for a grace period strikes an appropriate balance between those obligations and should facilitate an increase in 'on time' reporting.

Schedule 4 also includes amendments to remove the current requirement that providers lodge a biannual 'lost member statement'. This is a consequence of the ATO introducing the Member Account Attribute Service (MAAS) as the format for event based reporting of member account information, including lost member status, under section 390-5 of Schedule 1 of the TAA 1953. An ATO legislative instrument[8] prescribes MAAS as the approved form, to be lodged within five days after an event.

Taken in isolation, this would require superannuation providers to report members five days after they meet the definition of 'lost' – a significant change from the current biannual reporting and one that would have substantial implications in terms of cost and implementation of MAAS. Accordingly, ASFA welcomed clarification (in the context of a draft version of the MAAS legislative instrument) that the ATO would require providers to report lost member information on the MAAS report "at least twice a year", and would consult on appropriate dates if the proposed abolition of the lost member statement became law[9]. However, this clarification was provided only via a newsletter, and is not reflected in the explanatory material for the MAAS legislative instrument or this Bill.

We note that the Government's 2018-19 Budget proposed significant new requirements on trustees to transfer inactive, low-balance accounts to the ATO as a new category of unclaimed superannuation money. It is presently unclear what, if any, amendments to the ATO's requirements in relation to reporting of lost members will be necessary as a result of these changes.

We would encourage the ATO to ensure its requirements in relation to reporting of lost member information are settled as quickly as possible and communicated widely throughout the industry.

ASFA recommends that the ATO settles its requirements in relation to reporting of lost member information as quickly as possible and ensures they are widely communicated.

4. Schedule 6: amendments relating to employee commencement

Schedule 6 of the Bill proposes an addition to the list of exemptions allowing a taxation officer to make a disclosure of 'protected information' in subsection 355-65(3) of Schedule 1 of the TAA 1953. This addition relates to the provision of an individual's superannuation information to an employer for the purposes of enhancing online superannuation choice processes.

ASFA understands this amendment is needed to facilitate the design of an integrated employer Business Management Software and ATO online employee commencement solution where employees are provided with pre-filled superannuation information within the employer's software. It is also understood these services will not be available for use until sometime in 2019.

While ASFA acknowledges the need for the ATO to provide the required information to employers to allow the effective and efficient operation of the fully integrated service, we have some concerns with the measure as it stands.

[8] *Taxation Administration Member Account Attribute Service – the Reporting of Information relating to Superannuation Account Phases and Attributes 2018*
[9] CRT Alert 007/2018 - Open for consultation - MAAS legislative instrument

The EM to the Bill notes that the purpose of the amendment is to inform an individual of their existing superannuation interests to assist with choosing a superannuation fund and giving effect to that choice. Crucially, the EM indicates (our emphasis) that:

> An individual, whose information will be disclosed by the Commissioner under these amendments, must first request the Commissioner disclose their information before the Commissioner discloses their protected information to their employer's business management software so that it can be presented as pre-filled information to assist the individual to make a withholding declaration. **The individual must make this request each time they want the Commissioner to make the disclosure.** For example, with each new employer or if the information held by the Commissioner changes and they want this new information to be disclosed to their employer's business management software so that it can be presented as pre-filled information.[10]

ASFA welcomes the confirmation that the individuals' consent will be required for each disclosure. This assurance was not included in the explanatory material accompanying the exposure draft of these amendments.

However, the relevant legislative amendment, contained in Part 3 of Schedule 6, is completely silent on the matter of consent. ASFA is firmly of the view that the requirement for consent should be explicitly stated in the legislative provision itself, not merely the explanatory material. In contrast, a requirement for consent (via a 'request') is explicitly built into a separate legislative amendment providing for another (unrelated) exception to the protected information rules in this Bill[11]. It is unclear why consistent drafting practice has not been adopted throughout Schedule 6.

ASFA recognises that the ATO has the capacity and intention to build the required protections into the design of these services. However, as this will occur in the future it is important that the legislative framework now under consideration expressly specifies that protected information may only be disclosed for the stated purpose once the individual's consent has been obtained.

The SGA Act provides for an employer to give a 'standard choice form' to an employee within 28 days of the commencement of employment and an employee may then effectively request a standard choice form once per year[12] – the SGA Act recognises that an individual's consideration of their superannuation interests is not a once-off event. The Bill does not in any way alter that standard choice framework. In ASFA's view, the proposed exception should only operate to allow disclosure in relation to events directly related to the giving of a standard choice form. Employers should not be able to access an individual's superannuation information on an ongoing basis.

It is also important that the method for giving consent is clear and unambiguous for the individual.

[10] Explanatory Memorandum, paragraph 6.14
[11] 2018 Measures No 4 Bill, Schedule 6, Part 2
[12] SGA Act, section 32N

ASFA strongly recommends that the legislative exemption allowing disclosure to an individual's employer of 'protected information' relating to the individual's superannuation interests, for choice of fund purposes, is redrafted to specify that:

- any disclosure is subject to the express consent of the individual; and
- consent is not ongoing and must be provided in relation to each disclosure.

5. Schedule 8: miscellaneous amendments

5.1 Part 1 – amendments to commencement provisions

ASFA welcomes the clarification provided in Part 1 of Schedule 8 regarding the commencement of elements of the MySuper reforms.

5.2 Part 6 – various amendments

Part 6 of Schedule 8 contains amendments designed to remove an inconsistency in the current taxation treatment of deferred annuities.

Currently, annuities issued by life companies to complying superannuation funds to meet their liabilities to provide deferred income streams are a 'qualifying security' for tax purposes, and accordingly are taxed at both the life company level and the superannuation fund level. As a result, these annuities may be subject to double taxation during the accumulation (pre-retirement) phase. In contrast, the definition of 'qualifying security' excludes a deferred annuity purchased by an individual from a life company directly, and these annuities therefore avoid double taxation.

ASFA welcomes the amendments, which will exempt a deferred annuity purchased by a complying superannuation fund from double taxation, provided certain conditions are met.

The Government recently amended the regulatory settings to encourage superannuation funds to expand their offering of income streams[13], and – as confirmed in the 2018-19 Budget[14] – is committed to the introduction of comprehensive income products for retirement (CIPRs). It is likely that a fund's CIPR offering will feature a deferred annuity component, therefore it is important to ensure there is no tax disincentive to the use of such products. ASFA considers these amendments to be both appropriate and timely.

Part 6 also contains amendments in relation to the payment of a transition to retirement income stream (TRIS) to a reversionary beneficiary. In particular, these amendments modify the rules that determine when a TRIS is in the retirement phase, to:

- ensure a reversionary TRIS being paid to a reversionary beneficiary is considered to remain in retirement phase, irrespective of whether the beneficiary has satisfied a condition of release
- allow a reversionary TRIS to be paid to a dependant beneficiary without requiring a commutation and commencement of a new income stream from the deceased member's underlying superannuation interests.

[13] *Treasury Laws Amendment (2017 Measures No. 1) Regulations 2017*
[14] Australian Government, Budget Paper No. 2: Budget Measures 2018-19, page 185

The amendments resolve adverse consequences that flowed from reforms to the taxation treatment of TRIS that commenced on 1 July 2017. Left unaddressed, the legislation would require recipients of a reversionary TRIS, during a time of bereavement and loss, to commute the reversionary death benefit income stream to a new income stream in order to be able to retain the appropriate tax treatment. Administration of the legislation would also have involved significant operational challenges for superannuation providers.

ASFA welcomes the amendments, and the constructive approach taken by Treasury towards rectifying this issue once it was brought to their attention by ASFA and our members late last year.

5.3 Part 7 – transitional arrangements relating to the disclosure of information

Part 7 of Schedule 8 contains measures relevant to the implementation of the external dispute resolution (EDR) arrangements for financial services from 1 November 2018. These arrangements involve the establishment of the Australian Financial Complaints Authority (AFCA) as the single EDR body for financial services, replacing the Superannuation Complaints Tribunal (SCT) as the relevant EDR body for the APRA-regulated superannuation sector.

The proposed measures amend the secrecy rules that currently apply to the SCT to enable it to disclose information or documents to AFCA to enable AFCA to perform its functions or exercise its powers under the *Corporations Act 2001*. ASFA agrees these amendments are necessary to facilitate a smooth transition to AFCA, and to ensure that the SCT and AFCA can adopt a coordinated approach to handling complaints. This will be particularly important during the period the two bodies operate in parallel, while the SCT clears its existing caseload[15].

The absence of any measures enabling the SCT to share information and documents with AFCA was highlighted during consideration of the Bill that established the new dispute resolution framework and consultation on the earlier exposure draft[16]. ASFA welcomes the rectification of this omission.

[15] New superannuation complaints from 1 November 2018 will be heard by AFCA. The SCT will continue to operate to address complaints lodged prior to 1 November. The date on which the SCT will cease to operate will be determined by the Minister. The Minister has previously indicated that the SCT will close by 30 June 2020, and the SCT does not currently have funding confirmed beyond that date.

[16] *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2018* and the Exposure Draft *Treasury Laws Amendment (External Dispute Resolution) Bill 2017*