

18 December 2009

Senate Economics Committee
Department of the senate
PO Box 6100
Canberra ACT 2600

Economics.sen@aph.gov.au

Dear Committee Members

RE: Inquiry into the Tax Laws Amendment (2009 Measures No. 6) Bill 2009

The Association of Superannuation Funds of Australia Ltd (ASFA) would like to make this submission to the Committee's inquiry into the Tax Laws Amendment (2009 Measures No 6) Bill 2009.

ASFA is a non-profit, non-political national organisation whose mission is to protect, promote and advance the interests of Australia's superannuation funds, their trustees and their members. Our membership, which includes corporate, public sector, industry and retail superannuation funds, accounts for more than 5.7 million member accounts and over 80% of superannuation savings.

ASFA's interest in the bill is in Schedule 2 – Loss relief for merging superannuation funds.

ASFA is strongly supportive of this initiative by the Government, which seeks to address an issue critically affecting certain funds in the superannuation industry in the present financial climate. ASFA acknowledges that this measure has been under consideration by the Government for more than 12 months and has been the subject of extensive consultation with the superannuation industry.

However, despite the extensive consultations, ASFA considers that there are certain shortcomings in the paper which need to be addressed if the relief proposed by the Government is to be effectively achieved.

Single Income Year

Subdivision 310-D is headed Choice for assets roll-over. The assets roll-over choice can only be made where three conditions are met. The second of those conditions is contained in sub-section 310-45(3). This requires that the transfer events all happen in the income year (the *transfer year*) for the transferring entity that includes the 'completion time for the losses choice'.

Subdivision 310B – Choice to transfer losses – sets out the requirements to be met for transferring losses. Within subdivision 310-B (See subsections 310-10(3), 310-15(3) and 310-20(3)) the 'completion time for the losses choice' is the time at which the closing fund 'ceases to have any members within the meaning of the *Superannuation Industry (Supervision) Act 1993* at a particular time'.

In effect, the requirement is that where the choice for assets rollover is made, the transfer events must all happen in a single income year, the *transfer year*, with the transfer year being the year in which the original fund ceased to have any members.

Under some administrative arrangements, this requirement may present difficulties where the merger date is 30 June in any year. In many cases, the inconsistency between the successor fund rules in superannuation legislation, requirements within fund trust deeds, and the requirements of funds' master custodians and administrators, can mean that, for some purposes, transfers associated with a merger date of 30 June may nonetheless be processed as occurring on the first day of the following tax year (that is, on 1 July) or shortly thereafter.

The Bill currently recognises that, because of circumstances beyond the control of the trustee of the closing fund, it may not be possible to transfer all members of the closing fund by the selected 'closing time'. This is allowed for in subsections 310-10(5), 310-15(5) and 310-20(5).

ASFA recommends that the Bill be amended to enable satisfaction of the test in section 310-45(3) to also occur where the Commissioner approves a later completion time for the transfer of the assets. ASFA would suggest that such a later completion time would be where the transfer events occur within a short period (for example, 1 or 2 months) after the completion time for the losses choice.

Assets of a PST

Subdivision 310-D is headed Choice for assets roll-over. Section 310-45(1) provides that an entity may choose to rollover assets if the conditions set out in that section are satisfied.

Subsection 310-45(2) sets out specific conditions to be met according to the nature of the holder of the original assets (original fund, life insurance company, or pooled superannuation trust). Subsection 310-45(2)(c) deals with assets held by a pooled superannuation trust (PST).

The first condition for a PST (45(2)(c)) is that CGT event(s) happen in relation to all of the PST's 'CGT assets reasonably attributable to the units in that entity held by the original fund' with the result that the PST ceases to own those assets.

ASFA is concerned that the Bill does not make it clear that the following situation is also covered:

The PST, rather than selling assets, uses its cash reserves to redeem units held by the original fund when that fund merges into another fund.

Division 108 of the Income Tax Assessment Act 1997 sets out what is a CGT asset. It is unclear whether, under this division, cash constitutes such an asset.

It is suggested that a note be inserted following subsection 310-45(2) confirming that for the purpose of this provision CGT assets includes cash.

Clarification of fund's that can make the choice

Under section 310-10, a series of conditions are set out that a fund must satisfy before it can choose to transfer losses under the transfer loss provisions.

The section is headed 'Original fund's assets extend beyond life insurance policies and units in pooled superannuation trusts'.

The Bill at subsection 310-10(2) indicates that the first condition is satisfied if 'the transferring entity's assets include assets other than' a complying superannuation/FHSA life insurance policy or units in a PST.

Based on this wording, where a fund holds a mix of assets and the fund also holds either of these types of assets (a life insurance policy or units in a PST) the fund would not be eligible to transfer

its losses. This would appear to be contrary to intention of the Government's announcements regarding the transfer loss provisions and also the section heading. That is, the words 'other than', used in subsection 310-10(2), is at odds with the words 'extend beyond' used in the heading for section 310-10.

While there may be some argument that reliance could be put on the Explanatory Memorandum (EM) relating to this section, ASFA considers that the current drafting of the EM does not provide sufficient guidance to clarify that funds are able to make a choice regarding the loss provisions where they are holding a mix of assets that includes a complying superannuation/FHSA life insurance policy or units in a PST..

Further, under the general rules of statutory interpretation, unless the legislation is ambiguous, obscure or leads to a manifestly absurd or unreasonable result, then extrinsic material cannot be used to derive the meaning of the legislation. ASFA is concerned that, as the legislation is unambiguous, the test in the legislation must be applied. That is, prima facie section 310-10 is clear – a fund only satisfies this condition if it does not hold a complying superannuation/FHSA life insurance policy or units in a PST. As a result, the EM cannot be relied upon to clarify the purpose of this section.

ASFA recommends that this section be reworded to give effect to the Government's intent as expressed in the section heading. A suggested wording is that words 'the transferring entity's assets included assets other than' in 310-10(2) be replaced with 'the transferring entity's included assets that extend beyond'. The intent of the amendment is to ensure that the condition is satisfied even where the transferring entity's asset holding is broader than a complying superannuation/FHSA life insurance policy or units in a PST.

ASFA considers that the mere holding of a complying superannuation/FHSA life insurance policy or units in a PST should not preclude a fund from being eligible to choose to transfer losses where the fund holds a variety of assets which may include a complying superannuation/FHSA life insurance policy or units in a PST.

We note that a fund is not subject to tax on a complying superannuation/FHSA life insurance policy or units in a PST where it disposes of them and therefore no loss transfer relief is required in relation to these assets.

Should you require any further information please contact Robert Hodge, Principal Policy Adviser on 02 8079 0806 or by email at rhodge@superannuation.asn.au

Melinda Howes
Director Policy and Industry Practice