

The Association of Superannuation Funds of Australia Limited
ABN 29 002 786 290
ASFA Secretariat
PO Box 1485, Sydney NSW 2001
p: 02 9264 9300 (1800 812 798 outside Sydney)
f: 1300 926 484
w: www.superannuation.asn.au



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Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600
Sent via e-mail to corporations.joint@aph.gov.au

Dear Dr Grant,

SUPERANNUATION LEGISLATION AMENDMENT (SERVICE PROVIDERS AND OTHER GOVERNANCE MEASURES) BILL 2012

Thank you for the invitation to give evidence at the hearing on 22 January 2012 at the inquiry into the provisions of the *Superannuation Legislation Amendment (Service Providers and Other Governance Measures) Bill 2012* (the "Bill").

During the hearing a question was raised by the Chair, Ms O'Neill, which it was agreed we could take on notice, to the following effect: -

"In your submission on the exposure draft, you raised a concern with the requirement in section 29TC(1)(g) that consent must be obtained in writing no more than 30 days before it occurs. Can you summarise ASFA's concern with this drafting?"

1. Summary re drafting concern

ASFA is supportive of the general principle of transfers and roll-overs taking place within 30 days.

The method by which the "30 day" requirement has been inserted into paragraphs 29TC(1)(g) and 29TC(1)(h) of the *Superannuation Industry (Supervision) Act 1993* (the "SIS" Act) has, however, given rise to unintended consequences.

The simple solution would be to remove the reference to 30 days from the SIS Act as there is already a similar 30 day obligation imposed on transfers and roll-overs under the *Superannuation Industry (Supervision) Regulations 1994* (the "SIS" regulations) which has been drafted correctly.

If it is decided to retain the reference to "30 days" in paragraphs 29TC(1)(g) and 29TC(1)(h) we have explained in detail below the two issues with the current drafting.

2. Detailed explanation of drafting concerns

Item 39 of the Bill has the effect of amending paragraph 29TC(1)(g) of the SIS Act such that it would read: -

“(g) a beneficial interest of that class in the fund cannot be replaced with a beneficial interest of another class in the fund, unless:

- (i) the person who holds the interest consents in writing to that replacement no more than 30 days before it occurs; or*
- (ii) the person who holds the interest has died and the interest is replaced with a beneficial interest of another class in the fund of a kind, and in the circumstances, prescribed by the regulations; and”.*

There are two issues with the current drafting of the obligations under paragraphs 29TC(1)(g) and 29TC(1)(h) of the SIS Act, as inserted \ amended by the various Stronger Super bills.

2.1 Consent to roll-over \ transfer is necessary but not sufficient

While consent is necessary prior to a roll-over or transfer taking place, it is not necessarily sufficient as the trustee may require other information prior to being able to give effect to the roll-over or transfer.

Division 6.5 of the *Superannuation Industry (Supervision) Regulations 1994* (the “SIS” regulations) explicitly recognises, and address, the fact that the trustee may need to receive certain information before they can roll-over or transfer a benefit.

Regulation 6.33 of the SIS regulations provides as follows (emphasis added): -

“Request for rollover or transfer of withdrawal benefit

(1) A member of a regulated superannuation fund or an approved deposit fund may, in writing, ask the trustee of the fund to roll over or transfer an amount that is the whole or part of the member’s withdrawal benefit.

(2) If the trustee of the fund requires further information that is mandatory information in the form in Schedule 2A (whether or not the request is made using the form):

- (a) the trustee must, within 10 working days after receiving the request, **ask the member for the information**; and*
- (b) if the trustee has not received the information within 10 working days after making the request, the trustee must **make reasonable further inquiries** of the member to obtain the information.*

Note *If a request does not include all of the mandatory information in the form in Schedule 2A (whether or not the request is made using the form) the trustee may still roll over or transfer the amount without asking for the rest of the mandatory information.*

(3) If the trustee of the fund requires further information in relation to a request for a partial transfer:

- (a) the trustee must, within 10 working days after receiving the request, **ask the member for the information**; and*
- (b) if the trustee has not received the information within 10 working days after making the request, the trustee must **make reasonable further inquiries** of the member to obtain the information.*

- (4) **If the trustee of the fund requires the information** under subregulation 6.34 (3):
- (a) **the trustee must**, within 10 working days after receiving the request, **ask the member for the information**; and
 - (b) **if the trustee has not received the information** within 10 working days after making the request, the trustee must **make reasonable further inquiries** of the member to obtain the information”.

Sub-regulation 6.34(5) of the SIS regulations provides as follows (emphasis added): -

- “(5) Subject to subregulations (6) and (7), **the trustee must roll over or transfer the amount** (or the part of the amount requested to be transferred) as soon as practicable, and in any case **within 30 days, after**:
- (a) the trustee receives a request made under subregulation 6.33 (1); or
 - (b) **if the trustee requires further information - the time when the trustee receives all of the information** that would be required in accordance with subregulations 6.33 (2), (3) and (4); or
 - (c) if there is a suspension under regulation 6.36 or 6.37 - the end of the period of the suspension”.

ASFA submits that paragraphs 29TC(1)(g) and 29TC(1)(h) of the SIS Act should recognise that the trustee may require further information before it is in a position to effect the roll-over or transfer.

2.2 Passive style of drafting can cause practical difficulties in complying

SIS sub-regulation 6.34(5) states that “[T]he trustee must roll over or transfer the amount ... within 30 days, after ... the trustee receives all of the information”.

This creates a positive obligation to roll over or transfer an amount within 30 days after receiving all of the information. Should the trustee not be in a position to roll-over or transfer the amount until, say, 31 days after receiving all of the information this will mean that, while they have not complied with their legislative obligation, nevertheless the roll-over or transfer would still be able to take place (albeit late).

Rather than creating a positive obligation on the trustee to transfer within 30 days, paragraphs 29TC(1)(g) and 29TC(1)(h) of the SIS Act create passive “condition precedent” to the transfer or roll-over occurring, such that: -

“a beneficial interest ... cannot be replaced with [another] beneficial interest ... unless ... the person who holds the interest consents in writing to that replacement no more than 30 days before it occurs”.

If the trustee, for some reason, has not been in a position to transfer or roll-over the benefit within 30 days of receiving consent then, because the legislation states that *“a beneficial interest ... cannot be replaced ... unless ... the person ... consents ... no more than 30 days before it occurs”*, the trustee would need to obtain the member’s consent again.

We would suggest this is an unintended consequence of the drafting and that it is likely that what was envisioned was that there should be a positive obligation on the trustee to transfer or roll-over within 30 days of receiving consent, along the lines of the requirement as stated in sub-regulation 6.34(5) of the SIS regulations.

Accordingly, ASFA submits that paragraphs 29TC(1)(g) and 29TC(1)(h) of the SIS Act should be amended to insert a positive obligation to roll-over or transfer within 30 days of receiving consent (and all of the necessary information), as opposed to consent 30 days prior being a condition precedent to the transfer or roll-over occurring.

3. Preferable alternative approach

Given that Division 6.5 of the SIS regulations would apply to the transfer or roll-over in any event, ASFA considers that it would be preferable to delete the references to consent “no more than 30 days before it occurs” from paragraphs 29TC(1)(g) and 29TC(1)(h) of the SIS Act altogether.

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Should you have any further queries with respect to this, please do not hesitate to contact Fiona Galbraith on (03) 9225-4021 or 0431 490 240 or via fgalbraith@superannuation.asn.au.

Yours sincerely

A handwritten signature in black ink that reads "Pauline B. Vamos". The signature is written in a cursive style and is set against a light blue rectangular background.

Pauline Vamos
Chief Executive Officer