12 March 2012

Committee Secretary
Department of the House of Representatives, Committees Office
Standing Committee on Economics
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Secretary

Re: Inquiry into the Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012

We appreciate the opportunity to provide comments on this Bill. We will restrict our comments to chapters 4 (excess superannuation contributions refund) and 5 (disclosure of superannuation information).

The Financial Services Council represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, trustee companies and public trustees. The Council has over 130 members who are responsible for investing more than $1.8 trillion on behalf of 11 million Australians.

We look forward to discussing this matter further. I can be contacted on 02 9299 3022.

Regards

ANDREW BRAGG
SENIOR POLICY MANAGER

SUMMARY OF RECOMMENDATIONS

1. The restrictions limiting the capacity for the Commissioner to make a determination where there has been a previous excess contribution be removed from the Bill by deleting s 292-467(c)
2. Sensitive member information should not be disclosed. Rather merely the existence of an account should be provided.
3. The Bill be amended such that either: the ATO is restricted to passing on such information to a fund only after the member has sought consolidation via SuperSeeker or the fund has sought that information with the member's consent, or the ATO must seek consent from the member prior to passing on information to a fund regarding holdings outside that fund.

1. Refund of Excess Concessional Contributions

Schedule 4 of the Bill provides for the refund of excess concessional contributions for contributions made in the 2011-12 financial year or a subsequent year. Section 292-467 provides the conditions for the refund of the contributions in specific circumstances and the $10 000 limit on the refund.

The FSC is concerned that the restrictions placed on the discretion of the Commissioner of Taxation to issue refunds are inappropriate given further proposed changes to the concessional contributions cap by the Government.

In particular, s 292-467(c) provides that a beneficiary will not receive a refund where they had excess concessional contributions for an earlier financial year beginning on or after 1 July 2011. That is, where a member has made an excess concessional contribution in or after 2011, if they make a second excess contribution in a later year then the Commissioner does not have the discretion to make a determination to issue a refund.

The FSC seeks to have the restrictions limiting the capacity for the Commissioner to make a determination where there has been a previous excess contribution be removed from the Bill by deleting s 292-467(c).

The FSC understands that the proposed measures have arisen out of the high number of excess contributions caused by recent changes in the concessional caps policy. The Government, however, is finalising details to again change this policy in a significant and complex way commencing 1 July 2012.[1] The FSC is concerned that these subsequent changes will again cause fund members to inadvertently make excess concessional contributions. However, where the same members have made excess contributions in the current financial year, they will not be able to seek a refund.

The proposed amendments are necessary because the Commissioner interpreted his previous discretionary power in s 292 -465 too tightly. That is, it was almost impossible to satisfy his interpretation of what was "reasonably foreseeable or special circumstances". Given this background it would be prudent if future use of the Commissioner's discretions in this area were to be unimpeded. That is, the discretion could be exercised if reasonable grounds exist or if the excessive contributions are relatively small compared to total contributions.

[1] Media Release – Minister for Financial Services and Superannuation, 23 February 2012
http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/007.htm&pageID=003&min=brs&Year=&DocType

As a general principle the FSC submits that the ability of the Commissioner to exercise his power to make a determination to refund an excess contribution should be available whenever there is a change to the concessional caps, such that individuals are not penalised as a result of ongoing policy changes.

RECOMMENDATION: The restrictions limiting the capacity for the Commissioner to make a determination where there has been a previous excess contribution be removed from the Bill by deleting s 292-467(c).

2. Disclosure of superannuation information

We broadly welcome the proposal to amend Division 355 of Schedule 1 of the *Taxation Administration Act 1953*, and extend the list of exceptions under which the Commissioner of Taxation may disclose superannuation information to certain entities.

The FSC acknowledges that this amendment seeks to provide the basis on which member account consolidation can be implemented and as such we find that full comment on this measure is difficult without access to and consideration of the legislative details of the consolidation measures.

We also advise that our generally supportive response to this amendment should not be taken as approval of the proposed consolidation measure in its entirety. The FSC supports a consolidation regime that is driven by member consent and sensible measures to reduce the number of truly unnecessary accounts, and therefore we recognise the necessity of this amendment to support this program.

We would therefore seek confirmation in the Bill that information would only ever be provided from the ATO's database to a superannuation entity on a consensual basis for existing members (or new members), and that information would be restricted to "non-sensitive" information, for example, omitting account balances.

In particular, we seek clarification that the Explanatory Memorandum box on page 60 describing the new mechanism will not permit disclosure of "all types of (member) information" such as account balances.

We do not believe that it would be necessary to disclose the quantum of a member's superannuation balance to a provider in order for consolidation to proceed. Rather, the existence of an account should be disclosed. Member privacy does not need to be compromised in order to achieve the policy goal of reducing duplicate superannuation accounts.

RECOMMENDATION: Sensitive member information should not be disclosed. Rather merely the existence of an account should be provided.

We are concerned that the wording of the ED is very ambiguous as to who would be able to access the information of the member, on privacy grounds. It reads that any Trustee that has entered into an agreement with the ATO would be able to access information of any member, regardless of whether that Trustee had a direct relationship with that member or not.

One of the primary purposes for creating this portal and providing the information to members and trustees is to proactively promote consolidation or transfer of a members superannuation interests. Whilst the ATO may maintain they are purely providing factual information and no advice to members, the purpose of the disclosure is to incite activity.

Therefore, we would maintain that the portal must contain appropriate information in relation to a members' interest in order for the member to make an informed decision with respect to any subsequent actions.

We believe that superannuation members should always retain a right to control the information that is available to third parties, and therefore a mechanism allowing members to "opt-out" of their information being provided to other superannuation funds, is needed.

This would consist of the member being able to instruct the ATO to not disclose their information to superannuation entities via this mechanism.

Under the current mechanism, a fund must have consent from the member to access a client's information from SuperMatch, and under the expanded SuperSeeker service, a member would give instruction to the ATO to initiate the consolidation process. Under auto-consolidation, we are concerned that the process foreshadowed in the September 2011 "Information Pack", combined with the amendment in the Bill would result in a situation where potentially sensitive information about a member's holdings in one fund could be provided to another fund without obtaining consent, or even providing advice to the member that the information had been passed on. We believe that this is not consistent with an environment in which members have control over the disclosure and use of their financial information.

RECOMMENDATION:
We recommend one of two possibilities. The Bill be amended such that either:

- the ATO is restricted to passing on such information to a fund only after the member has sought consolidation via SuperSeeker or the fund has sought that information with the member's consent, or
- the ATO must seek consent from the member prior to passing on information to a fund regarding holdings outside that fund.

There are certain product types which should be exempted from disclosure of superannuation information. These include:

- <u>Traditional or conventional life insurance policies offered through a superannuation fund</u>
  These products would include whole of life, endowment and pure endowment policies sold via a superannuation arrangement. These policies should not be captured as they are not investment accumulation type superannuation products.

- <u>Participating policy products</u>
  This style of product (where the trustee invests in a participating policy with a Life Company) should be exempt as they are not investment accumulation type superannuation products.

- <u>Risk-only life insurance policies offered through a superannuation fund</u>
  This style of product should be exempt as there is no investment component.

- Defined Benefit funds
  This style of product should be exempt as they are not investment accumulation type superannuation products.

- Pension-phase accounts
  This style of product should be exempt as they are not accumulation type superannuation products.

Additionally, there are other important product features/attributes of an individual's holding that could reasonably be expected to play a significant role in their decision making process, such as information on the following aspects of their account:

- Capital Guaranteed features - where the member's investment is backed in whole or by part by a guarantee by a Life Company should be exempt.
- Frozen investment amounts that are not immediately (within 30 days) portable
- Accounts with exit fees
- Insurance details
- Insurance claim status - in particular if an individual is on a Salary Continuance benefit or applying to claim under total and permanent disability insurance at the time
- Accounts with binding nominations

In light of this, there should be a list of product types that should be exempt from display. There should also be a list of product features/attributes that should be exempt from the act of consolidation without first highlighting to the individual that they have such a product feature/attribute.

The individual should be warned to take these factors into consideration and understand the impact on their personal financial situation. The individual could then contact the fund to get more information. Generic disclaimers are unlikely to be sufficient, given that we know what these product features/attributes are and are in a position to highlight such accounts.

These issues are in common across both the customer-initiated channels (for example an individual using the ATO's updated SuperSeeker online service) or via a fund-initiated channels (for example in the opt-out letter notifying an individual that their under-$1000 accounts are to be consolidated).