Chapter 3

Views on the Bill

3.1 The committee received seven submissions on the Bill.

3.2 To the extent that submissions commented on Schedules 1 (taxation of interest on unclaimed money) and 2 (reform of airline transport fringe benefits), this comment was supportive of the measures.

3.3 Only one submission addressed the loss carry-back measures at Schedules 5 and 6, with Virgin Australia supporting the loss carry-back concept, but arguing against the inclusion of a quantitative cap on the losses that could be carried back.

3.4 Five submissions discussed the measures relating to transactions of assets between SMSFs and related parties at Schedule 4.

3.5 None of the submissions received discussed Schedule 3, which relates to the SRWUIP, or Schedule 7, which gives effect to a range of miscellaneous changes to the tax and superannuation law.

Schedule 1: Taxation of interest on unclaimed money

3.6 The Australian Institute of Superannuation Trustees (AIST) expressed support for the measures contained in the Bill, suggesting the tax-free status of interest paid on unclaimed superannuation moneys would help preserve the value of unclaimed moneys in the period it remained out of the market.[1]

Committee view

3.7 The committee notes that while it only received two submissions addressing Schedule 1, the unclaimed money reforms (including the government's intention to exempt payments of interest on unclaimed moneys from income tax), have been subject to earlier consultative processes. These processes included an inquiry by the Senate Economics Legislation Committee on the *Treasury Legislation Amendment (Unclaimed Money and Other Measures) Bill 2012*, where the government made clear its intent to make interest paid on unclaimed money tax-exempt.[2]

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1 AIST, *Submission 3*, p. 1.

2 Senate Economics Legislation Committee, *Treasury Legislation Amendment (Unclaimed Money and Other Measures) Bill 2012*, report, November 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=economics_ctte/completed_inquiries/2010-13/treasury_unclaimed_money_2012/index.htm.

Schedule 2: Fringe benefits tax – reform of airline transport fringe benefits

3.8 Virgin Australia expressed support for the reforms in its submission, arguing that the measures in the Bill would 'modernise and simplify the current legislation.' In particular, Virgin Australia suggested the Bill would reduce the:

> …current administrative burden associated with calculating taxable values of our existing staff travel arrangements, which represent an important benefit to our workforce. In our view, the valuation of these benefits will remain consistent with the previous law, but compliance has been simplified.[3]

3.9 In its submission, Qantas noted that it been consulted in relation to the proposed amendments, and that the Bill as currently drafted 'addresses concerns we had in relation to this initiative.'[4]

Schedule 4: Self-managed superannuation funds (SMSFs) – acquisitions and disposals of certain assets between related parties

The need for an equitable treatment of SMSFs

3.10 CPA Australia argued against the restrictions on the acquisition and disposal of assets between SMSFs and related parties, as given effect in this Bill. In particular, CPA Australia argued that it would be:

> …inequitable to restrict SMSFs from transacting effectively and efficiently off-market when there is no demonstrable evidence of abuse and this avenue remains available to all other investors, including APRA [the Australian Prudential Regulatory Authority] regulated funds and individuals.[5]

3.11 While supporting the measures, SPAA also expressed concern that the requirement to acquire or dispose of listed securities from a related party in a prescribed manner would be limited to transactions involving SMSFs. SPAA argues that, contrary to the observations of APRA, off-market transfers of listed securities where the buyer and seller of the securities is essentially the same entity also occur in the APRA regulated sector of the superannuation industry. As such, the potential for transaction date or asset value manipulation also exists in the APRA sector, and therefore the same regulations should apply. This, SPAA argued, would ensure that:

> …all superannuation funds are treated equitably, and one sector of the superannuation market is not treated favourable over another, ensuring an efficient level playing field for retirement income vehicles.[6]

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3 Virgin Australia, *Submission 1*, p. 1.

4 Qantas, *Submission 5*, p. 1.

5 CPA Australia, *Submission 6*, p. 1.

6 SPAA, *Submission 4*, pp. 3–4.

3.12 The Cooper Review distinguished between the characteristics of SMSFs and APRA-regulated superannuation funds. SMSFs are closely held entities where all members must also be trustees or directors of a corporate trustee. The Review noted that unless there is a countervailing public policy reason, trustees of SMSFs should be free, as much as possible, from government intervention. It also expressed some concern that part of the SMSF regulatory framework need to be improved, and that the ATO needs a greater range of flexible penalties if it is to achieve 'appropriate and proportionate regulatory outcomes'.[7] The EM to the bill observed that the SMSF structure 'may provide the opportunity for SMSF members to engage in behaviour that is inconsistent with the Government's retirement policy that superannuation savings should be invested for the sole purpose of providing an income in retirement'.[8]

Merger exception

3.13 The Bill provides an exception to the prohibition on a trustee or an investment manager of a SMSF acquiring an asset from a related party of the fund if the asset is acquired under a merger between regulated superannuation funds and at market value, as determined by a qualified independent valuer.

3.14 The Law Council suggested that along with the exception applying to the acquisition of an asset through a merger, a mirror exception should be added at paragraph 66B(3) so that the same arrangement applies regarding the disposal of an asset to a related party via the merger arrangement. The Law Council suggested this would be appropriate, given that 'if the transferee fund will be acquiring an asset from a related party (which is likely to be an SMSF) then the transferor fund will also be disposing of an asset to a related party via the merger arrangement.'[9]

3.15 The Law Council further argued that the requirement that an asset acquired through a merger must be acquired at market value is problematic, as it would imply that an:

> …amount would be paid or other consideration given to the transferor fund – however, this is most unlikely in a merger situation as the transfer will typically be made for nil consideration as the transferee fund takes on the liabilities with respect to benefits payable for the members of the transferor fund.[10]

3.16 As such, the Law Council recommended that instead of the Bill requiring that an asset be 'acquired' at market value, it require that an asset be 'recognised' by the transferee at market value, as determined by a qualified independent valuer.

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7 Super System Review, *Final Report: Part 1, Overview and recommendations*, 2010, p. 16.

8 Explanatory Memorandum, p. 55.

9 Law Council of Australia, *Submission 2*, pp. 2–3.

10 Law Council of Australia, *Submission 2*, p. 3.

3.17 The committee sought Treasury's response to the Law Council's argument that a mirror exception be added to apply to the disposal of an asset to a related party via the merger arrangement. Treasury noted that proposed paragraph 66B(3)(f) provides a general exception for assets that are disposed of to a related party for market value, as determined by a qualified, independent valuer. It argued that a specific mirror exception is not required as the disposal of an asset in a merger situation is covered by this general exception.[11]

Money exception

3.18 The Bill includes exceptions to the prohibition on a trustee or an investment manager of an SMSF acquiring or disposing of an asset from a related party of the fund if 'the asset is money' (at proposed new paragraph 66A(3)(f) of the SIS Act for acquisitions, and 66B(3)(c) for disposals).

3.19 The Law Council suggested that to ensure consistency with the current exclusion in the SIS Act of the acceptance of money from the definition of 'acquire an asset' (paragraph 66(5) of SIS Act) the exceptions in the proposed new paragraphs 66A(3)(c) and 66B(3)(f) should be replaced with new sections stating that the 'acquire an asset does not include acceptance of money' and 'dispose of an asset does not include payment of money.'[12]

3.20 The Explanatory Memorandum states that the money exception, as currently worded in the Bill:

> …is not intended to operate or apply in a different manner to SMSFs than the way that the current section 66 allows a regulated superannuation fund to accept the money from a related party, for example, in the form of contributions.[13]

3.21 Treasury informed the committee that it has consulted on the money exception with the ATO, and is confident that the Bill as currently drafted will operate in a manner that is consistent with section 66 of the SIS Act.

3.22 Treasury also told the committee that the transfer of assets under a merger of regulated superannuation funds may occur for no consideration however the market value requirement of the exception can still be satisfied. It noted that in Self Managed Superannuation Funds Ruling SMSFR2010/1, the Commissioner provided guidance to trustees of SMSFs as to how an asset may be acquired at market value in these circumstances.[14]

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11 Treasury, *Response to question on notice*, received 7 March 2013.

12 Law Council of Australia, *Submission 2*, p. 3.

13 Explanatory Memorandum, p. 65.

14 Treasury, *Response to question on notice*, received 7 March 2013.

Anti-avoidance

3.23 The Law Council notes that the new anti-avoidance measures in the Bill relating to acquisitions of disposals do not require any intention to enter into a scheme to circumvent the prohibitions under sections 66A (acquisitions) and 66B (disposals). The Law Council suggested there is potential scope for SMSF trustees to unknowingly contravene the prohibitions, and be subject to civil penalty under the anti-avoidance measures. Moreover, there is potential for an innocent contravention to cause an SMSF to be treated as a non-complying fund.[15]

3.24 In contrast, the anti-avoidance measures in paragraph 66(3) of the current SIS Act, which sets out anti-avoidance measures in relation to the acquisition of certain assets from members of regulated superannuation funds, operates so that a contravention would only occur if an intention to defeat or circumvent the prohibitions can be established. As such, the Law Council recommends that section 66C of the Bill be drafted to be consistent with the terms of the existing paragraph 66(3).[16]

3.25 Similarly, SPAA argues that the prohibition on asset certain acquisitions and disposals between SMSFs and related parties should only apply to transactions that knowingly and intentionally involved related parties:

> This is especially relevant due to the complexity of the definition of related party in the SIS Act which can result in entities being a related party of a fund, even where there is little evidence of a direct link between the fund and the entity.[17]

Treasury's response

3.26 The committee asked Treasury to comment on the Law Council's observation that section 66C could be innocently and unknowingly contravened. Treasury responded that a:

> contravention of the current subsection 66 is an offence and carries a maximum penalty of 1 year imprisonment, and therefore it is appropriate that the provision contains an element of intention. In contrast, the proposed section 66C is a civil penalty provision and the consequences of contravention are outlined in the general civil penalty regime contained in Part 21 of the Superannuation Industry (Supervision) Act 1993 (SIS Act). The result of a civil penalty order is a declaration of contravention and where appropriate, a monetary penalty as determined by a court (up to a

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Australian Taxation Office, *Self Managed Super Funds Ruling 2010/1*, http://law.ato.gov.au/atolaw/view.htm?docid=SFR/SMSFR20101/NAT/ATO/00001 (accessed 8 March 2013).

15 Law Council of Australia, *Submission 2*, pp. 3–4.

16 Law Council of Australia, *Submission 2*, p. 4.

17 SPAA, *Submission 4*, pp. 4–5.

> maximum 2,000 penalty units). Further, section 221 of the SIS Act provides for relief from liability for contravening a civil penalty provision where the court is satisfied that the person acted honestly and in the circumstances the person ought fairly to be excused from the contravention.[18]

3.27 Treasury also told the committee that for criminal sanctions to be imposed under the general civil penalty regime, the Director of Public Prosecutions is required to establish that a civil penalty provision was contravened dishonestly and intending to gain, whether directly or indirectly, an advantage for another person or intending to deceive or defraud someone.[19]

3.28 Treasury also responded to the Law Council's concern that there is potential for an innocent contravention to cause an SMSF to be treated as a non-complying fund. Treasury argued that contravention of a regulatory provision does not lead to a fund automatically becoming non-complying. Rather, the Commissioner of Taxation will only make that decision after considering a number of factors which are set out in ATO Practice Statement Law Administration PS LA 2006/19.[20]

Allowing valuations of transferred assets by trustees in certain situations

3.29 CPA Australia suggested that if the measure is introduced, section 66B(3) should be amended so that in instances where there is no underlying market and a trustee is unable to obtain an independent valuation, the trustee 'is able to use their own valuation provided they can demonstrate a reasonable basis for it and it is documented.'[21]

3.30 AIST, however, questioned the appropriateness of 'funds holding assets obtained from related parties where valuations are unable to be obtained, and so do not support such transfers'.[22]

3.31 The Association of Superannuation Funds of Australia (ASFA) recommended that proposed subsection 66B(3) be expanded to include an 'in-specie' transfer of the asset to a member in consideration for the payment of a benefit from the fund. However, the amount of the benefit paid must be equal to the market value of the asset transferred. In addition, ASFA argued that given the obligation to use a qualified independent valuer:

> …there could now be additional classes of assets where acquisitions from or disposals to related parties could be permitted without material systemic integrity risk. Those assets could include, amongst other things:

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18 Treasury, *Response to question on notice,* received 7 March 2013.

19 Treasury, *Response to question on notice,* received 7 March 2013.

20 Treasury, *Response to question on notice,* received 7 March 2013.

21 CPA Australia, *Submission 6,* p. 1.

22 AIST, Submission 3, p. 1.

- shares in unrelated unlisted public companies; and
- unlisted fixed interest type securities issued by listed public companies, unlisted public companies, governments and government authorities, such as debentures and bonds.[23]

Regulations governing off-market transactions

3.32 The Self Managed Superannuation Funds Professionals' Association of Australia (SPAA) was supportive of the measures in Schedule 4, but encouraged the government to expedite the release if the draft regulations prescribing how SMSF off-market transfers of listed securities are to operate.

3.33 SPAA suggests that 'the best approach to governing SMSF off-market regulations is via a Superannuation Industry (Supervision) Regulations 1994 (SISR) operating standard.'[24]

3.34 Treasury has informed the committee that it is currently consulting with the Australian Securities and Investment Committee to develop the regulations. Treasury anticipates a standard consultation process will follow the release of the draft regulations, allowing interested stakeholders to provide input on the regulations.[25]

Committee view

3.35 Given the different structure, investment choices and regulatory framework applying to SMSFs, the committee does not believe that the bill inequitably restricts SMSFs from transacting effectively and efficiently off-market. The Cooper Review was concerned with these off-market acquisitions and disposal of assets between related parties and SMSFs. The committee believes that the bill is a proportionate response to these concerns.

3.36 The committee is also satisfied that the general exception for assets disposed of to a related party in proposed paragraph 66B(3)(f) is well drafted. The general exception is adequate and a specific mirror exception is not required.

3.37 In terms of the Law Council's concerns with the wording of the money exception, the committee is presented with no evidence for it to believe that the Bill will operate in a manner inconsistent with the current section 66 of the SIS Act.

3.38 With regard to concerns raised by the Law Council and SPAA concerning the absence of a requirement for intention to be demonstrated in instances where civil penalty provisions are applied, the committee notes that section 221 of the SIS Act sets out circumstances in which a person can be wholly or partially of liability for

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23 Association of Superannuation Funds of Australia, *Submission 7*, p. 2.

24 SPAA, *Submission 4*, p. 1.

25 Treasury, *Response to question on notice*, received 7 March 2013.

contravention of the provisions. Specifically, if, in eligible proceedings against a person that has, or may have, contravened a civil penalty it appears to the court that a person has acted honestly, the court may relieve that person of liability for the contravention. The committee further notes that section 323 of the SIS Act provides further relief from civil penalties where the contravention was due to a reasonable mistake or reasonable reliance on information supplied by another person.

3.39 The committee notes the points made by SPAA regarding the yet-to-be-released regulations governing off-market transactions. The committee further notes that Treasury intends to conduct a consultation process after the draft regulations are released.

Schedules 5 and 6:

3.40 Virgin Australia argued that the quantitative cap on the tax loss a company could carry back would limit the benefits to small-to-medium sized enterprises:

> In Virgin Australia's view, the advantages of these measures, such as greater certainty for profitable companies to be able to utilise a loss from an investment and the associated cash flow benefits, should be available to all corporate taxpayers, including companies with large capital requirements such as airlines. The removal of the quantitative cap would extend the benefits of the measures of the measures to large businesses, driving greater investment and innovation in the Australian economy. Importantly, it would not impact on Government tax revenue in the long-term, as tax losses which are carried back will not be available to be carried forward.[26]

3.41 Virgin Australia argued that given the ability to carry back losses will be limited in terms of time (to the two previous tax years) and franking account balance, the further quantitative cap of $300,000 (that is, the corporate tax paid on $1,000,000) is not appropriate. According to Virgin Australia, the use of the franking credit regime as a capping mechanism already ensures that tax credits from previous years have not already been distributed to shareholders.[27]

3.42 Virgin Australia also noted that Australia's Future Tax System Review did not suggest a quantitative cap be placed on losses that could be carried back.[28]

3.43 Finally, Virgin Australia challenged the idea, as contained in the Explanatory Memorandum, that small and medium businesses are not able to take advantage of the consolidation regime's loss utilisation rules, wherein the losses of one member of a corporate group can be offset against income earned by other members. Virgin Australia notes that there are, in fact, 'no restrictions on applying the consolidation

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26 Virgin Australia, *Submission 1*, p. 2.

27 Virgin Australia, *Submission 1*, p. 3.

28 Virgin Australia, *Submission 1*, p. 3.

rules for small and medium business that have more than one entity in their corporate structure.

3.44 The Regulation Impact Statement (RIS) prepared by Treasury (and included in Explanatory Memorandum), explained that the quantitative cap has two purposes:

(a) reducing integrity concerns by reducing the value of the deduction that is available, and thereby reducing the incentive to tax planning; and

(b) targeting the option to carry back losses to small and medium businesses.

3.45 Explaining further how the cap helps target the measure to small and medium businesses, the RIS argued that these businesses 'don't have the same access to losses as diversified business and corporate groups,' which can use profits from other activities to absorb losses.[29]

3.46 The RIS also argued the cap would 'reduce the exposure of the Government to very large losses incurred by individual businesses.'[30]

Committee view

3.47 The committee is satisfied the quantitative cap on the losses that can be carried back is an effective and appropriate means to target the measure at small and medium businesses, and recognises that these businesses generally do not have access to losses as large companies and consolidated groups with diversified activities.

3.48 While the committee only received one submission that addressed the loss carry-back measures (from Virgin Australia), the committee is aware that the changes have already been subject to extensive consultative processes. These consultative processes were covered in more detail in the previous chapter.

Recommendation 1

3.49 The committee recommends that the Bill be passed.

Ms Deborah O'Neill MP
Chair

29 Explanatory Memorandum, p. 138.

30 Explanatory Memorandum, p. 138.