

# Chapter Eleven

## Other Implementation Issues

### Introduction

11.1 This chapter examines the following implementation issues in relation to the portability regulations raised during the inquiry:

- a) A roll over/transfer protocol;
- b) The timing of roll overs/transfers;
- c) Suspension or variation of roll overs/transfers;
- d) Legal protection for trustees; and
- e) The commencement date of the regulations.

### A roll over/transfer protocol

11.2 Regulation 6.33 of the Superannuation Industry (Supervision) Amendment Regulations 2003 is the main regulation dealing with the roll over/transfer of withdrawal benefits. It states in part:

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.

11.3 In its written submission, ASFA argued that it would assist all parties if this regulation provided more detail of the level of information required to be supplied by the member to the fund. ASFA suggested the possible inclusion of an additional sub-regulation detailing the type of information required such as:

- a) The Australian Business Number (ABN) of the destined fund;
- b) The amount to be rolled over/transferred out of the fund; and
- c) Either the SPIN of the destination fund/product or the member's account number of that fund.<sup>1</sup>

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1 *Submission 2, ASFA, p. 6.*

11.4 This point was also made by IFF in its written submission. It argued that there needs to be a standard industry-wide protocol setting out the data that all superannuation funds need in order to implement a roll over/transfer request. The IFF suggested that currently, some funds delay implementing roll over/transfer requests because they claim to require further information (which in some cases seems designed to cause a member to abandon their request in frustration).<sup>2</sup>

11.5 Similarly, Cbus also argued that a roll over/transfer protocol should be included in the regulations. Such a protocol should define exactly what information is required for a roll over/transfer to occur and establish a standard form approved by the industry regulator to facilitate roll overs/transfers.<sup>3</sup> This point was also made by CPA Australia.<sup>4</sup>

11.6 The Committee also raised the issue of a roll over/transfer protocol with Mr Korchinski from AAS in the hearing on 31 July 2003. Mr Korchinski indicated:

The whole transfer protocol has been a matter that the industry has looked at for many years. It is conceptually attractive but very difficult to implement. The problem with the implementation is primarily due to the fact that a lot of the transfer processes are computerised—whilst we do have a standard protocol in place, for many of the funds the costs to actually move to that protocol are excessive, and there is no attraction in the short term to offset that cost. It is one of the disappointments within the industry, because in the majority of cases we issue cheques to transfer when there should conceptually be a clearing house approach, much like the way cheque clearing occurs.<sup>5</sup>

11.7 The Committee notes that Mr Silk from IFF,<sup>6</sup> Ms Kelleher from CPA Australia<sup>7</sup> and Mr Noble from Cbus also indicated in the hearing on 1 August 2003 their support for the development of an industry-wide roll over/transfer protocol. Mr Noble stated:

We believe that, in terms of the practices in the industry and consolidating superannuation accounts, good practice is not exercised by all participants in the industry. We believe that we operate on a basis of professionalism, trying to process rollovers as smoothly and professionally as possible, but we do believe that there are some providers out there who will delay the processing of rollover requests and who ultimately ask for their own forms to be used. When this is done, it creates another obstacle for members

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2 *Submission 4*, IFF, p. 2.

3 *Submission 16*, Cbus, p. 5.

4 *Submission 13*, CPA, p. 2.

5 *Committee Hansard*, 31 July 2003, p. 55.

6 *Committee Hansard*, 1 August 2003, p. 6.

7 *Committee Hansard*, 1 August 2003, p. 52.

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because members find it difficult enough to understand the superannuation system without being pushed through another hoop in terms of consolidating their superannuation accounts. We believe that we need some transfer protocols to ensure that we do get a consistency of standards across the industry in terms of rollovers.<sup>8</sup>

## **The timing of roll overs/transfers**

11.8 Under regulation 6.34(3) of the Superannuation Industry (Supervision) Amendment Regulations 2003, it is proposed that subject to certain restraints, if a trustee of a regulated superannuation fund or an approved deposit fund receives a request for a roll over/transfer under regulation 6.33, the trustee must roll over/transfer the amount as soon as practicable, and in any case within 90 days after:

- a) Receiving the request; or
- b) If the trustee requires further information in relation to the request – receiving the further information; or
- c) If there is a suspension under regulations 6.36 or 6.37 – the end of the period of the suspension.

11.9 In its September 2002 consultation paper on portability, Treasury noted that to adopt a longer notification period, such as 12 months, would diminish the effectiveness of the policy in meeting its objectives. In particular, it would reduce the extent to which portability would enhance competition between superannuation providers and, therefore, reduce the pressure on all funds to maintain investment strategies that meet the needs of members. It would also mean that some fund members would be required to keep their benefits in a fund that they did not consider was meeting their needs.<sup>9</sup>

11.10 The Committee notes that a number of parties in their written submissions recommended a shorter roll over/transfer period than 90 days:

- IFF acknowledged that the 90 day requirement will address the issue of deliberate delays by some superannuation funds in meeting a roll over/transfer request, but supported a shorter roll over/transfer period of 45 days following receipt of all necessary information.<sup>10</sup>
- The AIG suggested that the 90 day allowance could ‘possibly even be shortened’;<sup>11</sup>

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8 *Committee Hansard*, 1 August 2003, p. 21.

9 Commonwealth Treasury, *Portability of Superannuation Benefits*, p. 15.

10 *Submission 4*, IFF, p. 2.

11 *Submission 5*, AIG, p. 1.

- The ACTU argued that the 90 day allowance could reasonably be reduced to 30 days.<sup>12</sup>

11.11 However, Cbus supported the 90 day period as appropriate.<sup>13</sup> Similarly, in its written submission, AAS argued that its clients would regard a service level of 90 days as well outside acceptable standards, but indicated that 90 days may be an acceptable minimum standard.<sup>14</sup>

11.12 The Committee also raised this issue in hearings. Mr Korchinski from AAS indicated that 90 days to meet a request from a member for a roll over/transfer would generally be considered poor service, and that it would be reasonable for superannuation providers to meet a more ‘reasonable service standard’.<sup>15</sup> In addition, Mr Silk from IFF expressed his belief that a 30 or 45 day period would give superannuation funds sufficient time to act on a request following receipt of appropriate documentation.<sup>16</sup>

## **Suspension or variation of roll overs/transfers**

### Regulation 6.36 – Suspension or variation of obligation to roll over/transfer amounts by APRA

11.13 Under regulation 6.36 of the Superannuation Industry (Supervision) Amendment Regulations 2003, APRA may, by notice in writing to the trustee, suspend or vary an obligation on the trustee under regulation 6.34, if APRA believes on reasonable grounds that a roll over/transfer of an amount would have a significant adverse effect on:

- a) The financial position of the fund; or
- b) The interest of other members of the fund.

11.14 In their written submission, both ASFA and CPA Australia questioned whether the terms ‘reasonable grounds’ and ‘significant adverse effect’ require definition either through regulation or a Superannuation Circular issued by APRA prior to the provision coming into effect.

11.15 The Corporate Super Association also argued that it is desirable that information and guidelines be made available about the circumstances under which

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12 *Submission 10*, ACTU, p. 1.

13 *Submission 16*, Cbus, p. 5.

14 *Submission 18*, AAS, p. 3.

15 *Committee Hansard*, 31 July 2003, p. 55.

16 *Committee Hansard*, 1 August 2003, p. 4.

APRA would be likely to exercise its discretion, whether unilaterally or at the request of a fund's trustee (regulation 6.37).<sup>17</sup>

Regulation 6.37 – Suspension or variation of obligation to roll over/transfer amounts by APRA – application by trustee

11.16 Under regulation 6.37 of the Superannuation Industry (Supervision) Amendment Regulations 2003, a trustee may apply to APRA to suspend or vary the trustee's obligation to roll over/transfer an amount under regulation 6.34.

11.17 In its written submission, ASFA argued that there should be some time constraint imposed on trustees wishing to avail themselves of regulation 6.37. ASFA suggested that as the provision stands, a trustee may receive a valid application for a roll over/transfer, but could wait for, say, 80 days, before making an application to the regulator for relief. Although APRA has 30 days to respond under draft Regulation 6.37(5), draft regulation 6.43 would require the trustee to make the payment no later than 90 days after the application for a roll over/transfer.

11.18 Accordingly, ASFA proposed that a time limit, for example 30 days from receiving a request for a roll over/transfer, be imposed on the ability of a trustee to apply to APRA for relief under draft regulation 6.37. This would avoid any conflict that may arise between the requirement to roll over/transfer an amount and seeking and gaining relief due to an inability to pay.<sup>18</sup>

11.19 The Committee notes that this issue remains applicable to the gazetted regulations.

Protection for trustees

11.20 On a related issue, Mr Riordan from the Law Council of Australia noted that regulation 6.34(3) of the Superannuation Industry (Supervision) Amendment Regulations 2003, which requires that a trustee must roll over or transfer an amount within 90 days, does not allow for 'variation' or 'suspension' of that requirement under regulation 6.36 and 6.37. Accordingly, the Council argued that regulation 6.34(3)(c) needs to be amended to include reference to the roll over/transfer having to be accomplished within 90 days after 'notification of the variation under regulations 6.36(2) or 6.37(6)'.<sup>19</sup>

11.21 Mr Riordan and the Law Council of Australia in its submission also raised the possibility that under regulation 6.34(3) of the Superannuation Industry (Supervision) Amendment Regulations 2003, a trustee may make an application to APRA under regulation 6.37 for suspension of a transfer, but that APRA may not make a decision

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17 *Submission 9*, Corporate Super Association, p. 6.

18 *Submission 2*, ASFA, p. 7.

19 *Submission 20*, Law Council of Australia, p. 3. *Committee Hansard*, 14 August 2003, p. 2.

within 90 days, placing the trustee in breach of the regulation. Accordingly, the Council argued that some form of protection is required for a trustee who does not receive a response from APRA within the 90 day period.<sup>20</sup>

### **Legal protection for trustees**

11.22 In its written submission, the Law Council of Australia noted that there does not seem to be any legal protection for trustees under the draft regulation where a member rolls over/transfers their savings, but it later turns out they would have been better off staying where they were. The Council noted that in the family law superannuation splitting context, the trustee is expressly protected when it rolls over/transfers an amount in accordance with that regime.<sup>21</sup> Mr Riordan from the Law Council of Australia reiterated this concern in relation to the gazetted regulations in the hearing on 13 August 2003.<sup>22</sup>

11.23 Treasury replied to this matter in its response to questions on notice dated 18 August 2003. Treasury noted that there are already in place a number of protections for trustees:

- a) In particular, section 341 of the SIS Act expressly protects trustees from liability in relation to an act done in fulfilment of an obligation imposed by the SIS Act or SIS Regulations. The obligation to rollover or transfer a benefit under portability is contained in the SIS Regulations and hence would be covered by section 341.
- b) Section 310 of the SIS Act also provides protection. This section provides that in civil proceedings against trustees a court has the power to relieve the person of liability if the person acted honestly and having regard to all the circumstances, the person ought fairly to be excused. This defence applies to an action for negligence, default, breach of trust, or breach of duty.

11.24 Given these existing protections in the SIS Act, Treasury submitted that it does not appear that any further protection for trustees is necessary under the regulations.<sup>23</sup>

11.25 The Committee in turn requested the Law Council of Australia to respond to Treasury's position. In its supplementary written submission dated 25 August 2003, the Law Council made the following points:

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20 *Submission 20*, Law Council of Australia, p. 3.

21 *Submission 20*, Law Council of Australia, p. 4.

22 *Committee Hansard*, 13 August 2003, p. 2.

23 Treasury, Response to Questions on Notice, 18 August 2003, p. 1.

- a) Section 341 of the SIS Act: The Law Council of Australia argued that section 341 of the SIS Act provides protection to a trustee but is limited to liability for civil proceedings in relation to an act done in the fulfilment of an obligation imposed by the SIS Act or SIS Act Regulations. Accordingly, the Law Council of Australia argued that section 341 provides inadequate protection for trustees on two grounds:

Firstly, the provision can only be used as a defence to an action brought against a trustee rather than a true immunity for the fulfilment of obligations imposed on a trustee in accordance with the SIS Act and SIS Act Regulations.

Secondly, the defence is limited by the fact that it only covers acts which are done in ‘fulfilment of an obligation’. This will not cover ancillary acts of a trustee. For example, in the context of the gazetted regulation 6.34, a trustee will only be protected in relation to actions taken to ensure that a member is aware that they may ask the trustee for information regarding the entitlements that the member may have. This will not cover information provided by the trustee pursuant to a request from a member.

- b) Section 310 the SIS Act: The Law Council of Australia noted that Section 310 of the SIS Act provides the Courts with the power to grant relief of liability for civil proceedings bought against a superannuation official for official misconduct in the capacity of their role. A court may release a party from such liability where it appears that the official may be liable in respect of a claim and the official has acted honestly and having regard to all the circumstances of the case he or she ought fairly be excused for the official misconduct.

Once again, however, the Law Council of Australia argued that section 310 is inadequate to protect trustees in relation to the gazetted regulations. The Council made three points:

First, as with section 341, the provision grants only a defence to a civil proceeding or potential civil proceeding rather than a true immunity.

Secondly, the power to grant relief is confined to actions for ‘official misconduct’ which is of no relevance to division 6.5 of the gazetted regulations.

Thirdly, some commentators have questioned the constitutional validity of the provision.

11.26 Given its concerns, the Law Council of Australia advocated in its supplementary submission the inclusion of a specific section in the portability

regulations to protect trustees. That section could be modeled on section 90MZE of the *Family Law Act 1975* along the following lines:

The trustee of an eligible superannuation plan is not liable for loss or damage suffered by any person because of anything done (or not done) by the trustee in good faith:

- a) in relation to any roll over or transfer of a withdrawal benefit under this division; or
- b) where the trustee has made an application under regulation 6.37 to APRA to suspend the trustee's obligations to roll over or transfer a withdrawal benefit and APRA has not responded within 90 days; or
- c) where the trustee is unable to facilitate a roll over or transfer of withdrawal benefit due to a delay resulting from a request made by APRA for further information in accordance with an application made under regulation 6.37.<sup>24</sup>

11.27 The Committee notes that this proposed section picks up the concerns noted earlier of the Law Council of Australia in relation to the suspension or variation of roll overs/transfers.

### **Commencement date**

11.28 In its written submission, Mercer argued that the introduction of portability will require many funds to implement significant systems changes. In addition, Mercer noted that trustees are currently heavily involved in implementing procedures to cope with the new FSR Act requirements. Furthermore, from early next year, it is likely that trustees will also need to start preparing for the draft APRA licensing arrangements.

11.29 Accordingly, Mercer argued that portability should not commence until at least 12 months after either the regulations have been gazetted or any changes to surcharge legislation and procedures have been finalised. Mercer suggested that the current draft commencement date of 1 July 2004 is unrealistic.<sup>25</sup>

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24 *Submission 33*, Law Council of Australia, pp. 1-2.

25 *Submission 17*, Mercer, p. 7.