+61 2 6248 0639

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Law Council
OF AUSTRALIA

The Secretary
Senate Select Committee on Superannuation
The Senate
Parliament House
Canberra ACT 2600

Dear Secretary

Draft Superannuation Industry (Supervision) Amendment Regulations 2003

This submission has been prepared by the Superannuation Committee of the Legal Practice Section of the Law Council of Australia (**Committee**). The Committee is pleased to be given this opportunity to comment on the draft Superannuation Industry (Supervision) Amendment Regulations 2003 (**Draft Regulations**) and the proposed amendments they seek to effect with respect to the Superannuation Industry (Supervision) Act Regulations 1994 (**SIS Regulations**). The submission has not been considered by the Directors of the Law Council.

On 18 November 2002, the Committee made a submission to Treasury concerning its Consultation Paper on the "Portability of Superannuation Benefits" but, as several of our recommendations are not reflected in the Draft Regulations, we thought that a further submission to the Senate Select Committee was indicated so that the issues could be considered again. If you require, a copy of the Committee's earlier submission will be provided to you.

This submission focuses on the legal issues which arise out of the Regulations. The Committee does not purport to provide comment on Government policy but to comment on the Draft Regulations based on the combined experience and expertise of the Committee's members in advising and participating in the superannuation industry.

All references are to the Draft Regulations unless otherwise indicated.

1. Terms of Reference

The Committee would first like to comment generally on the Senate's 17 June 2003 Terms of Reference to the Senate Select Committee on Superannuation. (Paragraph (c) of the Terms of Reference will be addressed in detail in item 2 of this submission.)

In the Committee's experience, portability of benefits already exists in the industry with respect to benefits which are crystallised. eg, on a member's termination of employment. Under the governing rules of the vast majority of

superannuation funds, a member can elect to transfer his or her crystallised benefits to any other nominated superannuation fund. The governing rules of some superannuation funds allow a member (usually with employer consent) to transfer benefits which are still accruing to another superannuation fund.

This is the traditional portability model and is based on the concept that, barring some industrial instrument which requires otherwise, the employer is the party which at law decides to which superannuation fund it will make superannuation contributions in respect of its employees. Until Parliament changes the traditional contributions model by giving this decision-making power to the employee rather than to the employer, it seems unnecessary to change the portability model.

2. Comments on Draft Regulations

Paragraph (c) of the Terms of Reference requests the Senate Committee to address the "desirability and practicality of the portability regime contained in the draft regulations". Accordingly, following are the Committee's comments on the Draft Regulations.

1 Proposed new division 6.5 of the Draft Regulations deals only with "rollovers", whereas in the existing SIS Regulations the more common terminology is "roll over or transfer" (eg, see SIS Regulation 7A.06 in the context of family law transfers).

Under SIS Regulation 5.01(1):

- "rolled over" means "paid as an eligible termination payment"; and
- "transferred" means the payment or receipt of a member's benefits "otherwise than upon the satisfaction by the member of a condition of release".

These definitions apply to part 6 of the SIS Regulations (and therefore will apply to Draft Regulations division 6.5) because of SIS Regulation 6.01(1). As we understand that it is the Government's intention that the portability measures would apply in both situations (ie, where the benefit is an eligible termination payment as well as where the benefit is in the accrual phase), it seems that the references in Draft Regulations division 6.5 to "rollover" should be changed in all instances to "rollover or transfer". Consequential changes to Draft Regulation 1.03B will also be required.

2 The wording of Draft Regulation 6.30(2)(c) is confusing as it refers to division 6.5 not applying to a member who is "eligible to contribute to the fund under the governing rules of the fund". Is the Regulation trying to address the situation where the member is eligible to make voluntary contributions or where the member is required (and therefore eligible) to make contributions toward his or her defined benefit interest? There may also be situations where members do not contribute to the accrual of a defined benefit interest (for example, if member contributions have been waived due to a surplus of assets in the fund).

The Committee thought that the Government had expressed its intent to exclude all defined benefit interests from the proposed portability regime but the wording of Draft Regulations 6.30(2)(c) seems to be inconsistent with that intention.

3 There seems to be a typographical error as "(1)" is missing at the start of Draft Regulation 6.31.

4 Under Draft Regulation 6.33, it seems that a member can request as many partial rollovers as he or she wants and in any amount (no matter how small). This will create an unnecessary administrative burden for the fund's trustee and could result in a member treating a superannuation interest like a bank account and transferring amounts very frequently, resulting in greater costs to be borne by all members. The Draft Regulations ought either to prescribe the number of times annually a member can make a request for a partial transfer or to give the trustee the power to determine how frequently the request could be made (perhaps an obligation on the trustee to permit a transfer or rollover at least once a year could be prescribed in the Draft Regulations).

Otherwise, a situation may develop where the trustee accepting contributions has the administrative burden of processing contributions but will not get the advantage of the funds for investment purposes, particularly if choice of fund legislation is not in place.

5 Draft Regulation 6.34(2) does not seem to contemplate the situation of variation (even though Regulations 6.36 and 6.37 both permit "variation" as well as "suspension"). Draft Regulation 6.34(2)(c) needs to be amended to include a reference to the rollover having to be accomplished within 90 days after "notification of the variation under regulation 6.36(2) or 6.37(6)".

Also in Draft Regulation 6.34(2), the Committee believes that there is an unintended omission where an application has been made by a trustee under Draft Regulation 6.37 and APRA has not made a decision and the 90 day period elapses. (Draft Regulation 6.37 does not specify a time period within which a trustee must make an application to APRA.) The trustee would be in breach of Draft Regulation 6.34(2) in this circumstance but that seems to be unintended. Some form of protection is required for a trustee who considers that there is a risk of a "material adverse effect" and does not receive a response from APRA within the 90 day period. If in the circumstances the trustee is "forced" to rollover the member's benefit then there may be serious consequences for the trustee under other provisions of the SIS legislation and at common law.

6 In relation to Draft Regulation 6.35, the trustee is not required to roll over an amount if "the governing rules" of the recipient fund prevent the amount being accepted. The Committee believes that the Regulation needs to be amended so that it allows the trustee of the recipient fund to refuse to accept the rollover in other circumstances. The Committee suggests that more flexibility be built into the Regulation.

For example, in SIS Regulation 7A.09(2)(c) (which the Committee believes to be an analogous situation concerning family law payment split transfers), the rollover request does not have to be given effect to by the trustee of the recipient fund if "the [fund] specified in the request does not accept" the rollover.

7 There does not seem to be any protection for a trustee that effects a transfer in accordance with proposed new division 6.5. That is, a member may be disappointed to have made a transfer decision if it later turns out they would have been better off staying where they were – and this may expose the trustee to claims. In the family law superannuation splitting context, the trustee is expressly protected when it transfers an amount in accordance with that regime. The Committee believes that a similar provision should be added to the Draft Regulations (ie, making it clear that if a member transfers, the member bears the risk).

8 There seems to be a typographical error in that the reference in Draft Regulation 6.37(7) to "sub regulation (4)" should be to "sub regulation (6)".

3. Other Comments

The Draft Regulations are not complete in that they do not cover all legal issues which are likely to arise for superannuation fund trustees. Accordingly, the Committee suggests that the Draft Regulations need to be amended to address the following issues.

1 Portability has major implications for the continuity of members' death and disability insurance and has the potential to disadvantage members and their dependants significantly. The Draft Regulations should specifically set out how the Government intends for the industry to deal with this situation.

There is an obvious link between member communication and the member being aware of the effect that his or her choice will have on his long-term retirement savings. As the Draft Regulations do not address communication at all, it seems that the member will be responsible for obtaining the information he or she deems necessary to make that decision. Alternatively trustees may be exposed to liability (including before the Superannuation Complaints Tribunal) for failure to inform members about risks associated with rolling over their benefits. In these circumstances imposing (whether by legislation or as a result of common law) a duty of disclosure on trustees is onerous for trustees and expensive for funds. The Committee believes consideration should be given to protective provisions for trustees in these circumstances.

2 If a member has chosen to transfer entitlements from their existing superannuation fund and thereafter chosen to take advantage of the "cooling off" period in the recipient fund (if a "cooling off" period is required), the member should not be allowed to re-transfer the entitlements back to their original fund. The Draft Regulations do not address this issue.

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In the Committee's opinion, employee choice of fund legislation is crucial to the success of a portability regime. In our view, the Draft Regulations are not sufficient to implement satisfactorily a portability regime which would apply to benefits still in the accrual stage. The Committee also cannot identify any apparent benefits to members or trustees in allowing portability in the accrual stage.

The portability regime as set out in the Draft Regulations could result in a situation where amounts are contributed by an employer one day and then moved to another superannuation fund the next day. In effect, this would amount to choice of fund by the member when, as the Senate Select Committee is aware, choice of fund legislation has not been passed by Parliament.

Yours faithfully

Michael Lavarch
Secretary-General