

20 June 2013

The Secretary  
Senate Standing Committees on Economics  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Mr Bryant

**RE : INQUIRY INTO SUPERANNUATION LAWS AMENDMENT (MYSUPER CAPITAL GAINS TAX RELIEF AND OTHER MEASURES) BILL 2013**

We thank the Committee for the opportunity to provide comment to its inquiry into the Superannuation Laws Amendment (MySuper Capital Gains Tax Relief and Other Measures) Bill 2013 ("the Bill").

The Financial Services Council (*FSC*) represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers and financial advisory networks. The FSC has 130 members who are responsible for investing \$2 trillion on behalf of more than 11 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Stock Exchange and is the fourth largest pool of managed funds in the world. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

The objective of the Government's MySuper reform is to provide a product offering that is in the best financial interests of members. As drafted, the Bill disadvantages certain historical fund structures and as a result, fund members, by not providing the benefit of CGT rollover relief to all mandatory transfers to new MySuper products.

In Appendix A we outline the policy rationale for receiving the benefit of CGT rollover relief when establishing a new MySuper product under an existing fund. This is done by reference to the relevant legislative drafting and APRA prudential standards, both of which treat transfers between products and transfers between funds equally. There is no policy reason for establishment of a MySuper product under an existing fund to be disadvantaged and such differentiation contradicts our understanding of the MySuper reform's intention.

The FSC recommends that the Bill be amended so as not to differentiate between funds based on their historical investment structure.

Yours sincerely

**CARLA HOORWEG**  
Senior Policy Manager

## Appendix A

### Movement of default member's accrued default amounts under MySuper

#### Policy Rationale for inclusion of 'product' level transfers

#### Legislative Framework

Schedule 6 of the *Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Act 2012* (the "Act") contains provisions relating to the movement of accrued default amounts (ADAs) to a complying MySuper product. These are the requirements under which ADAs for members who have not given a direction with respect to their superannuation fund and investment option must be transferred to MySuper (providing the members does not 'opt-out' during the notice period). These transfers are due to occur in 2017.

The Act contains provisions for the Trustee of a fund that intends to obtain a licence from APRA and offer a MySuper product, to make an election to transfer members to that MySuper product, hence recognising that in many cases a transfer to MySuper will involve a move between products within the same fund.

The wording of the section clearly refers to 'product' rather than 'fund'. The relevant section (with emphasis added) reads as follows:

#### **29SAA Election to transfer accrued default amounts**

(1) An RSE licensee that applies for authority to offer a class of beneficial interest in a regulated superannuation fund as a MySuper product makes an election in accordance with this section if:

(a) the RSE licensee elects that, if authority to offer the class of beneficial interest in the fund as a MySuper product is given, the RSE licensee will:

(i) attribute to the MySuper **product** each amount that is an accrued default amount for a member of the fund who is eligible to hold the MySuper **product**, unless the member directs the RSE licensee in writing to attribute the amount to another MySuper **product or an investment option within a choice product in the fund; and**

(ii) do so before the end of a period of 30 days beginning on the day on which notice of authority to offer the class of beneficial interest in the fund as a MySuper product is given to the RSE licensee under section 29TD;

#### Regulatory Framework

The majority of the requirements with respect to the transfer of ADAs are dealt with in APRA's Superannuation Prudential Standard SPS 410 - MySuper Transition ("SPS 410"). This also uses the

phrase ‘product’ throughout and does not differentiate between transitions that involve a move between products within a single fund, and those that require a transfer between funds (because the fund currently holding the ADAs will not offer a MySuper product).

The core definition within SPS 410 of a suitable MySuper product to which ADAs can be transferred recognises that the product could be an existing product, a different product within the same fund, or a product in a different fund.

Paragraph 11 of SPS 410 defines a suitable MySuper product as:

11. A MySuper product will be suitable for the purposes of paragraph 10 if it is a MySuper product:

(a) that:

- (i) the RSE licensee is authorised to offer in the RSE in which the accrued default amount is held; or
- (ii) the RSE licensee is authorised to offer in another RSE within its business operations; or
- (iii) is in any other RSE; and

(b) into which the member or class of members is eligible under the governing rules to make contributions; and

(c) to which the RSE licensee is legally able to attribute the member’s accrued default amount

and the RSE licensee has formed the view that attribution of the member’s accrued default amount to that MySuper product promotes the financial interests of the member or class of members.

### **Intention to treat product and fund transfers equally**

It is clear from both legislative drafting and the drafting of APRA prudential standards that the policy parameters for the transfer of ADAs to the MySuper regime treats transfers between products, and transfers between funds equally; no distinction or differentiation is made in this regard.

A superannuation Trustee that holds ADAs on behalf of a member is required to transfer those amounts to a suitable MySuper product. This is a mandatory transfer.

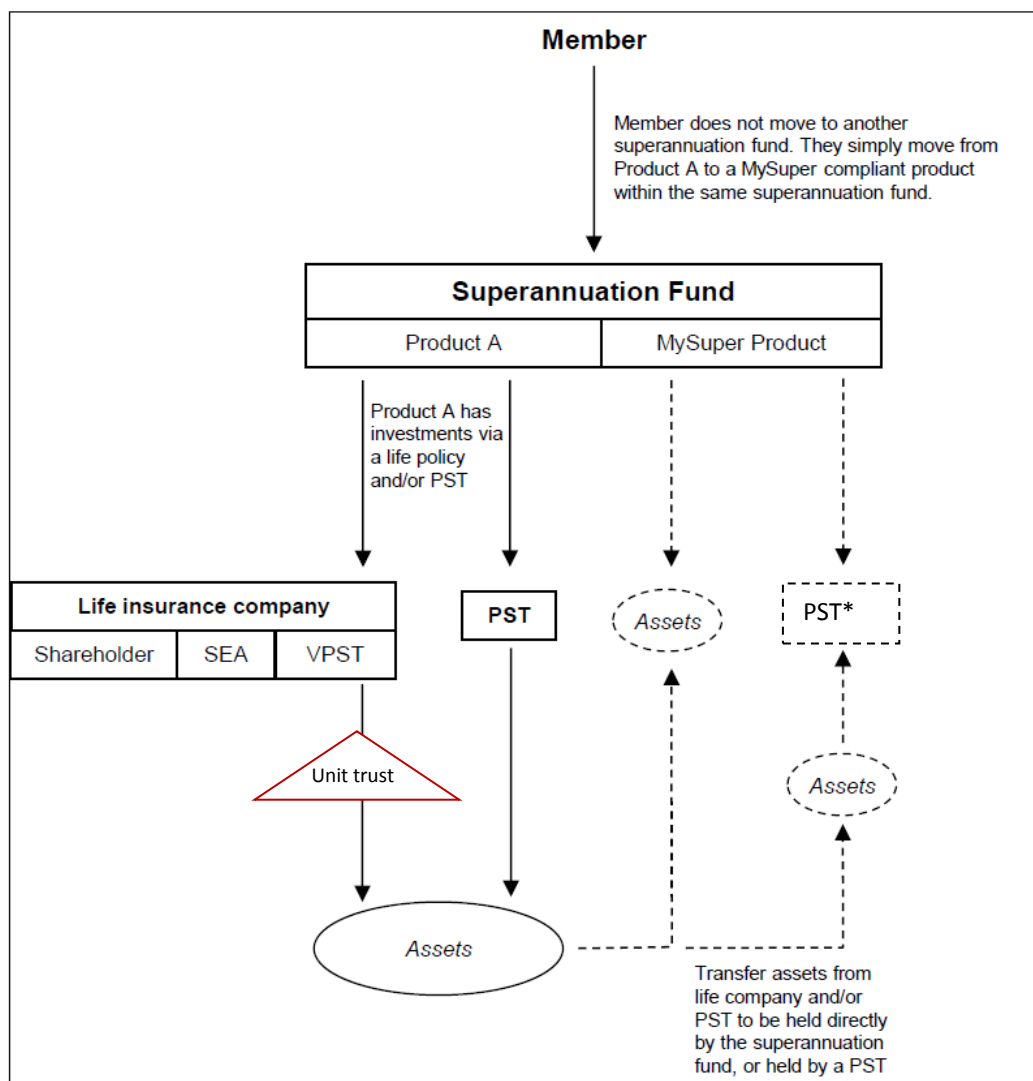
The MySuper regime does not, however mandate that the member’s ADAs must be transferred between funds, it clearly recognises that the MySuper product may be the same product in which the member’s monies reside, a different product within the same fund, or a product within a different fund. If the Trustee selects a suitable MySuper product within the same fund as the appropriate MySuper product, the transfer to this product is ‘mandatory’ in the same way as a transfer to a product in a different fund would be, had that been the appropriate product selected by the Trustee.

**We therefore submit that the structure of the CGT and loss rollover relief being provided to facilitate the transition to MySuper should equally support transfers between products within a single fund, and transfers between funds.**

## Income tax implications

The issue of intra-fund transfers was illustrated by the diagram in the Financial Services Council's submission to Treasury on 24 August 2012. Shown below is an additional scenario where a unit trust holds assets under the complying superannuation class of a life insurance company (shown in red). A copy of the FSC submission is enclosed.

Diagram A



\*The assets transferred in the above example could be transferred to a PST or a non-PST unit trust into which the superannuation fund invests.

Many life insurance companies hold assets via unit trusts and asset transfers from unit trusts such as those shown above will be needed for mandatory MySuper transfers within the same superannuation fund. However, the draft legislation contained in *Tax Laws Amendment (2013*

*Miscellaneous Measures No.1) Bill 2013* does not allow for loss or asset roll-over relief in these circumstances.

Without relief, the transfer of assets will crystallise tax on gains that will unfairly deplete superannuant's balances, contrary to the policy intent of MySuper. It will also deprive superannuant's of the value of losses, either previously realised or crystallised on the transfer of assets (see the discussion below regarding losses).

As noted above, the policy parameters for the transfer of ADAs to the MySuper regime does not discriminate between transfers to a MySuper product within the same fund or transfers to a MySuper product in a different fund. It is inappropriate that the proposed income tax relief does not afford equal treatment to both scenarios.

#### *Economic ownership of losses*

If loss transfer relief is extended to the above scenario, the transfer of losses from the unit trust to the superannuation fund will not cause a change in the economic ownership of the losses for the following reasons:

- Assuming no capping of deferred tax assets, the full value of tax or capital losses will already be recognised in unit pricing of the life policy held in respect of Product A. This means that the appropriate amount of losses to be transferred can be readily identified and only that amount could be transferred, otherwise there would be a detriment to either transferring or remaining policyholders and the directors of the life insurance company would be in breach of their duty to take reasonable care under Section 48 of the *Life Insurance Act 1995*.
- Although losses transferred to the superannuation fund could be used to offset income or gains in respect of assets held to support other members, there would be no benefit to existing members of the superannuation fund for the following reasons:
  - Existing member balances will not include the value of deferred tax assets for losses that are transferred. Conversely, losses transferred with members that move into a MySuper product will be recognised as a deferred tax asset only in the account balances of such new members.
  - If transferred losses are used to offset gains/income arising from existing member assets, their accounts will be charged with an amount equal to the tax that would have arisen on a stand-alone basis to the relevant income/gain.
  - The new MySuper member's account will be credited with the same amount, thereby replacing a deferred tax asset with cash.

It is important to note that the issue of economic ownership of losses is not unique to intra-fund MySuper transfers. It already exists in respect of:

- Losses transferred between superannuation funds on a MySuper transfer, whereby the value of those losses will attach to transferring members through the process outlined above. Given that draft *Tax Laws Amendment (2013 Miscellaneous Measures No.1) Bill 2013* does not contain any measures to quarantine losses transferred between funds, this already appears to have been accepted by Treasury.
- Complying superannuation class losses within a life insurance company. This is appropriately dealt with by unit pricing *and* tax funding mechanisms, whereby if losses arising in respect of one policyholder are used by another policyholder within the same class, compensation is paid for the amount of tax that would otherwise have arisen to the income/gain policyholder. Again, if compensation were not paid there would be a breach of duties owed to policyholders.

### **FSC Recommendation**

The FSC recommends that amendments be made to the Superannuation Laws Amendment (MySuper Capital Gains Tax Relief and Other Measures) Bill 2013 to ensure that the rollover relief explained above and shown in Diagram A is reflected in the legislation.

The objective of MySuper is to provide a product offering that is in the best financial interests of members. In order to do this the FSC believes that the rollover provisions should be drafted to ensure that members are not inadvertently disadvantaged due to the historical investment structure of the superannuation fund.