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Mr Tim Bryant
Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Email: to economics.sen@aph.gov.au

Dear Mr Bryant,

RE: Income Superannuation Laws Amendment (MySuper Capital Gains Tax Relief and Other Measures) Bill 2013

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to the request for comments on the *Income Superannuation Laws Amendment (MySuper Capital Gains Tax Relief and Other Measures) Bill 2013* (the "Bill").

ASFA supports the provision of tax relief to ensure that members of superannuation funds are not adversely affected if their account balances are transferred to another fund. We note, however, that CGT relief is not extended to circumstances where members are moved to a MySuper product within the same fund which necessitates the realisation of assets.

ASFA would like to see this measure extended indefinitely, as a matter of principle, as opposed to being confined to a transition period.

About ASFA

ASFA is a non-profit, non-political national organisation whose mission is to protect, promote and advance the interests of Australia's superannuation funds, their trustees and their members. We focus on the issues that affect the entire superannuation system. Our membership, which includes corporate, public sector, industry and retail superannuation funds, plus self-managed superannuation funds and small APRA funds through its service provider membership, represent over 90% of the 12 million Australians with superannuation.

General comments

The comments we have received from members indicate that, while the Bill generally will be effective in achieving its stated aim, there will be some difficulties faced by funds with respect to implementing contribution splitting and the application of the CGT rollover relief to pooled superannuation trusts and life office statutory funds, which may necessitate some guidance from the ATO.

Specific comment on the Bill

Contribution splitting

Without appropriate relief, a member will be required to provide a notice to split contributions prior to the compulsory rollover being undertaken. ASFA suggests that, to avoid the potential that a member may be disadvantaged, consideration should be given to amending the *Superannuation Industry (Supervision) Regulations 1994* ("SIS" regulations) to allow the contributions splitting notice to be served on the member's MySuper successor fund in a similar fashion to the manner in which the Bill enables claim for a deduction for a personal contribution to be given to the successor fund.

There is a precedent for this. SIS Modification Declaration No 1 of 2006 amended the SIS Regs to allow the receiving fund to treat as a "splittable contribution" an amount which was a splittable contribution in the transferring out fund. The SIS Modification Declaration ceased to have effect after 1 July 2007.

General comment on CGT relief

ASFA submits that CGT relief should be ongoing. Capital gains and losses resulting from the merger of two superannuation funds should not be crystallised on merger but instead the assets should be able to be carried forward in the accounts of the resulting fund.

The underlying policy principle of CGT is that part of a capital gain\capital loss resulting from a taxpayer having disposed of an asset should be treated as income\loss for the financial year in which the asset is sold, transferred or otherwise altered. This policy has integrity in circumstances where a taxpayer has control over the disposal of the asset, including where superannuation funds dispose of assets in the normal course of investing their funds under management.

It is arguable, however, that this policy should not extend to apply to superannuation fund mergers, where the underlying beneficial interest in the assets remains the same and only the legal ownership has been changed from one trustee to another. In these circumstances any capital gain\loss is not as a result of the final disposal of an asset to a third party but instead a CGT event is triggered merely by the change in legal ownership from one trustee to another, despite the underlying beneficial entitlements remaining the same.

ASFA submits that the distinction should be recognised between the circumstances where: -

- an asset is disposed of by being sold to a third party, whereby both the legal and beneficial ownership change, which creates a genuine capital gain\loss for the beneficial owner of the asset; and

- only the legal ownership is transferred to another, leaving the beneficial ownership unchanged, such that any capital gain\loss is only a notional gain\loss for the legal owner who was holding the asset in trust for the beneficial owner.

With respect to the latter, it should be borne in mind that: -

- the beneficiary member of the superannuation fund, who is the one who ultimately bears the tax consequences of any CGT gain\loss, does not have any control over the decision to merge funds or the consequential transfer of the legal ownership of the assets; and

- any CGT tax payable will be incurred by the beneficiary members, as opposed to the trustee as legal owner, through reduced unit prices or crediting rates which decrease the value of their superannuation investment.

ASFA submits that the law should recognise the distinction where the beneficial interest in the asset is not transferred and allow capital gains and losses to be rolled-over to the new legal owner.

The amendments contained in the *Income Tax Assessment Amendment (Capital Gains) Bill 1986,* which introduced the CGT reforms, allowed rollovers for asset ownership changes associated with specified types of business reorganisations where no change occurred in the underlying ownership of the asset concerned or where the underlying assets against which the taxpayers had a claim did not change.

The policy rationale behind this recognises that, where asset ownership changes are consequent upon the reorganisation of a business, and no change occurs in the underlying ownership of the asset, any CGT gains or losses should be able to be rolled-over to the new entity. ASFA submits that our proposal to permit the roll-over of CGT gains\losses where only the legal, and not beneficial, ownership of the assets has changed is entirely consistent with this.

Given the stated policy objective that funds should consider merging to achieve scale, as this ultimately will be to the benefit of fund members and the community generally, it is arguable that CGT roll-over relief should be ongoing.

Rollovers of CGT gains and losses has been allowed previously to promote industry consolidation and to provide relief as trustees transitioned to the SIS and RSE licensing regimes. This relief facilitated rollovers and ensured that the members of the funds were not penalised by incurring CGT tax costs.

ASFA agreed with, and welcomed, the decision that it was determined to be appropriate to grant relief during these transitional periods.

This, however, begs the question as to why it is not considered appropriate that relief be available on an ongoing basis? Why should members whose funds are merged outside a transition period bear the cost of CGT tax, whilst members of funds who merge during a transition period do not?

This has the potential to create significant inequities between members of different funds, based on no criteria other than the timing of their fund mergers.

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I trust that the information contained in this submission is of value.

If you have any queries or comments regarding the contents of our submission, please contact me.

Fiona Galbraith
Director, Policy