

27 April 2017

The Manager
Retirement Benefits Unit
Retirement Income Policy Division
The Treasury
Langton Crescent
Parkes ACT 2600

By email: superannuation@treasury.gov.au

Dear Sir/Madam

Submission on Consultation of exposure draft Treasury Laws Amendment (2017 Measures No. 2) Bill 2017: Superannuation Reform Package Amending Provisions (Bill)

Submission on Consultation of expanding the range of capped defined benefit income streams exposure draft Treasury Instruments Autumn 2017: TSY/45/029 Capped defined benefit income stream (Statutory Instrument)

This submission has been prepared by the Superannuation Committee of the Law Council's Legal Practice Section (**the Committee**).¹ The Committee's objectives are to ensure that the law relating to superannuation in Australia is sound, equitable and clear. The Committee makes submissions and provides comments on the legal aspects of the majority of all proposed legislation, circulars, policy papers and other regulatory instruments which affect superannuation funds.

The Committee is pleased to have the opportunity to comment on the Consultation of exposure draft Treasury Laws Amendment (2017 Measures No. 2) Bill 2017: Superannuation Reform Package Amending Provisions (**Bill**) and the Consultation of expanding the range of capped defined income streams exposure draft Treasury Instruments Autumn 2017: TSY/45/029 Capped defined benefit income stream (Statutory Instrument). The Committee is guided by its objectives identified above and has only made comments below where the Committee has identified issues within its remit.

¹ The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

Consultation on exposure draft Treasury Laws Amendment (2017 Measures No. 2) Bill 2017: Superannuation Reform Package Amending Provisions (Bill)

The Committee makes the following points on the Bill and the accompanying exposure draft explanatory materials (EM):

Transfer balance cap amendments

The expansion of subsections 294-25 and 294-80 to provide for a regulation-making power for the expansion of transfer balance credits and transfer balance debits should be limited so that regulations cannot apply retrospectively. The current provisions operate so that the regulations may specify the operative time – and may allow for back-dating. From a rule of law perspective any backdating would be inappropriate.

The Committee notes the proposed amendments to the operative effect of the death benefit rollover provisions such that they will commence on the introduction of the Bill, as opposed to 1 July 2017. Whilst the new commencement date, presumably in June 2017 (unless introduced earlier in the May Budget sittings), is made clear from the terms of the Bill (see item 18 inserting new sub-item 36(1A)) – the position is nevertheless uncertain and not without risk for those pensioners deciding to take action from that time because the Bill will not then have been passed.

It would be unusual for funds (including many large funds which will also be impacted by these changes) to restructure their administration systems and their member communications to satisfy proposed reforms – as opposed to the law as it stands at the time. Accordingly, the Committee considers there is significant risk for inconsistent treatment of members across different funds from this new earlier commencement time. For example, some funds may take the view (quite properly) that a reversionary pensioner with a pension that has been in place for a number of years can only commute to a 'superannuation member benefit' in order to achieve a rollover (internal or external) and that the rollover of a death benefit is not permitted.

Further, if reversionary pensioners who are under age 60 years are attempting to commute and be paid a portion of their benefit out of the superannuation system – the fund would again be in a difficult position as to whether to apply withholding tax for the superannuation member benefit in accordance with the law as it then stands – or to assume that the proposed amendments as introduced into Parliament will be passed. Again, the backdated nature of the proposed amendments is not appropriate from a rule of law perspective.

In all of the circumstances the Committee considers that it may be more appropriate to not make this change retrospective. Those pensioners affected by the death benefit rollover provisions who have satisfied the six month rule and are properly advised would have the option of internally commuting their excess death benefit pension and retaining it within the superannuation system as a superannuation member benefit in accumulation phase going forward or waiting to cash it out on 1 July 2017. Those who have not satisfied the six month rule could take their excess tax-free (though they would not be entitled to convert it to a superannuation member benefit to be held in accumulation phase). These benefits should be unrestricted non-preserved as they are death benefits and do not require preservation as such (noting that the Minister's announcement erred in this regard).

It may be appropriate to consider whether pensioners who will not satisfy the six month rule before 1 July 2017 should also be provided with an option to convert their benefit into an

accumulation phase benefit and retain it within the system. The Committee notes that for some funds it may be difficult and punitive to restructure and unwind investments in order to satisfy the requirement to cash these benefits out of the superannuation system by 1 July 2017 or even on the issuing of a commutation authority; where the underlying investment is not in liquid funds. The Committee queries whether the Commissioner might be in a position to provide such relief pursuant to his new relief making powers. If so, some reference to this in the EM would be helpful.

Amendments in relation to Transition to Retirement Income Streams

The Superannuation Committee is concerned regarding the auto-conversion of Transition to Retirement Income Streams (TRISs) to retirement phase pensions upon a member satisfying a condition of release with a nil cashing restriction. For many large funds it will be a difficult matter to know precisely when a member in receipt of a TRIS may have satisfied such a condition – then requiring the trustee to convert the TRIS to a retirement phase pension. Further, for the member concerned the conversion may cause them to exceed their transfer balance cap with adverse consequences.

In view of these concerns the Committee recommends that these auto-conversion provisions only apply upon a member notifying the trustee and electing for their TRIS to be converted.

Other comments

The Committee suggests that consideration be given to permitting child pensions to be rolled over. Currently regulation 306-10.01 would prevent section 306-10 being available to child pensions – limiting death benefit rollovers to spouse pensions. The Committee no longer sees any basis for this limitation to continue beyond 30 June 2017. It is often appropriate that a child pension be rolled over to another fund, particularly where there are infants involved without suitable guardians.

The Committee queries how the Bill addresses the Minister's announcement regarding the application of crediting for limited recourse borrowing arrangements as it is not apparent.

The Committee also suggests that consideration be given to whether self-managed superannuation funds that are entirely in pension phase (and therefore likely to be deemed to be subject to segregation) should be provided with similar relief to that proposed for TRISs under new subparagraph 294-110(b) (item 13 of the Bill). Without this relief those funds may inadvertently be denied transitional capital gains tax relief unless they restructure prior to 1 July 2017.

Consultation on expanding the range of capped defined benefit income streams exposure draft *Treasury Instruments Autumn 2017:TSY/45/029 Capped defined benefit income stream* (Statutory Instrument)

Proposed new sub-regulation 294-130.01(3) deals with circumstances in which a lifetime pension payable due to invalidity may continue to meet the 'capped defined benefit income stream' definition despite the pension being subject to variations due to the pensioner's level of invalidity being reclassified, their personal income circumstances changing, their failing to provide information (for example, ongoing medical examinations) or a change to their employment status.

The Committee notes however that the expanded definition will only apply to 'government superannuation schemes' of the Commonwealth or a State or a Territory. Accordingly, there

will be many non-government as well as exempt public sector superannuation schemes where the expanded definition will not apply. The Committee recommends further consideration be given to the expansion of the kinds of funds to which the new expanded definition for invalidity lifetime pensions would apply.

Contact

The Committee would welcome the opportunity to discuss its submission further and to provide additional information in respect of the comments made above. In the first instance, please contact:

- Mr Luke Barrett, Chair, Superannuation Committee on (T) 03 9910 6145 or at (E) luke.barrett@unisuper.com.au; or
- Ms Michelle Levy, Tax Sub-Committee Chair, Superannuation Committee on (T) 02 9230 5170 or at (E) michelle.levy@allens.com.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jonathan Smithers', written over a horizontal line that extends across the page.

Jonathan Smithers
Chief Executive Officer