



Law Council
OF AUSTRALIA

Professor (Emeritus) Sally Walker
Secretary-General

13 June 2012

The General Manager
Business Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: cgt_super_roll-over@treasury.gov.au

Dear Sir or Madam,


Taxation relief to support the implementation of Stronger Super

I am pleased to enclose a submission prepared by the Superannuation Committee of the Legal Practice Section of the Law Council of Australia *Taxation relief to support the implementation of Stronger Super*. Please be advised that this submission is not inconsistent with one lodged last week by the Law Council on behalf of the SME Committee of the Business Law Section.

The Committee would welcome the opportunity to discuss its submission further. In the first instance, please contact the Chair of the Superannuation Committee, Ms Heather Gray on (03) 9274 5321 or at heather.gray@dlapiper.com.

Due to time constraints, this submission has not been considered by the Directors of the Law Council of Australia.

Yours sincerely,


Professor Sally Walker
Secretary-General

Taxation relief to support the implementation of Stronger Super

The Treasury

**Submission of the Superannuation Committee of the Legal Practice Section of the
Law Council of Australia**

13 June 2012

The Superannuation Committee of the Law Council of Australia welcomes the Government's proposal to provide taxation relief to support the implementation of the Government's package of 'Stronger Super' reforms.

The Superannuation Committee is a committee of the Legal Practice Section of the Law Council of Australia. Its objectives include ensuring that the law relating to superannuation in Australia is sound, equitable and demonstrably clear. It fulfils this objective in part by making submissions and providing comments on the legal aspects of proposed legislation, circulars, policy papers and other regulatory instruments.

This submission has been prepared by the Superannuation Committee and it has not been considered by the directors of the Law Council of Australia due to time constraints.

Submission

The Committee notes the proposals paper dated May 2012 with respect to the implementation and design details of the proposed taxation relief, and wishes to raise two key concerns it has with the proposals:

- (1) that the proposal is for 'temporary' relief only and it should provide permanent relief with respect to mergers of complying superannuation funds and other transfers triggered as a consequence of the Stronger Super amendments; and
- (2) that the proposal for relief in respect of mergers should extend to mergers that involve a sub-plan or sub-fund being transferred to another fund.

The Committee's more detailed comments on these issues appear under the relevant headings below.

The Committee has also mentioned some other points at the end of this submission.

Provision of temporary relief only

The Committee considers it is appropriate to provide permanent relief in respect of asset transfers that occur between complying superannuation funds in consequence of members transferring between those funds. Whilst it will be compulsory to ensure that accrued default benefits are maintained under or transferred to a MySuper product by 30 June 2017, trustees will continue to be obliged to test the viability of their MySuper products beyond that time and there is also the possibility of funds losing their MySuper authorisation, in effect, meaning that compulsory transfers to MySuper could continue to occur well beyond 1 July 2017.

In the Committee's view it is inappropriate for a transfer of assets associated with a transfer of members between complying superannuation funds to trigger a CGT event. When assets are transferred to a receiving fund in connection with members also transferring to the receiving fund the transferor fund does not receive consideration other than to the extent that the receiving fund assumes liability in respect of current and future benefits payable for transferring members). The transferring members will cease to have a beneficial interest in the transferor fund and will commence to have a beneficial interest in the receiving fund, generally with an equivalent value. Surely, from an overall policy perspective, members of superannuation funds should not be disadvantaged by the lack of available taxation relief beyond 30 June 2017 where they are compulsorily transferred to another fund whether as a consequence of a merger or measures undertaken by trustees as a consequence of the Stronger Super reforms.

For these reasons the Committee considers that permanent relief should be offered such that transfers of assets made in connection with transfers of members between complying superannuation funds should be treated for taxation purposes such that any resulting capital gain or loss is disregarded and assets transferred retain their pre-existing status for capital gains and loss purposes.

Transfer of sub-plan

Restructuring of superannuation funds brought about by the Stronger Super reforms, particularly of master trusts, is likely to involve the transfer and consolidation of sub-plans. Sub-plans within a master trust will often include a separately identifiable cohort of members and assets and an arrangement with an employer group for the operation of the sub-plan. It is probable, as a consequence of MySuper and default fund changes, that these sub-plans may be transferred to new funds by way of successor fund transfer. The Committee considers that the relief extended with respect to the merger of funds should also be offered in circumstances where there is a successor fund transfer of a sub-plan to another fund. These transfers could potentially involve significant numbers of members and the movement of sizeable assets and there should not be a distinction between whether a merger occurs on a whole-of-fund basis or on a sub-fund basis – for the members involved, the tax outcome should be the same. An example of the kind of transfer that might occur in the context of a sub-fund is where a master trust does not obtain a MySuper authorisation and the employer sponsoring the sub-fund determines to make its default fund a MySuper fund in another master fund – in these circumstances, it is likely that the employer would look to terminate its arrangements with the first mentioned master trust and the sub-fund would be transferred to the MySuper master fund. This is different to a mandatory requirement to transfer default members and their benefits to a MySuper product and so the MySuper CGT relief would not be available.

Other matters

The Committee is concerned that the integrity measures may go too far, perhaps unintentionally.

In particular, the integrity measures appear to provide, for example, that if fund A has sold assets to fund B during an income year and as a consequence fund A has suffered a capital loss, then if fund A and fund B subsequently merge then fund B is not entitled to use the capital loss from fund A that is referable to the earlier asset transfer. With respect, the Committee questions the mischief to which such integrity measure is addressed. Given that the account balances or benefits of members of fund A will recognise a tax benefit in the loss arising from the earlier transaction, why should this benefit be lost if the members are subsequently transferred to fund B? Further clarification on the intended operation of this measure would be helpful prior to finalising the proposed legislative amendments.

Further, it is possible with there being a lesser number of superannuation funds in existence that a number of superannuation funds will hold shares or other equity interests in the same infrastructure style investments. In a merger situation it is often the case that the pre-emptive right provisions of a shareholders agreement or other joint venture ownership document will be triggered – meaning that the merger itself gives rise to an ‘off-market’ sale of shares or securities between superannuation funds that are merging. As the Committee understands it, the proposed integrity measure would mean that in these circumstances any loss that the transferor superannuation fund suffers on the sale of its interest in the infrastructure investment to the transferee superannuation fund could not be brought across to be utilised by the transferee superannuation fund and for the benefit of transferring members. The Committee does not understand why the integrity measures need to go this far.

Finally, the proposals paper mentions that “during the merger time” the transferring entity will not be able to realise a loss and not choose a roll-over and then transfer the realised loss and the asset on which the loss was made to another relevant merger entity. The Committee is unclear about how this measure will operate and, in particular, how the “merger time” will be defined for the purposes of this measure. The Committee assumes such clarification will be provided by the draft legislation, but presumes that there will be some prescription around what constitutes the “merger time”.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 56,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.