Law Council
OF AUSTRALIA

[insert date]

Manager
Benefit and Regulations Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: superannuation@treasury.gov.au

Dear Sir

Tax and Superannuation Laws Amendment (2014 Measures No. 7) Bill 2014: Providing certainty for superannuation fund mergers

I am pleased to enclose a submission prepared by the Superannuation Committee of the Legal Practice Section of the Law Council of Australia.

The Committee would welcome the opportunity to discuss the submission further. In the first instance, please contact:

- Ms Pam McAlister, Chair, Superannuation Committee T: 03 9603 3185
  E: pam.mcalister@hallandwilcox.com.au or
- Ms Suzanne Mackenzie, Chair, Taxation Subcommittee T: 03 9910 6145
  E: smackenzie @dmawlawyers.com.au

Yours sincerely

[insert signatory details]

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

Law Council
OF AUSTRALIA

Tax and Superannuation Laws Amendment (2014 Measures No. 7) Bill 2014: Providing certainty for superannuation fund mergers

Benefit and Regulations Unity
Personal and Retirement Incomes Division
The Treasury

20 October 2014

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

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

About the Law Council of Australia's Superannuation Committee

The Law Council of Australia is the peak national representative body of the Australian legal profession; it represents some 60,000 legal practitioners nationwide. Attachment A outlines further details in this regard.

This submission has been prepared by the Law Council of Australia's Superannuation Committee (the Committee), which is a committee of the Legal Practice Section of the Law Council of Australia.

The Committee's objectives are to ensure that the law relating to superannuation in Australia is sound, equitable and demonstrably clear. The Committee makes submissions and provides comments on the legal aspects of virtually all proposed legislation, circulars, policy papers and other regulatory instruments which affect superannuation funds.

Introduction

The Committee welcomes these reform measures to address the particular concerns that have now been raised by professional and industry associations over several years about the application of the proportioning rule to members' benefits in a superannuation fund merger, typically occurring pursuant to a successor fund transfer.

It is noted that the Committee did not agree with the Commissioner's approach to the application of the proportioning rule in the context of a successor fund transfer pursuant to which the Commissioner took the view that a successor fund transfer of a member's benefit was a benefit 'roll-over' to which a member's benefits were crystallised and the proportioning rule applied. However, the Committee accepts that there was a level of uncertainty about the matter and obtaining legislative clarity is helpful.

Timing

The Committee notes that the original policy announcement in support of these changes was made in 2012-2013 mid-year economic and fiscal outlook (MYEFO) in October 2012. Since that time the Commissioner has made various public announcements that he would not apply the proportioning rule to benefit payments and rollovers made in the context of successor fund transfers. Further the Commissioner has stated that until royal assent of the relevant amending legislation, funds can continue to rely on the Australian Taxation Office (ATO) guidance provided to the National Tax Liaison Group (NTLG) Super technical sub-group concerning successor fund transfers.

The Committee therefore questions why the amendments will only take effect from 1 July 2015 and urges consideration of an earlier effective date to provide greater certainty to funds currently considering merging. Further, in line with the MYEFO announcement and industry practice since that time, the Committee suggests that consideration should be given to a retrospective application of the measures (possibly back to 1 July 2007). Alternatively, some form of statutory relief may be considered appropriate to include in the amendments to formally absolve past practice in respect of successor fund transfers and to provide certainty for components of members' benefits going forward.

Technical drafting matters

The Committee notes the statement made at paragraph 1.4 of the draft Explanatory Material as follows:

> *An involuntary transfer of a superannuation benefit may occur under a successor fund arrangement, where there is a compulsory transfer of an accrued default amount to a MySuper product in another complying superannuation plan, or where a transfer is made to an eligible rollover fund.*

It is inaccurate to state that a compulsory transfer of an 'accrued default amount' is made pursuant to the successor fund transfer provisions of the Superannuation Industry (Supervision) legislation (SIS). Similarly, it is inaccurate to state that a transfer made to an eligible rollover fund without the consent of a member is made pursuant to a successor fund arrangement. Different legislative mechanisms empower trustees to make such transfers (see, for example, section 29X of the *Superannuation Industry (Supervision) Act 1993* (SISA) and section 243 of SISA).

The Committee notes that the draft bill separately describes these three kinds of involuntary rollovers under the proposed new definition of "involuntary roll-over superannuation benefit" in new section 306-12. However, it is suggested that consideration be given to including a new limb under paragraph (b) of section 306-12 to also capture involuntary transfers made pursuant to an APRA prudential standard under section 29X of SISA.

The Committee notes that the bill proposes a substituted definition of "successor fund" to include reference to "approved deposit funds". Neither the definition of "successor fund" nor the definitions of "involuntary rollover superannuation benefit" expressly require that the transfer is made without the relevant member's or depositor's consent. The Committee notes that it is therefore possible that a transfer could be structured to be made to a "successor fund" by technically meeting the conditions for that definition in circumstances where it was not the policy intent that such transfer be captured. The Committee envisages opportunities for tax planning arise in the context of what might be taken to constitute an "agreement" between a transferor and transferee trustee. Accordingly, the Committee suggests consideration be given to either ensuring that the "successor fund" definition only applies to transfers that occur without member/depositor consent or that an express reference to the intention be made clear in the Explanatory Material.

The Committee suggests that it may be prudent for the new measures to also include a power for the Commissioner to determine additional kinds of transfers that could be taken to also be an "involuntary roll-over superannuation benefit". There are circumstances pursuant to which a regulator may require a member's superannuation interest to be transferred from one fund to another fund, for example, in the context of enforcement action (concerning accrued default amounts not transferred by 30 June 2017) or the winding up of a fund where the relevant criteria set out under proposed new section 306-12 would not be satisfied. This may also extend to self-managed superannuation funds (SMSFs) where there are innocent trustees/members or minors who would be disadvantaged by the application of the proportioning rule upon the compulsory transfer of their benefit. Further, there are circumstances where involuntary transfers may occur which are not within the scope of the new measures – for example, an "amalgamation of funds" under Part 18 of SISA.

Finally, the Committee notes that the relief proposed would not extend to any successor fund transfer of a "superannuation death benefit" as the relief measures purport to apply

only to “roll-over superannuation benefits”. According to Taxation Determination TD 2013/11 a transfer of a death benefit to another fund for immediate cashing in the other fund would not qualify as a “roll-over superannuation benefit”. Death benefits pending payment are often encompassed within a fund merger process and therefore the relief should be equally extended such that transferred “superannuation death benefits” are similarly treated.

Additional matters concerning fund mergers

As mentioned, the Committee welcomes the measures contained in the exposure draft bill. However, it is noted that there remain various other taxation related concerns in the context of a superannuation fund merger which are not addressed by the policy announcement or the proposed changes.

In particular, the following issues commonly arise as areas of such concern in a fund merger:

- the application of the minimum pension payment requirements apply such that a new pension is taken to have commenced in the transferee fund and the minimum pension requirements must be satisfied across both funds – often causing difficulties and confusion where a merger takes place other than in the month of June or 1 July (for example, in some cases the transferor fund will increase the last pension payment it makes to take account of the proposed black-out period that will occur pre-and-post merger, but these additional payments cannot be factored in by the trustee of the transferee fund in determining whether minimum pension payments have been made from the transferee fund for the relevant year;

- determinations around terminal medical condition benefits and total and temporary disablement benefits which are pending payment as at the date of the fund merger are technically required to be re-made by the trustee of the transferee fund following the merger; and

- binding death benefit nominations in place with the transferor fund do not automatically carry over to the transferee fund (which the Committee accepts also has broader ramifications for the prudential regulation of superannuation funds).

The Committee also notes that the new measures would not have application to any transfer made to a self-managed superannuation fund (SMSF) due to SMSFs being excluded from the new definition of “involuntary roll-over superannuation benefit”. However, there are sometimes circumstances in which a transferor fund has been able to reach a merger agreement with another fund pursuant to which some members will not be transferred to the successor fund (for example, those with old-style pension benefits or other legacy arrangements). In such cases it is not uncommon for those legacy members to be offered alternative transfer arrangements, which may include a transfer to their SMSF. It seems unreasonable that these members would be disadvantaged because of their legacy style product. Accordingly, consideration should be given to dealing with these legacy arrangements, including where these members may be transferred on the winding up of a fund to an SMSF.

Finally, the Committee notes that the measures do not extend to internal involuntary roll-overs within a fund which may be deemed to be a “payment” for the purposes of section 307-5(8) of the *Income Tax Assessment Act 1997* (ITAA97). Whilst not listed in November 2013 as an un-enacted measure with which the Government proposed to now proceed to enact, it would also seem prudent to give consideration to this issue –

particularly as an involuntary transfer of a member's accrued default amount may occur within the same fund, but be taken to be the transfer to a new superannuation interest (noting that new section 306-12 would require a transfer to "another" complying fund.

The Committee would welcome the opportunity to discuss its submission further and to provide additional information in respect of the comments made above

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 Territory 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 60,000 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 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer

- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

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