



HENRY DAVIS YORK
LAWYERS

2 November 2012

Our Ref AQM/BRH/AQM000

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Dear Sirs

Superannuation Legislation Amendment (Further Measures) Bill 2012

Henry Davis York is grateful for the opportunity to comment on Treasury's exposure draft bill which is the fourth tranche of legislation implementing the Government's MySuper and governance reforms as part of Stronger Super.

Our submission is set out in the attachment to this letter.

Please let us know if we can be of further assistance.

Yours sincerely
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Superannuation Legislation Amendment (Further Measures) Bill 2012 (Exposure Draft)

Submission

1 Summary

On 18 October 2012, Treasury released an Exposure Draft of Tranche 4 of the Stronger Super legislation - the Superannuation Legislation Amendment (Further Measures) Bill 2012.

Submissions in relation to the exposure draft are due today Friday 2 November 2012. Given the short time available, we have limited our comments, as follows:

- (a) Revisions are required to clarify that accrued default amounts are transferable to a large corporate MySuper product.
- (b) It is unduly burdensome to *now* define a direction in relation to an investment option in a way that is different from fund practice to date, such as a requirement for a written direction. Funds ought to be able to rely on their previous practice rather than having to undertake re-confirmations.
- (c) The requirement for a court to grant leave to bring an action where it considers an applicant is acting in good faith and there is a serious question to be tried should apply to both trustees and individual directors under sections 29VP and 29VO. Consequential amendments will be required to section 55.
- (d) Corporate social responsibility investment requirements should be carved out of the scope of section 58A(3).

2 Submissions

In this submission we refer to relevant sections by their section number, rather than distinguishing between sections of legislation, and paragraphs of bills and the exposure draft.

2.1 Contributions paid to a MySuper product and transfers of accrued default amounts

Proposed section 29WB sets out a scheme for payment of contributions to a large employer MySuper product, which conforms with the requirements of section 29TB. Section 29WB uses very specific language:

"a class of beneficial interest in the fund as a MySuper product on the basis that section 29TB is satisfied in relation to that class of beneficial interest".

However, equivalent amendments to the same effect have not been made to those provisions dealing with the definition of, and transfer of, accrued default amounts, such as sections 20B and 29SAA.

We submit that the same approach ought to be taken, and specifically that a new section which has the same effect as section 29SAA but which replicates the language used in section 29WB and refers to "*a class of beneficial interest in the fund as a MySuper product on the basis that section 29TB is satisfied in relation to that class of beneficial interest*" should be made.

Further the definite and indefinite articles (ie "the MySuper product" and "a MySuper product") are used inconsistently throughout sections 20B, 29SAA, 29WA and 29WB, and may cause confusion in interpretation. We suggest that a revision to drafting is required in order to clarify that a section 29TB MySuper product will be a suitable recipient product for accrued default amounts.

2.2 Direction in writing

We understand that the practice of many funds to date is to allow a member to make an investment option direction verbally. Such a direction may be made after a member places a call to a fund call centre. That direction will then be confirmed in writing by the fund.

We submit:

- (a) it would place an undue burden on trustees to now have to seek a written direction from members in circumstances where a valid direction has already been made in compliance with the fund processes and procedures, but not in writing, in order to ensure that a member's investment choice is implemented in accordance with that member's direction;
- (b) it is not necessary that a member's direction should be "in writing", and verbal directions ought to be permitted in future. A superannuation fund's ordinary obligations to keep proper records would be enough to ensure that the validity of the direction can be established, and that a proper record of the direction kept.

2.3 Leave of court

We commend the revision of section 29VP by the inclusion of section 29VPA to require the leave of the court to be sought before an action can be commenced against directors of a corporate trustee pursuant to section 29VO. However, for reasons of consistency of treatment and certainty in interpretation, the timing of any such action should be limited to 6 years, and accordingly a provision equivalent to section 29VP(4) should also be included in section 29VPA.

We also submit that an action against a trustee for contravention of 29VN pursuant to section 29VP should be limited by requirements that the applicant be acting in good faith and that there is a serious question to be tried. Submissions in relation to Tranche 2 have already raised with Treasury the significant potential for vexatious litigation, given the broad, and as yet untested, concepts in section 29VN, such as "promote the financial interests of beneficiaries¹", "disadvantage in comparison to

¹ Section 29VN(a)

beneficiaries of other funds², and "insufficiency" of the number of beneficiaries³ or pool of assets⁴. We submit that a requirement for leave of the court, in terms similar to those included in section 29VPA(3) and (4) should also apply to section 29VP.

For consistency and clarity, amendments should also be made to section 55.

2.4 Investments cannot be limited to particular persons

We have some concern that the inclusion of words "(whether by name or in any other way, directly or indirectly)" in section 58A(3) may apply in circumstances where the governing rules of a fund include a requirement for an ethical, sustainable or corporate social responsibility approach to investing.

We suggest that an amendment be made to section 58A that clarifies that such investments are outside the scope of the section.



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² Section 29VN(b)

³ Section 29VN(b)(i) and (ii)

⁴ Section 29VN(b)(iii) and (iv)