



AUSTRALIAN INSTITUTE of
SUPERANNUATION TRUSTEES

1 March 2019

Regulatory Framework Unit
Retirement Income Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600
Email: superannuation@treasury.gov.au

Dear Mr. Kennedy

**AIST response to Exposure Draft
Treasury Laws Amendment (Protecting Your Superannuation Package) Regulations 2019**

In brief:

AIST proposes improvements to the Regulations for:

- member communications about cessation of insurance cover following inactivity;
- calculation of the low balance fee cap, including the prevention of gaming;
- ATO reporting to super funds about accounts not being inactive.

AIST welcomes the opportunity to respond to the public consultation Exposure Draft Regulations and explanatory material to implement the Protecting Your Superannuation package.

Our submission does not address policy questions but is focused upon issues arising from the requirements to notify members about the insurance consequences of account inactivity; and the administration of both the low balance fee cap and the transfer of inactive low account balances to and from the ATO.

While the circumstances of some super funds mean they may have difficulty in meeting aspects of the Protecting Your Superannuation package by 1 July 2019 (eg, inability to reprice insurance policies in time), these matters are being raised separately with the Government and its agencies.

We are specifically concerned to make constructive comments to aid the efficient and appropriate implementation of the Protecting Your Super package.

Cessation of insurance following inactivity

- **Scope**

The Bill identifies that the rules for cessation of insurance apply to choice and MySuper products and identifies limited categories of members in s.68AAA(6) for whom the section does not comply. For the avoidance of doubt, the Regulations should be amended to confirm the application of the rules to legacy superannuation products.

- **Uncontactable members**

There is no reference in s.68AAA or the associated Regulations about notification requirements for uncontactable members. Where a member does not have a valid address and is determined to be uncontactable following the return of one or two pieces of mail, there should not be a requirement to send the member any of the notices about insurance inactivity.

The Regulations should explicitly clarify that the provisions of regulation 1.03A(1)(a) of the SIS Regulations apply in relation to s.68AAA to the effect that there is no requirement to contact uncontactable members (both in relation to the transitional arrangements and proposed Regulation 7.9.44B(7)), and to put the question beyond doubt.

- **Time for giving inactivity notices**

Proposed Regulation 7.9.44B(7) imposes requirement for each notice to be sent “within a period of 2 weeks after the day on which the member’s account becomes inactive” [for 9, 12 and 15 months].

The regulation should require that notices be sent within the next month of an account not receiving an amount. The Regulation should also make clear its intention to give funds the flexibility to align the distribution of notices with their notice production and distribution schedules.

Batch processing of notices on a monthly basis may be more efficient and cost-effective and should be allowed. It is appropriate and efficient for super funds to be able to line up the notices their months end processes, when fees are deducted from accounts.

This would be the logical time to run reports to determine how long it has been since a contribution has been received and issue inactivity notices. While the requirements of the proposed regulations could be met by super funds and their administrators running weekly processes in order to meet the two week requirement, this is likely to decrease super fund efficiency.

This would also be consistent with the approach taken in the Bill for the transitional provisions, wherein super funds have one month from the identification of inactive members on 1 April 2019 to the requirement to notify the members on or before 1 May 2019.

The legislation also calibrates inactivity in monthly units, and the notification requirements should also reflect this.

- **Cessation of insurance cover less than 16 months**

An intention of the Protecting Your Superannuation package, including requiring cessation of insurance following inactivity, is to protect account balances from fee erosion. This was also an intention of the Insurance in Superannuation Voluntary Code of Practice, generally requiring the cessation of insurance cover for a low account balance after 13 months of inactivity.

Most AIST member funds (and most APRA-regulated super funds) have subscribed to the Code. The Code requires three member communications for inactive members, at 6, 9 and 12 months.

The Regulations do not comprehend cessation of cover earlier than 16 months of inactivity, and AIST submits that they should do so. While the Code provisions may be reviewed to bring them align with the requirements of the Bill, the Regulation should nonetheless allow for earlier cessation. Specifically, the Regulations should not require a letter to be sent to a member after 15 months of inactivity if insurance cover ceased after 13 months (and the member had already received notice of this).

- **Time for giving notices about the right to cease insurance cover**

Proposed regulation 7.9.44C(4)(b) provides for the trustee to be able to decide the date that the annual reminder is sent to the member, as long as it is within 15 months of the last notice sent to the member.

The regulation should be amended to reflect the statement in the Explanatory Materials that this will give trustees the flexibility to align the distribution of reminder notices with their ordinary distribution schedule and to *specifically* allow distribution with periodic statements. The Regulation should clarify that a separate communication is not required.

- **Content of insurance inactivity notices to be sent on or before 1 May 2019**

The legislated transitional provisions for s.68AAA require the initial insurance inactivity notices to be sent on or before 1 May 2019. They require the notice to state that insurance will cease on or after 1 July for the member; that the member has not elected to maintain cover; and the means by which this may occur.

Additional requirements for notices about insurance inactivity are given in the Regulations. The requirements are provided for both insurance inactivity notices and final insurance inactivity notices.

The Regulation notice requirements to include the amount of insurance fee charged in relation to the product for the fund's most recent year of income will be difficult for many funds to fulfil in the two months between now and 1 May 2019. Funds will however be able to comply with this requirement on an ongoing basis.

AIST submits that the Regulation notice requirements be amended to not require the inclusion the amount of insurance fee charged in relation to the product for the fund's most recent year of income for the notice to be sent on 1 May 2019.

- **Offering and maintaining insurance**

S.68AAA creates a requirement for an insurance benefit not to be provided where a member's account is inactive for a continuous period of 16 months unless the member makes an election in writing to maintain that insurance. However, there are references in the Explanatory Materials to "offering" insurance in addition to "maintaining" it.

AIST submits that the references to "offering" insurance should be deleted from the Explanatory Materials, to make it clear that s.68AAA and the associated regulation relate to "maintaining" insurance for inactive member accounts.

Fee cap on low balances

- **MySuper and Choice interests within one account**

AIST notes the apparent intention of the Bill for fee cap to be calculated for each account held for a member within each fund. The language used throughout the Bill and Regulations refers specifically to a single product, indicating that the cap applies to each account. This is also supported by the references throughout to "a choice product or a MySuper product".

However, where one account within a fund has both MySuper and Choice interests, AIST submits that it should be considered as the single account that it is. In these circumstances, where the member has one account the Regulations should clarify that the fee cap should be calculated in respect of the sum total of these interests.

The following examples illustrate AIST's understanding of the cap's operation.:

1. A member maintains two separate accounts with a fund and receives two separate periodic statements. In one account, the member has chosen a Choice investment option and has an account balance of \$5,000; in the second account, the member has \$5,000 that has defaulted

into a MySuper product. Our understanding is that the cap is calculated separately for each account, and as both accounts have less than \$6,000, applies to both accounts.

2. A member maintains one account with a fund and receives one periodic statement for that account. Within the account, the member has \$5,000 in a Choice investment option and \$5,000 in a MySuper investment option. Our understanding is that the cap is calculated on the basis of the total account balance of \$10,000 and as the total is more than \$6,000, the cap does not apply.

In consultations with many super funds, AIST has noted differing interpretations of this requirement. Regardless of Treasury's response to AIST's submission about this, it is important that the Regulations and Explanatory Statements more clearly state the way this provision is intended to operate.

- **Regulation should be structured to prevent gaming**

Pursuant to s.99G, the fee cap applies to accounts with balances of less than \$6,000 "on the last day of a year of income of the fund." Unless the regulation provides further particulars about the operation of the cap, it may be manipulated to obtain a benefit at the expense of other members or the super fund, while other members who should receive the cap may be excluded from its protections.

AIST submits that the Regulations should be structured to:

1. prohibit the application of the fee cap to accounts that have a higher than \$6,000 average account balance over the whole year; and
2. apply the fee cap to that have a lower than \$6,000 average account balance over the whole year; and
3. define account balance for purpose of calculating the cap on the basis of the average balance over the whole part of the year a member holds the product.

The following examples illustrate these points:

1. A member maintains an account balance of \$100,000 for 11 months of a year, and transfers \$98,000 to another fund on 1 June. The member will have held the product for the whole year and have an account balance of \$2,000 on the last day of the financial year, and so be entitled to the fee cap. This is not consistent with the intention of the Bill to protect low balance accounts from fee erosion.

2. A member maintains an account balance of \$2,000 for 11 months of a year and receives a rollover of \$98,000 from another fund on 1 June. The member will have held the product for the whole year and have an account balance of \$100,000 on the last day of the financial year but will not be entitled to a fee cap for any of the year. This is despite having an account balance of \$less than \$6,000 for most of the year. This is not consistent with the intention of the Bill to protect low balance accounts from fee erosion.

In the event Treasury is of the view that a change to the calculation methodology for the fee cap would require legislative change, AIST submits that such change be made to the legislation at the earliest opportunity.

In the alternate (that may also require legislative change), another potential solution could be to apply the fee cap to account balances that did not exceed \$6,000 during the income year.

- **Fee cap statement on periodic statements**

The fee cap statement proposed to be added at the end of sub-clause 303(1) of Schedule 10 of the Corporations Regulations 2001 as part of the Additional Explanation of Fees and Costs should be amended to clarify that any applicable refund must be paid *within three months of the end of the year*.

- **Impact of fee cap on RG 97 (Disclosing fees and costs in PDSs and periodic statements)**

The Regulations should be further reviewed to facilitate alignment between the calculation of the fee cap and the requirements of RG 97. For example, the Regulations should clarify that the calculation of the cap should not include property operating costs or borrowing costs in accordance with the requirements of RG 97.

The ASIC January 2019 Consultation Paper 308 (Review of RG 97 Disclosing fees and costs in PDSs and periodic statements)¹ addressed the fee cap then in the Protecting Your Superannuation package. At paragraph 39, noted the expectation:

As stated in the Explanatory Memorandum (at paragraphs 214–216), it is expected that regulations will:

(a) capture amounts that directly or indirectly reduce the return on a member's investment; and

1. <https://asic.gov.au/regulatory-resources/find-a-document/consultation-papers/cp-308-review-of-rg-97-disclosing-fees-and-costs-in-pdss-and-periodic-statements/>

(b) prescribe these amounts with reference to the amount of indirect costs disclosed by the superannuation trustee.

We firstly note that the Regulations require the inclusion of indirect costs in accordance with s.1017 of the Corporations Act.

However, the ASIC Consultation Paper 308 goes on to state in paragraph 40:

...if passed, the PYSP Bill (and any associated regulations) may have significant impacts on the proposals set out in this paper. In particular, it may not be possible to implement:

(a) recommendation 11 (see proposal B1), as the merger of indirect costs with administration fees and investment fees will result in indirect costs no longer being a stand-alone visible figure in superannuation product PDSs; and

(b) recommendation 16 (see proposal B4), which proposes to simplify periodic statements to no longer show indirect costs as a stand-alone visible figure.

As a consequence of the implementation of the Protecting Your Superannuation package and RG 97, super funds must update their Product Disclosure Statements on two occasions. AIST notes that this is a costly exercise that could have been less so had there been better alignment and sequencing of the Bill and RG 97.

Transfer of inactive low account balances to and from the ATO

- **Funds owed an amount for a member**

S.20QA(1A) of the Bill identifies the circumstances in which an account is not taken to be an inactive low-balance account. At (v), this includes *“the superannuation provider was owed an amount in respect of the member”*.

The Regulations should clarify the meaning of this circumstance, as funds are not generally owed an amount in respect of the member. An employer is generally required to make a Superannuation Guarantee contribution in respect of eligible employees, with the destination fund for the contribution determined by the employee. However, the super fund receiving the contribution is not generally ‘owed’ the contribution.

If the circumstance is intended to capture contributions that must be legally or contractually paid to a specified super funds, and the super fund is able to commence proceedings if the payment is not made, then the Regulations should so clarify. If any other circumstances are intended to be captured, this should also be identified.

- **Standard ATO format for reporting to funds**

The identification of an account as *not* an inactive, low balance account includes where a member has sought to be excluded “by written notice to the [Tax] Commissioner.” This necessarily adds additional steps to the assessment of inactive, low balance accounts, and AIST submits that the Regulations should prescribe measure to ensure that the process is as fast, accurate and seamless as possible.

AIST proposes that the Regulations prescribe a standard ATO format for reporting to funds, and for member declaration information to be forwarded to super funds on a near real-time basis. This could be done through an amendment to MAAS reporting, with regular reporting being instituted on a transitional basis.

The Regulations should require the ATO to communicate to the member at the time of the transfer, about the transfer to of the amount to a member’s active account, the basis upon which this has been done, and to provide the member with a nudge about the value of consolidating superannuation accounts.

The ATO may also develop a tailor-made link for use by super funds on their websites, whereat a member may make their declaration. The Regulations should allow for the use of such a link to simultaneously notify the super fund and the ATO, and for this to meet the requirements of the declaration.

For further information regarding our submission, please contact David Haynes, Senior Policy Manager on 03 8677 3800 or at dhaynes@aist.asn.au

Yours sincerely,



Eva Scheerlinck
Chief Executive Officer

The Australian Institute of Superannuation Trustees is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public-sector funds.

As the principal advocate and peak representative body for the \$1.3 trillion profit-to-members superannuation sector, AIST plays a key role in policy development and is a leading provider of research.

AIST provides professional training and support for trustees and fund staff to help them meet the challenges of managing superannuation funds and advancing the interests of their fund members. Each year, AIST

hosts the Conference of Major Superannuation Funds (CMSF), in addition to numerous other industry conferences and events.