

12 April 2017

Project Managers Office
The Insurance in Superannuation Working Group
Financial Services Council
Level 24, 44 Market Street
SYDNEY NSW 2000

By email: ISWG-PMO@kpmg.com.au

Dear Sir/Madam

Submission on the Discussion Paper: Account balance erosion due to insurance premiums

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 Insurance in Superannuation Working Group's (**ISWG**) Discussion Paper titled 'Account balance erosion due to insurance premiums' of 9 March 2017 (**Discussion Paper**). The Committee is guided by its objectives identified above and has only made comments below where the Committee has identified issues within its remit.

The Committee notes the majority of the key questions raised in the Discussion Paper (i.e. B.1 Questions, B.2 Questions, B.3 Questions B.4 Questions, B.5 Questions, C.1 Questions and C.2 Questions) are more appropriate for the industry to address. However, the Committee would like to specifically address the following key questions:

- Key question 7 - Are there any other considerations that should be called out? (In relation to: Establish design principles to be adhered to when determining automatic cover and affordable insurance premiums).
- Key question 47 - To what extent does the current regulatory environment support superannuation fund's efforts to help members make informed decisions about consolidating?

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.

- Key question 48 - What complexities with regulatory guidance prevent superannuation funds from providing general advice because of concerns that it may be deemed personal advice?

The Committee welcomes the discussion topics raised in this Discussion Paper. However, the Committee would like to particularly address the impact of the current regulatory environment for superannuation trustees to address issues regarding members paying for cover they do not need through having multiple super accounts.

Key question 7 - Are there any other considerations that should be called out? (In relation to: Establish design principles to be adhered to when determining automatic cover and affordable insurance premiums).

The Discussion Paper does not refer to legislative restrictions that limit the design principles.

There are prescribed minimum levels of death cover that must be provided in the MySuper product by a fund that is a default fund for superannuation guarantee purposes, under the *Superannuation Guarantee (Administration) Act 1992 s 32(2)(d)* and *Superannuation Guarantee (Administration) Regulations 1992 reg 9A and sch 1*. The levels are based on specified age cohorts or minimum premiums. For members aged 56 and over there is no prescribed minimum death cover. However for members under age 20 the Committee understands the ATO interprets reg 9A as requiring default death cover at a premium of not less than \$0.50 per week (regardless of the amount of cover).

The Committee suggests that the prescribed minimum default levels need to be expressly considered in the design principles, and consideration given to whether a legislative change is desirable to improve flexibility particularly for younger age cohorts.

Key question 47 - To what extent does the current regulatory environment support superannuation fund's efforts to help members make informed decisions about consolidating?

The ISWG identifies that superannuation funds currently undertake numerous activities to educate and inform members about their superannuation and insurance. The issue is whether the current regulatory environment provides sufficient support for superannuation funds to assist members in making an informed decision to consolidate their superannuation and to subsequently cancel or consolidate their insurance cover to reduce their account balance erosion. The Committee submits that it is unclear whether a superannuation fund advising a member on consolidating their superannuation funds could be construed as providing personal advice. Due to this ambiguity, superannuation funds may be reluctant to assist members with making an informed decision about consolidating.

General and personal advice

The main concern for superannuation funds is the distinction between "general advice" and "personal advice" under Chapter 7 of the *Corporations Act 2001* (Cth) (**Corporations Act**). Specifically, s 766B(3) of the *Corporations Act* says that for the purposes of Chapter 7, "personal advice" is financial product advice that is given or directed to a person in circumstances where:

- (a) the provider of the advice has considered one or more of the person's objectives, financial situation and needs; or

- (b) a reasonable person might expect the provider to have considered one or more of those matters.

For the purposes of Chapter 7, "general advice" is financial product advice that is not personal advice: s 766B(4).

Current regulatory environment

Current legislation allows a superannuation fund to use a member's tax file number to facilitate the consolidation of the member's superannuation account after obtaining the member's consent.² However, superannuation funds face uncertainty with the level of advice that can be given to members in the first instance that would lead to member's agreeing to consolidate. If the proposal is to extend the Life Insurance Code of Practice to superannuation trustees, regulatory change needs to be made to clarify how much, and the nature of, any advice that can be given to members to make an informed decision on consolidating without it being subject to the stricter regulations of personal advice.

The Committee acknowledges the current Government initiatives in promoting awareness to individuals about consolidating their superannuation funds is limited to the Australian Securities and Investments Commissions' (**ASIC**) *MoneySmart* website³ and *myGov*. The Australian Tax Office (**ATO**) also promotes the consolidation of superannuation accounts through their YouTube video 'Too many super accounts?',⁴ which explains an individuals' ability to consolidate their superannuation accounts through *myGov* and ATO's superannuation consolidation tool. Despite these initiatives, the Government fails to provide clear guidance for superannuation funds on the extent advice can be given to a member on consolidating their superannuation accounts and insurances without construing it as personal advice.

Alternatively, it is arguable that a superannuation fund relaying the same information communicated on ASIC's *MoneySmart* website can be interpreted as providing only factual information or general advice. In particular, a superannuation fund can reiterate the same benefits identified by ASIC to help a member make a decision on consolidating small super into one account such as:

- "saving costs by paying only one set of fees
- reducing your paperwork
- making it easier to keep track of your super".⁵

Nonetheless, the information provided on ASIC's *MoneySmart* website is limited, and insufficient to support a superannuation fund's efforts as it does not distinguish what information is considered personal advice on consolidating.

The Committee also notes that clearer regulatory guidance is needed on giving financial advice for consolidating superannuation accounts and insurances. ASIC Regulatory Guidance 175

² See s 299LA of the *Superannuation Industry (Supervision) Act 1993* (Cth) and reg. 6.49 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth).

³ ASIC MoneySmart website: <https://www.moneysmart.gov.au/superannuation-and-retirement/keeping-track-and-lost-super/consolidating-super-funds>.

⁴ ATO YouTube video on 'Too many super accounts?': <https://www.youtube.com/watch?v=4qnOCTZpcml>

⁵ Why you should consolidate your super' <https://www.moneysmart.gov.au/superannuation-and-retirement/keeping-track-and-lost-super/consolidating-super-funds>.

Licensing: Financial product advisers – Conduct and disclosure (RG 175) uses multiple examples where advice provided to a client to consolidate their superannuation funds is assumed to be personal advice.⁶ However, RG 175 and other regulatory guidance do not explain when providing financial advice on consolidating is general or personal advice. The Committee considers that the current regulatory environment is vague on its guidance and inadvertently reduces efforts of superannuation funds to help members make an informed decision on consolidating.

Recommendation

The Committee submits the current regulatory environment does provide some support to a superannuation fund's efforts to help members make informed decisions on consolidating their superannuation accounts and insurances through the ASIC *MoneySmart* and *MyGov* websites. However, clearer regulatory guidance is required to set distinct parameters on the level of information a superannuation fund may provide to a member regarding consolidation. Without this clear regulatory guidance, superannuation funds will remain reluctant to provide sufficient assistance for members to make an informed decision on consolidating and reduce efforts of addressing the issue of account balance erosion due to insurance premiums.

Key question 48 - What complexities with regulatory guidance prevent superannuation funds from providing general advice because of concerns that it may be deemed personal advice?

Under the current regulatory regime, complexities regarding regulatory guidance on personal and general advice hinders the objective of reducing account balance erosion of retirement savings due to insurance premiums. As it stands, 'personal' advice is subject to a stricter regulatory regime than 'general' advice. However, the Committee submits that there is a lack of certainty and guidance as to when financial product advice will move from being 'general' to 'personal'. This hinders the ability of superannuation funds to provide recommendations to members when they are considering their insurance needs. In particular, there is a risk that a recommendation to consolidate superannuation funds is, in itself, considered 'personal' advice. There are also a number of important consequences that flow from advice becoming 'personal'. As such, the current formulation does not support superannuation funds in making recommendations on consolidating super accounts and insurances. It poses the risk that superannuation funds will simply avoid giving comprehensive advice to assist members regarding consolidation, which potentially exacerbates account balance erosion due to uninformed members holding multiple automatic insurance policies.

⁶ See paragraph RG 175.337(d), example 12 and example 18 of the ASIC Regulatory Guide 175.

What is 'personal' advice?

The Corporations Act defines 'personal advice' by reference to whether the provider of the advice has considered the client's "objectives, financial situation and needs", or a reasonable person might expect the provider to have done so. However, ASIC's guidance makes clear that general advice can be provided to a client even if personal information about the client is used. ASIC also notes that personal information about a client's relevant circumstances can be used to provide general advice that is relevant and useful to them, provided that the client's personal circumstances are not in fact considered in preparing and giving the advice and it is unlikely that the client would expect the advice provided to reflect a consideration of their personal circumstances.

Under these formulations, the Committee considers that recommending a client to consolidate their superannuation accounts and insurance may or may not amount to 'personal' advice as it will be a function of whether the client's personal circumstances are used to generate the advice or whether the client is merely being informed of the advantages of consolidation which should not constitute personal advice. Further, whether a reasonable person might expect the advice to reflect a consideration of their personal circumstances may rely on a mutual understanding between the superannuation fund and the client that 'general', as opposed to 'personal' advice, is being provided. Some further clarification and assistance around these principles would be advantageous.

The consequences of advice being 'personal'

There are also a number of important consequences that flow when a person gives 'personal' advice, as opposed to 'general' advice, to a client. The potential consequences may discourage superannuation funds from making comprehensive recommendations to their members. Namely, there are consequences relating to the superannuation fund's disclosure obligations to the member who receives the advice which may include the need to give the member a statement of advice. There are also a number of provisions relating to personal advice to a member that place a number of obligations on the superannuation fund, including to act in the best interests of the member. Finally, it is not uncommon for an Australian Financial Services Licence (**AFSL**) to permit the licensee to provide only general advice, not personal advice. As such, for many superannuation funds where advice moves from being 'general' to 'personal' advice, the consequence is a breach of their AFSL.

Recommendation

Until the distinction between 'personal' and 'general' advice is made clearer in regulatory guidance, superannuation funds may be cautious to assist members to make an informed decision to consolidate their superannuation accounts and insurance. The Committee considers further clarification is necessary to improve the experiences of superannuation fund members in making a decision to consolidate. Once the complexities on providing advice are ameliorated, superannuation funds will be able to achieve the objective of reducing account balance erosion of retirement savings.

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
- Dr Lisa Butler Beatty, Deputy Chair, Superannuation Committee on (T) 0477 753 941 or at (E) beattyli@cba.com.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jonathan Smithers', with a long horizontal line extending to the right across the signature.

Jonathan Smithers
Chief Executive Officer