Ms Lynn Kelly

Interim CEO

Board of Taxation

The Treasury

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Parkes ACT 2600

Via email: lynn.kelly@treasury.gov.au

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25 June 2019

Dear Ms Kelly

**ASFA response to invitation to comment on superannuation ideas**

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this response to the Board of Taxation's letter dated 9 April 2019, inviting our comment on a number of superannuation-related ideas submitted to the 'Sounding Board' website facility.

As noted in my email to Ms Karen Payne on 18 April, we have taken the opportunity to canvass the views of our membership through engagement with our Tax Specialist Advisory Committee. This Committee comprises a number of senior tax partners from the major accounting firms, as well as in-house tax managers working with superannuation trustees.

Attachment A to this letter indicates our views on the eight issues raised in the Board's letter of 9 April. As requested in that letter, we have also highlighted, at a very high level, a number of additional issues that, in our view, warrant the Board's consideration; these are outlined in Attachment B. We would welcome the opportunity to discuss these with you and your colleagues, and to gain a broader understanding of the types of issues that are of interest to the Board, in more detail.

If you have any queries regarding the attached, please contact me on (02) 8079 0808 or by email gmccrea@superannuation.asn.au, or Julia Stannard, senior policy advisor, on (02) 9225 4027 or by email jstannard@superannuation.asn.au.

Yours sincerely

Glen McCrea

Deputy CEO and Chief Policy Officer

## Attachment A: Response to matters raised via the Sounding Board

## Redundancies after the age of 65 aren't 'genuine' – is it fair

This issue notes that a redundancy is only eligible to be considered a 'genuine' redundancy for tax purposes under subsection 83-175(2)() of the *Income Tax Assessment Act 1997* (ITAA 1997) if it occurs before the day an employee reaches age 65. Redundancies that occur on or after an employee reaching age 65 do not receive concessional tax treatment.

ASFA agrees that there would be value in reviewing the requirements of section 83-175. The age limitation is, in ASFA's view outdated and inappropriate given increasing life expectancies and a societal shift that has seen increasing numbers of individuals working beyond the 'traditional' retirement age of 65. This is particularly so given successive federal governments have actively encouraged older Australians to remain in the workforce through a range of measures — for example, through the Pension Bonus Scheme and incentives for businesses that employer older workers and through removal, from 1 July 2013, of the upper age limit for receipt of superannuation guarantee (SG) contributions.

## Superannuation on resignation

This issue effectively notes that on termination of employment, an employee receives (if applicable) a payment for annual and long service leave that is accrued and untaken, but no allowance for the superannuation guarantee (SG) contributions that would have been payable if the termination had not occurred and the employee had instead taken (or worked out) the leave. The issue submits that superannuation should be considered part of the benefit of annual and long service leave and should be paid on termination.

ASFA is of the view this is not an unreasonable submission. However, we note that Superannuation Guarantee Ruling SGR 2009/2 reflects the ATO's longstanding view that unused leave payments on termination are not considered to be part of ordinary time earnings. It would therefore be necessary to amend either SGR 2009/2 or the SG Administration Act 1993 in order to achieve an outcome where payment of SG was mandatory on unused leave paid in lump sums on termination. ASFA considers that any future proposals in this space could potentially be considered as part of a broader package of measures, including the issue above in relation to redundancies after age 65.

## Superannuation guarantee charge simplification

This issue indicates a view that the SG rules are 'complex and onerous' and should be 'substantially simplified in order to provide clarity and improved compliance'.

ASFA continues to be strongly committed to measures and policies that reflect and support the core role of the superannuation system in providing adequate retirement outcomes for all Australians and in our view the SG regime plays an integral role in this.

A necessary element of compulsory contributions by employers on behalf of their employees is that contributions are actually made. Significant non-compliance with SG obligations leads to poorer retirement outcomes for many thousands of employees, resulting in higher Age Pension expenditures by the Government. It is in both the interest of individuals and the community as a whole that required superannuation contributions are made.

Accordingly, ASFA would be interested in further consideration of proposals for simplification that would lead to higher rates of employers meeting their SG obligations.

## Exempt Current Pension Income and Actuary's Certificates

This issue refers to 'burdensome' requirements on fund trustees to obtain an actuary's certificate in order to substantiate a fund's exempt current pension income (ECPI) under section 295-385 of the ITAA 1997.

ASFA acknowledges that the requirements to obtain actuarial certificates in relation to ECPI can be onerous for smaller funds and especially for self-managed superannuation funds (SMSFs).

An exemption from the requirement applies in relation to the provision of account based pensions where the fund has adopted the segregated method of calculating ECPI (pursuant to section 295-385 of the ITAA 1997). However, we note that concerns have been raised in relation to this actuarial certificate requirements in the context of SMSFs that are presently forced to use the percentage method of calculating ECPI (pursuant to section sec 295-390) because at least one member of the fund is in pension phase and the fund assets exceed $1.6 million.

We note that the Government's Budget for 2019-20 indicated that it would streamline some administrative requirements for the calculation of ECPI from 1 July 2020. In particular, the Budget announcement indicated:

- the Government will allow fund trustees with interests in both the accumulation and retirement phases during an income year to choose their preferred method of calculating ECPI
- funds will no longer be required to obtain an actuarial certificate when calculating ECPI using the proportionate method if all members of the fund are fully in the retirement phase for all of the income year.

At this time, no further information has been released in relation to this Budget announcement. We recommend that this Sounding Board issue is considered further once the full details of the Government's Budget announcements in relation to actuarial certificates and calculation of ECPI are known.

## Extended super fund central management and control exemption

This issue notes the implications of the current definition of 'Australian superannuation fund', and in particular the impact on SMSFs of the requirement that the central management and control of the fund must 'ordinarily' be in Australia. This requirement may be met even where the central control and management of the fund is temporarily outside Australia for a period of not more than two years (subsections 295-95(2)(b) and (4) of the ITAA 1997).

ASFA acknowledges that the two-year time limitation may be inappropriate in light of evolving work arrangements and would not be opposed to increasing the time limitation to four years as proposed.

## Attachment B: Additional matters for the Board's consideration

Members of ASFA's Tax Specialist Advisory Committee have identified a number of additional matters which may warrant consideration by the Board of Taxation.

We would welcome the opportunity for representatives of the Committee to meet with members of the Board secretariat, to provide detail on any or all of these matters:

1. Rectification of tax issues arising in relation to a fund merger, given the Government has announced Division 310 tax relief (CGT roll-over and loss transfers) will become permanent. These include:
   - application of the 45 day holding period rule for franking credit entitlements
   - entitlement of the continuing (destination) fund to claim the no-TFN tax offset in respect of no-TFN tax paid by the merged fund
   - calculation of minimum annual payment from a superannuation income stream where both the merged and continuing funds made income stream payments for a member during the period
   - treatment of merger costs as capital in the merging fund, typically meaning a significant amount is unable to ever be claimed as a deduction (application of section 40-880)
   - capacity to amend prior year tax returns of the merging fund
   - whether a merger gives rise to a realisation event for funds that chose to apply CGT transitional relief as part of the 1 July 2017 changes, and might still hold assets with deferred gains amounts
   - broadening merger relief to encompass scenarios where for regulatory reasons a fund transfers a large portion of its members to another fund, but the original fund continues (similar to Division 125 demerger relief for corporates)
   - imposition of state-based stamp duty on transfers of certain assets under the merger.
2. Limited partnerships – in particular, eligibility for 'foreign hybrid' treatment and tax treaty rates.
3. Source of foreign exchange gains and losses – in particular, ongoing difficulties for superannuation funds in addressing rules in Taxation Ruling TR 2014/7.
4. Inclusion of "foreign-sourced" capital gains as part of disregarded income for the purposes of the foreign income tax offset cap rules
5. Tax treatment of swaps – both in terms of their source and their categorisation as capital Vs revenue.
6. Definition of 'dividend', insofar as its potential very onerous application to redemptions from foreign investment companies.
7. Differential tax treatment where total and permanent disablement proceeds are rolled over prior to commencing an income stream as opposed to commencing an income stream from the original fund, arbitrarily creating an incentive to rollover (application of section 307-45, see also ATO ID 2009/125).
8. Potential for some death and disability risks to be denied a deduction when a fund changes from the section 295-470 method for claiming a deduction for insurance premiums to the section 295-465 method.
9. Suitability of the current range of ATO advice 'products', given the shift away from issuing public rulings in favour of different types of binding and non-binding ATO 'advice'.