



Law Council
OF AUSTRALIA

Consultation on draft Law Companion Guidelines - Transfer Balance Account and Transfer Balance Cap

Australian Taxation Office

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Acknowledgement

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 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.

About 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 Law Firms Australia, 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 Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors - one from each of the constituent bodies and six elected Executive members. 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 members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

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- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

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

Introduction

1. The Committee's response to the draft Law Companion Guidelines (**Draft LCGs**) is guided by its objectives to ensure that the law relating to superannuation in Australia is sound, equitable and clear.
2. The Committee has only made comments below where the Committee has identified issues within its remit, and has not been able, in the time available, to carry out a thorough review. The Committee has not had a chance to substantively review the Draft LCG in relation to CGT relief.

Preliminary

Consultation period

3. The Committee notes that two or three business days (Melbourne had a public holiday on 1 November 2016) was allowed for consultation. The Committee does not consider that this is enough time for those individuals and groups invited to provide comments to undertake a thorough review of the draft materials.

Overall approach

4. The Committee notes that it is intended to remove some of the commentary in the Draft LCGs from the final versions that are issued. However, it is not clear to the Committee what material will be removed. As a general point, the Committee thinks that commentary on the operation of the provisions is useful and as far as possible should be retained or otherwise made available.
5. If the Draft LCGs, when final, are to be of practical assistance to taxpayers seeking to understand their position, the Committee makes the following recommendations:
 - 'plain English' definitions of all key terms should be included at the beginning of each LCG;
 - grammatical and other typographical errors should be corrected; and
 - in the Draft LCG for the Transfer Balance Account and Transfer Balance Cap:
 - some explanation of the policy background should be included, given that these concepts are not intuitively clear;
 - more worked examples should be included - in particular, examples for the operation of the payment splits and structured settlements after paragraph 26 and an example around the excess transfer balance tax after paragraph 49 would be of assistance. Examples for the operation of the default commutation notice and commutation authorities would also assist following paragraph 71 - building in different aspects for the election provisions;
 - a 'decision tree' or flowchart would be of considerable assistance so that the reader can put together a 'big picture' view of the new regime and track through the process from establishing a pension, to having an

excess transfer balance, receiving and actioning determinations and paying excess transfer balance tax;

- in each case where something has to be done by an individual, there should be, at a minimum, a brief outline of what needs to be done and how and when - for example, the Committee has mentioned below the need to give more detail about valuations, and how an individual (and fund trustee) would commute a pension; and
- a brief explanation of how defined benefit pensions fit into the regime should be included.

Draft LCG for the Transfer Balance Account and Transfer Balance Cap

General

6. The Committee notes that the language of "pensions" and "income streams" appears to be used interchangeably throughout the LCG and it is unclear whether this was by design or not. For example, Example 1 makes reference to "pensions" and income stream benefits so that the income stream benefits flow from the pensions, then in Example 3, the concept of "superannuation interest" is also introduced on top of these references. The Committee suggests it may be helpful to clarify the different meanings intended when using these terms.

Specific Comments

Paragraph 3

7. The terms listed here should be defined, together with terms such as 'retirement phase' and 'retirement phase recipient' (perhaps moved here from paragraphs 6 and 7).

Paragraph 4.

8. The first sentence states that 'Individual[s] can transfer to the retirement phase of superannuation which will have the effect of limiting the amount of fund earnings that will be exempt from tax.' The Committee considers that this is a sentence that would be understandable only to superannuation practitioners, and suggests that a Plain English explanation of exempt current pension income be included.

Paragraph 7

9. 'Deferred superannuation income stream' and 'conditions of release' should be explained.

Paragraph 10

10. This paragraph is difficult to follow and there appears to be words missing. The final sentence says that 'Generally, capital growth of assets supporting the superannuation income streams will not affect your TBA balance'. There should be some indication of

when capital growth would have this effect, or a reference to a later section where this is explained.

Paragraph 11

11. There should be more detail provided about how a superannuation interest is to be valued.

Paragraph 16

12. More detail should be provided about reversionary beneficiaries. This is not a term defined in the superannuation legislation, and its use notoriously creates confusion. How is this paragraph intended to interact with the comments on reversionaries in Tax Ruling 2013/5? What does 'immediately' mean? Further, while "reversionary beneficiaries" are mentioned at paragraphs 16 and 17, there are not adequate details about the treatment of death benefit pensions generally. The footnotes to the child reversionary pensions comments note that there are special rules - but the Committee recommends that these special rules should be described and not just flagged. Further, the consequence of an auto-reversionary pension is described at paragraph 17, but this does not go far enough - it merely addresses the date from which the reversionary beneficiary will be taken to be in receipt of a superannuation income stream - it does not address more generally the impact for death benefit pensions.
13. For "reversionary beneficiaries" the Committee questions whether it may be difficult (or impossible) in some cases of reversionary pensions that commenced many years ago to now determine whether they were auto-reversionary or not. How will these issues of evidence be addressed - particularly where the relevant recipient may be very elderly and frail and there is inadequate documentation as to whether the pension was strictly auto-reversionary? This points to the issue previously raised by the Committee that there may need to be further transitional relief or concessions given for pre-1 July 2017 income streams (thus avoiding restrictions or requirements being imposed retrospectively).
14. In relation to death benefit pensions, the Committee notes that the issue of whether or not the excess must be cashed out of the superannuation system - or might be able to be retained in accumulation phase (as raised in the Committee's submission to Treasury on Tranche 2) has not been addressed. Once resolved, the Committee expects further details about this treatment would be set out in the LCG.

Paragraphs 18 and 19

15. These paragraphs should more closely follow the legislation. There should be reference to structured settlement amounts that arose before 1 July 2017.

Paragraph 20

16. The description of payment spits may be overly simplified and should at least flag that this is a high level description and not intended to be comprehensive.

Paragraph 26

17. The Committee suggests that some reference be made to defined benefit pensions here, and more generally, rather than simply using the term 'non-commutable' in respect of superannuation interests. The Committee expects that many taxpayers who

will be seeking guidance in the early implementation of these new measures will be those with defined benefit income streams and the LCG would be improved if further work was included to address this area.

Paragraph 27

18. A footnote refers to fraud and dishonesty and bankruptcy. These topics should be addressed in detail.

Paragraphs 28 and 29

19. Paragraphs 28 and 29 appear to assume that the taxpayer is obliged to notify the Commissioner regarding the payment splits for "debit" purposes. Is this correct? It is not clear why these amounts would not be capable of being reported by the funds. Further explanation and/or examples would be helpful to expand on this.

Paragraph 30

20. There should be an explanation of what it means to 'commute' an amount of a pension as opposed to drawing down an amount. The Committee does not think the average individual would understand this difference.

Paragraph 35

21. There is a reference to a further NCC of \$200,000 and it is not made clear that there would have to be an additional condition of release for this contribution to be able to be added to the new pension amount - the Committee suggests this be clarified.

Paragraph 37

22. In the experience of many members of the Committee there are often timing issues relating to the receipt and payment of amounts on or about 30 June. The funds often apply a different concept to that of the member/taxpayer or an employer (where contributions are involved). Whilst paragraph 37 considers timing issues for amounts debited and credited throughout the course of a day - it would be helpful to also have further clarity about when a fund might be taken to recognise a particular debit or credit - for example, when would a commutation take effect for the purposes of it being debited to the TBA? Similarly, when would a pension technically be credited to the TBA? It is noted that there remains a level of concern in the industry about TR 2013/5 which became less relevant following amendments to the legislation to deem assets to remain in pension phase following a member's death and until payment of the death benefit commenced - merely citing TR 2013/5 may not be sufficient for the purposes of the new measures.

Paragraph 38

23. There should be an explanation of the indexation of transfer balance caps and how this works and the circumstances in which it would be relevant, so as to put the potential loss of indexation into context.

Paragraph 44

24. There should be an explanation of what excess transfer balance tax is, the level at which it applies and who is obliged to pay it. There should also be an explanation of why it is applied from a policy perspective.

Paragraph 54

25. It should be explained whether the individual has to apply for amendment or revocation of a determination, and how they would do this.

Paragraph 58

26. What is meant by 'the superannuation income stream which caused the excess transfer balance'?

Paragraph 60

27. The Committee recommends that powers of objection should be treated as a separate topic.

Paragraph 62

28. This paragraph needs elaboration. In particular the term 'crystallised reduction amount' needs to be explained.

Paragraph 66

29. This should explain that the election form will be provided by the Commissioner together with a determination.

Paragraph 67

30. This should explain how an individual applies for an extension of time.

Paragraph 70

31. The Committee remains concerned about unnecessary paperwork and administration in circumstances where there is a cross-over between taxpayers seeking to themselves rectify an excess transfer balance by voluntarily commuting amounts and the Commissioner issuing default commutation notices and ultimately commutation authorities (if, for example, a taxpayer does not make an election because they have previously voluntarily commuted a relevant amount). The Committee acknowledges this may need to be addressed legislatively, but ultimately it will have adverse administrative implications if further consideration is not given to these matters.

Contacts

32. 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:

- Ms Michelle Levy, Chair, Superannuation Committee on T: (02) 9230 5170 or at E: michelle.levy@allens.com.au; or
- Ms Heather Gray, Chair, Tax Subcommittee of the Superannuation Committee on T: (03) 9603 3608 or at E: heather.gray@hallandwilcox.com.au.