



# Mergers: avoid a slip up

If mergers between superannuation funds weren't complex enough, [BARRY DIAMOND](#) and [ZOE CHUNG](#) report it's important to factor in other potential pitfalls – especially stamp duty.

**A**s mergers of superannuation funds (super funds) become more common, fund managers need to be aware of the associated stamp duty traps and pitfalls, particularly because stamp duty laws have not kept up with the commercial realities of modern superannuation mergers and can be difficult to apply in practice.

The current commercial environment for super funds is very challenging due to the current instability in financial markets, greater regulatory demands, increasing insurance cost and, at the same time, pressure from Government to reduce member fees.

In the face of these challenges, an increasing number of super funds are choosing to merge. This is becoming more attractive since the Government's proposal to provide capital gains tax (CGT) relief to super fund mergers.

In light of the above, it is important to consider the practical stamp duty implications and costs associated with super fund mergers.

This is an area which is often overlooked by fund managers, and the lack of careful planning and understanding of stamp duty issues can be costly.

Stamp duty is a state based tax with laws which vary significantly across the States and Territories of Australia. Most jurisdictions have stamp duty exemptions/concessions that can be applied to the various merger related transactions, and some have specific provisions directed at super fund mergers.

However, the requirements vary between jurisdictions and the relevant laws have not kept up with commercial realities. Accordingly, the intended concessions can be difficult to apply and it is critical to carefully consider requirements and conditions imposed in each jurisdiction in order to manage the stamp duty exposure.

A typical super fund merger between Fund A (Successor Fund) and Fund B (Transferor Fund) may involve the following steps:

- Appointment of the Custodian of

Successor Fund to become the new Custodian of Transferor Fund. This step could typically take place several weeks prior to the merger to ensure that each super fund's systems are updated and synchronised to enable a smooth transformation upon merger; and

- Transfer of all the members and investments of Transferor Fund to Successor Fund.

Broadly, the above steps may give rise to one or more of a number of types of duty including: marketable securities duty (on unlisted securities only), transfer duty, "land rich" duty, "landholder" duty and trust "look-through" duty.

The applicable types of duty depend, amongst other things, on the nature of Transferor Fund's investments and their situs (location) for stamp duty purposes, in particular, whether Transferor Fund's investments are comprised of:

- direct investment in real property or other dutiable property (e.g., equipment, receivables);

- investments in securities (listed or unlisted) with no indirect interests in real property; and
- investments in securities (listed or unlisted) with indirect interests in real property.

For instance, many super funds hold indirect interests in real property by way of holding units in trusts that either directly hold real property, or in turn, hold interests in further property holding trusts or partnerships (Property Trusts).

Take, for example, the case where Transferor Fund has investments in unlisted Property Trusts managed from Sydney (and where the Trusts' unit register is kept) and that those Property Trusts have Queensland or South Australian real property in their portfolio. The types of duty relevant in this case would be unit transfer (marketable securities) duty and trust "look through" duty.

Unit transfer (marketable securities) duty would be relevant in New South Wales. Many fund managers and custodians would already be aware of this type of duty.

Trust "look through" duty would be relevant in Queensland and South Australia (prior to 1 July 2008, trust "look through" duty also applied in Western Australia).

The rules in relation to this type of duty are extremely complex and are subject to many different and varied exclusions and inclusions. Essentially, it applies to certain types of unit trusts and seeks to apply duty on a transfer of the units as if it were a direct transfer of a proportionate interest in the underlying assets of the unit trust.

Further, the rules require a taxpayer to "look through" that unit trust's ownership chain (ie through interests that it holds in other unit trusts) to determine whether the unit trust can be deemed to hold "dutyable property" in the relevant jurisdiction by virtue of its holdings in other unit trusts, and therefore fall within that State's taxing jurisdiction.

In our example then, *prima facie* duty may be imposed on transfer of Transferor Fund's holdings in the Property Trusts at rates of up to 4.5-5.5 per cent of the value of the proportionate interest of the real property held by the Property Trusts in Queensland and South Australia. In addition, unit transfer (marketable securities) duty would *prima facie* apply in New South Wales at the rate of 0.6 per cent of the value of the proportionate interest in the units transferred.

Moreover, in our example, there will be two transfers of Transferor Fund's

investments (and potentially two lots of stamp duty in each of New South Wales, Queensland and South Australia), firstly on the appointment of the new Custodian, and secondly, to effect the merger into the Successor Fund.

Applying the various concessions or exemptions is not as straightforward as you might expect.

For example, on the first transfer occurring upon the appointment of the new Custodian (whilst there are, broadly speaking, concessions for this), the

duty consequences) in circumstances where one may have expected concessions to be clearly available.

Administratively, it is also extremely burdensome to identify what the proper stamp duty payable should be.

For instance, a popular way for super funds (particularly smaller funds) to ensure their holdings are sufficiently diversified is to invest in managed investment schemes or similar funds, and those funds themselves may also choose to hold a proportion of their investments in other

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concessions may be narrowly drafted.

For instance, while both the New South Wales and Queensland laws have a specific provision relevant to transfers to custodians, in Queensland, it can only apply to certain types of "public superannuation entitlements" as defined in the Queensland law.

This is a much narrower group of super funds than is anticipated to be covered under the proposed CGT measure and there is no sound policy rationale for this limited operation.

South Australia is worse in that it does not even have any specific provision regarding transfers to custodians. *Ex gratia* (discretionary) relief would need to be applied for.

In relation to the second transfer occurring upon merger of the super funds, the concessions may be narrowly drafted to apply only to a direct transfer of real property, but not to an "indirect" transfer of real property, (e.g., by way of transfer of units in a Property Trust).

Again there is no sound policy rationale for this. For instance, if the Queensland Office of State Revenue were to technically apply a strict literal interpretation of the concession, the concession should only be applicable to direct transfers of real property and not to an indirect transfer of the real property via a transfer of the units in the Property Trust.

Accordingly, the above example demonstrates that potentially stamp duty will be payable in various States on the change of custodian and merger (i.e., double

funds and so on.

Accordingly, there could be a long chain of ownership until a direct interest in real or other dutiable property can be found.

While the stamp duty laws require this to be done, administratively, this significantly increases the information collection process and in turn the costs to determine the precise stamp duty payable (let alone in the first instance whether there will even be a duty liability in a particular jurisdiction for a particular investment).

In conclusion, the inadequacy of stamp duty laws to apply consistently and simply to these common scenarios is unsatisfactory, particularly because often *ex gratia* (i.e., discretionary) relief must be applied for to achieve the concessional treatment that should apply under the intent of the stamp duty laws.

All this amounts to significantly increasing the administrative time and costs incurred in implementing super fund mergers.

Further, this is only one example of the potential difficulties and inconsistencies that can occur. There are many other difficulties in relation to other types of investments and jurisdictions that arise in practice. **SF**

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