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20 January 2012

The Manager
Contribution and Accumulation Unit
Personal and Retirement Incomes Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: recc@treasury.gov.au

RE: Exposure Draft Legislation – Refund of Excess Concessional Contributions

Dear Manager,

The Association of Superannuation Funds of Australia (ASFA) would like to lodge this submission with respect to the above exposure draft legislation and explanatory statement on the proposal to permit the refund of excess concessional contributions in certain circumstances.

ASFA is a non-profit, non-political national organisation whose mission is to advance effective retirement outcomes for members of superannuation funds through research and advocacy. We focus on the issues that affect the entire superannuation industry. Our membership, which includes corporate, public sector, industry and retail superannuation funds as well service providers some of whom deal with self managed superannuation funds (SMSFs), has over 90% of the approximately 12 million Australians with superannuation as members. ASFA members manage or advise on the bulk of the \$1.3 trillion in superannuation assets as at September 2011. ASFA is the only organisation that represents all types of superannuation funds and associated service providers.

Comments on the Policy

ASFA notes that the policy objective of the measure is to provide a one-off opportunity for an individual to escape the impost of excess concessional contributions tax. This can occur once

only in respect of concessional contributions made in the 2011-12 and subsequent financial years, and only where the excess contributions in a financial year total less than \$10,000.

ASFA is concerned that the \$10,000 upper limit is a hard limit. That is, if it is exceeded by \$1 then the person has no access to the measure. This issue could be resolved by permitting a person to seek a refund of the first \$10,000 by which the contribution cap is breached.

ASFA is also concerned that the \$10,000 upper limit may be too low. Whilst it may appear to provide a reasonable margin of error for those with a \$25,000 concessional contributions cap, it may not be sufficient to deal with situations likely to arise under the concessional contribution caps that are proposed from 1 July 2012. Under the proposed cap there will be the capacity to contribute an additional \$25,000, determined by reference to both the contributors age (must be aged 50 or older) and their total superannuation benefits (must have less than \$500,000 in accumulated superannuation balances at the relevant date). ASFA considers that the increased complexity in the contribution rules will provide more scope for inadvertent errors and mistakes by persons attempting to maximise their contributions. Of particular concern is the potential that a person aged 50 or more may contribute an additional \$25,000 in the mistaken belief that they are entitled to contribute under the higher cap rules. ASFA considers that increasing the \$10,000 to a higher figure, say \$25,000 for those over age 50, would not be inconsistent with the objective of providing one-off relief for individuals in respect of inadvertent errors or misunderstandings and the opportunity to, without penalty, gain a better understanding of the operation of the law and the many ways in which inadvertent breaches of the caps may occur.

ASFA considers that a change in the way the threshold operates (soft cap and higher cap for those aged 50 and older), when combined with the ability of the Commissioner under section 292-465 of the Income Tax Assessment Act 1997 (ITAA 97) to disregard, or allocate to another year, all or apart of a person's concessional contribution and the new provisions, would provide sufficient scope to deal with a significant number of potential excess concessional contributions cases.

ASFA also notes that there is no similar relief available where there are excess non-concessional contributions. There are many instances where inadvertent breaches of the non-concessional contributions cap occur through a misunderstanding of the operation of the law, poor advice by professional advisers, or through oversight of earlier contributions. Where such cases involve a triggering of the bring-forward rule the resulting financial penalty can seem harsh and out of proportion to the amount of the contributions actually in error. See Attachment A for an example. To address this issue, ASFA seeks consideration of a policy change such that:

- A person could have a once only opportunity to withdraw a non-concessional contribution amount such that the excess non-concessional contribution is reduced to nil, or

- A person could elect that the 'bring forward' rule is not triggered and that the excess non-concessional contribution tax be applicable with respect to a breach of the single year cap.

Finally, before we comment on the detail of the legislation, a matter of concern for superannuation funds is the likelihood that they may be the first point of contact for a member who receives an offer from the Commissioner to make a determination. Due to the complexities of the potential outcomes and the possibility that any advice may be considered to be taxation advice as well as financial advice, superannuation funds will need to carefully consider how, or whether, they should respond to such enquiries. There will also be a need for funds to provide generic information to their members about these release authorities and the refund process.

Comments on the proposed administration arrangements

ASFA is very supportive of the proposed administrative arrangements:

- Having the process initiated by the ATO and combining the offer of a section 292-467 Determination with the current ATO process of advising of a potential breach of the concessional contributions cap limits should simplify the process for affected individuals.
- The proposal that the ATO issue the release authority direct to the individual's superannuation fund and link this process with an existing process will simplify the superannuation industry's administration processes.
- The process of automatic amendment of the individual's income tax assessment combined with the application of tax credits and rebates should make the process reasonably seamless for the affected individuals.

However, ASFA is concerned that currently the excess contributions tax process for making payments to the ATO and reporting to the ATO in response to a release authority is a manual process. That is, there currently is no electronic communication channel. ASFA is concerned that the continued absence of such a channel may result in a significant call on fund resources as there is expected to be a significant increase in release authority volumes under this new arrangement. ASFA calls on the ATO to expedite the introduction of an electronic communication channel.

ASFA's primary concerns with the proposed arrangements centre on two areas:

- An apparent inability of a person to initiate action where they consider that they are entitled to relief but the Commissioner determines to not issue a relief offer.
- The limited circumstances under which a superannuation fund may advise the Commissioner that they are not required to comply with a release order.

Each of these issues is considered more fully in the following section.

Separately, ASFA seeks confirmation that:

- Superannuation entities will not have to submit an amended member contribution statement with respect to a member for whom a release authority is received as the ATO has all the necessary information to adjust the member record once the money has been released by the fund.
- Superannuation funds are not required to amend their income tax returns to seek a refund of tax paid with respect to contributions 'refunded' under a release authority as the member will receive an equivalent tax offset on their amended tax assessment.

ASFA notes the need for the ATO to carefully manage the sequencing of their processes to ensure that the overlapping of the sixty day objection time limit with the 30 day payment requirement does not result in an unnecessary reduction in a member's capacity to contribute to the full extent of the contributions cap.

Comments on the exposure draft legislation

Part 1 – main amendments

Section 292-420

Subsections (4) and (5)

Subsection (4) states that superannuation provider must comply with a release authority within 30 days.

Subsection (5) sets out the circumstances under which a superannuation provider may advise the Commissioner that the superannuation provider is not required to comply with a particular release authority.

Subsection (5)(a) deals with the situation where the value of the member's interests in the fund, other than those listed in Subsection (5)(b), is less than the amount of the release authority.

Subsection (5)(b) lists three specific situations where a release order does not need to be complied with. ASFA is concerned that subsection (5) does not deal with the situations where the member's investments are illiquid, there is a legal impediment to the release of benefits or a release authority has already been complied with and a second release authority is received for a lesser amount (i.e. a potential refund situation).

Illiquid investments

ASFA is concerned that subsection (5) does not deal with the situations where:

- The member's account is in an illiquid investment option (as set out in SIS

Regulation 6.34), or

- Where the member's capacity to withdraw funds has been restricted, with agreement from APRA, through the operation of SIS Regulation 6.37, or
- Where the members capacity to withdraw funds has been restricted by APRA through the operation of SIS Regulation 6.36.

Where these situations arise the superannuation fund trustee has specific obligations under SIS Regulation 6.38. ASFA considers that this restriction on the ability of the trustee to rollover or transfer benefits should also apply to this specific type of release request as payment to the Commissioner is a similar transaction – i.e. the money is leaving the fund.

Additionally, an inability to redeem investments within the 30 day time period would require superannuation providers to introduce additional administrative arrangements in order to fund the release authority and then manage the recovery of the money form the member's account.

The situation regarding liquidation of assets is compounded by the 30 day period commencing on the date of issue of the notice by the ATO, not the date it is received by the superannuation provider.

To cater for these situations, ASFA seeks a change to include:

- A capacity for a superannuation provider to seek an extension of time to comply with a release authority be included, and
- An expansion of the list of circumstances in subsection (5) to cover the above specific situations where it is recognised that immediate release of benefits may not be deemed desirable.

Legal impediment to paying a benefit

ASFA is also concerned that the legislation makes no provisions for circumstances where the trustee is under a legal impediment that prevents the payment of a benefit. Such situations include:

- A *Family Court* order which restricts the member's capacity to dealing with all or part of the benefit. For example, 100% of the benefit may be payable to the non-member spouse leaving no available funds with which to satisfy the release authority.
- A *Family Court* freezing order which prevents the member dealing with their superannuation benefits pending finalisation of a Family Court order.
- A freezing order imposed by a court with respect to a member's benefit under proceeds of crime legislation.
- A direction under bankruptcy proceedings to make previously paid superannuation contributions available to the trustee in bankruptcy for distribution to creditors.

To cater for these situations, ASFA seeks either:

- An expansion of the list of circumstances in subsection (5) to cover the above specific, and other similar, situations where it is recognised that release of benefits may be prevented by the operation of another law; or
- Clarification that the release authority has priority over all other claims to the member's benefit.

Payment already made

A further concern is that subsection (5) does not cater for the situation where payment is made to the ATO by a superannuation provider (or the generation of the payment is initiated) prior to the provider receiving a release authority following the Commissioner's decision (under section 292-468) to vary downwards a determination.

The provisions of section 292-468 (Variation etc of refunded excess concessional contributions determinations) clearly contemplate that where there is a request for a downwards variation of a determination and the associated release authority has already been complied with then there should be no capacity for the Commissioner to vary or revoke a determination. This appears to be so as to remove the need for the creation of a refund process. In a mass decision making system there will always be situations where decisions are made without full possession of the facts, where there are delays between process initiation and completion, and where processes once commenced cannot be stopped. Such situations occur regularly in the administration of superannuation. Where the ATO is involved, certain difficulties are handled through the Commissioner making a determination with respect to acceptable administration process. Significantly this occurs in situations where a notice overturning a request to pay money to the Commissioner is received after the payment process has been initiated.

It is ASFA's view that if the intent of section 292-468 is to be met and the need for a refund process to be implemented is removed then subsection 292-470(5) of the legislation should contemplate the gaps and delays that naturally occur in mass decision making systems.

To redress this legislative gap ASFA seeks the inclusion in subsection 292-420(5) of the capacity for a superannuation provider to not comply with a release authority where, at the time of receipt, payment has been made, or the payment process initiated, in respect of a release authority for a greater amount for the same person and financial year.

Subsection (6)

This subsection states that where the provider is not required to comply with the release authority they must, within 30 days of its issue date, return the release authority (paragraph (6)(a)) and advise the Commissioner of that on the approved form (paragraph (6)(b)). ASFA suggests that this process be reviewed as returning the actual advice received would not achieve an outcome different to that which could be achieved through a properly designed approved form. A process of returning the release authority would also appear to be

inconsistent with the Government Policy, as expressed through its Stronger Super reforms, that superannuation funds should be moving to a more efficient (electronic) processing environment.

Of particular concern is that if the release authorities are to be paper forms then, where entities have introduced imaging systems, retrieving and returning these forms is not practical, difficult, costly and is counterintuitive to the reason for introducing such systems. Similarly, where the release authority is an electronic form, returning the actual form received is impractical.

Rather, in both cases the approved form should accommodate the information from the release authority such that the ATO receives the information it requires in order to complete its processing.

ASFA seeks amendment such that the sole requirement is that the Commissioner is to be advised on the approved form. This would allow flexibility in the development of the process. (For example it would facilitate the process being done electronically).

Section 292-468 Variations etc of refunded excess concessional contributions determination

As discussed above, we note that there appears to be no provision for the Commissioner to vary or revoke a determination where payment has been received by the Commissioner and the Commissioner determines that the amount of excess contributions in the determination is greater than the actual amount of excess concessional contributions.

We further note that the Commissioner, having decided to vary or revoke a determination and notifying the affected individual of this (292-468(6)), is not obliged to issue another (a replacement) release authority (292-468(7)).

Our understanding of the effect of the provisions is that, where money has already be received by the ATO the Commissioner would not be required to refund the 'overpayment' to the superannuation fund. While noting that the removal of the need for a refund process would considerably simplify the administration processes for the measure, the actual impact of the Policy decision is that an affected individual has lost the ability to maximise their concessional contributions for the relevant year. We draw this fact to your attention.

Section 292-469 objections against determinations etc

Section 292-467, the operative provision, states that where certain circumstances exist the Commissioner may make a written determination that the excess contributions may be disregarded, with the result that a similar amount is included in assessable income of the individual for the relevant financial year.

Section 292-469 provides for a right of appeal against an original or varied determination of the Commissioner or a decision by the Commissioner not to vary or revoke a determination.

However, there appears to be no redress in this division of the Act for an individual where

they meet the requirements of section 292-467(1) and the Commissioner does not make a determination that the excess contributions are to be disregarded.

Separately, we note that the *Taxation Administration Act 1953* is to be amended by item 12 in Part 2 to set a time limit of 60 days to object under section 292-469 of the ITAA 97 “in relation to a decision not to make a determination” and “in relation to a decision not to vary a determination”.

This suggests that the legislation contemplates a right to object where the Commissioner fails to make a determination.

ASFA questions whether the lack of an objection right in section 292-469 is an oversight or whether there are other provisions that may be used to seek redress. ASFA seeks either an amendment to the provision or a clarifying statement under section 292-469, as appropriate.

Separately, ASFA queries whether it is contemplated that the mechanism by which the person would be expected to know that the date on which the Commissioner has failed to make a determination (and therefore the commencement day of the sixty day window in which to object), is the issuing of the ATO’s excess contributions tax pre-assessment letter without an accompanying release offer..

Section 303-15 Payments from release authorities for refunded excess concessional contributions

ASFA suggests that for ease of understanding this provision’s purpose, consideration be given to including a note under Subsection 305-15(1) to the effect that the deemed benefit payment is not assessable income and not exempt income because Subsection 292-467(2)(a) includes an amount equal to the refunded excess concessional contributions in the person’s assessable income for the financial year.

Part 2 – Other amendments

Item 7

Should the reference to 292-467(3)(b) be a reference to 297-467(2)(b)?

Item 13

Should the reference to 292-420(3)(a) be a reference to 292-420(4)(a)?

Item 15

Should the reference to 292-420(3)(a) be a reference to 292-420(4)(a)?

Comments on the Explanatory memorandum

Paragraph 1.7 states that if the provider is not required to comply with the release authority they must, within 30 days of its issue date, advise the Commissioner of that on the approved

form and return the release authority. ASFA suggests that this process be reviewed. If the release authorities are to be paper forms then retrieving and returning these forms is not practical where entities have introduced imaging systems. Similarly, where the release authority is an electronic form returning the form as received is impractical. Rather, in both cases the approved form should accommodate the information from the release authority that the ATO requires in order to complete its processing (similar to current variation advice processes) and thus eliminating the requirement to return the release authority.

Paragraph 1.14 deals with contributions made prior to 1 July 2011. As the two concepts mentioned here (you cannot seek a refund of these contributions and previous excess contributions assessments are ignored for determining access to the new rules) are fundamental to an understanding of the scope of the new arrangements it would assist if there was an example of both included in the explanatory memorandum.

Paragraph 1.45 deals with Item 3 - subsection 303-159(2) in the exposure draft. That provision states that the proportioning rule does not apply to a release authority.

It may assist a reader's understanding of this provision if the paragraph was expanded to explain that the reason the proportioning rule does not apply is because the concessional component of a member's interest is determined by reducing the total value of the member's interest by the value of the non-concessional component. To apply the proportioning rule to a release authority would adversely affect the member as it would result in a reduction in the non-concessional component of the member's interest.

Additional comments

ASFA notes that whilst this legislation will permit the ATO to seek the release of the excess concessional contributions from the member's account, the *Superannuation industry (Supervision) Act and Regulations* (SIS Act and Regulations) do not recognise the release authority as a valid 'condition of release' and therefore do not permit the fund trustee to make the payment to the ATO.

To overcome this situation and facilitate the release of the excess contributions from the superannuation fund there needs to be an amendment to the SIS Regulations. Specifically, the table in Schedule 1 to the SIS Regulations will need to be amended to either:

- Include a new condition of release, or
- Amend current item 112 to incorporate a release authority issued by the Commissioner of Taxation under section 292-420 of the *Income Tax Assessment Act 1997*.

Similarly, SIS Regulation 6.22 (Limitation on cashing of benefits in regulated superannuation funds in favour of persons other than members or their legal personal representatives) will need amendment to permit the payment to the Commissioner of money requested under the new provision. To facilitate payment, subregulation 6.22(4) will require amendment to include a

reference to section 292-420 of the ITAA 97.

Both changes will be required prior to the Commissioner issuing the first release authority under the new provisions.

Although in the vast majority of circumstances the contributions to be refunded will have been made by way of salary sacrifice, in certain circumstances the refunded contributions may have been made in satisfaction of a Superannuation Guarantee Act obligation. This raises the question as whether such amounts should be included in assessable income as they generally would never have been received as income. It also raises the possibility that the associated reduction in the individuals RESC amount may result in a negative value. These matters may need consideration in process design and as to whether additional amendments or regulations are required.

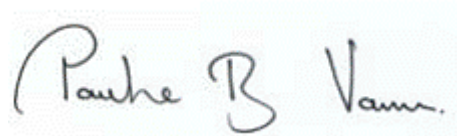
Clarification is sought as to whether the issuing of a release authority is considered to be a benefit payment for the purpose of a superannuation contribution surcharge liability. That is, is it a trigger for the payment of a surcharge debt. The industry is still awaiting clarification in response to a similar issue with regard to a release authority for an excess contribution tax assessment. The issue is relevant in the context of a member with both a defined benefit and an accumulation interest in the same fund. ASFA's preference would be for the inclusion in the Other Amendments section of the bill of a provision that stated that, for the purpose of superannuation contributions surcharge, complying with a release authority is not considered to be the payment of a benefit.

Early advice from APRA as to whether these release authority amounts will be separately reportable on the annual APRA return would be appreciated so as to assist the development of appropriate administrative arrangements to apply in the 2012/13 financial year.

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Should you have any questions please contact our Principal Policy Adviser, Robert Hodge, on 02 8079 0806.

Yours sincerely

A handwritten signature in blue ink that reads "Pauline B. Vamos". The signature is written in a cursive style with a large, stylized 'B'.

Pauline Vamos
Chief Executive Officer

ATTACHMENT A

Example of the anomalous outcomes that can arise from the application of the “bring forward rule”

The “bring forward rule” looks over a three year period and allows the non-concessional caps from 2 subsequent years to be brought forward to the current year.

A member may have inadvertently triggered the “bring forward rule” by a small amount and, without realising they have already triggered the rule in an earlier year, the member then attempts to use the “bring forward rule” in a subsequent year.

ASFA has seen numerous occasions where a small breach when looking at the contributions over a four year period has resulted in a disproportionately large tax liability. The following example deals with a breach of the non-concessional contributions cap and shows how members who make the same total contributions over a four year period may have significantly different excess contributions tax outcomes:

Members A and B make the following personal contributions to XYZ Fund. Both members have structured the contributions to trigger the bring-forward rule in year 2.

Year 1: \$150,000

Year 2: \$450,000

Year 3: \$0

Year 4: \$0

Both members receive a letter from ABC Fund in year 1 suggesting that they may be eligible for the co-contribution if they make a personal contribution of \$1,000. Both members, without seeking advice, make a personal contribution of \$1,000 for ABC Fund. Member A’s additional contribution is received in year 2, whilst Member B’s contribution is received in year 1.

Member A

Total contributions made:

Year 1: \$150,000

Year 2: \$451,000

Year 3: \$0

Year 4: \$0

Year 1: Excess contributions tax = \$0

(Cap for year 1 \$150,000)

Year 2: Excess contributions tax = \$465

(Bring forward cap for year 2 \$450,000

(Cap for year 2 of \$450,000

Excess contributions of \$1,000 (\$450,000 cap – \$451,000 contributed

Tax = 46.5% of \$1,000)

Year 3: Excess contributions tax = \$0
(Cap for year 3 \$0)

Year 4: Excess contributions tax = \$0
(Cap for year 4 \$0)

Total excess contributions tax of \$465.

Member B

Total contributions made:

Year 1: \$151,000

Year 2: \$450,000

Year 3: \$0

Year 4: \$0

Year 1: Excess contributions tax = \$0
(Bring forward cap for year 1 \$450,000 less contributions of \$151,000)

Year 2: Excess contributions tax = \$70,215
(Cap for year 2 of \$299,000 (being \$450,000 - \$151,000)
Excess contributions of \$151,000 (\$299,000 carried forward cap – \$450,000 contributed
Tax = 46.5% of \$151,000)

Year 3: Excess contributions tax = \$0
(Cap for year 3 \$0)

Year 4: Excess contributions tax = \$0
(Cap for year 4 \$150,000/\$450,000)

Total excess contributions tax of \$70,215.

Whilst over the same four year period both members have contributed \$601,000 and exceeded the four-single-years contribution cap by \$1,000, due to the timing of the contributions Member A receives an excess contributions tax assessment for \$465 and Member B an assessment for \$70,215. Such an outcome can result from as little as a 1 day difference in the timing of the member contributions.

The above example demonstrates, with actual cases, the perceived inequity that can arise under the current rules.

The Commissioner has, we believe correctly, advised that the discretion provided in section 292-465 is somewhat limited and will not be exercised in situations such as the above as it is considered that the contributions are within the member’s control and this is not a “special circumstance” as provided for in section 295-465(3)(a).