

8 April 2014

Jessica Carew  
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The Treasury  
Langton Crescent  
PARKES ACT 2600

By Email : [Jessica.Carew@TREASURY.gov.au](mailto:Jessica.Carew@TREASURY.gov.au)

Dear Ms Carew

## **Consultation on Division 293 Tax Regulation - Calculating Notional Contributions For Defined Benefit Interests**

We refer to the exposure draft for *Tax and Superannuation Laws Amendment (2014 Measures No. 2) Regulation 2014: Calculating defined benefit contributions—final arrangements from 1 July 2013* and the accompanying explanatory material. Thank you for the opportunity to comment on this draft material.

The Actuaries Institute is the sole professional body for actuaries in Australia. It represents the interests of over 4,100 members, including more than 2,200 actuaries. Our members have had significant involvement in the superannuation industry and the development of superannuation regulation, reporting and disclosure, interpreting financial statistics, risk management and related practices in Australia for many years.

### **1. Methodology**

We strongly support the change in approach to use the notional taxed contributions (NTC) methodology, which will, for most defined benefit funds, result in substantial compliance cost savings and avoid the member confusion which would have arisen from having different defined benefit contribution methodologies for excess contributions tax (ECT) and Division 293 purposes.

### **2. Definition of 'funded benefit interest'**

The proposed definition of 'funded benefit interest' is set out in draft r293-115.15(2).

(2) *The interest is a funded benefit interest if:*

(a) *the interest is in a complying superannuation fund that is not a constitutionally protected fund; and*

(b) *if the interest is in a public sector superannuation scheme:*

(i) *the fund trustee has certified, for the financial year, that the fund trustee considers that the scheme will only ever pay superannuation benefits from contributions made to the scheme or earnings from the contributions; and*

(ii) *the fund trustee has not chosen, under section 295-180 of the Act, to have contributions made by you, or on your behalf, excluded from the assessable income of the scheme for the financial year.*

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We are not sure what part (b)(ii) of draft r293-115.15(2) is intended to achieve. The commentary in the Explanatory Statement (under the 'Last Minute Contributions' heading) seems to indicate that, for a public sector scheme which is able to make the certification under part (b)(i), the notional employer contributions for each member will equal their NTCs regardless of whether or not they utilise s295-180. This conclusion seems valid to us.

However, if part (b)(ii) of draft r293-115.15(2) is intended to have some effect, we query whether the proposed wording will achieve this. We think that the references in part (b)(ii) to '*contributions made by you, or on your behalf*' are problematic:

- It appears that the trustee will need to consider whether or not (b)(ii) applies at *individual member level* rather than for the fund as a whole.
- The only relevant defined benefit contributions clearly caught by this reference would be member salary sacrifice contributions.
- Other defined benefit employer contributions would generally not be regarded as 'on behalf of' an individual member.
- Even if we disregard the previous point, for schemes where all employer funding is via 'last minute contributions', no employer funding for an individual member occurs until their benefit becomes payable. Hence in all the financial years leading up to this point, part (ii) would apply.

### 3. Schemes funded by 'last minute contributions' – existing issue

Some public sector schemes are funded in full or part by 'last minute' contributions which are subject to s295-180 elections and pay untaxed benefits (in full or part). For some of these funds, NTCs currently apply to the whole employer financed benefit. Members of such funds are harshly treated as they are subject to the ECT rules and also potentially to higher tax on the excess over the untaxed benefit cap. We understand that Treasury considered removing the NTC requirements for such funds a number of years ago, but this has not yet occurred.

A possible solution would be to amend the NTC Regulations so that such funds do not have to calculate and report NTCs in respect of the component to be paid as an untaxed benefit for ECT purposes. The Schedule 1AA approach could then be used for Division 293 purposes. This would address the existing ECT problem and the new Division 293 problem.

### 4. Other existing issues associated with NTCs

There are a considerable number of outstanding issues associated with the determination of NTCs – refer to the Actuaries Institute's submission of 6 May 2010.

[http://www.actuaries.asn.au/Library/2010\\_0506\\_IAA\\_Sub\\_Treasury\\_Reg\\_Arr\\_Notional\\_Taxed\\_Contributions.pdf](http://www.actuaries.asn.au/Library/2010_0506_IAA_Sub_Treasury_Reg_Arr_Notional_Taxed_Contributions.pdf)

Many of these issues will now be relevant to the determination of defined benefit contributions, particularly the issues associated with the determination of W, X, Y and Z.

The issues raised in section 4.2 of the letter regarding whether or not pensioners are non-accruing members may also be relevant. For example, where there is an improvement in indexation, the additional ECT and Division 293 taxes could each be many times the additional pension paid in the first year. Potentially, pensioners could be adversely affected by an improvement in indexation.

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We note that, in the case of the recent improvement in indexation of Military Super pensions, the Government decided to specifically exclude the capital value of the improvement from defined benefit contributions for Division 293 purposes. We quote from the Explanatory Statement to the Defence Force Retirement Benefits Legislation Amendment (Fair Indexation) Bill 2014:

*“Without an exemption, the one-off additional notional contribution will result in some individuals on moderate income, but with significant past service, incurring a Division 293 tax liability. The Government has therefore decided to exclude the capitalised value of the one-off benefit improvement for past service at 1 July 2014 from the operation of Division 293 tax.”*

We trust that the spirit of the above decision will be reflected in the response to the issues we have raised with the determination of W, X, Y and Z more generally.

Please do not hesitate to contact the Chief Executive Officer of the Actuaries Institute, David Bell (phone 02 9239 6106 or email [david.bell@actuaries.asn.au](mailto:david.bell@actuaries.asn.au)) to discuss any aspect of this paper.

Yours sincerely

Daniel Smith  
President

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