FSC FINANCIAL SERVICES COUNCIL

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Common Reporting Standard for the automatic exchange of tax information

The Financial Services Council (*FSC*) represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers and financial advisory networks. The FSC has 130 members who are responsible for investing $2 trillion on behalf of more than 11 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Stock Exchange and is the fourth largest pool of managed funds in the world. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

We refer to the Treasury Discussion Paper *Common Reporting Standard for the automatic exchange of tax information* (June 2014) (the **CRS Discussion Paper**). We welcome the opportunity to make this submission.

The Common Reporting Standard (**CRS**) will be complex in the detail. Given the limited timeframe to comment we have had to limit our comments to some material observations which we seek be incorporated in the development of any CRS model to Australia. FSC reserves the right on behalf of its members to make additional comments as any consideration of CRS evolves.

We very much welcome the Government's objectives of implementing CRS in a way which does not impose undue or unnecessary compliance costs.

Executive summary of the overarching principles which should apply in considering CRS

1. Australian institutions are subject to a range of reporting and customer on-boarding requirements, relevantly for this submission, including AML, FATCA as well as the potential CRS requirements. The Table below sets out the over-arching principles which should apply in any implementation of CRS by the Australian Government.

2. In addition to the comments in the body of this submission we set out more detailed and technical comments in **Annexure A**, which also forms part of our submission.

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Principle No.	Over-arching principles relevant to a consideration of CRS
1.	We urge the Government to leverage the existing information it receives via the ATO, for example in tax returns and the AIIR and to look to build on, and leverage, that information to satisfy CRS.
2.	**Flexibility: Alternative methods of meeting CRS need to be available**. The methods available should be flexible to allow each institution to implement the most appropriate and cost effective manner of implementation of CRS given their circumstances (such as systems and procedures). Some institutions will wish to consider leveraging AIIR. Others may prefer to use other methods, including leveraging processes and mechanisms implemented for FATCA. CRS should be applied flexibly to accommodate the circumstances of each institution.
3.	**FATCA exclusions (in Annex II of the IGA) need to be carried across as CRS exclusions**.
4.	**Consistency between FATCA, CRS and AML (anti-money laundering requirements) is required**. In relation to consistency between FATCA and CRS, in particular consistency is required in relation to in-scope financial institutions and financial accounts.
5.	Curing indicia of residency – there will be difficulties (and waste) in approaching existing clients on tax residency.
6.	Listed Investment Entities/ETFs – our submission sets out some particular issues for CRS and Listed Investment Entities/ETFs.
7.	The CRS requirements should be principles based generally, not prescriptive as to the manner of meeting CRS.
8.	Further consultation on the CRS Timetable may be required. As to whether a timeframe is achievable depends on the final detail of the CRS requirements and the extent to which any FATCA IGA (Annex II) exclusions are or are not replicated in CRS (see Principle 3 above). If some institutions can comply earlier than other institutions, the timetable should be reasonable and allow institutions (but not mandate) to opt in to CRS early. FSC can not be definitive as to whether a 2017 start date for CRS is achievable. Broadly it might be achievable for some institutions if CRS replicates FATCA including all FATCA exemptions and FATCA thresholds being carried across to CRS. However, there are likely to be some institutions for which 2017 is not achievable. (By way of example, because CRS applies to some financial institutions that were not in scope for FATCA, such organisations will need more time to implement CRS.)
9.	Government should consider impacts on a range of stakeholders such as financial planners (on collection requirements).

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Principle No.	Over-arching principles relevant to a consideration of CRS
10.	CRS should provide a mechanism to exclude accounts/products in future (as new product types are launched, for example in response to legislative change).
11.	**It is critical that entities are able to rely on self-certification of tax residency**, provided they do not have reasonable grounds to suspect the self-certification is not reliable. That is, the onus should be on account holders to provide their tax residence to financial institutions rather than for financial institutions to undertake onerous procedures to determine tax residence of financial account holders. Each country's tax residency rules could be different. Anything other than self-certification is likely to be unachievable, costly, and not necessarily more determinative in relation to tax residency.
12.	AML simplified verification procedures should be carried across to a CRS environment.

CRS Consultation Questions

2.1 Who will need to report under the CRS? (CRS Section VIII A and B)

Are there any entities in Australia to which the application of the CRS definition of financial institution is unclear?

3. Holding companies should be exempted as should excepted inter-affiliates. Entities to be included should exactly match FATCA to avoid confusion over requirements.

What other financial institutions should be considered Non-Reporting Financial Institutions under paragraph 3 (and therefore exempt from CRS reporting requirements in Australia)?

4. The provisions of Annex II should be mirrored i.e. all entities currently exempted in Annex II of the FATCA IGA should be exempted under CRS, particularly investment advisers and managers. As outlined in the CRS Discussion Paper, it should be made clear that superannuation funds and self-managed retirement funds are exempt from reporting requirements and it should be made clear as to which government entities are exempt.

5. There should also be included in the CRS arrangements, a provision equivalent to the trustee documented trust/sponsored sponsoring entity provisions so as to ensure there is no "double reporting" for example by both: a trustee and a trust; or by a platform and the underlying managed investment scheme; or by an investment manager and the custodian. Holding companies should be confirmed as exempted - i.e. not an FI, or if an FI exempted from reporting as per the inter-affiliate exemption in the FATCA Treasury Regulations.

6. Consistent with our CRS Principle 4 (consistency between FATCA and CRS (and AML)), FSC also requests, by way of example, that Treasury give consideration to ensuring that CRS aligns with FATCA in relation to the managed investments matters below. (We refer Treasury to **Annexure A** of our submission in relation to other products and more detail, in relation to consistency between FATCA and CRS):

7. *Managed Investment Schemes*

(a) Each managed investment scheme is an "Investment Entity" under the CRS definition in Annex, Section VIII, Para. A.6.a) and their accounts are "Financial Accounts". A CRS reporting exemption for managed investment scheme accounts cannot be easily argued. These Financial Accounts present more than a low risk of being used to evade tax. They also do not have similar characteristics to the Exempt Account types described in CRS Annex, Section VIII, Paras. 17.a) to f).

(b) The Australian FATCA IGA permits a Responsible Entity with more than one managed investment scheme to provide the ATO with a single FATCA report for all accounts in all its schemes, rather than one report for each scheme (many reports). This is achieved through the "trustee documented trust" concession in Annex II Article IV.A. (the scheme is regarded as a FATCA exempt Non-Reporting Australian Financial Institution that is treated as a deemed compliant FFI, where the Responsible Entity provides the FATCA information for the scheme accounts).

(c) Some Responsible Entities propose to take advantage of this exemption. This will result in scheme specific Australian Annual Investment Income Report (**AIIR**) reports being lodged with the ATO, and omnibus FATCA reports being lodged in respect of FATCA information. Others will elect to lodge separate scheme specific AIIR and FATCA reports and not use the FATCA IGA "trustee documented trust" concession.

(d) The ATO has indicated to the FSC that it is aware of the limitations of the AIIR and is reviewing its future. The FSC understands that both Treasury and the ATO are open to considering flexibility around CRS reporting methodology and formats. To permit consolidated CRS reporting within the CRS framework, local domestic law could specify that a scheme (i.e. Investment Entity) will be taken to have complied with its CRS obligations where its trustee (i.e. relevant Financial Institution) reports the required information to the ATO on behalf of the scheme.

8. In summary, in relation to managed investments, FSC makes the following request and recommendation:

> **Recommendation**
>
> FSC recommends that local domestic law should specify that a trust based Investment Entity will be taken to have complied with its CRS obligations where the trustee reports to the ATO on behalf of the trust, all required CRS information with respect to all of the trust's reportable accounts.

For financial institutions with international operations, what are the expected implications if they are exempt from CRS reporting requirements in Australia but remain subject to CRS reporting in other countries? Would exemption in Australia reduce or increase implementation and compliance costs?

9. Institutions with substantial international operations will be impacted to the extent CRS reporting requirements overseas differ from Australia's requirements. Ultimately though, consistency between FATCA (under the IGA entered into between the Australian and United

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States Governments) and CRS requirements is of prime concern at this stage of the CRS evolution.

2.2 What accounts will need to be reported?

What accounts should be considered an Excluded Account and could satisfy the requirements that they present a low risk of being used to evade tax and have substantially similar characteristics to any of the accounts described in CRS Section VIII C 17 a) to f)?

10. Accounts that are excluded should match FATCA's requirements to reduce the compliance burden.

11. See our more detailed comments in **Annexure A** of this submission.

2.3 How to determine if an account holder is a non-resident (CRS Sections II to VII)

How many financial institution accounts are estimated to have an indication that the account holder is a non‑resident? How many are reportable accounts for FATCA purposes? What proportion of accounts is estimated to be non‑resident accounts?

12. It is not possible to provide reliable data in the timeframe to make this submission. In order to provide a meaningful estimate, various sampling exercises on CRS impacted accounts would be required. We suggest that the ATO holds information that would enable an estimate to be made of the number of overseas residents who are not tax payers in Australia by reference to the AIIR and information received from border protection agencies.

What existing processes can financial institutions rely on to determine whether an account holder is a non‑resident, and what additional processes would need to be established?

13. If entities were able to use the primary address held as a proxy for tax residence for both individuals and entities, this may facilitate a more seamless implementation of CRS. Other indicia of tax residency in CRS are less likely to be stored or stored in a searchable format. Of course, tax residence can be a complex legal and factual question and it cannot be expected (absent reliance on self-certification of account holders) that a definitive assessment could be made by Reporting Financial Institutions.

14. In terms of additional processes, additional fields (for data capture) including for the provision of self-certifications from customers, would need to be built into on-boarding processes.

Some financial institutions may wish to establish self‑certification processes prior to the commencement of the CRS to minimise the cost of revisiting accounts opened between now and the implementation date. Are there any barriers to financial institutions doing this and can the Government reduce those barriers?

15. Legislation is required to reduce barriers by providing certainty that CRS collection does not breach any Australian Privacy Laws plus providing certainty as to the information to be

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collected (to ensure that the disclosure of the information collected to the ATO was required or authorised by law in order to comply with privacy laws).

Should Australia's implementing legislation allow financial institutions to undertake due diligence for all non‑residents when undertaking due diligence for Pre‑Existing Accounts ('big bang approach'), rather than financial institutions undertaking due diligence for accounts for each jurisdiction when Australia enters into information exchange agreement with that jurisdiction?

16. A "big bang" approach should be adopted. There should be no requirement to "go back" to existing clients once CRS has commenced and as a new country is added. The costs of undertaking due diligence every time a country comes "online" would be prohibitive. In addition, the likely lack of response should not be underestimated. In fact, FSC would anticipate a low response rate. This likelihood (or virtual certainty) of a low response rate is, for example, evidenced by the very low return rate of forms from customers. By way of evidence of the low return rates that should be expected from existing clients under CRS (and FATCA), an FSC member notes that about two thirds of investors in US cross-listed products currently do not complete US tax forms **even where there is a significant incentive to return these forms to avoid having to complete a US tax return**.

17. Entities may also want the option to collect and remit information for all overseas customers, not just for the countries that have signed up to/implement CRS, as otherwise it will be difficult to keep checking and amending the information collected and remitted – this may require Government to clarify the position for privacy law purposes to allow such an approach.

2.4 What account information will need to be reported?

18. Where the TIN and date of birth are not in the records of the financial institution, financial institutions will be required to employ "reasonable efforts to obtain that data within a certain period of time". As outlined above, investors often do not provide this information after an account has been opened and therefore we suggest that guidance is provided that "reasonable efforts" are satisfied by a financial institution making at least one *attempt* to contact the investor to obtain this information.

Item 3 of CRS Discussion Paper - Current Reporting Requirements

Could the AIIR provide an appropriate mechanism for all Reporting Financial Institutions (under the CRS) to report non‑resident account information?

19. Yes, although the AIIR is currently a manual process that would require amendment. We believe the ATO probably holds a great deal of information about resident and non-residents already - including on the AIIR and we strongly support a gap analysis being undertaken by the ATO and Treasury to see what other information would need to be provided on the AIIR to enable the ATO to receive the requisite information to satisfy any CRS obligations to the OECD.

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AIIR and Cash Value Insurance Contracts and Annuities

20. FSC notes that AIIR style reporting is proposed to be introduced for life insurance companies to report on Cash Value Insurance Contracts and Annuity Contracts. This will be a new requirement, and companies will incur significant implementation costs.

21. Insurance companies will shortly commence providing the ATO with reports for FATCA purposes. For most companies, this has required development of a new purpose built reporting functionality. Additionally, for most companies, the Cash Value Insurance Contracts and Annuity Contracts in those reports relate to closed legacy books. The contracts will already have been held for long periods in an environment where holding a cash value insurance contract for 10 years or more is rewarded by tax concessions provided by section 27H of the Income Tax Assessment Act.

22. The ATO has indicated to FSC that it is aware of the limitations of the AIIR and is reviewing its future. FSC understands that both Treasury and ATO are open to providing flexibility around CRS reporting methodology and formats. Further, although they are not exempted by FATCA, FSC remains of the view that these products are low risk, and submits that this is a relevant factor supporting flexibility in reporting. It is FSC's preference that life insurers should be given flexibility in how the information is reported to the ATO, including by supplementing the FATCA reports with the additional information for AIIR compliance.

23. In summary, in relation to AIIR and Cash Value Insurance Contracts and Annuities, FSC requests and recommends the following:

Recommendation

It is FSC's preference that life insurers should be given flexibility in how the AIIR information for Cash Value Insurance Contracts and Annuity Contracts is reported to the ATO, including by supplementing the FATCA reports with the additional information required for AIIR compliance.

Are there any alternative reporting mechanisms that could result in lower costs for business while still delivering the information required under the CRS?

24. The ATO should consider whether it can build on the information it already receives to avoid FIs having to incur significant compliance costs to collect information the ATO already receives and holds. For example, the ATO receives information from those individuals and entities that have a TFN. Could the information that those TFN holders supply to the ATO be amended to include year end account information? For example, if a person is a non resident with a TFN, the tax office will know about that person already. Could the ATO not

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ask that person *directly* for any additional information required for the ATO then to provide that information to an overseas revenue authority under CRS?

25. Where an individual or entity does not have a TFN, then the ATO receives information about them due to the withholding on certain accounts that must occur, with remittance via the AIIR. As mentioned above, could this information not be expanded to satisfy CRS requirements? We feel that a combined use of address and TFN can identify customers on whom CRS reports need to be made, but that it is possible for the ATO via returns and the AIIR to obtain this information without any change to up-front on-boarding procedures and limited change to reporting. We also note that we understand that the ATO receives information from Border Protection on the residency of individuals arriving and departing which it cross references to its records - that information could further supply information to the ATO for use with CRS.

If an enhanced AIIR is used for CRS reporting, should the AIIR be required to be lodged two times per year to enable the financial account information to be used for calendar and fiscal years? What are the costs and benefits of this approach?

26. This is too complex to provide a definitive view in the timeframe provided to respond to the CRS Discussion Paper. However, it is likely that one report would be a more cost effective option. Provided the reporting period remains a constant 12 months, we do not believe when the period is "from" and "to" impacts the quality of the information that the ATO will be able to remit to partner jurisdictions.

27. Consistent with Principle 4 in our Executive Summary section (namely the Principle of alignment between CRS and FATCA (and AML)), CRS reporting timeframes should be in accordance with FATCA timeframes, i.e. by calendar year. If an enhanced AIIR is used for CRS purposes, then we need more details to understand the "enhanced AIIR" and any cost efficiencies from adopting such an approach for CRS.

28. For global organisations, it is also important that such timeframes are aligned with as many partner jurisdictions as possible, so that financial institutions are not compelled to implement different reporting time frames for each jurisdiction of operation.

CRS Discussion Paper Item 3.2 Australia's Anti money laundering/counter terrorism financing regime

To what extent do you consider that the AML/CTF requirements, including the additional CDD requirements that came into effect on 1 June 2014, will meet the CRS requirements?

29. We would like the CDD requirements for AML and CRS to align. There needs to be alignment between CRS and AML/CTF requirements for CDD. The requirements of CDD for AML/CTF and CRS are so similar that the simplicity of complete alignment between CRS and AML/CTF CDD is warranted. This alignment needs to be confirmed as soon as possible as the AML CDD requirements are set and at present there are discrepancies between the AML CDD requirements and CRS proposals. To the extent that CRS requires self-certification (for

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example in relation to the Controlling Persons of Passive NFEs), this would not be satisfied by AML which does not require self certification. Also, AML is limited to *designated services* (not accounts) under the Anti-Money Laundering/Counter-Terrorism Financing Act (not financial accounts under FATCA/CRS). Further, not all entities which might be passive NFEs are required to disclose beneficial owners - as there are simplified verification procedures for some entities under AML.

30. Conversely, compliance with the CRS regime should automatically result in FATCA compliance. To this end, we urge the Government to advocate this via the OECD and/or the United States Government.

To what extent can existing AML processes be easily adapted to collect any additional information required under the CRS?

31. AML requires collection of an address (but not necessarily verification), so if an address can be used as proxy for taxation residence, this would greatly assist. In the wealth management industry, financial advisers undertake a role in assisting with AML requirements because the financial advisor has the direct relationship with the customer. Once identification has been undertaken by one financial adviser for a customer, this information will generally be used by the advisor for a number of accounts opened over time with different product issuers.

Using address as a proxy

32. The **use of physical address** (in the case of individuals) or **principal place of business or place of establishment/incorporation** (in the case of an entity) to determine the tax residency of a customer (*whether pre-existing customers or new customers*) and ultimate beneficial owners should be seriously considered for the following reasons:

    (a) There is existing precedent for this option in both domestic tax law (specifically the Pay as you go (PAYG) withholding provisions contained in Division 12 of Part 2-5 of Schedule 1 of the Taxation and Administration Act 1953 relating to "fund payment" and "interest" make reference to addresses as a preliminary consideration for withholding payments) and in the proposed CRS rules (address is used as indicia to determine the tax residency of pre-existing customers).

    (b) Even if a self-certification is obtained from each new customer of the reporting financial institution, it has to be verified through a *reason-to-know* and *change-of circumstance* process that exclusively relies on searching electronically searchable AML/KYC information or by leveraging actual knowledge that a relationship manager has in respect of a customer. Therefore, if the quality and extent of AML/KYC information is considered acceptable to perform these tests, there should be no conceptual or philosophical reason why AML/KYC information (and address or principal place of business or place of establishment/incorporation in particular) cannot be used from the start as a proxy to determine a customer's tax residency status.

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(c) In identifying the beneficial owners of passive non-financial foreign entities, the new AML rules which apply from 1 June 2014 also broadly require tracing through a chain of entities and the collection of a physical address which can be used to identify the individual(s) that is/are the ultimate beneficial owners.

(d) Relying on address will assist financial institutions to more accurately report on a customer's tax residency, in that AML/KYC requires a customer to initially verify information through the submission of appropriate documents at the account opening stage, for example, through the submission of a utility account or driver's licence. Conversely, no such verification is required at the time a customer attests to his/her tax residency status on a self-certification form. As mentioned, this verification of tax residency happens after identification and/or verification of AML/KYC information obtained from the customer. Given the above, we do not believe that using an address (as a prima facie determinant of CRS tax residency) has any less veracity than a self-certification; so both self-certification and use of address should be permitted as determinants of tax residency under CRS.

(e) The current AIIR relies exclusively on the use of address for the identification of tax residency and Australia has for a long time been automatically exchanging information with the tax authorities of certain countries on this basis. From what we understand the quality of information supplied has not to our knowledge been questioned as problematic, and has arguably been of a higher standard than that received by the ATO from other tax authorities.

(f) Our members experience with FATCA indicates that there is likely to be little divergence between the number of non-residents identified (through the use of their address or principal place of business or place of establishment/incorporation) and reported through the AIIR on the one-hand; and those identified through the use of a self-certification process on the other hand.

(g) Customers are likely to update their address if they move, but less likely to update a self-certification after an account has been opened.

CRS Discussion Paper – Item 3.3 Foreign Account Tax compliance Act

Do you consider that financial institutions' compliance with FATCA reporting requirements will assist them in meeting the CRS' reporting requirements?

33. Yes but only to the extent that CRS reporting requirements (including thresholds and exclusions) are the same as FATCA reporting requirements. To the extent CRS and FATCA rules differ, this causes significant additional compliance and systems costs (apart from being inefficient). We note that for FATCA, entities have to report the account plus the FI and relevant GIIN for that account. We assume we will not have to do that with CRS as financial institutions are not required to register for CRS (as they do under FATCA).

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34. There are additional requirements for the CRS that are not required for FATCA. For example, the draft Commentary on the CRS suggests that a self-certification must be signed (the ATO has given guidance that a self-certification for FATCA may be obtained over the phone or by email) and that controlling persons must sign the self-certification form where the account is over $1 million (this is not required for FATCA). Obtaining signatures, particularly from controlling persons who may not be situated within the entity that is making the investment application will be extremely challenging. Financial institutions are unlikely to be able to obtain these signatures for many accounts.

CRS Discussion Paper – Item 4. Implementation process and timing

4.2 Significant non-compliance with the CRS by tax authorities

Are there any other legislative changes required to give effect to the CRS and provide financial institutions with the ability to comply with the law (e.g. changes to privacy laws)?

35. Privacy laws and enabling legislation need to be addressed to give effect to CRS.

Are legislative changes necessary to enable willing financial institutions to prepare for CRS due diligence earlier than the CRS's effective implementation in Australia? What are the changes?

36. Privacy laws and enabling legislation need to be addressed to give effect to CRS.

4.6 Australia's implementation of the CRS

Is this indicative timetable for Australia's implementation of the CRS achievable? If not, when will your Financial Institution be able to implement the CRS?

37. Further consultation on the CRS Timetable will be required. As to whether a timeframe is achievable depends on the final detail of the CRS requirements and the extent to which any FATCA IGA (Annex II) exclusions are, or are not, replicated in CRS (see Principle 3 above in our Executive Summary section) and the extent of consistency or inconsistency between FATCA and CRS (see Principle 4 above in our Executive Summary section). If some institutions can comply earlier than other institutions, the timetable should be reasonable and allow institutions (but not mandate) to opt in to CRS early. FSC can not be definitive as to whether a 2017 start date for CRS is achievable by all FSC Members. Broadly it might be achievable for some institutions if CRS completely replicates FATCA including all FATCA exemptions (in Annex II of the IGA) and FATCA thresholds being carried across to CRS. However, there are likely to be many institutions for which 2017 is not likely to be achievable. At this stage, without seeing further detail (i.e. whether FATCA Annex II exemptions, and thresholds, are carried to CRS) we cannot be any more definitive on whether the timeframe is achievable.

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Timing

38. As far as the costs associated with implementing the proposed CRS solution is concerned, it is often asserted that such costs (i.e. CRS implementation costs) might be insignificant as "CRS significantly leverages FATCA". Such assertion is inaccurate, for although the AHI and reporting provisions under both sets of rules have many similarities and the automated AHI and reporting solution which has been designed and built for FATCA could in theory also be used to discharge many (but not all) CRS obligations, for many members the information needed and the customer and product systems from which that information is sourced, is markedly different under each. This is because for many FSC members their front line customer and product systems will have their own processes and procedures which would not have data feeds into their respective reporting modules. In an ideal situation, customers/investors would have their personal information held in one system and product information in a relevant product system. Although some members have fewer product systems and/or a customer master used for on-boarding most customers, that is not the case for many others in the industry. (Further some institutions may have not been caught by FATCA but are caught by CRS.)

39. Often customer information is held in a number of locations and systems, which include customer systems and also product systems. As a result of the (i) expected low volumes of US customers caught under FATCA, (ii) the complexity of existing systems, (iii) the need to meet FATCA compliance deadlines and (iv) to reduce the impact on customers; it was not necessary for most institutions to build an automated system solution for FATCA upon which (now) CRS might begin to be leveraged. An automated solution will now have to be built for CRS.

40. Apart from the systems impact highlighted above, timing can also be impacted by an institution's ability to undertake changes in systems through approved and limited system window periods within which to implement and test all system changes. (These processes are necessary to reduce operational risk of systems changes.)

41. Most FSC members and other financial institutions have a strict IT release cycle that manages changes to existing systems or the implementation of new systems. At the moment, given work on other system upgrades and implementation of other compliance obligations, it is unlikely that work can commence quickly to implement the proposed CRS solution and therefore a delay until 2018 for a first start date is preferred, with the option for those institutions who choose and can do so to start earlier (provided they are not mandated to do so).

42. It is also noted that the 2013-14 Budget measure, 'Tax compliance — improving compliance through third party reporting and data matching', has been deferred to 1 July 2016. Should this measure proceed on the timeframe proposed, this will also be a project that will need to be factored in and for which resources will have to be allocated.

43. There may be a limited number of larger organisations that might have the ability (and a preference) to implement the proposed CRS solution by 2017 or earlier. <u>There will be other</u>

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institutions which will not be able to meet 2017. Given that many institutions will not or may not be able to adopt a 2017 date (such as because of the reasons mentioned above) and that the success of any regulatory reform or legislation depends on the ability of the industry impacted having the ability to implement the CRS in an orderly manner with no operational or systems risk; we suggest that allowance be made for a CRS timetable that would allow all institutions to meet the timetable (as not all institutions would be able to meet 2017). We do not believe that adopting this approach in any way disadvantages those organisations that may wish to implement the CRS earlier as nothing will prevent them from collecting information in the meantime (but we request that the appropriate legislative amendment be made (from a privacy law perspective) to facilitate earlier collection for those who can and wish to do so).

44. The limited time to respond to the CRS Discussion Paper has not allowed a fulsome consideration on timing and FSC members and FSC reserve the right to make further comment on timing, transition and implementation in relation to any aspects of CRS.

Address as a proxy for tax residence

45. A solution that uses address or principal place of business or place of establishment/incorporation for determining tax residency could, however, reduce system impacts and lead times. See our comments elsewhere in this submission on use of address (or place of establishment/incorporation for entities) as a proxy for tax residence.

Are there any particular types of information to be reported under the CRS that would require a relatively longer period for financial institutions to implement? For example, are there concerns about implementing procedures to obtain the total gross proceeds from the sale or redemption of property?

46. We are not entirely clear how institutions would be able to identify gross proceeds in any event. If it is limited to the redemption of units in a trust i.e. the redemption of a debt or equity interest in a trust then entities can probably provide that information.

CRS and Listed Investment Entities/ETFs

Market Distortion

47. FSC members are concerned the application of obligations under the CRS to a subset of Listed Investment Entities (such as ETFs, LICs and LPTs) could ultimately result in "product arbitrage" causing a decrease in investments in Listed Investment Entities in favour of other Australian listed securities that do not attract CRS reporting obligations. Furthermore, if stockbrokers were compelled to perform CRS obligations on this small subset of Australian Listed Investment Entities, it is possible some stockbrokers may also cease offering stockbroking services for securities in Listed Investment Entities as it would be too costly to establish CRS processes to service this small subset of Australian listed securities.

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48. Accordingly, FSC members submit that there should be parity of treatment between Listed Investment Entities, ETFs and other types of listed or quoted investments under CRS as well as under the FATCA IGA.

Regulatory impact disproportionate to regulatory intent

49. The stated aim of the CRS is to combat tax evasion at the international level. However, the application of CRS to a small subset of all listed securities does not appear to achieve the stated aim of the CRS as there will be no reporting under the CRS in respect of the remaining listed security market.

50. FSC members are concerned that the application of CRS to a small subset of all listed securities disproportionately increases the regulatory burden on Listed Investment Entities and would appear to contradict the Government's stated objective of "reducing regulatory burdens as a critical step towards improving Australia's productivity".

51. It also remains unclear how such a disproportionate increase in the regulatory and compliance burden impacting a small subset of Listed Investment Entities can be substantiated from the perspective of formulating a Regulatory Impact Statement (especially in circumstances where achievement of the stated aim of the CRS appears tenuous given the CRS does not apply to the broader listed securities market).

Potential Competitive Disadvantage

52. If CRS obligations are ultimately applied to a small subset of Australian Listed Investment Entities, FSC members would be keen to ensure other jurisdictions participating in the CRS adopt a similar stance in respect of their Listed Investment Entities. An outcome whereby Australia is the only country (or among only a few countries) where Listed Investment Entities are subject to CRS obligation would be inequitable and could place such Australian Listed Investment Entities at a competitive disadvantage vis a vis their counterparts overseas (because of an increase in regulatory costs as compared to the offering of similar products in jurisdictions not impacted by CRS).

Implementation issue – pre-existing customers of stockbrokers

53. The FSC FATCA Working Group is working with the ASX and other interested parties to seek to develop an industry solution whereby stockbrokers collect FATCA customer information and pass that information via the ASX CHESS System to the Listed Investment Entity's registry provider for FATCA purposes.

54. The ideal industry solution would involve stockbrokers collecting a customer's FATCA information (from 1 January 2016) as part of the stockbrokers on-boarding and AML processes for new customers and passing this information to the registry provider via the ASX CHESS System.

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55. However, any *pre 1 Jan 2016* stockbroking customers that trade securities in Listed Investment Entities after 1 January 2016 will need to have their FATCA status established by the registry provider of the Listed Investment Entity (because the investor would have acquired the "Financial Account" from the issuer post 1 January 2016), and the only feasible way at the moment to do this is for the registry to collect this information from the investor after the purchase of the securities in the Listed Investment Entity. In reality, unless a solution is found to this problem, Registry providers will from 1 January 2016, have to solicit self-certifications from the vast majority of Listed Investment Entity investors for many years to come because stockbrokers will only collect the FATCA customer information from their *new clients from 1 January 2016*.

56. A similar problem will exist under the CRS.

57. Unless relief or dispensation is provided by Australian Treasury/ATO via regulation to treat pre-existing investors of the stockbroker as pre-existing investors of the Listed Investment Entity, the only feasible way to collect information from these pre-existing investors will be via the Listed Investment Entity's registry provider, thereby increasing the regulatory compliance costs for the Listed Investment Entity.

58. We are concerned about the cost to Listed Investment Entities in undertaking pre-existing & new account due diligence given no AML/KYC documentation is available. We understand Computershare is making a separate submission outlining the potential estimated costs to Listed Investment Entities of due diligence.

5. Implementation and Compliance Costs

59. The compliance costs are certainly significant.

60. For example, one FSC member has provided an initial ball-park aggregate estimate of costs as potentially in the region of $45 million including business systems design and development, staff training and education, internal compliance system arrangements, legal advice, project implementation and global integration costs. Given the small sample of costs data, FSC is not able to provide more specific information, in order to ensure the commercial in-confidence nature of FSC member information. The FSC member which provided FSC with details relating to the above ball-park costs estimate would be happy to share directly with Treasury (but in confidence) more details on this cost estimate.

61. There will be costs in extending the AIIR for any new data fields and in respect of any new AIIR requirements for life companies (non reporters). Most life products would be closed legacy products, so any CRS requirements will likely give rise to a significant amount of costs being incurred on a declining book of business.

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5.2 Recurring compliance costs

Will different parts of the finance industry have larger implementation and compliance costs than others? If so, why, and to what extent?

62. Yes. It will depend on the number of different systems that require amendment in order to implement CRS, which greatly increases the cost. Some entities may have included a largely manual process for FATCA on the basis that few US citizens or taxpayers would be identified therefore a "back end" manual process would be sufficient - utilising a small team of people as opposed to opening up all the front end systems. With CRS all these systems will have to be opened up – which significantly impacts implementation and systems costs of CRS.

Are there particular elements of financial institutions' businesses that raise more significant implementation and compliance cost concerns than others?

63. Yes, the more legal entities/funds and the more core systems the greater the cost impacts. One FSC member has many 100s of entities and well over 10 core systems which would be affected by CRS. Additionally where an entity took a more manual approach to FATCA, there would be additional costs for CRS.

To what extent will financial institutions' compliance costs be passed on to consumers? How else might consumers be affected?

64. Costs of CRS are significant. Costs will be passed on to consumers.

65. Clients will also be impacted by the requirement to seek to understand and respond to the additional questions required for CRS reporting (e.g. tax residence) and the provision of self certification.

Are there are other ways to implement the CRS, and to what extent would they reduce implementation and compliance costs?

66. Please see above for our suggestion to leverage the use of filed tax returns and AIIR.

67. We support the use of the AIIR *as one way* that FIs can comply with CRS requirements. It is important that entities which wish to leverage AIIR be able to do so and entities which do not wish to do so are not mandated to do so.

68. The AIIR contains investor identity details which includes names, address, TFNs or ABN, and details of investment income paid to investors that year.

69. The completion of the AIIR is often a manual process, so the time taken to complete them is reflected in the cost. Additionally sometimes entities use third parties who prepare and file

the AIIR on the entity's behalf. In such case, the entity is charged a cost per AIIR. In one example this is a minimum of $450 per fund, with 100's of funds filing AIIR reports. If the fund has some special distributions, or is a multicurrency fund, it will incur an additional charge of $2,250 per fund.

70. One FSC member estimated that the time incurred by tax accounting to complete AIIR is approximately 12 days effort per year for the lodgement of each AIIR.

71. If the AIIR has to be lodged twice a year under CRS, the costs would double because of the lack of automation

72. Being able to rely on self-certifications from customers and **not** having to communicate or attempt to communicate repeatedly with customers in order to obtain information that they may not be willing to provide (or simply do not respond, such as due to apathy) or to otherwise verify this information, would reduce compliance costs.

Are there other regulatory requirements on financial institutions outside the CRS that could be reduced to offset the CRS implementation and compliance costs?

73. See above for AML, tax returns and AIIR.

6. Annexure A – More detailed comments in response to the CRS Discussion Paper

74. Our more detailed comments are contained in the attached **Annexure A**. Annexure A forms part of our submission and despite being referred to as "detail" requires consideration along with the rest of this submission.

75. Annexure A provides more detail in relation to FATCA exclusions (in Annex II of IGA) to reiterate that it is essential the Government (via OECD) impress the need for all FATCA exclusions to be replicated in CRS. Where a product excluded under FATCA is not excluded under CRS, this will lead to significantly higher implementation and ongoing costs and difficulties.

76. Annexure A also provides more detail in relation to our CRS Principles 3 and 4 (contained in our Executive Summary) of replicating all FATCA exclusions to CRS, as well as the need for consistency between FATCA and CRS.

77. Annexure A also covers a range of other important matters, including legacy accounts, superannuation funds, approved deposit funds and pooled superannuation trusts,

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78. While Annexure A contains some level of detail, it should not be treated as exhaustive. We may make further comments as CRS evolves.

Please feel free to contact Stephen Judge on (02) 9299 3022 if you have any questions on our submission.

Yours sincerely

Stephen Judge
General Counsel

Attached: **Annexure A** – *More Detailed Comments and submissions to Treasury Common Reporting Standard Discussion Paper*

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Annexure A – *More Detailed Comments and submissions to Treasury Common Reporting Standard Discussion Paper*

FATCA exclusions (in Annex II of IGA) need to be carried across as CRS exclusions.

Discussion Paper (DP) section 2.2 implies the Model Competent Authority Agreement and Common Reporting Standard (CRS) exempts certain accounts which the CRS does not in fact exempt.

The FSC considers the exemptions need to be clarified, which could be done in line with the following recommendations in respect of each area of concern.

1. Superannuation and Other Retirement Accounts (Superannuation Funds)

Accounts must fit one of the definitions outlined in sections 1.1 to 1.3 below to be exempt. They either do not, or may not, for the reasons given.

FATCA Status: Each fund account is exempt under FATCA due to the fund being a Non-Reporting Australian Financial Institution and exempt beneficial owner under Australian FATCA IGA (Annex II, Article II.A.1).

There is scope for these accounts to be made CRS exempt by Australian complying superannuation funds being defined in domestic Australian law as a Non-Reporting Financial Institution due to presenting a low risk of being used to evade tax and having similar characteristics to a "Broad Based Retirement Fund" (CRS Annex, Section VIII Para. B.1.c)).

Recommendation:

FSC Recommends that domestic Australian law be passed specifying that any plan, scheme, fund, trust, or other arrangement operated principally to administer or provide pension, retirement superannuation, or death benefits that is a "superannuation entity" as defined in the **Superannuation Industry (Supervision) Act 1993** be designated as a "Non-Reporting Financial Institution" for the purposes of CRS Annex, Section VIII, Para. C.1.c).

1.1 Broad Participation Retirement Fund

CRS Annex Section VIII, Para. B.5.	**Australian superannuation funds must meet the following condition, but many do not:**	
Opening paragraph	Fund established to provide retirement, disability or death benefits to current or former employees (or persons they designate) of one or more employers in consideration for services rendered.	No - many funds provide only personal superannuation accounts, with a high proportion of self employed. There are no employees (or employers), and benefits are not provided in consideration of services rendered.
	Australian superannuation funds must meet at least one of the following conditions, but many do not:	
c)i)	Fund must be generally exempt from tax on investment income.	No - tax at 15% applies to all investment income of all funds referrable to the 'accumulation phase'.
ii)	Fund receives 50% or more	No - many funds provide only

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	of total contributions from employers.	personal superannuation accounts, with a high proportion of self employed. They receive less than 50% of total contributions from employers.
iii)	Withdrawals allowed only in specified events related to retirement, disability or death (except rollovers) unless penalties apply to earlier withdrawals.	No - funds are permitted to release benefits earlier with no penalties in certain cases, such as compassionate grounds and financial hardship.
iv)	Contributions by employers (other than permitted make-up contributions) are limited by reference to earned income of the employee or may not exceed $50,000 annually.	No - employer contributions are not limited by reference to earned income, with employees free to nominate salary sacrifice contributions. Undeducted personal contributions are not limited to $50,000 pa.

1.2 Narrow Participation Retirement Fund

CRS Annex Section VIII, Para. B.6.	**Australian superannuation funds must meet the following condition, but many do not:**	
Opening paragraph	Fund be established to provide retirement, disability or death benefits to current or former employees (or persons they designate) of one or more employers in consideration for services rendered.	No - many funds provide only personal superannuation accounts, with a high proportion of self employed. There are no employees (or employers), and benefits are not provided in consideration of services rendered.
CRS Annex Section VIII, Para. B.6.	**Australian superannuation funds must meet all the following conditions, but many do not.**	
a)	Fund must have fewer than 50 members.	No - many funds are larger than this.
b)	The fund is sponsored by one or more employers that are not Investment Entities or Passive NFFSs.	No - many funds provide only personal superannuation accounts, with a high proportion of self employed - there are no employers. This is especially the case for self managed superannuation funds, to which this exception seems designed.
c)	Employee and employer contributions are limited by reference to earned income and compensation of the employee respectively.	No – employee and employer contributions are not limited by reference to earned income, or compensation. Fixed dollar contribution limits apply.
d)	Participants that are not Australian residents are not entitled to more than 20% of the Fund’s assets.	No - self Managed superannuation funds have 4 or fewer members. For some, one or more single members may be beneficially entitled to more than 20% of the fund’s assets. Such members may cease to be Australian residents for tax purposes, or never have been.

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1.3 Excluded Account

CRS Annex Section VIII, Para. C. 17.	**Retirement or pension accounts must meet the following conditions, but many superannuation funds do not:**	
a)iv)	Withdrawals are conditional on reaching a specified retirement age, disability, death, with penalties for earlier withdrawals.	No - funds are permitted to release benefits earlier with no penalties in certain cases, such as compassionate grounds and financial hardship.
v)	Either (1) Annual contributions are limited to $50,000 or (2) there is a maximum lifetime contribution limit to this and all other accounts of $1,000,000 in aggregate.	No – (1) combined fixed dollar employer and employee contribution limits exceed this amount. Also, new benefit roll-overs from other superannuation funds can be made, and this definition does not ignore them (2) there is no superannuation maximum lifetime contribution limit.

2. Superannuation and Other Retirement Accounts (Approved Deposit Funds)

Approved Deposit Funds are trusts, operated by APRA supervised RSE Licensees and regulated by the SIS Act. They are no longer sold.

Before 1 July 1994, certain superannuation funds were not permitted to retain benefits after a member ceasing employment before retirement. Members were compelled to roll-over their preserved benefits to a deferred annuity, or an approved deposit fund. The demand for both product types died out after July 1994 when all superannuation funds were allowed to retain benefits, and accept roll-overs from other funds.

ADF accounts must fit one of the definitions outlined in sections 2.1 to 2.3 below to be exempt. They either do not, or may not, for the reasons given.

FATCA Status: Each ADF account is exempt under FATCA due to the fund being a Non-Reporting Australian Financial Institution and exempt beneficial owner under Australian FATCA IGA (Annex II, Article II.A.1).

There is scope for ADF accounts to be made CRS exempt by ADFs being defined in domestic Australian law as a Non-Reporting Financial Institution, due to it presenting a low risk of being used to evade tax, and having similar characteristics to a "Broad Based Retirement Fund" (CRS Annex, Section VIII Para. B.1.c)).

Recommendation:

FSC Recommends that domestic Australian law be passed specifying that any plan, scheme, fund, trust, or other arrangement operated principally to administer or provide pension, retirement superannuation, or death benefits that is a "superannuation entity" as defined in the **Superannuation Industry (Supervision) Act 1993** be designated as a "Non-Reporting Financial Institution" for the purposes of CRS Annex, Section VIII, Para. C.1.c).

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2.1 Broad Participation Retirement Fund

CRS Annex Section VIII, Para. B, 5.	**ADFs must meet the following condition, but do not:**	
Opening paragraph	Fund established to provide retirement, disability or death benefits to current or former employees (or persons they designate) of one or more employers in consideration for services rendered.	No – all ADFs provide only personal superannuation accounts, funded by roll-overs. There are no employees (or employers), and benefits are not provided in consideration of services rendered.
	ADFs must meet at least one of the following conditions, but do not:	
c)i)	Fund must be generally exempt from tax on investment income.	No - tax at 15% applies to all investment income of ADFs.
ii)	Fund receives 50% or more of total contributions from employers.	No – all ADFs provide only personal superannuation accounts, funded by roll-overs. There are no employer contributors.
iii)	Withdrawals allowed only in specified events related to retirement, disability or death (except rollovers) unless penalties apply to earlier withdrawals.	No – ADFs are permitted to release benefits earlier with no penalties in certain cases, such as compassionate grounds and financial hardship.

2.2 Narrow Participation Retirement Fund

CRS Annex Section VIII, Para. B, 6.	**ADFs must meet the following condition, but do not:**	
Opening paragraph	Fund be established to provide retirement, disability or death benefits to current or former employees (or persons they designate) of one or more employers in consideration for services rendered.	No – all ADFs provide only personal superannuation accounts, funded by roll-overs. There are no employees (or employers), and benefits are not provided in consideration of services rendered.
CRS Annex Section VIII, Para. B, 6.	**ADFs must meet at all the following conditions, but do not.**	
a)	Fund must have fewer than 50 members.	No –ADFs are larger than this.
b)	The fund is sponsored by one or more employers that are not Investment Entities or Passive NFFSs.	No - there are no employer sponsors.
c) …	…	…
d)	Participants that are not Australian residents are not entitled to more than 20% of the Fund's assets.	ADFs are broad based funds. It is unlikely this limit would be invoked, but that would depend on each ADFs circumstances.

2.3 Excluded Account

CRS Annex Section VIII, Para. C, 17.	Australian superannuation fund retirement or pension accounts must meet the following conditions, but ADF accounts do not:	
a)iv)	Withdrawals are conditional on reaching a specified retirement age, disability or death, with penalties for earlier withdrawals.	No – ADFs are permitted to release benefits earlier with no penalties in certain cases, such as compassionate grounds and financial hardship.
v)	Either (1) Annual contributions are limited to $50,000 or (2) there is a maximum lifetime contribution limit to this and all other accounts of $1,000,000 in aggregate.	No – (1) contributions are not permitted, but new benefit roll-overs from other superannuation funds can be made, and this definition does not ignore them. (2) there is no superannuation maximum lifetime contribution limit.

3. Superannuation and Other Retirement Accounts (Retirement Savings Accounts):

Retirement Savings Accounts are issued directly to the customer, and no superannuation fund is involved. They are regulated by the *Retirement Savings Accounts Act 1997*, and also recognised in the SIS Act. They continue to be sold.

These accounts must fit within the Annex Section VIII, Para. C.17.a) definition of Exempt Account to be a CRS exempt superannuation or pension account. They either do not, or may not, in the areas noted below.

CRS Annex Section VIII, Para. C.17.	Retirement or pension accounts must meet the following conditions, but RSAs do not:	
a)iv)	Withdrawals are conditional on reaching a specified retirement age, disability, death, with penalties for earlier withdrawals.	No – RSAs are permitted to release benefits earlier with no penalties in certain cases, such as compassionate grounds and financial hardship.
v)	Either (1) Annual contributions are limited to $50,000 or (2) there is a maximum lifetime contribution limit to this and all other accounts of $1,000,000 in aggregate.	No – (1) combined fixed dollar employer and employee contribution limits exceed this amount. Also, new benefit roll-overs from other superannuation funds can be made, and this definition does not ignore them (2) there is no superannuation maximum lifetime contribution limit.

FATCA Status: Retirement Savings Accounts are Excluded Accounts under Annex II of the Australian FATCA IGA (Annex II, Article V.A.1.c).

There is scope for Retirement Savings Accounts to be made CRS exempt by RSAs being defined in domestic Australian law as a class of Exempt Account (CRS Annex, Section VIII, Para. 17.g) due to them presenting a low risk of being used to evade tax, and having similar characteristics to a the retirement and pension account type described in CRS Annex, Section VIII, Para. 17.a).

Recommendation:

FSC Recommends that domestic Australian law be passed specifying that an account established by any contract that is a "retirement savings account" as defined in the Retirement Savings Accounts Act 1997 be designated as an "Exempt Account" for the purposes of CRS Annex, Section VIII, Para. 17.g).

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4. Superannuation and Other Retirement Accounts (Deferred Annuities):

Deferred annuities were issued by APRA regulated life insurance Companies directly to the customer, and no superannuation fund is involved. They are nonetheless recognised in the Superannuation Industry (Supervision) Act **(SIS)**. They are no longer sold.

Before 1 July 1994, certain superannuation funds were not permitted to retain benefits after a member ceasing employment before retirement. Members were compelled to roll-over their preserved benefits to a deferred annuity, or an approved deposit fund. The demand for both product types died out after July 1994 when all superannuation funds were allowed to retain benefits, and accept roll-overs from other funds.

These annuity accounts do not fall within the CRS annuity exception in paragraph c) of the "Financial Account" definition (Annex, section VIII, Para. C.1.c) and are not thereby exempted from the CRS. These accounts must therefore fit within the Annex, Section VIII, paragraph C.17.a) definition of Exempt Account to be a CRS exempt superannuation or pension account. They either do not, or may not, in the areas noted below.

CRS Annex Section VIII, Para. C. 17.	**Retirement or pension accounts must meet the following conditions, but deferred annuities do not:**	
a)iv)	Withdrawals are conditional on reaching a specified retirement age, disability, death, with penalties for earlier withdrawals.	No – contracts permit benefits to be released earlier with no penalties in certain cases, such as compassionate grounds and financial hardship.
v)	Either (1) Annual contributions are limited to $50,000 or (2) there is a maximum lifetime contribution limit to this and all other accounts of $1,000,000 in aggregate.	No – (1) contributions are not permitted, but new benefit roll-overs from other superannuation funds can be made, and this definition does not ignore them. (2) there is no superannuation maximum lifetime contribution limit.

FATCA Status: Deferred Annuities are Excluded Accounts under Annex II of the Australian FATCA IGA (Annex II, Article V.A.1.a).

There is scope for Deferred Annuities to be made CRS exempt by DAs being defined in domestic Australian law as a class of Exempt Account (CRS Annex, Section VIII, Para. 17.g) due to them presenting a low risk of being used to evade tax, and having similar characteristics to a the retirement and pension account type described in CRS Annex, Section VIII, Para. C.17.a).

Recommendation:

FSC Recommends that domestic Australian law be passed specifying that an account established by any contract that is a "complying superannuation life insurance policy"* as defined in the Income Tax Assessment Act 1997 be designated as an "Exempt Account" for the purposes of CRS Annex, Section VIII, Para. 17.g).

* the equivalent FATCA exemption adds the words "FHSA life insurance policy" to also exempt First Home Saver Accounts established as life policies under the Tax Act.

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5. Superannuation and Other Retirement Accounts (Allocated Annuities)

Allocated annuities were issued by APRA regulated life insurance companies directly to the customer, and no superannuation fund is involved. They are nonetheless regulated under by the SIS Act. They are no longer sold.

Before 1 July 2000, it was common for Life Insurance companies to issue allocated annuity policies. These were functionally identical to allocated pensions provided by superannuation funds (replaced by account based pensions from 1 July 2007) and are regulated in the same way by the SIS regime. They could continue to be issued, but there is no benefit to life insurers from doing so following 1 July 2000 tax changes equalising their underlying tax position to that of allocated pension products. Their investment earnings are fully tax exempt.

FATCA Status: Allocated annuities are Excluded Accounts under Annex II of the Australian FATCA IGA (Annex II, Article V.A.1.b)

These annuity accounts do not fall within the CRS annuity exception in paragraph c) of the "Financial Account" definition (Annex, section VIII, Para. C.1.c) and are not thereby exempted from the CRS. These accounts must therefore fit within the Annex, Section VIII, Para. C.17.a) definition of Exempt Account to be a CRS exempt superannuation or pension account. They either do not, or may not, in the areas noted below.

CRS Annex Section VIII, Para. C.17.	**Australian superannuation fund retirement or pension accounts must meet the following conditions, but allocated annuities do not:**	
a)v)	Either (1) Annual contributions are limited to $50,000 or (2) there is a maximum lifetime contribution limit to this and all other accounts of $1,000,000 in aggregate.	No – (1) contributions are not permitted, but new benefit roll-overs from other superannuation funds can be made, and this definition does not ignore them. (2) there is no superannuation maximum lifetime contribution limit.

There is scope for Allocated Annuities to be made CRS exempt by AAs being defined in domestic Australian law a class of Exempt Account (CRS Annex, Section VIII, Para. 17.g) due to them presenting a low risk of being used to evade tax, and having similar characteristics to a the retirement and pension account type described in CRS Annex, Section VIII, C.17.a).

Recommendation:

FSC Recommends that domestic Australian law be passed specifying that an account established by any contract that is an "exempt life insurance policy" as defined in the Income Tax Assessment Act 1997 (other than a policy referred to in sub-paragraphs (e)(i) or (iii) of subsection 320-246(1) of that Act*) be designated as an "Exempt Account" for the purposes of CRS Annex, Section VIII, Para. 17.g).

* the equivalent FATCA exemption uses this parenthesized carve out to the exemption.

6. Pooled Superannuation Trusts

A PST is wholly owned by, conducts investments activities, accepts deposits from and holds financial assets exclusively for or behalf of one or more superannuation

funds, ADFs, and other like arrangements that either are or, based on the above submissions, should be:

- Non-Reporting Financial Institutions or other entities in respect of their provision of Financial Accounts; or
- Providers of Exempt Accounts, with the PST investment relating entirely to those Exempt Accounts.

They are regulated by APRA under the SIS Act.

There are no CRS definitions into which PST accounts could be classified for exemption.

FATCA Status: PST accounts are exempt under FATCA due to the fund being a Non-Reporting Australian Financial Institution and exempt beneficial owner under Australian FATCA IGA (Annex II, Article II.A.1,2 & 3).

There is scope for PST accounts to be made CRS exempt by PSTs being defined in domestic Australian law as a Non-Reporting Financial Institution due to them presenting a low risk of being used to evade tax, and having similar characteristics to a "Broad Based Retirement Fund" (CRS Annex, Section VIII Para. B.1.c)).

Recommendation:

FSC Recommends that domestic Australian law be passed specifying that any:

(1) plan, scheme, fund, trust, or other arrangement operated principally to administer or provide pension, retirement, superannuation, or death benefits that is a "superannuation entity" as defined in the Superannuation Industry (Supervision) Act 1993;
(2) any pooled superannuation trust" as defined in the Income Tax Assessment Act 1997; or
(3) entity that is wholly owned by, and conducts investment activities, accepts deposits from, or holds financial assets exclusively for or on behalf of, one or more plans, schemes, funds, trusts, or other arrangements referred to in subparagraphs (1) or (2),

be designated as a "Non-Reporting Financial Institution" for the purposes of CRS Annex, Section VIII, Para. C.1.c).

7. Pure Risk Life Insurance

A pure risk life insurance contract is not a "Cash Value Insurance Contract" within the CRS definition (CRS Annex, Section VIII, Para. C.7). However, the CRS potentially confuses the issue, by treating pure risk life insurance contracts as Exempt Accounts only if they meet specified conditions (CRS Annex Section VIII, Para. C.17.b). Some of those specified conditions are problematic in the Australian market. For example, the requirement that the contract must end by age 90 differs to Australian market practice where contracts can be continue until age 99, and so it may not be met in some cases. The appearance of such contracts being outside the exemption may cause people to think they are caught, even though they are not Financial Accounts in the first place.

In summary, FSC considers that pure risk life insurance contracts are not caught to start with, making the CRS "Exempt Account" exemption unnecessary, redundant and potentially confusing. Specifically, CRS defines a Cash Value Insurance Contract (Annex Section VIII, Para. C.7) as an Insurance Contract with

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a "Cash Value" greater than $50,000 - which pure risk policies do not have. If there were any doubt about this, "Cash Value" is defined in CRS Annex Section VIII, Para. C.8) to:

- Include an amount receivable upon surrender or termination – this is nil for pure risk contracts, other than premium refunds for unexpired periods of cover.
- Include amounts the policy holder can borrow with regard to the contract - this is also nil for pure risk contracts.
- Exclude benefits paid under the policy for death, injury or sickness.
- Exclude a refund of a previously paid premium due to policy cancellation or termination, or a decrease in cover. This concession is denied for premium refunds under a life insurance contract or annuity contract (not defined), and it's not clear why. In any event, premiums on this type of cover rarely exceed $50,000 and so can for practical purposes be ignored.

FATCA Status: The ATO has recently issued draft FATCA guidance for industry consultation on 25 June 2014 confirming its view that pure risk life insurance contracts are Exempt Accounts (Annexure A). FSC seeks the same guidance in relation to CRS.

Recommendation:

FSC Recommends that the Explanatory Memorandum to the domestic Australian law passed to implement the CRS clarifies that pure risk life insurance contracts are "Exempt Accounts" under CRS and that the ATO issues CRS guidance equivalent to the draft FATCA guidance issued for industry consultation on 25 June 2014 that pure risk life insurance contracts are "Exempt Accounts".

8. Pure risk insurance products

Article 1.1(y) of the FATCA Agreement treats an insurance contract that has a Cash Value, as defined in Article 1.1(z), as a Cash Value Insurance Contract (which will constitute a Financial Account maintained by a Specified Insurance Company that issues or is obligated to make payments with respect to such contract).

Certain Term Life Insurance Contracts, as described in section V.B of Annex II of the FATCA Agreement, are specifically excluded from the definition of 'Financial Account' and are therefore not reportable.

The definition of 'Cash Value' also specifically excludes certain amounts payable under an insurance contract.

Pure risk life insurance products (and other pure risk insurance products) will not be treated as having a Cash Value and therefore do not constitute Cash Value Insurance Contracts for the purposes of the FATCA Agreement. This is irrespective of whether the terms of the definition of 'Certain Term Life Insurance Contracts' (in the case of life insurance products) are satisfied (e.g. that the insurance product does not run past age 90).

In Australia, pure risk life (and other) insurance products will generally display the following features, which are listed to illustrate the notion of 'pure risk':

■ Benefits are paid only on death, disablement or trauma (specified illness or injury);

■ There are no policy loans;

■ There are no policyholder dividends (including termination dividends) or other payments;

■ There are no surrender charges;

■ These products require regular payment of premiums on a 'pay as you go' basis;

■ Premiums are usually either age based stepped premiums (low becoming high) or level for the contract duration (no increases). There are also some instances where level premiums switch to being stepped from a certain age;

■ They do not have a surrender value, an investment element value or any characteristic resembling a cash value (this is also the case for level premiums);

■ Advance payments of premiums may be permitted, but interest is not paid on them;

■ The policy expires if the next premium due is not paid or if cancelled by the policyholder;

■ If the policyholder cancels policy, the premium refund relates only to the unexpired period of future cover that has been paid for (e.g. cancellation part way through a period for which a premium was paid – other than for 'cooling off' periods, where the full premium is refunded);

■ If policyholder reduces cover, premium refund relates only to the amount of the reduction to cover for the unexpired period of future cover that has been paid for (e.g. reduction to sum insured part way through a period for which a premium was paid);

■ Death benefits may not be age limited – the cover may run until a contractually specified expiry age (e.g. age 99) or indefinitely as long as premiums continue to be paid; and

■ Disability and trauma benefits are not age limited (other than after age 99, although narrower coverage can apply from earlier ages, such as age 75 or 65): the cover runs until the contractually specified expiry age of 99 years.

9. CRS and Employee Share Schemes

We request consideration be given to an exemption of Employee Share Schemes from CRS on the basis they are a low risk asset for tax evasion given the factors below:

(a) Only employees can participate in an ESS and they can only receive shares in their employer and not any other type of investments.

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(b) In most cases, restriction and forfeiture rules govern when employees can access the shares held in the scheme. For example, typically ESS shares will be subject to a vesting period which means they cannot be accessed for a significant period post grant.

(c) Under Division 83A of the Income Tax Assessment Act 1997 (Div 83A), the vast majority of ESS accounts are reportable to the ATO and subject to Australian income tax and reporting.

(d) For many schemes, there is a ceiling on contributions to the scheme.

(e) ESS exist to supplement employment income and form part of employee remuneration and it is inconsistent if certain ESS are subject to CRS oversight (simply due to the use of a trust structure as a vehicle to administer schemes in an efficient way and to manage forfeiture) when other forms of ESS and employment income more generally are not.

We note also that the treatment of the ESS trust as an exempt product would mean that the units held by the employees in the ESS would not be regarded as financial accounts. This should alleviate much of the compliance burden placed on the ESS trust. However, it is critical that the ESS trust also be included in the definition of non reporting financial institutions that are treated as exempt beneficial owners. This would effectively put ESS trusts on the same footing as ESS arrangements where the employee holds the listed shares directly.

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