

24 October 2014

Manager
Contributions and Accumulations Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: ENCCTax@treasury.gov.au

Dear Sir/Madam,

Re: Reforming the Superannuation Excess Non-concessional Contributions Tax

The Australian Institute of Superannuation Trustees is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public-sector funds.

As the principal advocate and peak representative body for the \$600 billion not-for-profit superannuation sector, AIST plays a key role in policy development and is a leading provider of research.

AIST provides professional training, consulting services and support for trustees and fund staff to help them meet the challenges of managing superannuation funds and advancing the interests of their fund members. Each year, AIST hosts the Conference of Major Superannuation Funds (CMSF), in addition to numerous other industry conferences and events.

Support for measure

AIST welcomes the opportunity to comment on the exposure draft legislation and draft explanatory memorandum to give effect to the 2014–15 Federal Budget measure to allow individuals the option of withdrawing superannuation contributions in excess of the non-concessional contributions cap made from 1 July 2013 and associated earnings. AIST also thanks Treasury for the opportunity to participate in the associated workshop convened by Treasury on Friday, 17 October 2014.

AIST supports measures to discourage individuals from exceeding their contribution caps, both in relation to concessional and non-concessional contributions.

However, AIST also supports the widely held view that the additional tax for excess contributions in existing legislation is unnecessarily punitive, and therefore supports the measure to allow

individuals the option of withdrawing their excess non-concessional contributions, and for the excess to be taxed at their marginal rate.

The Government was elected on a policy that it would work with key stakeholders in the superannuation industry to develop an appropriate process that addresses “inadvertent” breaches of the contribution caps where an individual can show that their mistake was genuine and the error would result in the disproportionate penalty.

AIST supports this policy and notes that that this was the consensus view of the industry participants in the workshop on 17 October. Furthermore, the view of participants - including the ATO and Treasury – is that in most cases breaches of the non-concessional cap are indeed inadvertent

For example, this can occur when an individual has not properly considered all the contributions they have made in all their superannuation funds or has not appreciated the implications of making a specific contribution (e.g., to pay for insurance) on top of a large concessional contribution.

The determination of Treasury and the ATO to apply the changes in a practical and reasonable manner that was in evidence at the workshop is applauded. In this submission, AIST makes a number of suggestions to assist such a practical application.

Comments on the issue

The Government’s policy also stated that “*an increasing number of Australians are confronted with large tax penalties as a result of genuinely unintentional errors resulting in their voluntary contributions exceeding their concessional or non-concessional caps*”¹.

Notwithstanding this concern, the excess non-concessional contributions tax rate has in fact been increasing over the past 18 months. The rate of excess non-concessional contributions tax was firstly increased from 46.5% to 47% for 2014-15², and further increased by another 2% in line with the Government’s temporary budget repair levy measures³. This means that the rate of excess non-concessional contributions tax is currently 49%, and is now harsher than it ever was.

However, the extent of excess non-concessional contributions is not great, and AIST notes that the workshop on 17 October was advised that less than 2,000 individuals have exceeded the caps in each of the previous two financial years. It was also stated that most individuals exceeded the cap by less than \$10,000, with the average being around \$30,000.

¹“The Coalition’s Policy for Superannuation September 2013”, page 4 (<http://tinyurl.com/m7mtfwp>)

² *Superannuation (Excess Non-concessional Contributions Tax) Amendment (Disability Care Australia) Act 2013*

³ *Excess Non-concessional Contributions Tax Superannuation (Excess Non-Concessional Contributions Tax) Act 2007*

This is not a large number of people, and there is no evidence that these numbers are going to increase. AIST argues that the legislative solution should therefore be as simple as possible. This means that the legislation should not attempt to anticipate every possible circumstance.

Applying the *de minimis* test

The ATO has previously advised that it considers applying the '*de minimis*' test in deciding whether or not to apply the excess non-concessional contributions tax. Given that most individuals exceed the cap by a relatively small amount, this approach is supported and should continue to apply (so that no excess non-concessional contributions tax is paid) after the passage of this legislation where small amounts are involved and where these appear to be the result of unintentional errors. A note to the effect that the Commissioner of Taxation will take a consistent and flexible approach in relation to his discretion to disregard or reallocate excess contributions should be included in the Explanatory Memorandum.

Further to this, we note that this has the potential to create problems with a member's account where amounts released reduce the tax-free component to a negative balance, or where an account is reduced below minimum balance requirements. These issues should be included in the explanatory memorandum as being within the scope of the Commissioner's discretion.

Operation of bring-forward rule

At the workshop, Michael Davidson (Senior Policy Adviser, Superannuation, CPA Australia) made a suggestion for a refund process that AIST supports. Our understanding of that process is as follows:

For individuals under 65 years of age, their non-concessional contributions cap is effectively the brought-forward cap over three years, that is, a consequence of exceeding the one year cap is to automatically trigger the bring-forward provision.

This means that an individual could have inadvertently and unknowingly triggered the brought forward rule in Year 1 by making non-concessional contributions only a few dollars over the cap. Not knowing this, they could then make the problem much worse by making what they thought was a three-year brought forward contribution of \$540,000 in Year 3.

Under this exposure draft, this individual would then be faced with withdrawing hundreds of thousands of dollars of excess non-concessional contributions made in Year 3, and paying an interest charge on that amount.

An alternative, that AIST supports, is for the individual to be able to withdraw the excess amount that triggered the brought-forward rule in Year 1, and to pay an interest charge on that amount.

However, early notification by the ATO to the individual, that is, after Year 1 when they first trigger the bring-forward rule, would further reduce the problem. If the individual wished, they could then elect to refund the excess component in Year 1 and ‘preserve’ their option to exercise the bring-forward rule in Year 3.

This approach is consistent with the recommendation made by the Inspector-General of Taxation who stated:

Taxpayers also raised concerns regarding the timeliness of the ATO’s detection and notification of excess contributions as it affected their ability to take corrective action. Indeed, in certain instances, up to 45 months may elapse between the taxpayer making the contribution and the ATO informing them of an excess contribution. Such delays give rise to a higher risk of repeated excess contributions, compounding the adverse impacts on taxpayers. The IGT has recommended that the ATO improve the timeliness of excess contribution detection, ensure taxpayers are notified of excess contributions within six months of the ATO receiving all relevant information and ensure that taxpayers who trigger the ‘bring forward’ provision are notified earlier to minimise the risk of ECT liability in later years⁴.

Withdrawal of excess contribution

Where an individual withdraws the excess contribution, the current proposal is that they also be required to withdraw an “associated earnings amount” based on the General Interest Charge.

While AIST supports the idea of a notionally calculated amount, the charge applying to withdrawn excess contributions should be less harsh than the General Interest Charge. For 2013-14, the average GIC rate for the 4 quarters of the financial year is 9.66%.

AIST submits that the charge should not be overly harsh, that the charge should be excess concessional contributions charge (currently approximately 5.69%). While this charge is lower, it is nonetheless sufficient to ensure the payments excess concessional contributions are discouraged.

In addition, this consistency will minimise the need to make system changes and associated costs, and aid compliance.

AIST also submits that the legislation should not prescribe the source of a withdrawn payment but should allow the general proportioning rules to apply.

⁴ Inspector-General of Taxation, “Review into the Australian Taxation Office’s compliance approach to individual taxpayers — superannuation excess contributions tax” March 2014, page vii

Release of excess contributions

The proposed legislation requires a superannuation fund to release excess contributions within 7 days of the date of issue of a release authority. At the workshop on 17 October, there was a consensus that this period needs to be extended. AIST supports such an extension to 21 days.

Changes to SIS regulations

AIST supports the submission made by UniSuper to explicitly allow defined benefit members to apply release authorities against an accumulation account associated with their defined benefit rather than having to 'crystallise' their defined benefits. We also support amendments to the SIS Regulations that would allow defined benefit pensions to be partly commuted as the discretion of the Trustee to release monies under release authorities issued for excess concessional contributions, excess non-concessional contributions and the Division 293 tax. We note that such a change would be of specific benefit to defined benefit funds and their members.

Implications for administration systems

We note that this exposure draft creates a new condition of release. This will mean an increase in costs at funds as administration platforms need to be updated in order to process requests.

If you have any further questions regarding this submission, please contact David Haynes, Executive Manager Policy & Research on 03 8677 3803 or at dhaynes@aist.asn.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Tom Garcia', is written over a light blue horizontal line.

Tom Garcia
Chief Executive Officer