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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TAX LAWS AMENDMENT (2012 MEASURES NO. 6) BILL 2012: UNLAWFUL
PAYMENTS FROM REGULATED SUPERANNUATION FUNDS

INCOME TAX RATES AMENDMENT (UNLAWFUL PAYMENTS FROM
REGULATED SUPERANNUATION FUNDS) BILL 2012

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Minister for Financial Services and Superannuation, the Hon Bill Shorten MP)

[Click here and insert the name of the Bill]

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
Bill	Tax Laws Amendment (2012 Measures No. 6) Bill 2012: Unlawful payments from regulated superannuation funds
Commissioner	Commissioner of Taxation
ITAA97	<i>Income Tax Assessment Act 1997</i> (Cth)
ITR Act	<i>Income Tax Rates Act 1986</i> (Cth)
ITR Bill	Income Tax Rates Amendment (Unlawful Payments from Regulated Superannuation Funds) Bill 2012
Review	Super System Review
RIS	regulation impact statement
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i> (Cth)
SIS Regulations	<i>Superannuation Industry (Supervision) Regulations 1994</i> (Cth)
SMSF	self managed superannuation fund

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General outline and financial impact

Stronger Super

On 16 December 2010, the Assistant Treasurer and Minister for Financial Services and Superannuation, the Hon Bill Shorten MP, announced the Stronger Super reforms.

Stronger Super represents the Government's response to the review of the governance, efficiency, structure and operation of Australia's superannuation system, the Super System Review (Review).

To provide input on the design and implementation of the Stronger Super reforms, the Government undertook extensive consultations with industry, employer and consumer groups. In addition, the Government established a specialised working group for reforms affecting self managed superannuation funds (SMSFs).

The Review found that stronger sanctions must exist to deter promoters of illegal early release schemes from undermining the Government's retirement policy and harming members in the process. The Review recommended that civil and criminal sanctions should be introduced to enable the Commissioner of Taxation (Commissioner) as Regulator, to seek civil and criminal penalties in order to discourage illegal early release scheme promoters.

The Review also found that those individuals who gain illegal early access to their superannuation benefits should not enjoy the same tax treatment as those who legally gain early access to their superannuation benefits. The Review recommended that amounts released early by illegal means should be subject to the superannuation fund non-complying tax rate of 45%.

Schedule # to the Tax Laws Amendment (2012 Measures No. 6) Bill: Unlawful payments from regulated superannuation funds (Bill) provides for civil and criminal penalties for the promotion of illegal early release schemes.

The Income Tax Rates Amendment (Unlawful Payments from Regulated Superannuation Funds) Bill 2012 (ITR Bill) amends the law to ensure that superannuation benefits received in breach of legislative requirements are taxed at 45%.

Date of effect: The promoter penalty provisions in the Bill commence on Royal Assent. The amendments in the ITR Bill to *Income Tax Rates Act 1936* (Cth) (the ITR Act) apply to assessments for the 2013-14 income year and later income years.

Proposal announced: On 16 December 2010, the Minister announced the Stronger Super reforms. In September 2011, the Minister released the Stronger Super Information Pack, outlining key aspects of the Stronger Super reforms. On 13 July 2012, the Minister announced further details of these reforms including amended commencement dates for the measures contained in the Bill and the ITR Bill.

Financial impact: Commonwealth costs associated with implementation of a range of SMSF Stronger Super reforms, including these measures is \$40.2 million over 5 years. These costs will be offset by increases to the SMSF Supervisory Levy.

Human rights implications: This Bill does not raise any human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 3, paragraphs 3.1 - 3.3.

Compliance cost impact: Nil.

Summary of regulation impact statement

Impact: A regulation impact statement (RIS) exemption was granted for measures contained in this Bill, which will be the subject to a post-implementation review.

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Chapter 1

Promotion of illegal early release schemes

Outline of chapter

1.1 This chapter outlines the amendments in Schedule # of the Bill to the *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) to introduce penalties to deter and penalise persons who promote illegal early release schemes.

Context of amendments

1.2 Superannuation legislation imposes restrictions on when and in what form a person can access their superannuation benefits. Generally, access is based upon an individual attaining a certain age. The law prescribes certain exemptions to this rule whereby superannuation benefits may be released early, prior to meeting the age restrictions. ‘Illegal early release’ refers to cases where superannuation benefits are withdrawn contrary to these restrictions and where the relevant exemptions do not apply.

1.3 Illegal early release schemes are generally promoted to people as a means of accessing their superannuation benefits prior to being eligible to receive those benefits which undermines the Government’s retirement income policy.

1.4 Illegal early release schemes commonly involve requesting a fund regulated by the Australian Prudential Regulation Authority (APRA) to pay a member’s superannuation benefits to the bank account of a purported SMSF that has been set up for the purpose of receiving such transfers and subsequently paying these out to participants of the scheme.

1.5 Promoters of illegal early release schemes have in the past exploited vulnerable people within the community by encouraging members to submit applications to rollover their superannuation balances to such purported SMSFs. In these situations the promoters have taken commissions of up to 50% of the member’s superannuation balance.

1.6 Some schemes have facilitated up to \$8 million in illegal release of superannuation benefits and generated millions in commissions for promoters. In some cases promoters have gone further and exploited

identity data for other criminal purposes or actually stolen the entire balance.

1.7 There are no specific penalties for promoters of illegal early release schemes who are not themselves trustees of a regulated superannuation fund. Often a promoter will not be a trustee of a purported superannuation fund used in a scheme, and instead recruits parties for this role. This limits the Commissioner’s ability to pursue existing penalties in the SIS Act.

1.8 The Review considered that the Commissioner should have access to additional civil and criminal penalties and is best placed to identify those promoting illegal early release schemes.

1.9 The Bill implements the Government’s response to the Review’s recommendation and provides for civil and criminal sanctions to enable the Commissioner to seek civil and criminal penalties in order to discourage illegal early release scheme promoters.

Summary of new law

1.10 Schedule # of the Bill provides that a person must not promote a scheme that has resulted, or is likely to result, in a payment being made from a regulated superannuation fund otherwise than in accordance with payment standards prescribed under subsection 31(1) of the SIS Act. This is a civil penalty provision.

1.11 Part 21 of the SIS Act provides for civil and criminal consequences for contravening a civil penalty provision.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
A person must not promote a scheme that has resulted, or is likely to result, in a payment being made from a regulated superannuation fund otherwise than in accordance with the payment standards prescribed under subsection 31(1) of the SIS Act	No equivalent
A person who promotes a scheme that has resulted, or is likely to result in a payment being made from a regulated	No equivalent

superannuation fund otherwise than in accordance with the payment standards, contravenes a civil penalty provision. The SIS Act provides for civil and criminal consequences of contravening a civil penalty provision	
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Detailed explanation of new law

1.12 A person must not promote a scheme that has resulted, or is likely to result, in a payment being made from a regulated superannuation fund otherwise than in accordance with the payment standards prescribed under subsection 31(1) of the SIS Act. [*Schedule #, item 1, subsection 68B(1)*]

1.13 *Person* is not defined in the SIS Act, however takes its meaning from section 2C of the *Acts Interpretation Act 1901* (Cth) to include a body corporate and an individual.

Promote

1.14 *Promote*, in relation to a scheme includes, but is not limited to, entering into a scheme, inducing another person to enter into a scheme, carrying out a scheme, commencing to carry out a scheme, and facilitating entry into, or the carrying out of, a scheme. [*Schedule #, item 1, subsection 68B(3)*]

1.15 Whether a person promotes a scheme will be determined on an objective case by case basis by considering the whole of the circumstances. Factors which may indicate that a person has promoted a scheme include, but are not limited to:

- the person markets the scheme (this may be marketing directly in the conventional sense, or otherwise) or encourages the growth or interest in it. This may include (but is not limited to) conduct such as:
 - distributing marketing material in relation to such a scheme;
 - advising persons to consider entering into the scheme; or
 - employing or recruiting other persons to conduct or market the scheme.
- the person devised or designed the scheme or part of the scheme. This may include (but is not limited to) conduct such as:

- setting up the legal or financial architecture of the scheme;
 - constructing or commissioning the production of documents that are to be used as part of the scheme; or
 - establishing mechanisms to obtain, or facilitate circumstances that may allow persons involved in the scheme the ability to obtain financial or other benefits in relation to the scheme.
- the person facilitates the means by which the participants can participate in the scheme. This may include (but is not limited to):
 - providing some or all of the necessary paperwork for participants to sign;
 - directing them to complete the necessary documents.
 - the person has provided information to the participants as how to undertake activities which ultimately result in the individual accessing their superannuation benefits without meeting a condition of release.

1.16 Whether or not a person has received consideration in respect of the scheme is not determinative of whether a person has promoted the scheme. If a person has received consideration in respect of a scheme it is an indication that they have promoted a scheme, however this is not a necessary element to establish. Often promoters of such schemes will deduct a portion of the superannuation benefits as either a ‘fee’ or on the basis that they will remit an amount for tax on behalf of the participant in the scheme. Amounts purportedly deducted as tax are never remitted to the Australian Taxation Office (ATO). In some cases, a promoter may take all of the superannuation benefits and not pass on any amount to a participant.

Scheme

1.17 *Scheme* means any agreement, arrangement, understanding, promise or undertaking, whether express or implied, or whether or not enforceable, or intended to be enforceable by legal proceedings, or any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise. [***Schedule #, item 1, subsection 68B(3)***]

1.18 Whether a person has promoted a *scheme* will be determined on a case by case basis having regard to the whole of the circumstances. In identifying whether a scheme exists, consideration should be given to a continuum, a sequence of events, a course of action and/or a course of conduct, rather than focusing on particular transactions at particular points in time.

Likely to result

1.19 A person will contravene section 68B if a scheme is likely to result in a payment being made from a regulated superannuation fund otherwise than in accordance with the payment standards.

1.20 Therefore, the Commissioner may seek civil and criminal penalties if a scheme is likely to result, but has not actually resulted, in a payment being made from a regulated superannuation fund otherwise than in accordance with the payment standards.

1.21 Whether a scheme is likely to result in a payment being made from a regulated superannuation fund otherwise than in accordance with the payment standards is determined by an objective analysis.

1.22 **Example:** ABC Superannuation Fund receives a rollover request from John, a member of Smith Superannuation Fund, an SMSF. ABC Superannuation Fund, as part of the rollover process, confirms with the ATO whether John is a member of the Smith Superannuation Fund. The ATO advise that John is not a member and, as a result, ABC Superannuation Fund rejects the rollover request. The Commissioner obtains information under his formal powers from ABC Superannuation Fund that identifies that Mr X is behind the rollover request from John. Neither John nor Mr X receive any money. Despite no money having been received by John or Mr X, penalties for a contravention of s 68B may still be sought by the Commissioner.

Payment standards

1.23 A person must not promote a scheme that has resulted, or is likely to result, in a payment being made from a regulated superannuation fund otherwise than in accordance with the payment standards. [*Schedule #, item 1, subsection 68B(1)*]

1.24 The payment standards are prescribed in Part 6 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (SIS Regulations). The payment standards impose restrictions on when and in what form a person can access their superannuation benefits.

1.25 This provision will apply to cases where a scheme has resulted, or is likely to result in superannuation benefits being withdrawn contrary to these restrictions, for example, in cases where benefits are accessed prior to the member meeting a condition of release such as retirement or attaining preservation age. The conditions of release are listed in Schedule 1 of the SIS Regulations.

Penalties

1.26 Currently, there are no specific penalties for promoters of illegal early release schemes who are not themselves trustees of a regulated superannuation fund. Often promoters and those involved in promotion will not be trustees of a purported superannuation fund used in these schemes, and instead recruit parties for this role. This limits the Commissioner's ability to pursue existing penalties in the SIS Act.

1.27 Currently, promoters are principally dealt with by the Australian Securities and Investments Commission (ASIC) which relies on its powers to take action against them, often on the grounds that they are providing unlicensed financial advice. The Commissioner's current activity focuses on other compliance methods that disrupt and/or close down schemes from operating, such as freezing the assets of the SMSF under its powers in section 264 of the SIS Act. It is intended that the operation of these powers will remain unchanged.

1.28 A person who promotes a scheme that has resulted, or is likely to result in a payment being made from a regulated superannuation fund otherwise than in accordance with the payment standards contravenes a civil penalty provision. [*Schedule #, item 1, subsection 68B(2); item 2, paragraph 193(ca)*]

1.29 The SIS Act contains a number of civil penalty provisions (refer to section 193). Contravention of a civil penalty provision may result in a fine not exceeding 2,000 penalty units (refer to subsection 196(3) of the SIS Act). A penalty unit is defined in section 4AA of the *Crimes Act 1914* (Cth) as \$110. Subsection 4B(3) of the *Crimes Act 1914* (Cth) provides that where a body corporate is convicted of an offence a Court may impose a pecuniary penalty up to 5 times the amount of the maximum penalty.

1.30 Contravention of a civil penalty provision may be an offence punishable on conviction by imprisonment for not longer than 5 years. (refer to subsection 202(1) of the SIS Act).

Application and transitional provisions

1.1 The amendments made by Schedule # to the Bill apply to acts occurring after Royal Assent.

Consequential amendments

- 1.2 There are no consequential amendments.

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Chapter 2

Unlawful payments from regulated superannuation funds

Outline of chapter

2.1 This chapter outlines the amendments to the ITR Act to ensure superannuation benefits received in breach of legislative requirements are taxed at 45%.

Context of amendments

2.2 Section 304-10 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97) operates to ensure superannuation benefits received in breach of legislative requirements are included in a person's assessable income. Currently, these amounts are taxed at a person's marginal tax rate.

2.3 The Review considered this an inequitable outcome as those who gain illegal access to their superannuation benefits are subject to similar taxation treatment as those who are able to legally access their benefits early.

2.4 The Review noted that people who have illegally accessed their superannuation will still benefit from the amount they are left with after being taxed at marginal rates. Some people will not pay tax at all due to their level of income. A percentage of the population may be willing to forfeit a portion of their superannuation to tax (and promoter fees where applicable) to access a portion of their superannuation benefits.

2.5 The Review recommended that amounts illegally released should be taxed at the superannuation fund non-complying rate of 45%. This is to deter people from accessing their superannuation benefits contrary to the law and to ensure that those who do access their benefits early in this manner do not enjoy the same treatment as those who legally gain early access to their superannuation.

2.6 The ITR Bill implements the Government's response to the Review's recommendation that amounts illegally released be taxed at 45%.

Summary of new law

2.7 The rate of tax on amounts included in assessable income under section 304-10 of the ITAA97 is 45%.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Unlawful early payment remainder of taxable income means so much of taxable income as is included in assessable income under section 304-10 of the ITAA97.	No equivalent.
The rate of tax for a resident taxpayer for the unlawful early payment remainder (if any) of taxable income is 45%.	No equivalent.
The rate of tax for a non-resident taxpayer for the unlawful early payment remainder (if any) of taxable income is 45%.	No equivalent.

Detailed explanation of new law

2.8 Section 304-10 of the ITAA97 operates to ensure superannuation benefits received in breach of legislative requirements are included in the person's assessable income.

2.9 These amendments will ensure that these amounts are taxed at a rate of 45%. As these amounts are also included in a person's taxable income under section 4-15 of the ITAA97, the amount is also subject to the Medicare levy.

2.10 *Unlawful early payment remainder* of taxable income is defined to mean so much of taxable income as is included in assessable income under section 304-10 of the ITAA97. [Schedule 1, item 2, subsection 3(1)]

2.11 A rate of tax of 45% applies to resident taxpayers for the amount included as unlawful early payment remainder of taxable income. [Schedule 1, item 3, Part 1 of Schedule 7, paragraph (ab)]

2.12 A rate of tax of 45% applies to non-resident taxpayers for the amount included as unlawful early payment remainder of taxable income. ***[Schedule 1, item 4, Part II of Schedule 7, paragraph (ab)]***

2.13 The definition of *ordinary taxable income* is amended to ensure ordinary taxable income does not include any amounts that are included in assessable income as unlawful early payment remainder of taxable income. ***[Schedule 1, item 1, subsection 3(1)]***

Application and transitional provisions

2.14 The amendments made by Schedule 1 apply to assessments for the 2013-14 income year and later income years. ***[Schedule 1, item 5]***

Consequential amendments

2.15 There are no consequential amendments.

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Chapter 3 Statement of compatibility with human rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

Overview of the Bill

3.1 The Bill introduces civil and criminal sanctions for a person who promotes a scheme resulting in the illegal early release of superannuation benefits.

3.2 The ITR Bill applies the superannuation fund non-complying tax rate of 45% to amounts illegally released from a superannuation fund.

Human rights implications

3.3 This Bill does not engage any of the applicable rights or freedoms.

Conclusion

3.4 This Bill is compatible with human rights as it does not raise any human rights issues.

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