



# **Tax Laws Amendment (Sustaining the Superannuation Contribution Concession) Bill 2013**

*The Commonwealth Treasury*

Submission by UniSuper

Wednesday, 8 May 2013



## **1. Introduction**

---

### **1.1 ABOUT UNISUPER**

#### **1.1.1**

UniSuper is the industry superannuation fund dedicated to people working in Australia's higher education and research sector – the thought leaders of Australia. With more than 479,000 members and \$35.5 billion in net funds under management (as at 31 March 2013), UniSuper is one of Australia's largest superannuation funds and has one of the very few open defined benefit schemes. Appendix 1 provides more details about UniSuper.

#### **1.1.2**

This submission has been prepared by UniSuper Management Pty Ltd (ABN 91 006 961 799), which acts as the administrator of the Trustee, UniSuper Limited (ABN 54 006 027 121).

#### **1.1.3**

UniSuper Management Pty Ltd would welcome the opportunity to discuss the submission further and to provide additional information in respect of the comments made in this submission. In the first instance, please contact Luke Barrett, Head of Investment Law and Compliance on 03 9910 6145 or [luke.barrett@unisuper.com.au](mailto:luke.barrett@unisuper.com.au), or Benedict Davies, National Technical Adviser on (03) 9910 6671 or [benedict.davies@unisuper.com.au](mailto:benedict.davies@unisuper.com.au).

## 2 General comments

---

### 2.1.1

In making this submission, UniSuper has not sought to make any comment on the policy underpinning the proposed new Division 293 tax. Given the scope of the consultation process, UniSuper's comments focus on the impact of the proposed legislation, particularly from the point of view of superannuation providers that offer defined benefit interests.

### 2.1.2

UniSuper endorses the general approach of levying this tax at the individual tax payer level, rather than at the level of the superannuation fund. This will mitigate the costs and burdens for superannuation providers. That said, aspects of the administration of the new tax will be borne by superannuation providers, such as:

- (a) The obligation to keep records and to calculate
  - (i) the employer-financed component of benefits accruing after 1 July 2012,
  - (ii) the end benefit cap applicable to members, and
  - (iii) the amount of defined benefit contributions for the purposes of the new tax;
- (b) The obligation to notify the Commissioner upon receiving the first request for payment of a benefit from a defined benefit member who has a deferred Division 293 tax debt; and
- (c) The obligation to respond to release authorities.

Subject to the comments in this submission, these aspects are anticipated to be manageable.

### 2.1.3

Our concerns include the potential for the new tax to lead to inequity in the context of:

- (a) death benefits,
- (b) division of assets following matrimonial breakdown,
- (c) sudden commutation of defined benefit income streams to pay tax debts,
- (d) allocation of reserves to members in order to comply with the MySuper legislation.

These concerns and others are outlined below in further detail below.

## **3 Obligations**

---

### **3.1 OBLIGATION TO KEEP RECORDS AND CALCULATE AMOUNTS**

#### **3.1.1**

It is unclear at this point in time how the employer-financed component of benefits accruing after 1 July 2012 is to be calculated and further detail is required before a comment can be made as to the practicalities and burdens of keeping records to calculate and report these amounts and the associated concept of the end benefit cap.

#### **3.1.2**

More significantly, details of how defined benefit contributions are to be calculated are yet to be released. Regulations have been foreshadowed in this regard. UniSuper will review the draft regulations with interest once they are released.

#### **3.1.3**

On a related note, it would appear that, under the proposed legislation, many defined benefit members will have no means of knowing accurately whether their income for surcharge purposes and their low tax contributions are above or below the \$300,000 threshold for the new tax. This is because the relevant calculations (details of which have not been released yet) would in any event only be conducted after the end of the financial year, by which time it would be too late for members and their advisers to make (or adjust) decisions about how much to contribute to the fund in the earlier year. We believe that many of our members will be concerned by this lack of certainty and will find that this makes it very difficult to sensibly plan for their retirement.

## **3.2 OBLIGATION TO NOTIFY COMMISSIONER**

### **3.2.1**

With regard to the obligation to notify the Commissioner when a defined benefit member with a deferred tax debt requests a payment, we note that there are circumstances where a member may not physically make a request for a payment. Benefits may become payable upon attaining a particular age. Similarly, following the death of a member, it is not the member who makes the request for payment of death benefits. The legislation should make clear what a trustee's obligations are in circumstances where no actual request has been made by the member. Along similar lines, it is possible that a member's account may be split following the dissolution of marriage and it is unclear whether this kind of dealing is intended to trigger an obligation to notify the Commissioner.

### **3.3 OBLIGATION TO RESPOND TO RELEASE NOTICES AND ASSOCIATED ISSUES**

#### **3.3.1**

We note that, in the case of defined benefit members with a deferred Division 293 tax debt, the very first benefit payment will trigger an obligation to pay the full amount of their deferred tax debt. However, the first benefit payment may be very small in comparison to the amount of the tax debt and it may not be equitable for a member to have to pay the full amount of their tax debt at that point in time. The potential inequity of the situation is especially pronounced in examples involving the payment of a benefit for temporary or permanent disablement. We would encourage Treasury to give further consideration to the potential for such hardship to arise.

#### **3.3.2**

Under the exposure draft, a trustee of a defined benefit fund could be required to release the full amount of a defined benefit member's tax debt, even if that exceeds the amount presently payable to the member. This is of concern to UniSuper as the trustee of a defined benefit fund. The explanatory memorandum foreshadows there will be regulations permitting trustees to initiate a commutation in order to comply with the release authority, subject to the governing rules. It is left unclear as to what action must be taken by a trustee where the governing rules do not permit a commutation, or indeed if regulations are not in fact made. In any event, a commutation can have considerable financial consequences for the member concerned and this proposal would seem to involve a real risk of complaints being made to the trustee where the member alleges that the trustee failed to act in their best interests in proceeding with the commutation.

#### **3.3.3**

Death benefits will give rise to a number of issues along these lines, with regard to accumulation and defined benefit interests. It is apparent from the explanatory memorandum that the liability to pay the Division 293 tax debt will pass to the estate of the deceased member. However, it is quite common for the death benefit not to be paid into the estate, but rather for a death benefit to be paid to one or more beneficiaries. The beneficiaries may be selected by the trustee at its discretion (in cases where the member has not made a binding nomination) or may be selected by the member prior to their death (in cases where the member has made a valid binding nomination). Sometimes, the assets which some potential beneficiaries stand to receive from the estate can be a factor in a trustee's determination as to who should receive a superannuation death benefit.

#### **3.3.4**

We are concerned that an ordinary administrative decision made by a trustee as to the distribution of death benefits could trigger a significant liability to be borne by other persons who do not necessarily receive any benefit from the contributions made on a concessional basis by the member during their lifetime. This is highly likely to complicate and increase the risk for disputes to arise when processing death benefits, especially where the persons affected may be partners and/or children from different relationships. To compound matters, trustees would have no knowledge of the amount of the tax liability that will be borne by a



member's estate and the impact that this would have on beneficiaries of the estate, which will make it more difficult for trustees to decide how to allocate the death benefits.

### **3.3.5**

It is also unclear whether a trustee must comply (or is even permitted to comply) with a release authority in circumstances where there is a payment flag attached to the member's account under the family law legislation that precludes the trustee from dealing with the interest. Clarity is required as to which of the two legislative regimes overrides the other.

## **4 Amounts allocated in relation to a complying superannuation plan**

---

### **4.1.1**

We note that the tax on Division 293 taxable contributions will also apply to amounts allocated from reserves (proposed section 293-30(5)). While we understand that these rules are an integrity measure to ensure that policy aims of capping contributions are not defeated, we submit that there are good policy reasons to exempt certain allocations from this proposed tax.

### **4.1.2**

UniSuper currently holds a limited amount of historic reserves for pre-paid insurance premiums and administration fees following a successor fund transfer. One of the outcomes of the MySuper fee requirements will likely see these reserves distributed to eligible members. These reserves were accrued over many years and we think it would be inequitable for this tax to apply to an allocation from these reserves when the reason they are being distributed is to comply with superannuation law.



## Appendix 1: About UniSuper

---

UniSuper is the industry superannuation fund for employees in Australia's higher education and research sector and was the result of a merger between the Tertiary Education Superannuation Scheme (TESS) and the Superannuation Scheme of Australian Universities (SSAU) in October 2000. Prior to the merger, UniSuper had been the trustee for the SSAU.

UniSuper offers both defined benefit and accumulation plans to its members. The Defined Benefit Division (DBD), which remains open to all new permanent employees in the sector and is portable across all participating employers, requires a fixed 14% employer contribution and standard after tax 7% member contribution.

On joining UniSuper, eligible members are automatically enrolled into the defined benefit division and have a period of 24 months to decide if they want to move from the DBD in to an accumulation plan in which they would receive the same level of contributions and insurance benefits. This is our Accumulation 2 product.

Other UniSuper members, usually casual employees and those employed by 'related bodies' that are not universities, join our Accumulation 1 plan. These members generally receive contributions at the Super Guarantee rate. These members receive a lower level of contributions than our Defined Benefit Division/Accumulation 2 members and the benefit structure and insurance arrangements differ as well.

For more information about UniSuper, please visit [www.unisuper.com.au](http://www.unisuper.com.au).